HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 20.08.2024
Pronounced on: 31.08.2024

ITA No.15/2009

M/s Reshi Construction Company through its
Managing Partner Mohammad Yaser ...Appellant(s)

Through:- Mr. Aditya Gupta, Advocate

V/s

Commissioner of Income Tax, Jammu ...Respondent(s)

Through:- Mr. Suraj Singh Wazir, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Sanjeev Kumar J

1. This appeal under Section 260A of the Income Tax Act, 1961 ["the Act"] arises out of an order dated 22nd July, 2009 passed by the Income Tax Appellate Tribunal, Amritsar ["ITAT"] in ITA No.478(ASR)/2008 titled M/s Reshi Construction Co. v. The Income Tax Officer, Ward 4, Srinagar, whereby the appeal of the appellant-assessee against the order of Commissioner, Income Tax (Appeals), Jammu dated 14th July, 2008 has been dismissed.

2. Vide order dated 23rd May, 2013, the instant appeal was admitted to hearing on the following substantial questions of law:-

A. Whether Hon'ble ITAT erred in law in upholding the validity of the jurisdiction assumed by the Assessing Officer to pass the assessment order, more so by disregarding the settled principle that there can be no estoppel against law.

B. Whether Hon'ble ITAT erred in law in upholding the addition of undisclosed investment by passing a non speaking order.

C. Whether Hon'ble ITAT erred in law in upholding the addition on account of "Addition to fixed assets" when such assets are appearing in the balance sheet.

D. Whether the order passed by Hon'ble Tribunal is in accordance with law.

3. The appellant is a partnership firm against whom an assessment for the assessment year 2005-06 was framed by ITO, Ward No.4, Srinagar ["Assessing Officer"] as against the income of Rs.2,21,148/-. The aforesaid order of assessment of the appellant was framed by the Assessing Officer after selecting the case for scrutiny as per the guidelines laid down in action plan for the

year 2006-07 as contained in Clause 2(q) thereof. The Assessing Officer made an aggregate addition of Rs.20,28,885/- as unexplained income on the ground that plant and machinery shown in the balance sheet on 31st March, 2004 was to the tune of Rs.21,58,400/- whereas the same was shown as on 1st April, 2004 by a figure which exceeded by Rs.13,29,206/-. Additionally, the Assessing Officer made an addition of Rs.6,99,679/- on account of plant and machinery added by the assessee during the year under appeal. The Assessing Officer, thus, made a total addition of Rs.20,28,855.00 (13,29,206 + 6,99,679).

4. Feeling dissatisfied and aggrieved by the assessment made by the Assessing Officer, the appellant filed an appeal before the Commissioner of Income Tax (Appeals), Jammu ["CIT(A)"] raising a plea that the assessment order was framed in violation of the CBDT guidelines and, therefore, null and void. The CIT(A) confirmed the assessment order and aforesaid additions made by the Assessing Officer vide order dated 14th July, 2008. The appellant took the matter before ITAT, Amritsar by way of an appeal registered as ITA No.478(ASR)/2008. Vide judgment and order impugned, the ITAT has dismissed the appeal and upheld the order of CIT(A), Jammu. It is this order the appellant is aggrieved of and is before us by way of instant appeal.

5. The impugned order of the ITAT is challenged by the appellant primarily on the ground that the CIT(A) as well as ITAT failed to appreciate that assumption of jurisdiction by the Income Tax Assessing Officer for framing an assessment order under Section 144 of the Act did not have the sanction of law, in that, the case of the appellant was selected for scrutiny by issuing notice under Section 143(2) of the Act in gross violation of CBDT guidelines. It is argued that in terms of Clause 2(q) of the CBDT guidelines, the case for scrutiny is selected only when there is addition to the capital. Similarly, under Clause 2(o) of CBDT guidelines, the case of an assessee for scrutiny can be selected and assessment could be framed under Section 144 of the Act only in cases of the contractors whose gross contractual receipts exceed rupees one crore and if total profit declared was less than 5% of gross contractual receipts.

6. It is submitted that the profit of the appellant for the accounting year in question was only Rs.7,92,508/-, which, in any case, was more than 5% and, therefore, Clause 2(o) of CBDT guidelines was not attracted. It is argued that simply because the assessee participated in the proceedings before the Assessing Officer without raising such objection cannot validate otherwise invalid jurisdiction. It is, thus, submitted that there could be no estoppel against law. On facts, it was argued that the additions made on account of fixed assets to the tune of Rs.13,29,206/- and

Rs.6,99,679/-, aggregating to Rs.20,28,885/-, was not tenable as these amounts were part of the books of accounts and balance sheet and, therefore, could not have been termed as addition to the assets.

7. *Per contra*, Mr. Suraj Singh Wazir, learned counsel appearing for the revenue, has sought to justify the assessment order and the orders passed by the CIT(A) and ITAT. He would submit that the Assessing Officer as well as both the appellate authorities have taken note of all aspects of the matter and have rightly concluded that there were unexplained additions made to the fixed assets for which the assessee was bound in law to account for.

8. On behalf of the revenue it is submitted that the findings of the learned 1st appellate authority i.e. CIT(A) are on the basis of remand report filed by the Assessing Officer on 16th April, 2008. The remand report was served upon the assessee and he was asked to submit his explanation. The first appellate authority i.e. CIT(A) considered the remand report and the clarifications thereto submitted by the assessee and while upholding the additions made also allowed depreciation of assets in dispute. It is argued that the explanation of assessee that he had previously acquired the assets on hire basis in order to run the business smoothly and to save cost, which were later on acquired by the

assessee was rightly not accepted by the Assessing Officer as also by both the appellate authorities below.

9. Having heard learned counsel for the parties and perused the material on record, following two question of law arise for determination:-

i) Whether ITAT erred in law in upholding the validity of jurisdiction assumed by the Assessing Officer to frame the assessment order under Section 144 of the Act?

ii) Whether ITAT erred in law in upholding the addition of undisclosed investment on account of "addition to fixed assets made by the assessee"?

10. Question No.(ii) framed herein above subsumes question No.B & C framed by this Court while admitting the appeal for hearing vide order dated 23rd May, 2013.

Question No.(i)

11. So far as question No.(i) is concerned, the plea of the appellant is that his case was picked up for compulsory scrutiny contrary to the CBDT guidelines and therefore, the assumption of jurisdiction by the Assessing officer to issue notice under Section 143(2) of the Act and framing of assessment under Section 144 of the Act was in gross violation of CBDT guidelines. The CIT(A) has held that selection of a case for scrutiny is an

administrative matter and does not relate to the jurisdiction of the Assessing Authority/Officer. The CIT(A) has further held that since the appellant-assessee had not objected to the selection of case for scrutiny and participated in the proceedings pursuant to the notice issued under Section 143(2) of the Act, as such, this ground was not available to the assessee. The ITAT has concurred with the view of the CIT(A), Jammu and has reaffirmed that in the absence of objection in this regard having been taken by the appellant-assessee before the Assessing Officer, such plea was not available to the appellant at the belated stage.

12. We have given our thoughtful consideration to this plea/ substantial question of law raised by the appellant. It is true that CBDT promulgated procedure for selection of returns/cases of Non-Corporate Assessees for scrutiny during the financial year 2006-07. Paragraph No.2 of the procedural guidelines, in particular its clauses (o) and (q) are relevant for our discussion and are, thus, set out below:-

> "2. The following categories of cases **shall be compulsorily scrutinized:-**
>
> (a) ……
>
> (b) ……..
>
> (c) ……..
>
> (d)……

(e) ……..

(f) ……

(g) ……

(h) ……

(i) ……..

(j) …….

(k) ……

(l) ……

(m)…….

(n) …….

(o) All cases of contractors whose gross contractual receipts exceed Rs.1 crore in laces other than 60 cities on computer network if total income declared is less than 5% of gross contractual receipts.

(p) ……..

(q) All cases in which fresh capital introduced during the year exceeds Rs.1 crore in Delhi, Mumbai, Chennai, Kolkata, Pune, Hyderabad, Banglore and Ahmedabad and Rs.10 lakh in other cities."

13. From a bare reading of paragraph No.2 of the procedure laid down by the CBDT for selection of returns/cases for the financial year 2006-07, it is evident that paragraph 2 only casts an obligation on the Assessing Officer to compulsorily scrutinize the cases covered by Clauses (a) to (s) of paragraph No.2. The CBDT circular laying down procedure aforesaid does not and

cannot take away the power and jurisdiction of the Assessing Officer conferred upon it under Section 143(2) of the Act.

14. As is rightly contended by the learned counsel for the Revenue and also observed by the CIT(A) in its order that the circulars issued by the CBDT laying down guidelines for income tax authorities for doing a particular thing in a particular manner are administrative in nature. Such circular/instructions of CBDT, though binding on the Assessing Officers, cannot be in derogation of the statutory provisions contained in Sections 143 and 144 of the Act. The CBDT circular in question only deals with cases where Assessing Officer is under an obligation to hold compulsory scrutiny to find out compliance with the provisions of the Act and Rules framed thereunder and to ensure that the income assessable to tax does not escape assessment. It is in the exercise of this power conferred upon the Assessing Officer under Subsection (2) of Section 143 of the Act, appellant-assessee was put on notice with regard to additions made to the fixed assets from out of the undisclosed income. The Assessing Officer found that as per the balance sheet of the appellant as on 31st March, 2004, the assessee had disclosed to have purchased plant and machinery of the value of Rs.21,58,400/- whereas in the schedule of fixed assets i.e. plant and machinery as on 01st April, 2004 an amount of Rs.34,87,606/- was indicated. There

was, thus, an increase of fixed assets by an amount of Rs.13,29,206/-.The appellant-assessee could not explain the investment of Rs.13,29,206/- made overnight for purchasing new plant and machinery. The explanation tendered by the appellant-assessee was examined by the Assessing Officer and CIT(A). Both the authorities found the explanation not tenable in law and unsupported by any evidence. The Assessing Officer as also both the appellate authorities below rightly treated the addition of Rs.13,29,206/- as an undisclosed income.

15. The Assessing Officer as also both the appellate forums below have, on facts, found further addition of Rs.6,99,679/- made during the assessment year in question. Otherwise also, these are question of facts, which have been conclusively determined by the three forums below.

16. The reasoning of CIT(A), which is upheld by the ITAT that the appellant had not raised any objection with regard to the jurisdiction of the Assessing Officer to select his case for scrutiny cannot be found fault with. The appellant, if aggrieved by selection of his case for scrutiny by the Assessing Officer, could have challenged the notice issued under Section 143(2) of the Act. The appellant did not object to the notice and rather voluntarily participated in the proceedings conducted by the

Assessing Officer, which ultimately culminated in framing of the assessment under Section 144 of the Act.

17. As is held herein above, CBDT circular laying down procedure for picking up cases for scrutiny may be binding on the Assessing Officers of the Income Tax Department but the same does not have the force of law nor can it supplant the express statutory provisions contained in Sections 143 and 144 of the Act. The exercise of jurisdiction by the Assessing Officer under Subsection (2) of Section 143 of the Act, which, if exercised under the circumstances enumerated in the Section 143 of the Act, cannot be found fault with on the ground that exercise of such jurisdiction is dependent upon compliance with CBDT circular, which is purely administrative in nature and calls upon the income tax authorities to go for compulsory scrutiny of the assessment in the cases enumerated in paragraph No.2 of such circular. The violation of the circular, if any made by the income tax authorities, may invite an administrative action but cannot be a ground for setting aside the assessment framed under Section 144 of the Act after following the procedure laid down in Section 143, in particular Subsection (2) of Section 143 of the Act.

18. It is true that in the instant case, the case of the appellant was processed under Section 143 (2) in reference to paragraph 2(q) of the guidelines issued for the financial year 2006-07, which,

prima facie, was not applicable/attracted in the case of the appellant. However, for the reasons explained above, we are of the considered opinion that even if case of the appellant was not liable to compulsorily scrutiny in terms of the aforesaid clause of CBDT guidelines, yet the case of appellant squarely fell within the purview of Subsection (2) of Section 143 of the Act. The Assessing Officer having noticed that certain income had escaped assessment was well within its power to issue notice under Subsection (2) of Section 143 of the Act and proceed to frame assessment under Section 144 of the Act. The order of assessment framed under Section 144 of the Act by the Assessing Officer in the case of the appellant, therefore, cannot be found fault with.

19. The first appellate authority and the second appellate forum have rightly concurred with the view of the Assessing Officer and upheld the additions made on account of fixed assets. The other questions raised by the appellant are pure questions of fact and, therefore, cannot be, by any stretch of reasoning, termed as substantial questions of law, which is prerequisite for entertaining an appeal under Section 260A of the Act.

20. All the three forums have found that the additions to fixed assets made by the appellant-assessee are from undisclosed income and

have, therefore, rightly made additions to the income assessable to tax under the Act.

21. Learned counsel for the appellant relied upon some judgments of the Hon'ble Supreme Court and various High Courts to substantiate his argument that pure question of law which arises out of undisputed facts can be raised even at the appellate stage. There is no gainsaying that the aforesaid proposition of law is well settled and does not call for any debate.

22. Mr. Gupta, learned counsel for the appellant, has also relied upon couple of judgments from various High Courts to submit that if a case is picked up for scrutiny in violation of the CBDT circular/guidelines, subsequent assessment made in such case is not sustainable. Reliance was placed by Mr. Aditya Gupta, learned counsel for the appellant, on a Single Bench judgment of the Andhra Pradesh High Court in the case of **CIT v. Nayana P. Dedhia dated 27th August, 2004.**

23. In the aforesaid case, learned Single Bench of Andhra Pradesh High Court was examining the circular of CBDT issued under Section 119(1) of the Act for laying down procedure to select returns for the assessment year 1996-97. Clause 749A of the circular clearly laid down that the Income Tax Department shall not select returns for scrutiny for the financial year 1996-97, if

total income declared is at least 30 per cent more than the total income declared by the assessee for the assessment year 1995-96. It is, thus, evident that in the aforesaid circular issued for the assessment year 1996-97, there was a complete embargo placed by the CBDT on the power of the income tax authorities to select particular return and it is in that context, the learned Single Bench of Andhra Pradesh High Court held the proceedings initiated in respect of the assessee before it in violation of the CBDT circular. There is, thus, clear distinction between the CBDT guidelines for the assessment year 1996-97 and the circular of CBDT in question issued for the financial year 2006-07. CBDT circular for the financial year 2006-07 only enumerates categories of returns which are required to be selected by the Assessing Officer compulsorily for detailed scrutiny. The scrutiny of other returns is in the discretion of the Assessing Authority governed by mandate of Section 143 and Section 144 of the Act.

24. At this stage, we would like to refer to the provisions of Section 119 of the Act, which confers upon CBDT power to issue such orders, instructions and directions to income tax authorities for proper administration of the Act providing further that all such persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board. The

proviso first is very relevant and provides that no such order, instruction or order shall be issued by the CBDT so as to require an income tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or so as to interfere with the discretion of the Commissioner of Income Tax (Appeals) in the exercise of its appellate functions. The CBDT circulars are issued in the exercise of its powers conferred upon it by Section 119 of the Act. The proviso to Section 119 fortifies our conclusion that CBDT's instructions or directions cannot interfere with the power of the income tax authorities conferred upon it under the Act.

25. Under Section 143(2) of the Act, if a return has been furnished by the assessee under Section 139 or in response to a notice under Section 142(1) of the Act and the Assessing Authority has a reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, it shall serve a notice on the assessee specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him to produce any evidence or particulars specified therein or on which the assessee may rely in support of such claim.

26. Similarly, under Subsection (2) of Section 143 of the Act, if Assessing Officer considers it necessary or expedient to ensure

that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax, it shall serve on the assessee a notice either to attend his office or produce any evidence on which the assessee may rely in support of the return. This is notwithstanding anything contained in Clause (1).

27. In short, the power conferred upon the Assessing Authority under Subsection (2) of Section 143 of the Act is statutory in character and cannot be tinkered with or taken away by any order or instruction issued by the CBDT in the exercise of the power conferred upon it under Section 119 of the Act, for, issuance of such order or direction would be tantamount to requiring the Assessing Officer to make or dispose of a particular case in a particular manner not prescribed by statute.

28. Viewed from any angle, we do not find any illegality or infirmity in the order impugned passed by the ITAT, Amritsar. In view of the above, we find no merit in this appeal and the same is, accordingly, dismissed.

(Rajesh Sekhri)
Judge

(**Sanjeev Kumar)**
Judge

JAMMU
31.08.2024
Vinod,PS

Whether the order is speaking : Yes
Whether the order is reportable: Yes