

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2145/Mds/2011

निर्धारण वर्ष / Assessment Year : 2002-03

M/s Padmapriya Real
Estate,
Arjay Apex Centre,
51, College Road,
Chennai - 600 006.

v. The Income Tax Officer,
Business Ward XV(2),
Chennai - 600 034 .

PAN : AAAFP 0659 A

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri T. Vasudevan, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri N. Madhavan, JCIT

सुनवाई की तारीख/Date of Hearing : 25.05.2015

घोषणा की तारीख/Date of Pronouncement : 26.06.2015

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

This appeal of the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-XII, Chennai, dated 19.10.2011 and pertains to assessment year 2002-03.

2. Shri T. Vasudevan, the Ld.counsel for the assessee, submitted that the first issue arises for consideration is with regard to reopening of the assessment. According to the Ld. counsel, the assessee filed the return of income on 2.09.2002 admitting an income of ₹35,700/-. The return was processed under Section 143(1) of the Income-tax Act, 1961 (in short 'the Act'). Subsequently, the Assessing Officer reopened the assessment by issuing notice under Section 148 of the Act on 30.03.2007. According to the Ld. counsel, the Assessing Officer reopened the assessment due to change of opinion. The Ld.counsel placed his reliance on the judgment of the Delhi High Court in CIT v. Orient Craft Ltd. (2013) 354 ITR 536. According to the Ld. counsel, the assessee is a partnership firm dealing in real estate business. The assessee is managing properties apart from buying and selling of lands and leasing/letting out of properties. The assessee claimed rental income from the properties as income from business. However, the Assessing Officer disallowed the claim of the assessee. The CIT(Appeals) also confirmed the order of the Assessing Officer. According to the Ld. counsel, the business of the assessee is letting out of the properties, therefore, the CIT(Appeals) is not justified in confirming the order of the Assessing Officer. Referring to the judgment of the Apex Court in Chennai Properties &

Investments Ltd. v. CIT (2015) (5) TMI 46, the Ld.counsel submitted that the object of the assessee-company before the Apex Court is to acquire properties in the city of Madras and let out those properties. The assessee received rental income therefrom and showed as business income in the return filed. The Assessing Officer, however, treated the same as income from house properties. The Commissioner allowed the claim of the assessee holding it as its business income. However, Tribunal declined to interfere with the order of the Commissioner. On further appeal by the Revenue, before the High Court, the High Court allowed the appeal of the Revenue holding that income derived from letting out of the properties would not be income from business but would be assessed as income from house property. The Apex Court, after considering its earlier judgment in Karanpura Development Co. Ltd. v. CIT (44 ITR 362), found that each case has to be decided from businessman's point of view to find out whether letting was done as a business or exploitation of his property as owner. A commercial asset is only an asset used in a business and nothing else. The Apex Court further found that the rental income received by the assessee has to be assessed as income from business. Therefore, according to the Ld. counsel, even on merit, the assessee has a case. On a query from the Bench – what is the business of the

assessee, whether the property was let out in the course of its business or it was let out as an owner? The Ld.counsel submitted that the matter may be remitted back to the file of the Assessing Officer for reconsideration.

3. On the contrary, Shri N. Madhavan, the Ld. Departmental Representative, submitted that the assessee filed the return of income and the same was processed under Section 143(1) of the Act. According to the Ld. D.R., the Assessing Officer has not expressed any view. Therefore, it cannot be said that there was a change of opinion. Since the reopening was made within a period of four years, according to the Ld. D.R., the Assessing Officer has rightly reopened the assessment.

4. Referring to the merit of the appeal, the Ld. D.R. submitted that the assessee let out the property as an owner. It is not a business of the assessee to let out the properties. Therefore, according to the Ld. D.R., the judgment of Apex Court would not be applicable to the facts of the case.

5. We have considered the rival submissions on either side and perused the relevant material on record. The first issue arises for consideration is with regard to reopening of assessment. The contention of the assessee before this Tribunal is that the Assessing

Officer reopened the assessment only on the basis of the material available on record. There is no information/material came to the knowledge of the Assessing Officer other than the one which was filed along with the return of income. Therefore, contention of the Ld.counsel is that there was a change of opinion. The Ld.counsel placed his reliance on the judgment of Delhi High Court in the case of CIT v. Orient Craft Ltd. (2013) 354 ITR 536. The Delhi High Court, by placing reliance on the judgment of the Apex Court in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561, found that the Assessing Officer cannot change his opinion. The Delhi High Court further found that the satisfaction of the Assessing Officer with regard to escapement of income amounts to change of opinion even though the return was scrutinized under Section 143(1) of the Act. We have carefully gone through the provisions of Section 143(1) of the Act which reads as follows:-

“(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely :-

(a) the total income or loss shall be computed after making the following adjustments, namely :-

(i) any arithmetical error in the return ; or

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return ;

(b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a) ;

(c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted

at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest ;

(d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c) ; and

(e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee :

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him :

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.

Explanation — For the purposes of this sub-section,-

(a) 'an incorrect claim apparent from any information in the return' shall mean a claim, on the basis of an entry, in the return,-

(i) of an item, which is inconsistent with another entry of the same or some other item in such return ;

(ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished ; or

(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction ;

(b) the acknowledgment of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a)."

While processing the return under Section 143(1) of the Act, the Assessing Officer is empowered to correct arithmetic error in the return or adjustment of an incorrect claim which is apparent on the information given in the return. The Assessing Officer is not

expected to decide in respect of the issue which requires a discussion and examination. Therefore, the Assessing Officer is making a correction of arithmetic error and the claim which is apparent from the information available in the return. In the new scheme of intimation under Section 143(1) of the Act, the Assessing Officer is not expected to express any opinion on the issue raised by the assessee. In other words, the Assessing Officer cannot express any opinion while processing the return under Section 143(1) of the Act. This is a radical change made by the Parliament with effect from 1.4.1989. Since the Assessing Officer cannot make any adjustment with regard to an issue which is debatable in nature, this Tribunal is of the considered opinion that the Assessing Officer cannot express any opinion in a proceeding under Section 143(1) of the Act. Therefore, the judgment of the Apex Court in *Kelvinator of India Ltd. (supra)* and the judgment of the Delhi High Court in *Orient Kraft Ltd. (supra)* are not applicable to the facts of the case. In fact, the Apex Court in *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500* examined the very same issue in elaborate and observed as follows:-

“13. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the

right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989, and March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998, and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word "intimation" as substituted for "assessment" that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994 and May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions "intimation"

and "assessment order" have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes "the computation of income", sometimes "the determination of the amount of tax payable" and sometimes "the whole procedure laid down in the Act for imposing liability upon the tax payer". In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the Departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J.) in *Apogee International Limited v. Union of India* [1996] [220 ITR 248](#) (Delhi). It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

This observation of the Apex Court was not brought to the notice of the Delhi High Court. Therefore, this Tribunal is of the considered opinion that the Assessing Officer has rightly reopened the assessment by issuing a notice under Section 148 of the Act.

6. Now coming to the merit of the case, the assessee claims that the business of the assessee is letting out of the properties. No material is available on record to suggest that the assessee is carrying on the business of letting out of the properties nor any material available on record with regard to nature of property which was let out by the assessee and the purpose for which it was let out. Therefore, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer in the light of the judgment of the Apex Court in Chennai Properties & Investments Ltd. (supra). Accordingly, the orders of the lower authorities are set aside and the issue of letting out of property is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter afresh in the light of the material available on record and decide the same afresh in accordance with law after considering the judgment of the Apex Court in Chennai Properties & Investments Ltd. (supra).

7. With the above observation, the appeal of the assessee is allowed for statistical purposes.

Order pronounced on 26th June, 2015 at Chennai.

sd/-
(A.Mohan Alankamony)
(ए. मोहन अलंकामणी)
लेखा सदस्य/Accountant Member

sd/-
(N.R.S. Ganesan)
(एन.आर.एस. गणेशन)
न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 26th June, 2015.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-XII, Chennai-34
4. आयकर आयुक्त/CIT-X, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.