Form No. (J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

P R E S E N T:

THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITAT/96/2021
IA NO.GA/1/2021

PRINCIPAL COMMISSIONER OF INCOME TAX – 9, KOLKATA
VS.
MANJU OSATWAL

ITAT/96/2021
IA NO.GA/2/2021

PRINCIPAL COMMISSIONER OF INCOME TAX – 9, KOLKATA
VS.
MANJU OSATWAL

For the appellant : Mr. Soumen Bhattacharjee, Adv.

For the respondent : Ms. Swapna Das, Adv.
Mr. Siddharth Das, Adv.

Heard on : 11th February, 2022.

Judgment on : 11th February, 2022.

RE : IA No. GA 1 of 2021

T.S. SIVAGNANAM, J. : We have heard Mr. Soumen Bhattacharjee, learned standing counsel for the appellant/revenue

and Ms. Swapna Das, duly assisted by Mr. Siddharth Das, learned counsel for the respondent/assessee.

2. There is a delay of 420 days in filing the appeal. On perusal of the relevant dates, we find that the appellant/revenue would be entitled to the benefit of the order passed by the Hon'ble Supreme Court extending the period of limitation for filing appeals. Hence, the delay in filing the appeal is condoned.

3. Accordingly, the application for condonation of delay stands disposed of.

ITAT No. 96 of 2021

4. This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961, (the Act for brevity) is directed against the order dated 15th January, 2020 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata (Tribunal) in ITA No. 707/Kol/2019 for the assessment year 2014-2015.

5. The revenue has raised the following substantial questions of law for consideration :

i) Whether the Ld. ITAT has committed substantial error in law in holding that once the income offered and IDS (Income Declaration Scheme), 2016 is accepted by the Department an order under Section 143(3) of the Act cannot be revised as the items of addition in question directed by the Learned Principal Commissioner of Income Tax was part of

IDS, 2016 application and not part of the order passed under Section 143(3) of the Act?

ii) Whether the Learned Tribunal has committed substantial error in law in holding that the order under Section 263 of the Act was without jurisdiction as such as the items of addition directed by the Learned Principal Commissioner of Income Tax was part of IDS, 2016 and not part of order under Section 143(3) of the Act?

iii) Whether the Learned Tribunal is perverse in our looking that it is the duty of the Tribunal to scratch surface and probe documentary evidence in depth in light of conduct of assessee and other surrounding circumstances in order to see whether the assessee is liable to provisions of Section 68 of the Income Tax Act or not?

6. We have heard Mr. Soumen Bhattacharjee, learned standing Counsel for the appellant and Ms. Swapna Das and Mr. Siddharth Das, learned Counsel appearing for the respondent/assessee.

7. As an interesting question of law arises for consideration in this appeal, we requested Mr. J.P. Khaitan, learned senior counsel to assist us and with his assistance and after hearing the learned counsels we proceed to decide the matter.

8. The assessee is an individual who had filed her return of income for the assessment year under consideration, AY 2014-2015 declaring

a total income of Rs.10,82,352/-. The return was processed under Section 143(1) of the Act. Subsequently, the return was selected for scrutiny and notice under Section 143(2) dated 18.09.2015 and notice under Section 142(1) along with a requisition of details/documents were issued to the assessee. In response to such notice, the assessee furnished necessary details. The assessing officer noted that the assessee derived income from salary from a company and other sources. Upon perusal of the details submitted by the assessee, the assessing officer further noted that the assessee derived income from long term capital gain and claimed exemption under Section 10(38) of the Act. The assessing officer further noted that the assessee had made sale/purchase of shares through a stock broker. A communication under section 133(6) of the Act was issued to the said share broker for verification and confirmation of the transactions regarding sale and purchase of shares and reply was received from the stock broker confirming the details filed by the assessee and having found no discrepancy, the assessment was completed under Section 143(3) of the Act by order dated 6.5.2016 accepting the return of total income of Rs.10,82,352/- and tax payable thereon was accordingly computed. After the assessment was completed, the assessee availed the benefit of Income Declaration Scheme, 2016 (IDS).

9. The said scheme was introduced in Chapter IX of the Finance Act, 2016.

10. Clause (a) in Section 182 defines 'declarant' to mean a person making a declaration under sub Section (1) of Section 180. Section

183(1) states that subject to the provisions of the scheme any person may make, on or after the date of commencement of the scheme (IDS), but before a date to be notified by the Central Government in the official gazette, a declaration in respect of any income chargeable to tax under the Income Tax Act for any assessment year prior to the assessment year beginning on the first day of April 2017. The circumstances enumerated in clauses (a), (b), (c) to Section 183(1) enumerates the types of assessees who would be entitled to file such declaration. Section 184 deals with charge of tax and surcharge. Sub Section (1) of Section 184 commences with a *non-obstante* clause stating that notwithstanding anything contained in the Income Tax Act or in any Finance Act, the undisclosed income declared under Section 180 within the time specified therein shall be chargeable to tax @30% of such undisclosed income. Section 185 deals with penalty. Section 186 speaks about the manner of declaration and sub Section (2) of Section 186 enumerates as to who has to sign the declaration. Section 187 deals with time for payment of tax. Section 188 deals with undisclosed income declared not to be included in the total income. The provision states that amount of undisclosed income declared in accordance with Section 180 shall not be included in the total income of the declarant for any assessment year under the Income Tax Act, if the declarant makes the payment of tax and surcharge referred to in Section 181 and the penalty referred to in Section 182 by the date specified under sub Section (1) of Section 184. Section 189 states that the declarant under the scheme shall not be

entitled, in respect of undisclosed income declared or any amount of tax and surcharge paid thereon, to reopen any assessment or reassessment made under the Income Tax Act, or the Wealth Tax 1957, or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment. Section 191 places an embargo on the declarant to the effect that any amount of tax and surcharge paid under Section 181 or penalty paid under Section 182 in pursuance of a declaration under Section 180 shall not be refundable. Section 193 deals with declaration by misrepresentation of facts to be void. The said provision commences with a *non-obstante* clause stating that notwithstanding anything contained in the scheme, where a declaration has been made by misrepresentation or suppression of facts, such declaration shall be void and shall be deemed never to have been made under the scheme (IDS). Section 196 enumerates the persons to whom the scheme will not apply. Clause (e) in Section 196 states that the scheme will not apply in relation to any undisclosed income chargeable to tax under the Income Tax Act and for any previous year relevant to an assessment year prior to the assessment year beginning on first day of April 2017. Clause (i) in Section 196(e) states that where a notice under Section 142 or sub Section (2) of Section 143 or Section 148 or Section 153(A) or Section 153(C) of the Income Tax Act has been issued in respect of such assessment year the proceedings is pending before the assessing officer, the provisions of the scheme (IDS), would

not apply. Section 198 deals with power to the Central Government to remove difficulties and Section 199 is the rule making power.

11. In exercise of the powers conferred under sub Section (1) and (2) of Section 199 of the Finance Act, 2016 the Central Board of Direct Taxes (CBDT) had framed the Income Declaration Scheme Rules 2016. In terms of Rule 4(1) a declaration of income or income in the form of investment in any asset under Section 183 shall be in Form 1. Form 2 is the acknowledgement of declaration under Section 183 of the Finance Act 2016 in respect of IDS. The said Form while acknowledging the receipt of the declaration determines the amount payable with regard to the declaration made by the assessee under the scheme. The assessee is required to pay an amount of not less than 25% of the amount quantified on or before 30.11.2016; an amount not less than 50% on or before 31.03.2017 and the whole of the sum payable reduced by the amount paid earlier on or before 30.09.2017. The assessee is required to give an intimation of payment made under Section 187(1) in respect of IDS in Form 3. After the proof of payment is intimated in Form 3, the certificate of declaration under Section 183 of the Finance Act, 2016 is issued in Form 4. In the said Form it is stated that it is an acknowledgement that a declaration under Section 183 of the Finance Act, 2016 has been accepted.

12. It would be relevant to note that in Form 2, which is the acknowledgement under Section 193 of the Finance Act, 2016 and where the amount payable by the assessee is notified, there is a tabular statement containing the assessment year, the undisclosed

income as declared in Form 1, undisclosed income eligible for the scheme, the amount payable namely, tax, sur-charge and penalty and reason in case there is a difference in the undisclosed income declared in Form 1 and undisclosed income eligible for the scheme.

13. In the preceding paragraphs we have mentioned about the manner in which the assessment was completed by the Assessing Officer under Section 143(3) of the Act by order dated 6th March, 2016. The Principal Commissioner of Income Tax X, Kolkata [PCIT] issued show cause notice dated 27th December, 2018 under Section 263 of the Act on the ground that an error was apparent in the assessment order and that in his prima facie view the assessment is erroneous in so far as it was prejudicial to the interest of revenue. Much prior to the issuance of notice under Section 263, dated 27th December, 2018, the assessee had submitted a declaration under the IDS on 24th September, 2016. The declaration was processed and a certificate of declaration under Section 183 of the Finance Act, 2016 in Form No.4 was issued on 30th October, 2017. In the declaration filed by the assessee, she had mentioned the amount of undisclosed income declared and accepted as Rs.74,24,379/-. This was verified and accepted by the PCIT who was the authority who had issued them show cause notice under Section 263 of the Act. The certificate of declaration in Form No.4, dated 13th October, 2017, clearly states that it is to acknowledge that the declaration under Section 193 of the Finance Act, 2016 submitted by the assessee has been accepted. The tax payable on the undisclosed income was computed at

Rs.22,27,314/-, sur-charge at Rs.5,56,829/-, penalty at Rs.5,56,829/- and the total amount payable as Rs.33,40,972/-.

14. It is not in dispute that the assessee has complied with the certificate and the entire amount has been paid. As mentioned earlier, much after the certificate of declaration dated 13th October, 2017 was issued, the PCIT issued show cause notice dated 27th December, 2018 under Section 263 of the Act. The PCIT was of the view that a sum of Rs.1 Lac which was claimed by the assessee as purchase price of the shares ought to have been included in the total income and the total amount should have been Rs.75,24,379/- and not Rs.74,24,379/- as declared by the assessee under the IDS. Further, the PCIT opined that the assessee would have paid commission to the entry operators and brokers etc. at 5% for making accommodation entries. The assessee in her submission dated 15th January, 2019 had denied having paid any commission. Nevertheless, the PCIT taking note of certain material which was culled out from the Investigation wing of the Department during the course of search and seizure proceedings against certain stock brokers there appears to have been statements recorded that they have been paid commission. The statements relied on were not furnished to the assessee, nor there is any finding that the assessee paid commission to any stock broker. Thus, the Assessing Officer was directed that the purchase price of Rs.1 Lac is to be added back though PCIT accepted the fact that the sum of Rs.74,24,380/- has been offered by way of declaration under the IDS and accepted and apart from that a sum of Rs.3,76,219/- has to be added back under

Section 69(c) of the Act. With these findings the Assessing Officer was directed to reassess the income of the assessee for the relevant assessment year. Aggrieved by the order passed by the PCIT the assessee filed appeal before the Tribunal. The Tribunal found that the assessee has already offered long term capital gain of Rs.74,24,380/- to tax under the IDS and paid the taxes thereon and this fact was brought to the notice of the PCIT in pursuance of the show cause notice issued under Section 263 of the Act and the Department's representative appearing on behalf of the Department before the Tribunal also acknowledged the same. The Tribunal was of the view that once the income offered and the declaration under IDS is accepted by the Department, the assessment order passed under Section 143(3) of the Act cannot be revised as the items of addition in question directed by the PCIT was part of IDS application and not part of the order passed under Section 143(3) of the Act. Further, the Tribunal observed that once a person has availed the benefit of the IDS and paid tax, the PCIT cannot revise the assessment order under Section 263 of the Act as it would be against the spirit of the Scheme. With this finding the appeal filed by the assessee was allowed.

15. The revenue is before us contending that the Tribunal committed substantial error in holding that once the income offered is accepted by the IDS, the Department cannot revise the assessment order by invoking the power under Section 263 of the Act. The other submissions is on the merits of the matter with which we are not

concerned in the facts at hand. Thus, the question would be whether the PCIT could have invoked this power under Section 263 of the Act.

16. Section 263 deals with the revision of orders prejudicial to revenue. Sub-section (1) of Section 263 states that the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceedings under the Income tax Act and if he considers that any order passed therein by the assessing officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment. Thus, the power under Section 263 could be invoked to examine the records of any proceedings under the Income tax Act and if the authority finds that the order is erroneous in so far as it is prejudicial to the interest of revenue, he may revise such order after opportunity to the assessee. In the case at hand, the tax paid by the assessee is under the IDS which is a scheme framed under the provisions of the Finance Act, 2016. That apart, in the declaration filed by the assessee in terms of Section 183 of the Act, in Form 1 the assessee has mentioned about the undisclosed income and also the undisclosed income which is eligible under the scheme (IDS). This declaration was considered by the appropriate authority, who incidentally is the PCIT and having been satisfied that the

assessee is eligible to the benefit of IDS, the acknowledgement of declaration was given in Form 2 mentioning the undisclosed income as declared by the assessee in Form 1 and the undisclosed income eligible for the Scheme. The acknowledgement issued in Form 2 is issued after consideration of relevant material and the determination is made by the PCIT on the amount payable by the assessee with respect to the declaration made by her under the Scheme. Therefore, it will be too late in the day for the PCIT to now invoke the power under Section 263 of the Income Tax Act to set at naught the finality arrived at under the IDS which was a Scheme notified in exercise of powers conferred under Section 199(1) and (2) of the Finance Act, 2016. That apart, the order of assessment under Section 143(3), upon the declaration being accepted has worked itself out and as on 13th October, 2017, the tax, sur-charge and penalty having been fully paid in terms of the declaration issued in Form 4, there is nothing more to be revised by the PCIT by invoking his power under the Income tax Act. If such revision of assessment is permitted, it would work against the object and purpose of IDS. Section 189 of the Finance Act, places an embargo on the assessee to the effect that an assessee who is a declarant under the IDS shall not be entitled, in respect of undisclosed income, declared or any amount of tax and sur-charge paid thereon, to reopen any assessment or re-assessment made under the Income tax Act. If such is the legal position, it would equally apply to the revenue thereby prohibiting them from disturbing the finality of a declaration issued under the IDS (a scheme framed

under the Finance Act, 2016) by invoking power under Section 263 of the Income tax Act. That apart, the declaration filed by the assessee was accepted and the PCIT who did not invoke his power under Section 193 of the Act stating that there has been a misrepresentation or suppression of facts by the assessee. Furthermore, it is not the case of the revenue that the assessee's case would fall under any one of the categories under Section 196 of the Finance Act for the scheme namely, IDS not to apply. Furthermore, in terms of clause (e) of Section 196 the Scheme will not apply in relation to any undisclosed income chargeable to tax under the Income tax Act for any previous year relevant to an assessment order prior to the assessment order beginning on first day of April, 2017. Clause (i) mentions the category where a notice under Section 142 or 143(3) or 148 or 153A or Section 153C has been issued, where the IDS would not apply. Admittedly, no such notice had been issued in the assessee's case to non-suit the assessee from availing the benefit of IDS. That apart, the PCIT in his order dated 29th January, 2019 under Section 263 of the Act has accepted the fact that the amount of Rs.75,24,380/- has been entered in the books of accounts. Nevertheless, the assessee while availing the declaration had mentioned the amount as Rs.74,24,379/-. Therefore, the authority while examining the declaration filed by the assessee under the IDS could have very well noted this aspect of the matter. However, such course was not adopted, the declaration was processed and a certificate of declaration was issued on 13th October, 2017 accepting the declaration filed by the assessee. Therefore, the power

under Section 263 could not have been invoked. That apart, the PCIT was of the view that the assessee would have paid commission to the stock brokers for making those accommodation entries in spite of the assessee's specific stand in her letter dated 15th January, 2019 that no commission had been paid. Therefore, this presumption is not based on any evidence directly linking the assessee, rather the PCIT himself would accept that he has come to such conclusion based upon certain statements which were recorded from certain other stock brokers during the search and survey operations conducted by the investigation wing of the Income tax Department. Further, we note that there is an annexure in Form I to declaration under Section 183 of the Act. The annexure is a statement of undisclosed income. It contains a description of undisclosed income and income declared in the form of investment in assets. There is a tabular statement which has to be filled up by the assessee mentioning the assessment year to which the undisclosed income pertains, the amount of undisclosed income and the nature of undisclosed income. Furthermore, we would be well justified in observing that the assumption of jurisdiction by the PCIT under Section 263 of the Act is, in fact, an exercise done by the concerned authority indirectly what the authority could not do directly in terms of the Finance Act, 2016 as the declaration filed by the assessee had been accepted and attained finality.

17. After going through the provisions of the scheme, this Court finds that Chapter IX of the Finance Act, 2016 is a complete code by itself. It provides an opportunity to an assessee to offer income, which

was not disclosed earlier, to tax. Chapter IX provides for a special procedure for disclosure and charging income to tax. It lays down the procedure for disclosure of such income; the rate of income tax and the penalty to be levied thereupon and the manner of making such payment. Under the said scheme the competent authority has been vested with the power to accept the declaration made by the assessee and such power to be exercised only upon being satisfied with such disclosure. It is also open to such authority not to accept such declaration. But once accepted, the same attains finality. The scheme does not empower and/or authorise the competent authority to reopen and/or revise a decision taken on such declaration. It is well settled that a statutory authority has to function within the limits of the jurisdiction vested with him under the statute. Thus, once the declaration is accepted by the PCIT such authority is estopped from taking any steps which would in effect amount to reopening and/or revising the decision already taken on such declaration. The said scheme was introduced in order to encourage an assessee to make a disclosure of the income not disclosed earlier. PCIT in the instant case invoked its power under Section 263 in respect of an item of income which was declared in terms of the said scheme. All particulars were available before the PCIT in respect of such income and the PCIT upon being satisfied, accepted such declaration. Thus, if the contention of the revenue is accepted that the PCIT has power to invoke Section 263 of the I.T. Act, the same, in our considered view, would frustrate the object behind introduction of such Scheme. The PCIT was not justified

in invoking the power under Section 263 of the I.T. Act as it would amount to revising a decision taken by the PCIT on such declaration by the assessing officer which is not contemplated under the Income Tax Act.

18. Thus, all materials were available before the PCIT when the declaration made under Section 183 of the Finance Act were considered and accepted. Therefore, the assumption of jurisdiction by the PCIT under Section 263 of the Act is wholly without jurisdiction.

19. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

20. With the dismissal of the appeal, the connected application is dismissed.

(T. S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

GH/RS/sn/S.Das