

HONOURABLE SRI JUSTICE GODA RAGHURAM

AND

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

I.T.T.A.No.34 of 2000

%21.08.2012

#The Commissioner of Income Tax, Andhra Pradesh-I, Hyderabad.

...APPELLANT

VERSUS

\$M/s.Bake Food Products (P) Ltd., Banjara Hills, Hyderabad.

...RESPONDENT

< GIST:

> HEAD NOTE:

!Counsel for Appellant: Sri S.R.Ashok

^Senior Standing Counsel for Respondent: Sri V.Srinivas

? Cases referred

[\[1\]](#) (2004) 3 S.C.C. 488

HONOURABLE SRI JUSTICE GODA RAGHURAM

AND

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

I.T.T.A.No.34 of 2000

JUDGMENT (per Hon'ble Sri Justice M.S.Ramachandra Rao):

This appeal is filed under Section 260 A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") by the Revenue challenging the order

dated 24-04-2000 in I.T.A.No.1699/Hyd/95 (Hyderabad 'A' Bench).

2. The facts giving rise in filing of this appeal are as under:

(a) The respondent/assessee filed its return of income for the assessment year 1986-1987 on 30-06-1986 admitting a loss of Rs.16,27,167/-. Notice under Section 143 (2) of the Act was issued fixing the date of hearing on 01-11-1988. There was no response to this notice. A detailed letter was issued by the Assistant Commissioner of Income Tax, Central Circle-III, Hyderabad (the assessing officer) on 07-12-1988 to the assessee stating that the return was not accompanied by the audited balance sheet and profit and loss account and sought an explanation from the assessee as to various discrepancies noticed in the books of accounts by 14.12.1988. This letter was served on the same date. The assessee requested a month's time for furnishing the details. The assessee was granted time up to 27-12-1988. Subsequently, the assessee filed another letter on 27-12-1988 requesting time up to the end of February 1989. The assessee later filed another letter on 10-01-1989 requesting time up to 15-02-1989 on which date it said it would submit the reply to the letter issued on 07-12-1988. On 06-02-1989, a representative of the assessee appeared and requested time up to 13-02-1989, which was granted. As the assessee had not furnished any information even after giving of three months time and as the assessing officer felt that the assessment was getting barred by limitation by 31-03-1989 vide order dated 20-03-1989, he completed the assessment based on the information available on record to the best of his judgment under S.144 of the Act. He made various additions on account of the discrepancies as per the provisional account and the figures shown in the earlier year. He assessed that the net taxable income of the assessee as Rs.30,50,800/- and directed the assessee to pay tax, surcharge and interest of Rs.27,62,879/-.

(b) The assessee filed an appeal to the Commissioner of Income Tax (Appeals-II), Hyderabad against the order of assessment dated 20-03-1989 contending that the assessment made was unjust, that the assessing officer erred in drawing adverse inference on account of discrepancies, that the

additions made to the income of the assessee were unwarranted and prayed that the additions made be deleted. It contended that the audit for the year end of 30-06-1985 is still not completed on account of closing down the activity group as a whole and that the unit was seized by the APSFC. It also contended that the Company was dormant during the year and depreciation was admissible even in the case of a dormant company and that there was no production and certain minimum expenditure has to be incurred to maintain the Company.

(c) After considering the contentions to the parties, the C.I.T. (Appeals-II), Hyderabad, by order dated 31-08-1995 held that the assessment completed under Section 144 of the Act by the assessment officer is not in accordance with law and deserves to be annulled. He relied on a circular No.281, dated 22-09-1980 issued by the C.B.D.T. Para 27-4 (VI), sub-clause (VI) of which provided as under:

“Where there is a default in rectifying the defect intimated by the ITO., the return of income has to be treated as an invalid return and further proceedings shall have to be taken on the footing that the assessee had failed to furnish the return. Thus in a case where the return is furnished voluntarily under Section 139 (1), the ITO cannot proceed to make ex-parte assessment under Section 144 without serving a notice under Section 139 (2) or as the case may be, under Section 148. Where, however, a defective return was filed in response to a notice under Section 139 (2) or Section 148, the ITO, may straightaway proceed to complete the assessment ex-parte under Section 144 or issue a notice under Section 142 (1).”

He noticed that the assessee had suo-moto filed a return under Section 139(1) of the Act on 30.6.1986 claiming a loss of Rs.16,27,167/- , that the appropriate authority by letter dated 07-12-1988 had informed the assessee that the return of income so filed is not accompanied by the audited balance sheet and profit and loss account and sought an explanation from the assessee as to why the return should not be treated as invalid return apart from pointing out other discrepancies therein and asked the assessee to give information and explanation by 14-12-1988 and that the assessee did not reply to it and kept on seeking extension of time. He therefore he held that the assessing authority should have

treated the return of income filed by the assessee as an invalid return as per Section 139(9) of the Act and the provisions of the Act would then apply as if the assessee had failed to furnish the return. He held that the assessing authority ought to have served a notice under Section 139 (2) or as the case may be under Section 148 as mandated by the above CBDT circular before proceeding under s.144 of the Act. He further held that as no notice under Section 139 (2) or S.148 was issued to the assessee before the completion of the assessment under Section 144 and the return of income filed by the assessee under Section 139 (1) was defective return, the completion of assessment under Section 144 was bad in law and accordingly the assessment made had to be annulled. In view of the fact the assessment was being annulled, he did not go into the other contentions of the assessee in regard to validity or otherwise of the different additions made in the impugned assessment on account of various discrepancies as it would not serve any useful purpose .

(d) Challenging the said order, the Revenue preferred I.T.A.No.1699/Hyd/95 to the Income Tax Appellate Tribunal, Hyderabad Bench 'A', Hyderabad. It contended that the order of the C.I.T. (Appeals) was erroneous and he ought not to have annulled the assessment made under Section 144 of the Act. However, the I.T.A.T. rejected the said contention relying on the above circular No.281, dated 22-09-1980 and held that the directions of the C.B.D.T. in the said circular fully applied to the facts of the case and that the Commissioner (Appeals) was justified in following the same and dismissed the appeal.

(e) Challenging the said order, the Revenue has filed this appeal.

3. Heard Sri S.R.Ashok, Senior Standing Counsel for the Revenue and Sri V.Srinivas, learned counsel for the respondent/assessee.

4. Sri S.R.Ashok, learned Senior Standing Counsel for the Revenue, contended that the C.I.T. (Appeals) and the I.T.A.T. were wrong in annulling the assessment made by the assessing officer. He also contended that the above circular might be binding on the assessing officer but it was not binding on the C.I.T. (Appeals) or on the I.T.A.T. He also contended that the said circular was contrary to the provisions of the Act and therefore the orders of the I.T.A.T. confirming the order of the C.I.T. (Appeals) deserves to be set aside.

5. Per contra, Sri V.Srinivas, learned counsel for the respondent/assessee, contended that the circular of C.B.D.T. is binding on the assessing officers and as the said circular was not contrary to any provisions of the Act, the assessing officer ought to have followed it and the C.I.T. (Appeals) and the I.T.A.T. did not commit any error in relying on the said circular and in setting aside the order of the assessing officer.

6. We have considered the submissions of the counsel for the appellant and the respondent.

7. The assessment which is subject matter of this appeal is for the assessment year 1986-87. Section 139 (1) of the Act provides for filing of a return by an assessee if his total income during the previous year exceeds the maximum amount which is not chargeable to income tax. At that relevant time (i.e in 1986-87), there was sub-section (2) in Section 139 which provided as follows:

“S.139(2) : In the case of any person who, in the Income Tax Officer's opinion is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income Tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed ..”

This sub-section (2) in S.139 was omitted by the Direct Tax Laws (Amendment) Act, 1987 with effect from 01-04-1989. But since the subject matter of the present case is the assessment made on 20.3.1989 for assessment year 1986-87, we have to consider the effect of sub-section (2) of S.139 and it cannot be ignored.

8. Section 144 of the Act provides for best judgment assessment of tax by an assessing officer. For the subject assessment year 1986-87, Section 144 (1) (a) provided for a best judgment assessment being made by the assessing officer if an assessee failed to make the return required **“by any notice given under sub section (2) of Section 139”** and has not

made a return or revised return under sub section (4) of sub section (5) of Section 139. By the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989, the words "by any notice given under sub section (2) of Section 139" in S.144 (1) (a) were substituted by the words "**under sub-section (1) of s.139**". But since this amendment came into force only with effect from 01-04-1989, the pre-amended provision applied to the present case (as the subject assessment year is 1986-87). Therefore best judgment assessment can only be made under Section 144 (1) (a) **if an assessee fails to make the return required by any notice given under sub section (2) of Section 139** and has not made a return or revised return under sub section (4) or sub section (5) of that Section.

9. Section 144 also provides for a best judgment assessment to be made under clauses 1 (b) (which is not relevant for the present case) and under clause 1 (c) thereof. Section 144 (1)(c) provided that a best judgment assessment can be made by the assessing officer if the assessee having made a return, failed to comply with all the terms of a notice issued under Section 143 (2) of the Act.

10. Sri S.R.Ashok, submits that in the present case, since a notice under Section 143 (2) of the Act has been issued by the assessment officer, the circular of the C.B.D.T. had no application and the best judgment assessment can be made invoking S.144 (1) (c) of the Act. We do not agree with this submission.

11. No doubt Section 144 (1) (c) provides for a situation where a best judgment assessment can be made when the assessee having made a return fails to comply with all the terms of a notice issued under Section 143 (2). But the interplay between S.144(1) (a) and S.144 (1) (c) and the proper course of action to be followed by an assessing officer before making a best judgment assessment **where a return filed is defective** is set out by the above circular. Accepting the contention of the Revenue would mean that one has to ignore s.139(9) (which states that where a return is filed and defects therein are intimated to the assessee and he does not rectify them, it

is to be treated as an “invalid return” and provisions of the Act would apply “as if the assessee had filed to furnish the return”), S.139(2) (as it stood then) (which entitled the assessing officer to issue notice to the assessee to file a return when he is of the opinion that the assessee has taxable income) and S.144 (1) (a) (as it then stood) of the Act. One has to interpret a statute by giving effect to every provision thereof and in a manner which does not render any provision otiose. Therefore, in our opinion, the said circular is not contrary to the provisions of the Act and it correctly guides the assessing officer as to what is to be done before proceeding to make best judgment assessment when a return filed suomoto by the assessee is found defective. Moreover, the circular is beneficial to the assessee as it provides him a further opportunity to give his correct income details after his earlier return is found to be defective (as he can give them atleast after receiving the notice U/S.139(2)).

12. It is settled law that said circulars which are issued under Section 119 by the Central Board of Direct Taxes have to be followed and observed by the authorities and other persons employed in the execution of the Act. The Supreme Court in **Commissioner of Customs, Calcutta and others Vs. Indian Oil Corporation Limited and another**^[1] held as follows:

“.....The circulars issued by the CBDT under the Income Tax Act, 1961 and CBEC under Section 37-B of the Central Excise Act, 1944 have been held to be binding primarily on the basis of the language of the statutory provisions buttressed by the need of the adjudicating officers to maintain uniformity in the levy of tax/duty through out the country.”

13. Having considered the same, we are of the view that the C.B.D.T. circular is in the nature of a clarification to the assessing authorities that when there is a default in rectifying a defect in the return as intimated by the I.T.O. by the assessee, the return of income has to be treated as an invalid return and further proceedings will have to be taken on the footing that the assessee had failed to file the return. The C.B.D.T. has rightly directed that in case where the return is furnished voluntarily under Section 139 (1), the I.T.O. cannot proceed to make *ex parte* assessment under Section 144 without serving notice under Section 139 (2) or as the case may be under Section 148. This circular is binding on the

assessing officer.

14. On the facts of the present case, when the assessee filed a defective return, and did not rectify the defects which were pointed out by the I.T.O., the assessing officer was bound to treat the return of income as invalid and take further proceedings on the footing that the assessee had failed to furnish the return. The assessing authority could not have proceeded to make *ex parte* assessment under Section 144 without serving notice under Section 139 (2) or as the case may be under Section 148.

15. In this view of the matter and in view of the law declared by the Supreme Court in the above decision, we are of the view that the decision of the I.T.A.T. confirming the decision of the Commissioner (Appeals) does not warrant any interference by this Court. Therefore, we hold that the substantial questions of law raised in this appeal have to be decided against the Revenue.

16. The appeal fails and is dismissed. No costs.

JUSTICE GODA RAGHURAM

JUSTICE M.S.RAMACHANDRA RAO

Date: 21-08-2012

Note :

Mark the L.R. Copy.

B/o

KVR

[\[1\]](#) (2004) 3 S.C.C. 488