आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 424 & 426/Ind/2022
(Assessment Years:2016-17 & 2017-18)

M.P. Madhyam 40, Jail Road Arera Hills Bhopal	Vs.	DCIT (CPC) Bangalore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAAJM 0294J		

Assessee by	Shri Sumit Nema Sr. Advocate and Shri Gagan Tiwari, Advocate
Revenue by	Shri Simran Bhullar, CIT-DR
Date of Hearing	29.08.2023
Date of Pronouncement	30.08.2023

O R D E R

Per Vijay Pal Rao, JM:

These two appeals by the assessee are directed against two separate orders of Commissioner of Income Tax (Appeal), National Faceless Appeal Centre (NFAC, Delhi both dated 18.10.2022 arising from processing of return of income 143(1) of the Act by CPC, Bangalore for A.Y.2016-17 & 2017-18 respectively. The assesse has raised common grounds for both the assessment years. Grounds for A.Y.2016-17 are as under:

> *"1.That on the facts and in the circumstances of the case and in law, the order u/s. 143(1) is bad in law, hence be quashed.*
>
> *2.That on the facts circumstances of the case and in and law the adjustment of Rs. 166979223 and Rs. 27781175 is beyond the scope*

of section 143(1) and therefore said two adjustments be kindly quashed.

3. That on the facts and in the circumstances of the case and in law, the denial of the deduction of revenue expenditure u/s 143(1) of Rs. 16,69,79,223 as claimed in the return is wholly unjustified and un lawful, hence the same be kindly allowed.

4. That on the facts and in the circumstances of the case and in law, the denial of statutory deduction u/s 143(1) u/s.11(1)(a) as claimed by the assessee at Rs. 2,77,81,175 in the return is wholly unlawful and unjustified and, therefore, the same be kindly allowed.

5.That on the facts and in the circumstances of the case and in law, the levy of interest u/s.234B and 234C are contrary to the provisions of law, hence be kindly cancelled."

2. At the time of hearing Ld. Sr. counsel for the assesse has submitted that the orders of the CPC, Bangalore passed u/s 143(1) dated 21.02.2018 and 31.03.2019 for A.Ys.2016-17 & 2017-18 respectively are invalid and liable to be set aside because prior to these orders were passed by the CPC the AO initiated the scrutiny assessment proceedings by issuing notices u/s 143(2) on 21st July 2017 & 9th August 2018 for a.Y.2016-17 and 2017-18 respectively. Thus, the senior counsel has submitted that when the AO already issued notices u/s 143(2) for these two assessment years and took the return of income for scrutiny assessment then the orders passed by the CPC u/s 143(1) and making adjustment is invalid and liable to be set aside. In support of his contention he has relied upon following decisions:

1. *Paras Kuhad vs. DCIT Circle -7, ITA/260/JP/2022 ITAT, Jaipur*
2. *Gujarat Poli-Aux Electronics Ltd. vs. DCIT, 222 ITR 140 (Gujarat High Court*
3. *Vodafone Ida Limited vs. ACIT & Orrs 424 ITR 664 (SC)*
4. *CESC Ltd. vs. DCIT 134 Taxman 647 (Cal)*

3. On the other hand Ld. DR has not disputed the fact that for these two assessment years at the time of passing impugned order by CPC the assessing officer already initiated the scrutiny assessment by issuing

notice u/s 143(2) of the Act. However, the Ld. DR has submitted that in the subsequent assessment order passed by the AO this addition has been made which is subject matter of the appeals filed by the assesse, therefore, the order u/s 143(1) has merged with order passed u/s 143(3). The Ld. DR has relied upon the orders of the authorities below.

4. We have considered the rival submissions as well as relevant material on record. There is no dispute that for A.Ys.2016-17 & 2017-18 the AO initiated the scrutiny assessment by issuing notice u/s 143(2) on 21st July 2017 and 9th August 2018 respectively. The relevant part of the assessment order passed u/s 143(3) for A.Y.2016-17 & 2017-18 are as under:

A.Y.2016-17

> *"This appeal was instituted on 07.04.2018 against intimation u/s. 143(1) of the Income-tax Act, 1961 dated 21.02.2018 passed by DCIT(CPC), Bengaluru for A.Y. 2016-17. Subsequently, the appeal was migrated to the National Faceless Appeals Centre in terms of Notification No. 76/2020/F.No. 370142/33/2020-TPL dated 25.09.2020 issued from the Ministry of Finance, Department of Revenue, Central Board of Direct Taxes."*

A.Y.2017-18

> *"The appeal was instituted on 09.07.2019 against the intimation u/s. 143(1) dated 31.03.2019 passed under section 143(1) of the Income Tax Act, 1961 passed by the Deputy Commissioner of Income Tax, CPC, Bengaluru for the Assessment Year 2017-18."*

5. After the AO issued the notices u/s 143(2) for A.Y.2016-17 & 2017-18 the CPC passed the impugned orders u/s 143(1) on 21.02.2018 & 31.03.2019 respectively. Therefore, the impugned orders passed by the CPC u/s 143(1) are subsequent to the returns of income already taken up for scrutiny by the AO. The Hon'ble Gujarat High Court in case of *Gujarat Poli-Aux Electronics Ltd. vs. DCIT (supra)* has held in para 15 & 16 as under:

"15. Mr. Shah, learned Counsel has placed reliance on the decision of Calcutta High Court in the case of Modern Fibotex India Limited v. Dy. C.I.T., 212 ITR 496. In view of the Calcutta High Court when once notice under Section 143(2) has been issued there is no scope for Assessing Officer either to make prima facie adjustment on the basis of the return as filed or issue intimation under Section 143(1)(a) of the Act. Emphasis is given to the omission by the legislature with regard to savings of powers as is found in sub-section (1) of Section 143. If issuance of notice under Section 143(2) would have been without prejudice to "intimation under Section 143(1) it could be said that parallel proceedings are permitted. The legislature specifically provided that issuance of intimation under Section 143(1)(a) would be without prejudice to provisions of Section 143(2). The provision is made so as to indicate the difference in the nature of two sub-sections. In view of Calcutta High Court the jurisdiction exercised under Section 143(1)(a) of the Act is a summary one. Looking to the language of Section 143(2) of the Act, it is clear that the Assessing Officer has to follow the procedure under Section 143(3) of the Act for making assessment. Mr. Shah, learned Counsel, submitted that in the instant case by issuing notice under Section 143(2) of the Act proceedings commenced under Section 143(3) of the Act. According to him, once the proceedings under Section 143(3) of the Act have commenced the Assessing Officer has no power to pass order under Section 143(1) of the Act. He submitted that order passed by Assessing Officer is without jurisdiction and, therefore, it must be quashed and set aside and the party should not be relegated to alternative forum. He pointed out the procedure and drew our attention to the decision of the Apex Court in the case of Calcutta Discount Company Limited v. ITO (4) ITR 191). The Court has held as under:

... though the writ or prohibition or certiorari would not issue against an order prohibiting an executive authority, the High Courts had power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of such alternative remedies as appeals and reference to the High Court was not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. When the Constitution conferred on the High Courts the power to give relief it became the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief were refused without adequate reasons."

> *16. In this view of the matter, we are of the opinion that after issuance of notice under Section 143(2) of the Act, it is not open for the Assessing Officer to make adjustment or to pass order under Section 143(1) of the Act but has to make assessment in accordance with law, l.e., under Section 143(3) of the Act."*

6. Thus, the Hon'ble High Court has held that after issuing notice u/s 143(2) of the Act it is not open for the AO to make adjustment or to pass the order u/s 143(1) of the Act but has to make the assessment in accordance with provisions of section 143(3) of the Act. Therefore, once the proceedings u/s 143(3) are initiated by the AO by issuing notice u/s 143(2) then the AO has no jurisdictional to initiate parallel proceedings of processing the return u/s 143(1) of the Act. The Hon'ble Supreme Court in case of *Vodafone Idea Limited vs. ACIT 424 ITR 664* has also observed in para 18 as under:

> *"18. The exercise of power under sub-sections (2) and (3) of Section 143 of the Act is thus premised on non-acceptance of what is evident from the return itself and to ensure that there is no avoidance of tax in any manner. The dimension of such power is far greater and deeper than mere adjustments to be made in respect of what is available from the return. Once such scrutiny is undertaken and proceedings are initiated by issuance of a notice under sub-section (2) of Section 143, it would be anomalous and incongruent that while such proceedings so initiated are pending, the return be processed under sub-section (1) of Section 143, which may in a given case, entail payment of refund. Logically, the outcome of the exercise initiated through notice under sub-section (2) of Section 143, must determine whether any refund is due and payable. If the return itself is under probe and scrutiny, such return cannot be the foundation to sustain a claim for refund till such scrutiny is not complete. Considering the nature of power exercisable under these two limbs of Section 143, the inescapable conclusion is that the processing of return under sub-section (1) of Section 143 must await the further exercise of power of scrutiny assessment under sub-sections (2) and (3) of Section 143. If the power under sub-section (2) of Section 143 of the Act is initiated in a manner known to law, there cannot be any insistence that the processing under sub-section (1) of Section 143 be completed and refund be made before the scrutiny pursuant to notice under sub-section (2) of Section 143 is over."*

7. Thus, the Hon'ble Supreme Court has held that once the scrutiny is undertaken and proceedings are initiated by issuance of notice u/s 143(2)

it would be anomalous and incongruent that while such proceedings so initiated are pending, the return be processed u/s 143(1). The Hon'ble Calcutta High Court in case of *CESC Ltd. vs. DCIT (supra)* has also considered this issue in para 11 & 12 as under:

> *"11. The Division Bench judgment of this Court, quoted hereinabove, answers the controversy raised before me squarely. The decision of the Apex Court noticed above, in my view, takes the matter a step further inasmuch as resorting to summary procedure under section 143(1)(a) after issuance of a notice under section 143(2) for regular assessment has been forbidden. If the Department cannot, after issuing a notice under section 143(2) for regular assessment, resort to the summary procedure under section 143(1)(a) can it not be said that the rectification of an intimation issued under the aforesaid section is also not permissible because in either case it would amount to activating section 143(1) of the Act which according to the judgment of the Apex Court is not permissible after issuance of a notice under section 143(2).*
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> *12. Regular assessment for the assessment years 1990-91 and 1992-93 under section 143(3) has been completed disallowing appropriates contingency reserve as a business expenditure and appeals therefrom are pending. A further question therefore arises whether assessment or the provisional assessment or to be more precise, the assessment made on the basis of the return itself under section 143(1)(a) the Act accepting appropriation to contingency reserve as an allowable expenditure merged in the order passed under section 143(3) of the wherein the aforesaid appropriation to contingency reserve was disallowed ? What was accepted in the intimation has been revered in regular assessment and the assessee has preferred an appeal which is pending. I am firmly of the view that this is a case where the theory merger is bound to apply because the intimation issued under section 143(1)(a) is no longer operative in respect of the assessment years 1991 and 1992-93. The only order which is effective and operative is the one passed under section 143(3) of the Act The order passed under section 143(1)(a) ceased to be operative and merged in the final order. I am supported in my view by the following judgments."*

8. The Hon'ble High Court has held that once the assessment u/s 143(3) has been completed then the order passed u/s 143(1)(a) merges with the order passed u/s 143(3) of the Act. Therefore, the order passed u/s 143(1) of the Act ceased to be operative. Accordingly in the facts and circumstances of the case as well as various binding precedents on the

point we hold that the order passed u/s 143(1) by CPC after the scrutiny assessment proceedings were initiated by the AO for A.Ys.2016-17 & 2016-18 are not valid and liable to be set aside. We order accordingly.

9. In the result, appeals of assessee for A.Y.2016-17 & 2017-18 are allowed.

Order pronounced in the open court on 30.08.2023.

Sd/- **sd/-**

(B.M. BIYANI) **(VIJAY PAL RAO)**
Accountant Member Judicial Member

Indore, 30 .08.2023

Patel/Sr. PS

Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore