



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.217 OF 2001.

Mr Balmukund Acharya
Proprietor of M/s Laxmi
General Supply Company
N.C.Kelkar Road, Near Plaza
Cinema, Dadar, Mumbai-400
028.

.. Appellant.

VERSUS.

1. Deputy Commissioner of
Income-tax, Special Range,
44, Piramal Chambers,
Lalbaug, Mumbai 400 012.

2. Commissioner of Income -
tax City IX, Piramal
Chambers, Lalbaug, Mumbai 400
012.

3. Union of India, through
Ministry of Law, Aayakar
Bhavan, M.K. Road, Mumbai-400
020.

.. Respondents.

Mr A. P. Sathe with Mandar Vaidya, Advocate for the
Appellant.

Mr B. M. Chatterjee i/b P. S. Sahadevan, Advocate
for the Respondents.

CORAM : DR.S.RADHAKRISHNAN
and V.C.DAGA, JJ.

DATED : 19TH DECEMBER, 2008.

JUDGMENT : (Per: VIJAY DAGA, J)

1. Heard. Perused appeal.

2. This appeal, under Section 260-A read with Section 246(1)(a) of the Income-tax Act, 1961 (hereinafter referred to as "the Act" for short), has been preferred by the assessee seeking to challenge the order of the authorities below, i.e., the Assessing Authority, Appellate order of the Commissioner of Income-tax (Appeals) and further appellate order dated 13.3.2001 passed by the Income-tax Appellate Tribunal, Mumbai Bench 'D' Mumbai, (the Tribunal for short).

THE ISSUE:

The **substantial question of law** involved in the appeal is as under:-

"Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that no appeal lies against the

order of intimation under Section 246 of the Act and that the order under Section 143 (1) (a) is limited to the adjustment made by the Assessing Officer and the said adjustment does not include denial of tax liability by the assessee and that additional ground leading to tax liability of capital gain does not arise from the order of the CIT(A)?

FACTUAL PANORAMA:

3. The factual panorama is that the Appellant is an individual and assessed to tax. The year under consideration is the financial year 1995-96. The Appellant filed his Income-tax return for the assessment year 1996-97 declaring total income of Rs. 1,04,86,080/- which included an amount of long term capital gains of Rs.1,07,00,000/- on account of sale of godown situated at Chaya Building, Dadar Mumbai-28.

4. The Appellant while declaring the capital gains, showed the cost of acquisition as 'Nil' and declared income received as long term capital gains and paid the taxes accordingly. Respondent No.1- the Deputy Commissioner of Income-tax, thereafter, passed an order under Section 143 (1)(a) of the Act and sent intimation alongwith the notice of demand including interest calculated in the sum of Rs. 1,87,352/-

under Section 234 of the Act.

5. Being aggrieved by the aforesaid order dated 26.12.1997 the Appellant preferred an appeal before the Commissioner of Income-Tax (Appeals) ("the CIT (A)" for short) raising the following two grounds:

- "(i) The Deputy Commissioner of Income Tax erred in charging capital gain on the sale of premises of the Appellant and failed to appreciate that the Capital gain was not taxable under Section 45 of the Act as the premises which was sold by the Appellant had not cost the Appellant anything in terms of money and as such, computation of capital gains under Section 45 was not possible on the basis of the principles laid down by the Supreme Court in the case of **ITO vs. B.C.Srinivas Shetty** reported in 128 ITR 294.
- (ii) The Deputy Commissioner of Income-tax erred in levying interest under Section 234(c) of the Act and failed to appreciate that the Section is very clear and as far as the said Section is concerned no advance tax is required to be paid by the Appellant in case of capital gains. Even otherwise he failed to appreciate that the Appellant had paid the advance tax on 15th March 1996 covering the full amount of capital gains, in case the same was assessable".

6. The CIT (A) rejected above appeal on the first ground holding no appeal lies under section 246 (1) (a) against an intimation sent under Section 143 (1) (a) of the Act since no adjustment had been made by the Assessing Authority (A.O.) and that the assessee had on his own declared the subject amount as capital gains and paid taxes thereon. It was, thus, held that the Appellant was not entitled to raise the issue which was not the subject matter of adjustment and that the subject question to be raised in the appeal did not arise from the order passed by the AO. The CIT(A) further held that on the pretext of challenging the levy of interest under Section 234 of the Act, the other issues on merits could not be allowed to be raised at appellate stage. He, thus, refused to entertain the ground of taxability of capital gains in respect of an assessment completed under Section 143 (1) (a) of the Act. In the result, the appeal was dismissed.

7. So far as the second ground raised in the memo appeal is concerned, the same was entertained and the appeal to that extent was allowed. The Assessing Officer (AO) in turn was directed to recalculate interest, if any, payable under Section 234 (c)

considering the fact that it may not be chargeable in respect of the capital gains.

8. Being aggrieved by the aforesaid order of the CIT(A), the Appellant preferred appeal before the Tribunal without success raising the following grounds:

- a. The CIT (A) erred in not admitting the ground of Appeal about the taxability of capital gain. The CIT (A) failed to appreciate that the order passed under Section 143 (1)(a) of the Act is an assessment order and as such the Appellant is not estopped in raising a ground of taxability of the income which goes to the root of the matter in spite of the fact that the assessee himself offered the said income for taxation and paid the taxes.
- b. The CIT (A) erred in not appreciating the fact that Section 246 (1) (a) itself provides that the assessee is entitled to file an Appeal in case where he denies his liability to be assessed under this Act i.e. particular item of income and in the present appeal even though the assessee himself offered a particular amount of tax after realizing that the same is not taxable he was within his rights under the said Section to raise such ground in the Appeal against the order under Section 143 (1) (a)

of the Act".

9. Being aggrieved by the aforesaid order, the Appellant has preferred this appeal raising a substantial question of law framed in the opening part of this judgment.

SUBMISSIONS:

10. Mr Sathe learned senior counsel appearing for the assessee-Appellant submits that the Appellant while offering the consideration received on account of sale of premises, had, specifically, stated in computation of income filed alongwith the return of income that there was no cost of property acquired which was sold and erroneously offered the whole consideration as capital gains. In his submission, facts disclosed in the return, unequivocally demonstrated that the said amount was not liable to be taxed in view of the Apex Court judgment in the case of **CIT v. B.C. Srinivasa Shetty 128 ITR 295**.

11. Mr Sathe further submits that if the Assessee is desirous of denying his liability to be taxed; he is entitled to file an appeal under Section 246 (1) (a) of the Act. In his submission the Appellant offered the amount of tax while filing the return

under mistaken belief that the alleged capital gain is subject to tax. He submits that it was a duty of the Assessing Officer to apply his mind based on the judgment of the Supreme Court and to reach to the proper conclusion that the capital gain was not taxable in the case of the Appellant-assessee.

12. Mr Sathe submits that Section 246 (1) (a) is pregnant with the meaning that if the Assessee thinks that the Assessing Officer has gone wrong and desires of denying his liability to be taxed under the Act, then appeal is very much tenable at the instance of such assessee even against intimation. In his submission the Tribunal did not consider this aspect of the matter while interpreting Section 246(1) (a) of the Act and the nature of intimation referred in the said Section.

13. Mr Sathe reiterated that if a particular item of income is not taxable in the eye of law and if the assessee is desirous of challenging such imposition of illegal tax then he cannot be deprived of his right to approach higher forum through the appellate door. He, thus, submits that the impugned order of the Tribunal is unsustainable in law. He placed reliance on the number of judgments in support of his submissions

which need no reference at this stage, since relevant judgments are being referred in the later part of the judgment while considering rival submissions.

14. Per contra, Mr Chatterjee learned counsel appearing for the Revenue urged that the Assessee had filed the return which was voluntary. It was merely accepted by the Assessing Officer and sent intimation under Section 143 (1)(a) of the Act, which indicated mere acceptance of return without there being any order of assessment. He submits that no appeal was maintainable under the Act against such intimation. In his submission, the subject appeal was rightly rejected as not maintainable.

15. Mr Chatterjee submits that the right of appeal is a creature of statute. Since the appeal is not provided for under the statute against the intimation, CIT (A) could not have entertained the subject appeal at the instance of the present assessee. In his submission the Tribunal was perfectly justified in upholding the order of the Appellate Authority and holding that the Appeal was not maintainable at the instance of the Assessee for want of an order of assessment.

16. Mr Chatterjee submits that the Assessee did not deny his liability under the Act before the Assessing Officer, as such subject appeal was not maintainable. According to him, there ought to have been total denial of liability of being assessed under the Act before the Assessing Officer. That in the case at hand, since there was no denial of liability to be assessed before the A.O., an appeal was not maintainable at the instance of the present Appellant.

17. Mr Chatterjee submits that word "or" appearing in clause 246 (1) (a) with respect to intimation under sub-section (1) needs to be read as "and". He, therefore, submits that appeal would be maintainable wherein an intimation is sent provided assessee denies his liability to be assessed or where he objects to the making of adjustments. He, thus, prayed for dismissal of the appeal.

STATUTORY PROVISIONS:

18. Before we deal with the aforesaid question of law, it is appropriate to first consider the relevant statutory provisions.

19. Chapter XX of the Act deals with appeals and revision. Section 246 deals with appealable orders. The aforesaid Section 246 of the Act was substituted by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1.4.1989, reading as under:-

"246.(1) Subject to the provisions of sub-section (2), any assessee aggrieved by any of the following orders of an Assessing Officer (other than the Deputy Commissioner) may appeal to the Deputy Commissioner (Appeals) against such order --

(a) an order against the assessee, where the assessee denies his liability to be assessed under this Act [or an intimation under sub-section (1) or sub-section (1B) of section 143, where the assessee objects to the making of adjustments], or any order of assessment under sub-section (3) of section 143 or section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;"

(b) ---

(Emphasis supplied)

20. Section 143 (1) of the unamended Act, which prevailed upto the assessment year 1988-89 was as under:-

Section 143 (1) (a) :-

Where a return has been made under Section 139, the Assessing Officer may, without requiring the presence of the Assessee or the production by him of any evidence in support of the return, make an assessment of the total income or loss of the assessee after making such adjustments to the income or loss declared in the return as are required to be made under clause (b) with reference to the return and the accounts and documents, if any, accompanying it, and for the purposes of adjustments referred to in sub clause (iv) of clause (b), also with reference to the record of the assessments, if any, of past years, and determine the sum payable by the assessee or refundable to him on the basis of such assessment."

21. The above statutory provision of Section 143 (1) was amended w.e.f. 1.4.1989 applicable for the assessment year 1989-90 and subsequent years. The Clause 37 by which the above Section 143 was amended reads as under:-

Clause (37) :-

"It is proposed to amend the Explanation occurring at the end of Section 143 to provide that an intimation sent to the assessee under sub section (1) or sub-section (1B) shall also be deemed to be an order for the purposes of section 246 which deals with the first appeal against the orders of an Assessing Officer."

22. The memo explaining the provisions in Finance Bill 1994 relating to the amendment leading to Section 143 (1) or 143 (1B) reads as under:

"To simplify this cumbersome procedure, the Bill proposes to provide that an intimation sent to the assessee under section 143 (1) or 143(1B) shall be deemed to be an appealable order for the purposes of section 246 of the Income-tax Act."

(Emphasis supplied)

23. The amended provision of Section 143 (1) of the Act, as applicable with effect from April, 1st 1989 reads thus :-

"143. (1) Where a return has been made under section 139, or in

response to a notice under sub-section (1) of section 142, --

- (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and
- (ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to that effect shall be sent to the assessee:

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him."

Explanation:-

An intimation sent to the assessee under sub-section (1) or sub-section (1B) shall be deemed to be an order for the purposes of sections 246 and 264.

24. The above explanation was omitted by the Finance Act of 1999 w.e.f. 1.6.1999. Since the case in hand relates to the assessment year 1995-96, this explanation will be very much applicable.

CONSIDERATION: -

25. Having heard both parties, two points of view arise before us with the support of the various cases decided by this Court as well as various other High Courts. The question at issue is regarding right of appeal. It is true that there is no inherent right of appeal to any Assessee and it has to be spelt out from the words of the statute, if any, providing for an appeal. But it is an equally well settled proposition of law that, if there is a provision conferring a right of appeal, it should be read in a reasonable, practical and liberal manner.

26. Having said so, let us turn to the provisions holding the field applicable to the relevant assessment year (quoted supra).

27. Section 143 (1) with explanation would be

applicable to the case in hand, since the assessment year in question is 1995-96. The explanation, which was on the statute upto 1.6.1999 till its omission by the Finance Act, 1999 if read in the light of clause 37 and the memo explaining the provision in Finance Bill 1994 extracted hereinabove, would unequivocally go to show that the intimation sent to the Assessee under sub section (1) or sub section 1(B) was deemed to be an order for the purposes of Section 246 and 264. Section 264 deals with appealable orders. If this be so, then the appeal against intimation sent relating to the assessment for the assessment year 1995-96 was very much maintainable in view of the explanation till its deletion with effect from 1.6.1999. This view of ours is in consonance with the view taken by the Division Bench of this Court (Panaji Bench) in the case of **C.I.T. v. Anderson Marine and Sons Pvt. Ltd (2004) 266 ITR 694**. We do not propose to address the question relating to the effect of deletion of the explanation w.e.f. 1.6.1999 on the right of appeal vis-a-vis intimation under Section 143 (1) of the Act, since it does not arise in the facts and circumstances of the case in hand.

28. In view of the above, we are of the considered view that so long as the subject explanation was on

the statute book the appeal was very much maintainable against the subject intimation under Section 143(1) of the Act. In this view of ours, it is not necessary to consider the submission advanced by Mr Chatterjee leading to the interpretation of the Section 246 of the Act. Judicial authorities are consistent that where the language of the statute is plain and unambiguous and admits only one interpretation "there does not arise a need for interpretation".

29. In **Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. (A.I.R. 2003 SC 511)** the Supreme Court reiterated the rules relating to the interpretation of statutes and held that recourse to construction or interpretation of the statute arises only when there is an ambiguity, obscurity, or inconsistency therein or otherwise. The basic principle of construction of statutes is that it should be read as a whole, then chapter by chapter, section by section and word by word. True meaning of a provision of law has to be determined on the basis of the clear language with due regard to the scheme of the law. No words shall be added, altered or modified unless it becomes necessary to do so to prevent the provision becoming unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

30. It is a presumption of interpretation of statute that the legislature inserted every word and expression in the statute for a definite purpose, and while interpreting a statute no word can be rejected as being inapposite or surplusage (**Mithilesh Singh vs. Union of India (AIR 2003 SC 1145)**). Where the language of the statute is clear and unambiguous nothing can be read into it by implication and the intention of the legislature has to be gathered from the language used. (**Dayal Singh vs. Union of India) AIR 2003 SC 1140**).

31. Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see **S.R. Kostı v CIT (Guj) (2005) 276 ITR 165**, **C.P.A. Yoosuf v. I.T.O. (1970) 77 ITR 237**, **CIT v. Bharat General Reinsurance Co. Ltd, (1971) 81 ITR 303**, **CIT vs. Archana R. Dhanwate (1982) 136 ITR 355 (Bom)**).

32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See **Dy. Commissioner of Sales Tax vs. Sreeni Printers (1987) 67 SCC 279.**

33. This Court in the case of **Nirmala L. Mehta v. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1** has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field.

34. One more aspect needs to be touched while disposing of this appeal. The CIT(A) entertained appeal in part and rejected in part. If the appeal was not maintainable, it was not maintainable at all. It cannot be said that for a particular ground an appeal is maintainable and for another it is not. Once the appeal is filed and entertained, then, all

grounds can be raised by the appellant requiring consideration. If the Revenue was of the view that an appeal itself was not maintainable before CIT (A), in that event, the order of the CIT (A) allowing appeal in part was bad order and that part of the order ought to have been challenged by the Revenue. The Revenue did not challenge the said order believing maintainability of the appeal. The Revenue at this stage cannot be allowed to contend otherwise. They cannot be allowed to blow hot and cold. Thus, taking an over all view of the matter and for the reasons recorded, we are of the considered view that the Appeal preferred by the Assessee was very much maintainable.

35. In the result, we answer the question of law framed in favour of the assessee and against the Revenue, and quash and set aside the impugned order and restore the appeal to the file of CIT (A) with directions to decide the same in accordance with law.

(V.C.DAGA, J)

(DR.S. RADHAKRISHNAN, J)