IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 478 OF 2016

Madhukar C. Ashar & Ors. .. Petitioners
v/s.
Union of India & Ors. .. Respondents

Mr. Vimal Gupta, Senior Counsel i/b Amit Shroff a/w Neha Bane for the petitioners
Mr. Nirmal C. Mohanty for the respondent nos. 2 and 3

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.
DATED : 13th APRIL, 2016.

P.C.

1. At the request of the Counsel, the petition is being finally disposed of at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges order dated 18th March, 2015 passed under Section 264 of the Income Tax Act, 1961 (the Act) by the Principal Commissioner of Income Tax. The impugned order dismisses the petitioners' Revision Application dated 7th August, 2014 filed in respect of an Intimation under Section 143(1) of the Act issued by the Assessing Officer for the Assessment Year 2011-12.

3. Briefly, the facts leading to this petition are as under :-

(a) Since Assessment Year 2005-06, the petitioners in its status as Association of Persons (AOP) has been filing its Returns of Income. However, the tax payable on the income earned by the AOP was allocated amongst the various members of the AOP (incidentally who are also the co-owners of the property) and accepted by the Revenue. On 2nd October, 2012, the petitioners e-filed its Return for the Assessment Year in its status as AOP for the Assessment Year 2011-12. In its Return of Income as was the accepted practice, the petitioners declared its total income at Rs.33.23 lakhs and indicated that no tax was payable by it. This was in line with the past practice of the income being allocated amongst its members for discharge of tax by them individually.

(b) On 7th August, 2014, an Intimation under Section 143(1) of the Act was issued by the Assessing Officer in respect of the petitioners' Return of Income for the A.Y. 2011-12. In the Intimation, the petitioners' tax liability was indicated at Rs.8.32 lakhs. This on the basis that the income of the petitioners as declared in its e-filed Return of Income was Rs.35.23 lakhs. However, as the Return of Income for A.Y. 2011-12 had been filed electronically, the earlier consistent practice of the profit of the AOP being allocated to its members as accepted by the Revenue in its order passed under Section 143(3) of the Act for the earlier assessment years, could not be brought to the notice of the Assessing Officer.

(c) In the above view, on 30th July, 2014, the petitioners filed a Revision Petition under Section 264 of the Act to the Commissioner of Income Tax. The Revision Petition sought a revision of the Intimation received under Section 143(1) of the Act raising a demand of Rs.8.32 lakhs.

(d) By the impugned order dated 18th March, 2015, the Intimation under Section 143(1) of the Act was upheld to hold that the petitioner is liable to pay tax as an AOP. This on the ground that the shares of the members of the AOP were indeterminate. Therefore, the assessment has to be made in the hands of the AOP in terms of Section 167B of the Act. Further, the contention of the petitioners that from the A.Y. 2005-06 onwards, the Income Tax Department has accepted that the income of the AOP has to be allocated amongst its individual members, who would be subjected to the tax under the Act was negatived by holding that the principle of res judicata would not apply to tax proceedings.

4. Mr. Gupta, learned Senior Counsel appearing for the petitioners in support of the petition submits that the impugned order is a non-speaking order inasmuch as it ignores the evidence led before him that

the shares of the members of the AOP were determinate amongst its present members since Assessment Year 2006-07 as was evident from the assessment order dated 5th May, 2007. It is next submitted that even the evidence led in the orders passed by the Assessing Officer for earlier assessment years under Section 143(3) of the Act consistently accepting the position that tax would be paid by the individual members of the AOP was ignored. This on the ground that principle of res judicata is inapplicable to tax matters. All this without considering the petitioners submissions. In the above view, it is submitted that the order be quashed and the Commissioner be directed to consider the petitioners' application afresh and pass a speaking order considering the various submissions made by the petitioners.

5. As against the above, Mr. Mohanty, learned Counsel for the Revenue in support of the impugned order invites our attention to the various provisions of the Act and in particular to Section 67A and 86 of the Act in support of the impugned order. It is further submitted that an Intimation under Section 143(1) of the Act is not amenable to challenge under Section 264 of the Act. In support, he invites our attention to the fact that prior to 1st June, 1999, there was an Explanation to Section 143 of the Act which *inter alia* deemed an

Intimation under Section 143(1) of the Act to be an order for the purposes of Section 264 of the Act. It is, therefore, submitted that in any view as the impugned order is without jurisdiction, the Intimation under Section 143(1) of the Act would hold the field and the petitioners are bound by it.

6. We find that the impugned order of the Commissioner of Income completely ignores the past practice accepted by the Revenue in orders passed under Section 143(3) of the Act taxing the income of the AOP on allocation in the hands of its individual members. Nothing is indicated in the impugned order to show that there has been any change either in facts or in law, which would warrant taking a different view from that taken by the Assessing Officer from the A.Y. 2005-06 onwards. Although the principle of res judicata may not specifically apply, yet where a fundamental aspect running through various Assessment Years is subject of consideration then as held by the Apex Court in ***Radhasoami Satsang Vs. Commissioner of Income Tax, AIR 1992, SC 377,*** the same approach be adopted in the absence of change in facts and law. Further, in ***Bharat Sanchar Nigam Ltd. Vs. Union of India 288 ITR 273*** the Apex Court held that though the principle of res judicata would not apply to tax matters as cause of action for each

assessment year is different / distinct, yet in case there is no change in the factual position or the law, the views expressed in one year are binding for the subsequent years. This on the principle of consistency. Therefore, if the impugned order wants to depart from the consistent view taken earlier, it must so justify. Moreover, the impugned order also completely ignores the fact that there has been no change amongst the members of AOP as existing since A.Y. 2006-07 till date. The assessment order for A.Y. 2006-07 and orders subsequent thereto do reflect a determinate share being attributed to each of the members of the AOP. This submission has not even been adverted to in the impugned order while proceeding to hold that the shares of the individual members of the AOP are not determinate. Thus, the impugned order is in breach of natural justice being a non-speaking order.

7. Further, Mr. Mohanty, learned Counsel for the Revenue places reliance upon Sections 67A and 86 of the Act to support the impugned order. These Sections do not find any reference in the impugned order. If the impugned order has to be supported on the basis of the sections which are not even adverted to in the impugned order, it would be appropriate to remand the proceedings to the Commissioner so as to

consider the same in the light of the submissions of the petitioners. Further, the issue of lack of jurisdiction of the Commissioner of Income Tax to entertain Revision Application under Section 264 of the Act from Intimation under Section 143(1) of the Act is left open to be considered by the Commissioner of Income Tax while passing his fresh order. Thus, the impugned order is quashed and set aside and the Revision Application is restored to the Commissioner of Income Tax to dispose it of afresh in accordance with law. All contentions raised by the parties are left open.

8. Accordingly, petition is disposed of in above terms. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**