

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 31.01.2017

PRONOUNCED ON:15.02.2017

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G. RAMESH
AND
THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Appeal No.2707 of 2010

M/s. Sri. Selvamuthukumar

.. Appellant

Vs

1. The Commissioner of Income Tax,
Chennai-VI,
Chennai 600 034.

2. The Asst. Commissioner of Income Tax,
Circle V,
Chennai 600 034.

.. Respondent

Prayer: Writ Appeal filed under Section 15 of the Letters Patent against the order of the learned Single Judge in W.P.No.16663 of 2010 dated 23.08.2010.

For Appellant : Mr. R. Vijayaraghavan

for M/s.Subbaraya Aiyar

For Respondent: Mr.M. Swaminathan &

K.Sureshkumar

J U D G M E N T

(Order of the Court was pronounced by Dr.Anita Sumanth, J.)

This Writ Appeal enumerates the scope of powers under section 264 of the Income Tax Act (hereinafter referred to as 'Act') dealing with Revision of orders.

2. The petitioner had entered into an agreement with M/s.Shanmuga Arts and Science Technology and Research Academy (SASTRA) for the purchase of hostel buildings. The hostels were being managed by the appellant pending finalization of sale and depreciation claimed thereupon in respect of Assessment Years 2003-04, 2004-05 and 2005-06. The transaction could not be completed and upon cancellation of the agreement of sale the hostels reverted to SASTRA and the appellant received back only a sum of Rs.8,63,70,652/- as against the consideration of Rs.9,79,44,847/- paid by it originally. The cancellation as well as the handing back of the buildings was in December 2005. Accordingly, no depreciation was claimed by the appellant in respect of assessment year 2006-07. SASTRA appears to have sought directions from the Additional Commissioner of Income Tax (Exemptions) on the taxability of the consideration from the aforesaid transaction, pursuant to which, an order

under Section 144A dated 31.12.2007 was passed to the effect that the transaction was one of lease. The assessing officer of SASTRA was directed to bring to tax the difference between the sale consideration received by SASTRA originally and returned by it to the appellant pursuant to cancellation (Rs.9.97 crores - Rs.8.63 crores) as lease rent to be spread over four years prorata. The direction under section 144A has attained finality.

3. It was the case of the appellant that consequent to the order under section 144A, the lease rentals paid by it over the period of four years (AY 2003-04 to AY 2006-07) was liable to be allowed in its hands as expenditure under section 37 of the Act. The legal position that results from the order under section 144A would have to be carried to its logical conclusion. In acceptance of this position, notices under section 148 were issued by the Income Tax Department on 11.3.2008 in respect of assessment years 2003-04, 2004-05 and 2005-06 and re assessments completed on 21.10.2008, 24.12.2008 and 14.12.2009, disallowing the depreciation claimed in the return of income and allowing the lease rentals as expenditure in the computation of income. This was however not possible in respect of assessment year 2006-07 for the reason that no depreciation had been claimed at the original instance and the re-assessment would thus result in the reduction of the returned income, impermissible in the light of the judgment of the Supreme Court in *Sun Engineering Works (P) Ltd V.*

Commissioner of Income Tax (198 ITR 297). The appellant was thus faced with a situation where, notwithstanding the admitted position that it was eligible for the deduction of lease rentals in the computation of tax for AY 2006-07, it was unable to obtain the relief on the basis of a technicality. The appellant had thus to seek a remedy other than re-assessment to avail of the benefit. A petition for revision under section 264 of the Act was filed by the appellant on 12.3.2009 before the Commissioner of Income Tax seeking the benefit of deduction of lease rentals in respect of assessment year 2006-2007. The Commissioner rejected the request for revision on two grounds, firstly, that the order under section 144A was passed in the case of SASTRA and as such would not be relevant in the case of any other assessee and secondly, on the ground that power to revise under section 264 is specific to consideration of any issue discussed or decided in an order of assessment which is not the case of the appellant. The Commissioner was of the view that the grievance raised does not emanate from either the return filed by the assessee or the order of assessment and thus jurisdiction under section 264 of the Act would not come into play.

4. A writ petition was filed by the assessee challenging the aforesaid order of the Commissioner of Income Tax dated 22.2.2010. The learned Single Judge vide order dated 23.8.2010 dismissed the writ petition applying the judgment of the Supreme Court in the case of Goetze (India)

Limited Vs. Commissioner of Income Tax. Hence the present appeal.

5. Section 264 of the Income Tax Act has been inserted as a parallel and alternate stream of remedy and relief available to an assessee. The limited question that arises in this case is whether the order under section 144A dated 31.12.2007 passed in the case of SASTRA has any relevance at all in the assessment of the appellant. We believe it does for the reason that the transaction dealt with in the order under section 144A is one between SASTRA and the appellant. In fact, effect has been given to the directions in the order under section 144A of the Act in the assessments of SASTRA as well as in the assessments of this very appellant in respect of AY's 2003-04, 2004-05 and 2005-06. It therefore does not stand to reason that a different conclusion is taken for the 4th year i.e., assessment year 2006-07, when the transaction, the facts, the circumstances and the law remain identical and unchanged throughout.

6. The language of section 264 provides ample powers to the Commissioner of Income Tax to make or cause such inquiry to be made as he thinks fit in dealing with an application for Revision under section 264. This would include taking into consideration relevant material that would have a bearing on the issue for consideration, which, in this case, includes the order under section 144A of the Act dated 31.12.2007.

7. Mr.Swaminathan would object on the ground that the inquiry contemplated under section 264 is restricted to the record of any proceeding under this Act and has, necessarily to refer to the specific assessee alone. He would also refer to Section 263 dealing with revision of orders prejudicial to the revenue and to the explanation thereto wherein 'Record' is defined as being all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner. In the absence of such definition in section 264, he would urge that 'record' for the purpose of section 264 would be limited to such records as were available at the time of assessment. We are not impressed with the distinction. The necessity for the insertion of a definition of 'record' by the Finance Act 1988 has been explained in a Circular issued by the Central Board of Direct Taxes No.528 dated 16.12.1998 to the following effect.

'39.1 Under the existing provisions of section 263 of the Income-tax Act, the Commissioner of Income-tax is empowered to call for and examine the record of any proceeding and if he considers that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of revenue, he may pass an order enhancing or modifying the assessment or cancelling the same with a direction to make it afresh. The provisions as presently worded have given rise to two areas of controversy. The first is relating to the interpretation of the word "record" and the second is regarding the issue relating to merger of the order of the Assessing Officer with the order of the appellate authority. Courts have held in some cases that the word 'record' occurring in section 263 could not mean the record as it stood at the time of examination by the CIT but the record as it stood at the time when the order was

passed by the Assessing Officer. Limiting the power of the CIT only to the situation that was existing at the time of making the assessment is to make the provision too restrictive, as many times information comes on record from various sources which indicate that the order of the Assessing Officer is erroneous and prejudicial to the interests of revenue. The above interpretation of the term "record" by some court besides being against the legislative intent also defeats the very objective sought to be achieved which is to revise the orders on the basis of records as is available to the CIT at the time of examination. With a view to clarifying the legislative intent of the term "record", a definition of the term "record" has been inserted in the Explanation to sub-section (1) of section 263 by the Finance Act to include all records relating to any proceedings under the Act available at the time of examination by the CIT. This has been carried out for removal of doubts. "

(emphasis supplied)

8. Useful reference can also be made to a judgment of the Supreme Court in the case of *Commissioner of Income Tax Vs. Sri Manjunathesware Packing Products and Camphor Works* (231 ITR 53), wherein the Supreme Court, while considering the import of the word 'record' in section 263 of the Act states as follows;

'If the material, which was not available to the Income-tax Officer when he made the assessment could thus be taken into consideration by the CIT after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him. '

The view of the department as reflected in the above Circular is thus to the effect that what constitutes 'record' cannot be limited to the return of income or order of assessment, but should be extended to include

information from other sources that would impact the issue in question.

9. Mr.Swaminathan would refer to the judgment of the Division Bench of the Andhra Pradesh High Court in *M.S.Raju Vs. Deputy Commissioner of Income Tax* (298 ITR 373) which has expressed a view to the effect that the import of the word 'record' as set out in the Circular (supra) would be restricted to the power under section 263 only and not section 264. The distinction noted by the Division Bench in that case was that the power of revision under section 263 of the Act was intended to be exercised in cases where the interests of revenue were prejudiced and it was for this reason that the inquiry of the Commissioner of Income Tax was not limited only to material available before the assessing officer, but also material obtained subsequently. The power under section 264 of the Act is, in fact as wide a power, and one that is intended to prevent miscarriage of justice. Courts have consistently taken a view that the conferment of powers under section 264 of the Act is to enable the Commissioner to provide relief to an assessee, where the law permits the same. Reference may be made to the decisions of the Gujarat High Court in *C.Parikh and Co. Vs. Commissioner of Income Tax* (122 ITR 610) ; *Ramdev Exports Vs. Commissioner of Income Tax* (251 ITR 873); Kerala High Court in *Parekh Brothers Vs. Commissioner of Income Tax* and Calcutta High Court in *Smt.Phool Lata Somani Vs.Commissioner of Income Tax* (276 ITR 216). In this view of the matter, we see no reason to

take a different view on the interpretation of the word 'record' occurring in section 264 of the Act from that expressed by the Central Board of Direct Taxes in the Circular extracted above. The order under section 144A dated 31.12.2007 is thus part of the record and ought to have been taken into consideration in deciding the petition under section 264 of the Act.

10. In fact the objection raised by the Department is hyper technical and runs counter to the stand taken by it in the assessment of this appellant in the three earlier assessment orders. Thus even applying the principles of consistency the treatment accorded to an issue arising in a continuing transaction should be consistent for the entire period in question.

11. The Supreme Court, in the case of Goetze India Ltd has clarified the position that the embargo placed on an assessing officer in considering a new claim would not impinge on the power of the appellate authorities or, in this case, the revisional authority. Thus even on this score, we are of the view that the order under section 144A ought to have been taken into consideration and applied.

12. Mr. Swaminathan would submit that the appellant ought to have filed a revised return under section 139(5) since there was sufficient time available and not having done so, he cannot seek remedy under section

264 of the Act. He would urge that both reliefs cannot run concurrently and one can be availed of only when the other is exhausted as otherwise an assessee who misses the time limit for filing a revised return would take recourse to the provisions of section 264 and seek a revision.

13. The relief provided in terms of section 139(5) is specific to the correction of a wrong statement or an omission in the original return by way of a revised return. The power under section 264 of the Act extends to passing any order as the Principal Commissioner or Commissioner may think fit after making an inquiry and subject to the provisions of the Act, either suo-moto or on an application by the assessee. Though the remedies overlap, power under section 264 is significantly wider and the wisdom of choosing one over the other would really depend on the facts and legal position of each case. The facts in the present case are to the effect that the petition under section 264 was filed on 12.03.2009 once it became clear that the 144A directions issued in the case of SASTRA were in fact being accepted and applied by the Revenue in the re-assessments of the appellant dated 21.10.2008, 24.12.2008 and 14.12.2009 (AY 2003-04, 2004-05 and 2005-06), by which time, limitation under Section 139(5) for filing a revised return, being 31.3.2008, had lapsed. Suffice it to say that, on the facts of this case, the remedy under section 264 is appropriate and ought to have been exercised in favour of the appellant by the Commissioner of

Income tax. In view of the above discussion, the Writ Appeal stands allowed.

No costs.

[H.G.R.J.] [A.S.M.J.]

15.02.2017

msr

Index:Yes/No

HULUVADI G. RAMESH, J.
and
Dr.Anita Sumanth, J.

msr

Pre-Delivery Judgment in
Writ Appeal No.2707 of 2010

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