(2005) 276 ITR 0165 :(2005) 193 CTR 0518 :(2005) 146 TAXMAN 0335

S.R. Koshti v. CIT ()

INCOME TAX

--Revision under section 263----VALIDITY*Exemption under section 10(10C) allowed on basis of revised return filed within the limitation*--Petitioner filed original return on 31-7-2001 and the same was processed under section 143(1)(a) and a refund order was issued on 13-5-2002. Subsequently, he filed revised return on 24-9-2002, claiming exemption under section 10(10C) in respect of compensation received under voluntary retirement scheme, which was omitted from being claimed in the original return. The AO allowed exemption to the assessee invoking section 154. CIT argued that the original return filed on 31-7-2001, was processed under section 143(1) of the Act on 28-3-2002, and hence, the revised return ought to have been submitted by 28-3-2002 or 31-3-2003, whichever was earlier. Therefore, the CIT invoked section 263 and held the assessment to be erroneous and prejudicial to interest of revenue on the ground that the revised return was invalid as it was filed out of time. Held: Intimation under section 143(1) is not an order of assessment, therefore, the assessee was entitled to revise the return upto 31-3-2003. As the revised return was filed on 13-5-2002, same was within the limitation. Hence, revision under section 263 was illegal and revenue directed to pay costs quantified at Rs. 5,000 to be recovered from the CIT.

Income Tax Act, 1961 s.263

INCOME TAX

--Revision under section 264----OVER-ASSESSMENT*Exemption under section 10(10C) claimed in revised return*--The CIT, merely relying upon his own order under section 263 and the salary certificate issued by the employer in Form No. 16, rejected assessee s petition under section 264 without considering the merits of the assessee s claim under section 10(10C), which he had omitted to be claimed in original return. Held: Regardless of whether a revised return is filed or not and whether the overassessment was a result of assessee s own mistake or otherwise, the CIT is duty bound under section 264(1), to provide relief to the assessee in accordance with the provisions of the Act, more so as the CIT had nowhere stated that the assessee was not entitled to exemption under section 10(10C).

Income Tax Act, 1961 s.264

INCOME TAX

--Revision under section 264----CONDONATION OF DELAY*Intimation under section 143(1), whether order of assessment*-- Held: The CIT was not justified in rejecting petition under section 264 filed by assessee holding that the same was beyond the period of one year from the date of passing the order in assessee s case under section 143(1). Intimation under section 143(1) is not an order of assessment, considering the scheme of the Act and hence, that could not have been a ground for refusing to condone the delay in filing revision petition.

Income Tax Act, 1961 s.264;

Income Tax Act, 1961, s.143(1)

S.R. Koshti v. CIT

In the Gujarat High Court D.A. Mehta & Ms. H.N. Devani, JJ.

Special Civil Appln. No 9998 of 2004 28 December 2004

In favour of: Assessee; Assessment year 2001-02

Counsel : Ms. Sonal D. Vyas, *for the Petitioner* Manish R. Bhatt & Mrs. MM Matt, *for the Respondent*

JUDGMENT

D.A. Mehta, J

Rule. Mrs. M.M. Bhatt, the learned standing counsel for the respondent, waives service of rule. When the notice was issued on 23-8-2004, the court had issued the notice for final disposal. Hence, in the light of the peculiar facts of the case, the petition is taken up for final hearing and disposal.

2. The petitioner, an individual, challenges, by way of this petition under Arts. 226 and 227 of the Constitution of India, the orders made by the CIT, Ahmedabad-VII,

Ahmedabad, under sections 263 and 264 of the Income Tax Act, 1961 (the Act), on 29-3-2004.

3. The petitioner was working as assistant manager with Industrial Financial Corporation of India Ltd. (the employer). On an offer being made by the employer, the petitioner opted under the Voluntary Retirement Scheme and received a compensation of Rs. 7,50,000. Admittedly, when the payment of the said amount was made by the employer, the employer did not inform the petitioner regarding the exemption from tax that the petitioner would be entitled and accordingly, in absence of the necessary clarification or the certificate from the employer, the petitioner furnished the return of income on 31-7-2001, for assessment year 2001-02. It is the say of the petitioner that, subsequently, the petitioner became aware that he was entitled to certain portion of the income so received as being exempt under section 10(10C) of the Act, but the employer had deducted tax at source on the entire amount by treating the same as salary and accordingly, the tax deduction certificate in Form No. 16 had been furnished by the employer,. which was annexed by the petitioner to the return of income filed by the petitioner. Accordingly, the petitioner had declared a total income of Rs. 9,98,182 on the basis of tax deduction certificate issued by the employer in Form No. 16 and claimed a refund of Rs. 12,219.

4. There appears to be some dispute between the petitioner and the respondent as to whether the aforesaid return of income was or was not processed under the provisions of section 143(1) of the Act. It is the stand of the respondent, as averred in the affidavit-in-reply, that the return of income was processed on 28-3-2002, and refund order had been issued which was encashed by the petitioner- assessee through his bank account.

5. According to the petitioner, the petitioner had not received any intimation under section 143(1) of the Act regarding the refund claim of the petitioner and as such, because a period of twelve months had elapsed from the date of the filing of the return, he consulted a tax practitioner for the possible course of action. It is the say of the petitioner that it was at this point of time that the petitioner was advised that he had committed a mistake in not claiming the exemption available under section 10(10C) of the Act from the V.R.S. compensation received by him. Accordingly, on advice received, a revised return of income came to be filed on 24-9-2002, claiming exemption of Rs. 5,00,000 from the compensation under section 10(10C) of the Act.

6. The assessing officer, having jurisdiction to assess the petitioner, called for various details, namely, (i) an order of the company regarding the exemption available upto an amount of Rs. 5,00,000 of V.R.S., (ii) copy of original statement of T.R., (iii) Home loan certificate, (iv) Income from other sources, and (v) Table with Form 10E. On being furnished the details called for, the assessing officer framed an order under section 154 of the Act rectifying mistake apparent on record and granting credit for prepaid taxes to the tune of Rs. 3,18,195. The assessing officer also directed to grant interest under section 244A of the Act. The order was made on 27-3-2003.

7. It appears that the order was forwarded to the Addl. CIT for the purpose of approval, but the Addl. CIT did not approve the same. Subsequently, the respondent-CIT took

action under section 263 of the Act to revise the order made under section 154 of the Act. Rejecting the contention raised by the petitioner in its reply, the impugned order dated 29-3-2004 (Annex. "G"), came to be made by the respondent. He held that the order dated 27-3-2003, made under section 154 of the Act was erroneous and prejudicial to the interest of revenue and as such, cancelled the same. As a result, the order under section 143(1) of the Act, accepting the returned income at Rs. 9,98,182 was held to prevail on the basis of the original return of income dated 31-7-2001.

8. In the meantime, the petitioner preferred an application under section 264 of the Act, requesting the respondent-CIT to revise the intimation made by the assessing officer on the return filed by the petitioner on 31-7-2001, or grant relief on the basis of revised return filed on 24-9-2002. The revision petition was filed on 4-9-2003, and the petitioner had further requested that, in the peculiar circumstances of the case, the delay in preferring the same may be condoned. It was the case of the petitioner that the order made by the assessing officer under section 154 of the Act was in order and ifthe same was found to be incorrect, the petitioner be assessed on the basis of revised return filed on 24-9-2002, and grant the relief admissible under the provisions of section 10(10C) of the Act, directing the assessing officer to issue further refund along with admissible interest at appropriate rate under section 244A of the Act. The respondent has rejected the petition under section 264 of the Act on 29-3-2004, by holding that the petition was beyond the period of one year from the date of passing the order in the case of the petitioner under section 143(1) of the Act and hence, the delay was not condoned. He has also referred to the order made by him under section 263 of the Act for the purposes of denying the relief by holding that the revised return filed on 24-9-2002, was an invalid return, being a return filed out of time and hence, non est in law.

9. Mrs. Sonal D. Vyas, the learned advocate for the petitioner, has reiterated the submissions made in the revision petition filed before the CIT under section 264 of the Act, while Mrs. M.M. Bhatt, the learned standing counsel appearing on behalf of the respondents, has vehemently referred to the averments made in the affidavit-in-reply and pleaded that the impugned orders under sections 263 and 264 of the Act do not require to be interfered with.

10. The reasons which have weighed with the respondent-CIT while passing the impugned order under section 263 of the Act are : (i) that the revised return filed on 24-9-2002, was beyond the period of limitation prescribed under section 139(5) of the Act; (ii) the order dated 27-3-2003, passed under section 154 of the Act by the assessing officer was prejudicial to the interests of revenue inasmuch as the income assessed in the said order was much lower than the taxable income earned by the petitioner during the year and shown in Form No. 16 by the employer. According to the respondent, the original return filed on 31-7-2001, was processed under section 143(1) of the Act on 28-3-2002, and hence, the revised return ought to have been submitted by 28-3-2002, or 31-3-2003, whichever was earlier. It is necessary to note that, in para 4 of the affidavit-in-reply, the respondent states that the refund of Rs. 12,290 was issued on 13-5-2002. Therefore, there is no question of applying first termini namely, 28-3-2002, which is the date worked out by the respondent as being the date on expiry of one year from the end of the relevant

assessment year or before the completion of the assessment, whichever is earlier. The assessment year being 2001-02 and the return having been filed on 31-7-2001, the expiry of one year from the end of the relevant assessment year would be 31-3-2003. Admittedly, the revised return has been filed on 24-9-2002, i.e., before 31-3-2003. Therefore, the emphasis by the respondent on the order under section 143(1), dated 28-3-2002.

11. It is an admitted fact, so far as the respondent is concerned, that no assessment order, as such, has been framed under section 143(3) of the Act. The return originally filed by the petitioner has been processed under section 143(1)(ii) of the Act, i.e., a refund due on the basis of such return has been granted. However, it requires to be noted that the respondent has nowhere stated that the refund order was accompanied by an intimation as required under the said provision. Even if, for the sake of argument, it is accepted that an intimation was also forwarded along with the refund order, the same was admittedly issued only on 13-5-2002. In the circumstances, there being no order of assessment as envisaged under the provisions of the Act, a revised return under section 139(5) could have been submitted by the petitioner on or before 31-3-2003, and in fact, was so submitted on 24-9-2002.

12. Under section 143, the following Explanation was inserted by Finance Act, 1994, with effect from 1-6-1994 :

"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. "

On a plain reading of the said Explanation, which was omitted by Finance Act, 1999, with effect from 1-6-1999, it becomes clear that even for the limited period when the legislature wanted the intimation to be deemed to be an order, it was for a limited purpose, namely, for the purposes of appeal under section 246 of the Act and revision at the instance of an assessee under section 264 of the Act. Thus, even when the said Explanation was on the statute book, the power to invoke the provision of section 263 of the Act could not be exercised in the circumstances. For the year under consideration, admittedly, the said Explanation is not on statute book. The respondent, therefore, could not have, in the circumstances, treated the intimation as an order for the purposes of non-suiting the petitioner by treating intimation dated 28-3-2002, as being an order of assessment and thus, denying the petitioner a statutory right to file a revised return within the period of limitation, The revised return is filed within the period of limitation and is hence valid. In these circumstances, the finding recorded by the respondent in the impugned order under section 263 of the Act that the revised return was non est in law, cannot be sustained and is accordingly held to be bad in law.

13. The next limb of the order of the CIT proceeds on the footing that the order made on 27-3-2003, under section 154 of the Act is prejudicial to the interests of revenue. However, the position in law is wefl-settled and in case of *Malabar Industrial Co. Ltd. v. CIT (2000) 159 CTR (SC) 1 : (2000) 243 ITR 83 (SC)*, the Apex Court has held that, every loss of revenue as a consequence of an order of the assessing officer cannot be

treated as prejudicial to the interest of the revenue. When an assessing officer has adopted one of the courses permissible in law, and which has resulted in loss of revenue, or where two views are possible and the assessing officer has taken one view, with which the CIT does not agree, the order cannot be treated to be erroneous and prejudicial to the interests of revenue, unless the view taken by the assessing officer is unsustainable in law. As already noticed hereinbefore, the assessing officer was not only right in law but was fully justified in passing the order under section 154 of the Act after entertaining the revised return which was filed within the time-limit statutorily prescribed. Therefore also, the respondent could not have assumed jurisdiction under section 263 of the Act.

14. In the order under section 263 of the Act, the respondent-CIT has not dealt with the principal issue which goes to the root of the matter, namely, whether the petitioner was entitled to claim exemption under section 10(10C) of the Act or not, and the same has been brushed aside by observing :

"The issue, whether the assessee was legally entitled to claim exemption under section 10(10C) of the Income Tax Act, at Rs. 5,00,000 out of the V.R.S. amount of Rs. 7,50,000 is a separate issue and not for consideration here."

This observation assumes importance in the light of the findings recorded by the respondent-CIT in his separate order of even date made under section 264 of the Act.

15. The respondent, while framing the assessment under section 264 of the Act refers to and relies upon his own order made under section 263 of the Act, of even date, to emphasise that the revised return filed on 24-9-2002, was an invalid return. Thereafter, the respondent refers to the salary certificate issued by the employer in Form No. 16 on 30-4-2001, and states that the gross salary shown by the employer is Rs. 10,28,182, and on the basis of the said certificate issued by the employer, upholds the income-tax calculation sheet prepared by the assessing officer in pursuance of the original return of income. Thus, without dealing with the merits of the claim under section 10(10Q of the Act, the respondent merely relies on the fact that the original return was processed under section 143(1) of the Act on 28-3-2002, and the consequential refund order issued thereupon being encashed by the petitioner. In para No. 5 of his order under section 264 of the Act, the respondent ultimately rejects the petition by holding that the revision petition was beyond the period of one year from the date of passing the order in assessee's case under section 143(1) of the Act and hence, refuses to condone the delay.

16. Intimation under section 143(1) of the Act is not an order of assessment, as already held hereinbefore, considering the scheme of the Act and hence, that could not have been a ground for refusing to condone the delay.

17. As to what is the scope of the powers of CIT in revisional proceedings under section 264 of the Act, is well-settled by a decision of this court in *C. Parikh & Co. v. CIT (1980) 15 CTR (Guj) 64 : (1980) 122 ITR 610 (Guj)*. In the said case, the petitioner was assessed under section 143(3) of the Act on the basis of the return of income submitted by the petitioner. The returned income was accepted along with a lump sum addition. However,

subsequently, it was found by the assessee that, in the balance sheet submitted along with the return, there was a discrepancy on the basis of which the petitioner was overassessed when the assessment order was passed. The petitioner, therefore, undertook close examination of the books of account and detected mistakes and ultimately, moved the CIT under section 264 of the Act, seeking relief to the extent of Rs. 20,000. The CIT was of the view that his revisionary powers did not extend to giving relief to an assessee on account of assessee's own mistake which the assessee detects after the assessment is completed, and thus, rejected the petition. This Court, on an analysis of the powers of the CIT under section 264 of the Act, has observed thus at pp. 613 and 614 of the report :

"It is clear that under section 264, the CIT is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the CIT may, either of his own motion or on an application by the assessee, call for the record of any proceedings under the Act and pass such order thereon not being an order prejudicial to the assessee, as he thinks fit. Sub-sections (2) and (3) of section 264 provide for limitation of one year for the exercise of this revisional powers, whether *suo motu,* or at the instance of the assessee. Power is also conferred on the CIT to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the CIT has no power to revise any order under section 264(1), .. (i) while an appeal against the order is pending before the Appellate Assistant Commissioner, and (ii) when the order has been subject to an appeal to the Tribunal. Subject to the above limitation, the revisional powers conferred on the CIT under s, 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the CIT has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitations prescribed in section 264, the CIT in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in section 264 which places any restriction on the CIT's revisional power to give relief to the assessee in a case where the assessee detects mistakes on account of which he was overassessed after the assessment was completed. We do not read any such embargo in the CIT's power as read by the CIT in the present case. It is open to the CIT to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding undertotalling of purchases before the Income Tax Officer, it was within the power of the CIT to admit such a ground in revision. The CIT, was also not right in holding that the overassessment did not arise from the order of assessment. Once the petitioner was able to satisfy that there was a mistake in totalling purchases and that there was undertotalling of purchases to the tune of Rs. 20,000, it is obvious that there was overassessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in overassessment. The CIT would not be acting de hors the Income Tax Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is overassessment, whether such overassessm'ent is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the CIT has misconstrued the words "subject to the provisions of this Act in section 264(1) and read a restriction on his revisional power which does not exist. The CIT was, therefore, not right

in holding that it was not open to him to give relief to the petitioner on account of the petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the CIT had power to correct it under section 264(1). In our opinion, therefore, the CIT was wrong in not giving relief to the petitioner in respect of overassessment as a result of undertotalling of the purchases to the extent of Rs. 20, 000. "

18. The position is, therefore, that, regardless of whether the revised return was filed or not, once an assessee is in a position to show that the assessee has been overassessed under the provisions of the Act, regardless of whether the overassessment is as a result of assessee's own mistake or otherwise, the CIT has the power to correct such an assessment under section 264(1) of the Act. If the CIT refuses to give relief to the assessee, in such circumstances, he would be acting de hors the powers under the Act and the provisions of the Act and, therefore, is duty-bound to give relief to an assessee, where due, in accordance with the provisions of the Act.

19. In the present case, the respondent-CIT has nowhere stated that the petitioner is not entitled to the relief under section 10(10C) of the Act. In fact, the said position is undisputed. The assessing officer himself had passed an order under section 154 of the Act, granting such relief. In the circumstances, even the order under section 264 of the Act made on 29-3-2004, cannot be sustained.

20. A word of caution. 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 an assessee, under a mistake, misconception or on not being properly instructed, is overassessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. N.O. Parekh, CIT, Spl. *Civil AppIn. No. 622 of 1981*, rendered on 20-8-1081, has laid down the approach that the authorities must adopt in such matters in the following terms :

"The Supreme Court has observed in numerous decisions, including *Ramlal & Ors. v. Rewa Coaffields Ltd. AIR 1962 SC 361*; The *State of West Bengal v. The Adminstrator, Howrah Municipality & Ors. AIR 1972 SC 749*, and *Babutmal Raichand Oswal v. Laxmibai R. Tarte AIR 1975 SC 1297*, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds, The State authorities cannot adopt the attitude which private litigants rnight adopt."

21. In the result, the orders dated 29-3-2004, made under sections 263 and 264 of the Act are quashed and set aside, and the order dated 27-3-2003, made by the assessing officer under section 154 of the Act shall prevail. The respondent is directed to not only issue the refund due in accordance with the order under section 154 of the Act dated 27-3-2003, but also grant interest under section 244A of the Act, till the date of payment of the refund at appropriate rate, as may be prevalent from time to time. The respondent is directed to ensure that the refund along with the interest due is paid within a period of

three weeks from the date of receipt of a writ of this Court, or a certified copy of this judgment and order, whichever is earlier.

22. The petition is allowed accordingly. Rule is made absolute. The respondent shall pay the costs quantified at Rs. 5,000. The revenue shall, in the first instance, pay the costs along with the refund to the petitioner, and recover the same from the respondent-CIT, who shall bear the same out of pocket.

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