ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT No. 54 of 2014
G.A. No. 1637 of 2014

COMMISSIONER OF INCOME TAX, CENTRAL-I
VERSUS
M/S BINANI INDUSTRIES LTD

BEFORE:

The Hon'ble JUSTICE SOUMITRA PAL

The Hon'ble JUSTICE ARINDAM SINHA

Date: 19th November, 2014

Ms. A.G. Gutgutia, Advocate
Mr.J.P. Khaitan, Sr.Adv. Mr.Malay Dhar, Adv.
And Mr. A.K.Dey, Adv.

THE COURT: This appeal under section 260A of the Income Tax Act, 1961 preferred by the Revenue against the consolidated order dated 21st November, 2013 passed by the Income Tax Appellate Tribunal ‘A’ Bench in ITA No. 1420/Kol/2008 and CO No. 132/kol/2008 filed by the assessee for the assessment year 2002-03 has been preferred on the questions of law stated in paragraph-7 of the application.

We formulate the question for hearing of the appeal as under:

“Whether on the facts and in the circumstances of the case the Tribunal erred in law in holding that the assessment order under section 143(3) of the Income Tax Act, 1961 dated 31.3.2005

received by the respondent-assessee on 13.4.2005 was barred by limitation and as such perverse?”

By consent of the parties, the appeal is treated to be ready for hearing and taken up as such.

Mrs. Gutgutia, learned Advocate appearing on behalf of appellant revenue urged before us the order of assessement was dated 31.3.2005 and there was no evidence on record to show that the Assessing Officer revisited the same in the period thereafter till the time the respondent assessee received it on 13.4.2005. She submitted the assessment order was made on the last day of the prescribed period under section 153 of the Income Tax Act, 1961 and as such the Tribunal went wrong in reversing the order of CIT (Appeal) to hold the same as barred by limitation.

Mr. Khaitan, learned Senior Advocate appearing on behalf of the respondent assessee submitted the issuance of the order could be said to be complete only when the same was despatched as communication of the order could only then be complete on the part of the department. Till before despatch, the order was within the power of the Assessing Officer who could have made addition or alteration thereto and it was the settled position that in such circumstances it cannot be said the order was duly issued. He relied on the following judgments:

1. *State of Punjab vs. Khemi Rao; 1969 (3) SCC 28.*
2. *Govt. Wood Works vs. State of Kerala; 69 STC 62;*
3. *India Ferro Alloy Industry Pvt. Ltd. vs. CIT; 202 ITR 671;*
4. *State of Andhra Pradesh vs. Khetmal Parekh; 93 STC 406 (SC);*
5. *Commissioner of Agricultural Income-tax vs. Kappu Malai Estate; 234 ITR 187;*

In all the above cases except *Khetmal Parekh* (supra) it was held, issuance of an order was complete only upon despatch of the same so as to put the order beyond the control of the person making it. In *Khetmal Parekh* it was held as under:

> *" We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6, 1973, but it was served upon the assessee on November 21, 1973 i.e. precisely 10½ months later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a*

> *proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made.”*

By that decision it appears there was room for the order to have been held to be duly made if there was a proper explanation from the Deputy Commissioner regarding the delay in service thereof.

The case before us is, according to us, distinguishable on facts from the decisions cited and relied upon by Mr. Khaitan. Admittedly, there was no attempt on the part of the department to despatch the order said to have been made on 31.3.2005, being the last date on which it could have been made within the time prescribed by section 153 of the Act.

It appears from the order of the Tribunal the representative of the assessee had filed an affidavit in which he had said he was served with the assessment order on 13.4.2005 when he visited the office of the Income Tax department. It further appears from the said order the CIT, DR was confronted with that affidavit and asked whether the assessment order left the control of the Assessing Officer or his office as on 31.3.2005 or not. The CIT, DR stated whatever records were available, he had produced, which record did not contain the despatch register. On further enquiry, the CIT, DR opined that once the assessment order including the demand notice was served on the assessee on 13.4.2005 by hand, there was no question of any entry in despatch register.

These were the facts on which the respondent assessee had based its challenge before the Tribunal. We have before us the affidavit evidence to show that a representative of the assessee, on his own volition and without intimation to the department, visited the office and found the assessment order ready to be served upon him. We also find from the oral evidence of the CIT, DR that all records were produced and the department had not made any attempt to despatch the order for service on the assessee. In the facts as above, there is no indication that the Assessing Officer revisited the order after 31.3.2005. The probability of the order being made and ready to be collected by the representative of the assessee as on 1.4.2005 cannot also be ruled out.

For the reasons aforesaid, we find the order of the Tribunal requires interference and the same is set aside with regard to the quashing of the assessment as barred by limitation and consequently, the cross objection of the assessee before it being allowed. The rest of the questions before the Tribunal must now be adjudicated by it.

We, therefore, answer the question formulated above in the affirmative, in favour of the revenue and against the assessee.

The appeal is disposed of.

(SOUMITRA PAL, J)

(ARINDAM SINHA, J)

km
AR(CR)