

MAHAVEER CHARITABLE TRUST vs. COMMISSIONER OF INCOME TAX (EXEMPTION)

IN THE ITAT ALLAHABAD

VIJAY PAL RAO, JM & RAMIT KOCHAR, AM.

ITA No. 190/ALLD/2018

Aug 3, 2021

(2021) 62 CCH 0380 AllTrib

Legislation Referred to

Section 115BBC, 143(3), 263

Case pertains to

Asst. Year 2013-14

Decision in favour of:

Matter remanded

Charitable trusts—Anonymous donations— Assessee is a charitable trust and registered u/s 12AA — Assessee has filed its return of income declaring nil income after claiming exemption u/s 11 and 12 — Case of assessee was selected for scrutiny through CASS and AO has completed scrutiny assessment u/s 143(3) at a total income of Rs. Nil but, however, anonymous donations were charged to tax by AO under section 115BBC — Commissioner opined that order passed by AO u/s 143(3) was not made in accordance with provisions of law and prima facie erroneous and prejudice to interest of Revenue — Commissioner has passed an ex-parte order and set aside assessment order for passing a fresh order — Held, impugned order was passed by CIT(E) on very same day whereby assessment order was set aside and Assessing Officer was directed to re-frame assessment after conducting a proper enquiry in respect of anonymous donations and as per provisions of section 13(7) examination of claim of exemption u/s 11 in respect of anonymous donations and to make proper enquiry to ascertain possible nexus between society and donors which attracted provisions of section 68 and also that AO erred in not charging interest u/s 234A and 234B — There is no dispute that except show cause notice CIT(E) has not issued any other notice to assessee and further impugned order was passed on very date when case was first time fixed for hearing — Therefore, assessee was not given an opportunity to explain cause and reasons for non-appearance — Hence, assessee was not given any effective and proper opportunity of hearing before passing impugned revision order by CIT(E) — Hence in interest of justice, impugned revision order passed by CIT(E) under section 263 is remanded to record of CIT(E) for deciding same afresh after giving an appropriate opportunity of hearing to assessee — Though assessee has raised various objections against jurisdiction invoked by CIT(E) however, since these objections could not be raised before

and considered by CIT(E) while passing impugned ex parte order therefore, same may be raised before CIT(E) in set aside proceedings and after considering same, CIT(E) shall pass afresh order — Matter remanded.

Held

Scrutiny assessment in the case of the assessee was completed by AO u/s 143(3) at a total income of Rs. Nil but, however, the anonymous donations of Rs. 1,97,69,650/- were charged to tax by AO under section 115BBC. The CIT(E) noticed that the Assessing Officer has not completed the assessment as per the provisions of section 13(7). The Commissioner was also of the view that the Assessing Officer failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68. The Commissioner also observed that the AO erred in not charging interest u/s 234A and 234B. The Commissioner has, thus, passed the impugned order dated 28.02.2018 thereby the assessment order was set aside by holding the same as erroneous and prejudicial to the interest of the Revenue in as much as the AO has completed the assessment without proper application of mind and examination of the claim of exemption u/s 11 in respect of anonymous donations, that the assessment has not been completed in accordance with provisions of section 13(7) and the AO failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68. The Commissioner opined that the order passed by the AO u/s 143(3) was not made in accordance with the provisions of law and prima facie erroneous and prejudice to the interest of the Revenue. He has also noted the fact that the Assessing Officer has not charged the interest under section 234A and B. The CIT(E) issued the show cause notice on 21st February, 2018 and fixed the hearing on 28th February, 2018. The assessee did not appear before CIT(E) on the date of hearing viz. 28.02.2018 fixed by the CIT(E). The impugned order was passed by the CIT(E) on the very same day i.e. 28th February, 2018 whereby the assessment order was set aside and Assessing Officer was directed to re-frame the assessment after conducting a proper enquiry in respect of anonymous donations and as per the provisions of section 13(7), examination of the claim of exemption u/s 11 in respect of anonymous donations and to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68, and also that the AO erred in not charging interest u/s 234A and 234B. There is no dispute that except the show cause notice dated 21.02.2018, the CIT(E) has not issued any other notice to the assessee and further the impugned order was passed on the very date when the case was first time fixed for hearing. Therefore, the assessee was not given an opportunity to explain the cause and reasons for non-appearance on 28th February, 2018. Hence, in the facts and circumstances of the case, assessee was not given any effective and proper opportunity of hearing before passing the impugned revision order by the CIT(E). Hence in the interest of justice, impugned revision order passed by the CIT(E) under section 263 is remanded to the record of the CIT(E) for deciding the same afresh after giving an appropriate opportunity of hearing to the assessee.

(para 6)

Conclusion

Assessee was not given any effective and proper opportunity of hearing before passing the impugned revision order by the CIT(E).

In favour of

Matter remanded

Counsel appeared:

Pawan Jaiswal, C.A for the Appellant.: Shantanu Dhamija, CIT DR for the Respondent

VIJAY PAL RAO, JM.

1. This appeal by the assessee is directed against revision order dated 28.02.2018 passed under section 263 of Income Tax Act by Commissioner of Income Tax (Exemptions), Lucknow for assessment year 2013-14. The assessee has raised the following grounds:

"1 Because the CIT(E) has erred in law and facts in holding that in assessment order dated 30.03.2016. Allahabad was erroneous and prejudicial to the interest of revenue within the meaning of Section 263 and the passing the impugned order directing the "Assessing Officer" shall make a fresh assessment after allowing the assessee due opportunity of being heard."

2. Because the direction for fresh assessment as per para 6 of the order dated 28.02.2018 as has been impugned in the present appeal, is wholly unenforceable in law as the subject matter of the assessment order dated 30.03.2016 itself is a subject matter of appeal before the first appellate authority which is pending for adjudication as on date.

3. Because merely the "Assessing Officer" adopted one plausible view while making an assessment under section 143(3) after carrying out all plausible ways of verification, reviewing of the assessment order under by the CIT(E) in the garb of provisions of section 263 is bad and erroneous and according the order dated 28.02.2018 passed by him deserves to be quashed.

4. Because the "Assessing Officer" had duly applied his mind while passing assessment order under section 143(3) {although same has not been accepted and an appeal is pending for adjudication before CIT(A) of the Act and against the returned NI income assessment had been completed at an income of Rs. 1,97,69/- break up of which is as under;

a) Aggregate of donations received by way of building funds 2,12,52,000

b) Voluntary donations, other than donations received by way of building funds as mentioned (a) above 4,55,000

c) Funds received through cheque included above (8,52,000)

d) Amount allowed @ 5 of Rs. 2,17,07,000 as deduction under section 115 BBC (10,85,350)

e) Amount treated as income liable for taxation 1,97,69,650 merely the CIT(E) is of different view, proceedings as also order under section 263 of the Act could not have been passed against the appellant.

5. Because the alleged observation made by the CIT(E) in the impugned order dated 28.02.2018 that the "Assessing Officer" failed to make proper inquiry in respect of donations as an Investigator and an Adjudicator and had committed an error, which amount to failure of enquiry is contradictory as the regular assessment order dated 30.03.2016 itself is based on enquiry made by the "Assessing Officer"

6. Because the twin condition laid down by the statute under the provisions of section 263 having not been fulfilled, the order dated 28.02.2018/- passed by the CIT (E) is bad and the same is liable to be quashed.

7. Because the order dated 28.03.2018 is based on erroneous and considerations and the same is not sustainable either on facts or in law.

8. Because in any case the ex-parte order dated 28.02.2018 passed by CIT (E) is completely bad as the same has been made without giving due and proper opportunity of being heard to the appellant.

9. Because the order appealed against is contrary to the facts, law and principles of natural justice."

2. The assessee is a charitable trust and registered u/s 12AA of the Income Tax Act. The assessee has filed its return of income for the year under consideration on 30.03.2015 declaring nil income after claiming exemption u/s 11 and 12 of the Act. The case of the assessee was selected for scrutiny through CASS and the AO has completed scrutiny assessment u/s 143(3) at a total income of Rs. Nil but, however, the anonymous donations of Rs. 1,97,69,650/- were charged to tax by AO under section 115BBC. Subsequently, the CIT(E) had examined the assessment record and noted that the assessee trust has shown donation of Rs. 2,17,07,000/- out of which only Rs. 8,52,000/- was received through cheques. The Commissioner has further noted that in the assessment order although tax has been charged on Rs. 1,97,69,650/- u/s 115BBC of the Income Tax Act but the assessment has not been completed in accordance with provisions of section 13(7) of the Act. The Commissioner was also of the view that the Assessing Officer failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68 of the Income Tax Act. The Commissioner opined that the order passed by the AO u/s 143(3) was not made in accordance with the provisions of law and prima facie erroneous and prejudice to the interest of the Revenue. The Commissioner also observed that the AO erred in not charging interest u/s 234A and 234B of the Act. The commissioner accordingly issued a show-cause notice u/s 263 on 21.02.2018 and fixed the date of hearing on 28.02.2018. The Commissioner has passed the impugned order dated 28.02.2018 thereby the assessment order was set aside by holding the same as erroneous and prejudicial to the interest of the Revenue in as much as the AO has completed the assessment without proper application of mind and examination of the claim of exemption u/s 11 of the Act in respect of anonymous donations, that the assessment has not been completed in accordance with provisions of section 13(7) of the Act and the AO failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68 of the Income Tax Act, as well that the AO erred in not charging interest u/s 234A and 234B of the Act. The AO was directed to make a fresh assessment after examination of the issues as taken up in the revision proceedings. Thus the Commissioner has passed an ex-parte order and set aside the assessment order for passing a fresh order.

3. Before the Tribunal, the learned AR of the assessee has submitted that the Assessing Officer made an addition of Rs. 1,97,69,650/- on account of anonymous donation and charged the same under section 115BBC while framing the assessment under section 143(3). He has thus contended that it is not a case of assessment of nil income as misconceived by the CIT(E) while invoking the provisions of section 263 of the Income Tax Act ignoring the fact that the Assessing Officer has made an addition on account of anonymous donation. He has pointed out that the assessee challenged the assessment order by filing an appeal before the CIT(A) which is pending. Therefore once the issue is pending in the appeal filed by the assessee before the CIT(A) the CIT(E) is not permitted to invoke the provisions of section 263 on the same issue. He has further contended that the CIT(E) has also not granted an effective hearing to the assessee before passing an impugned order. The hearing of the case was fixed by the CIT(E) on 28th February, 2018 by issuing a show cause and there was no further notice or opportunity was granted by the CIT(E) to the assessee but the impugned order was passed on the same

date. Therefore, the impugned order was passed in a haste without giving an appropriate opportunity of hearing to the assessee. He has relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Amitabh Bachhan 384 ITR 200 and submitted that the Hon'ble Supreme Court has observed that opportunity of hearing prior to finalization of order under section 263 is a condition precedent. Therefore, not granting of appropriate opportunity of hearing amounts to violation of principles of natural justice. Thus, the learned AR has pleaded that the impugned order may be set aside and assessee may be granted an appropriate opportunity of hearing before the CIT(E). The learned AR has also raised an objection against the invoking of the jurisdiction by the CIT(E) under section 263 on the issue which was duly examined and decided by the Assessing Officer and a possible view was taken by the Assessing Officer while framing the assessment under section 143(3). Therefore, when two views are possible on an issue and the Assessing Officer has taken one of the views then the CIT is not permitted to invoke the revisionary power under section 263 of the Income Tax Act merely because he does not agree with the view of the Assessing Officer. In support of this contention, he has relied upon and referred various case laws. He has also pointed out that as per the definition of anonymous donation provided in section 115BBC(3) the donation in the case of the assessee cannot be regarded as anonymous donation and therefore the invoking of provisions of section 115BBC is unjustified.

4. On the other hand, learned DR has submitted that the CIT(E) has recorded in the impugned order that notice was served on the issue on 23rd February, 2018 and the date of hearing was fixed on 28th February, 2018. Since there was no compliance to the show cause notice issued by the CIT which was duly served upon the assessee therefore, the Commissioner had no option but to pass the impugned ex parte order. He has further submitted that the Assessing Officer has completed the assessment on nil income and without charging the interest under section 234A and 234B which is mandatory and consequential. Therefore, the assessment order passed by the Assessing Officer is erroneous so far as prejudicial to the interest of the Revenue. He has pointed out that since the Assessing Officer has not charged the income by considering the provisions of section 13(7) of the Income Tax Act therefore, the assessment order suffers from error which has resulted loss of Revenue.

5. The learned DR has submitted that the alleged record of donation as maintained by the assessee is unverifiable because the assessee has not produced any supporting evidence or document to show particulars of the donors including their address is on the basis of any documentary proof. He has supported the impugned order of the CIT(E) passed under section 263 of the Act.

6. We have considered the rival submissions as well as relevant materials on record. The scrutiny assessment in the case of the assessee was completed by AO u/s 143(3) at a total income of Rs. Nil but, however, the anonymous donations of Rs. 1,97,69,650/- were charged to tax by AO under section 115BBC. The CIT(E) noticed that the Assessing Officer has not completed the assessment as per the provisions of section 13(7) of the Income Tax Act. The Commissioner was also of the view that the Assessing Officer failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68 of the Income Tax Act. The Commissioner also observed that the AO erred in not charging interest u/s 234A and 234B of the Act. The Commissioner has, thus, passed the impugned order dated 28.02.2018 thereby the assessment order was set aside by holding the same as erroneous and prejudicial to the interest of the Revenue in as much as the AO has completed the assessment without proper application of mind and examination of the claim of exemption u/s 11 of the Act in respect of anonymous donations, that the assessment has not been completed in accordance with provisions of section 13(7) of the Act and the AO failed to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68 of the Income Tax Act. The Commissioner opined that the order passed by the AO u/s 143(3) was not made in accordance with the provisions of law and prima facie erroneous and prejudice to the interest of the Revenue. He has also noted the fact that the Assessing Officer has not charged the interest under section 234A and B of the Income Tax Act. The CIT(E) issued the show cause notice on 21st February, 2018 and fixed the hearing on 28th February, 2018. The assessee did

not appear before Id. Ld. CIT(E) on the date of hearing viz. 28.02.2018 fixed by the Id. CIT(E). The impugned order was passed by the CIT(E) on the very same day i.e. 28th February, 2018 whereby the assessment order was set aside and Assessing Officer was directed to re-frame the assessment after conducting a proper enquiry in respect of anonymous donations and as per the provisions of section 13(7) of the Income Tax Act, examination of the claim of exemption u/s 11 of the Act in respect of anonymous donations and to make proper enquiry to ascertain the possible nexus between the society and the donors which attracted the provisions of section 68 of the Income Tax Act, and also that the AO erred in not charging interest u/s 234A and 234B of the Act. There is no dispute that except the show cause notice dated 21.02.2018, the CIT(E) has not issued any other notice to the assessee and further the impugned order was passed on the very date when the case was first time fixed for hearing. Therefore, the assessee was not given an opportunity to explain the cause and reasons for non-appearance on 28th February, 2018. Hence, in the facts and circumstances of the case, we are of the considered opinion that the assessee was not given any effective and proper opportunity of hearing before passing the impugned revision order by the CIT(E). Hence in the interest of justice, we set aside the impugned revision order passed by the CIT(E) under section 263 of the Income Tax Act and remand the matter to the record of the CIT(E) for deciding the same afresh after giving an appropriate opportunity of hearing to the assessee. Though the assessee has raised various objections against the jurisdiction invoked by the CIT(E) however, since these objections could not be raised before and considered by the CIT(E) while passing the impugned ex parte order therefore, the same may be raised before the CIT(E) in the set aside proceedings and after considering the same, the CIT(E) shall pass afresh order.

7. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 03.08.2021 through video conferencing.

Customized Notes

© Copyright 2021 Wolters Kluwer (India) Pvt. Ltd. All Rights Reserved.