IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice Md. Nizamuddin

WPA No. 16473 of 2014

Ena Chaudhuri
Vs
Assistant Commissioner of Income Tax, Circle – 30, Kolkata & Ors.

WPA No. 16476 of 2014

Ena Chaudhuri
Vs
Assistant Commissioner of Income Tax, Circle – 30, Kolkata & Ors.

For the Petitioner :- Mr. Ananda Sen, Adv.
Mr. S. Mandal, Adv.

For the Respondent :-

Judgement On :- 18.01.2023

MD. NIZAMUDDIN, J.

Heard Mr. Ananda Sen, learned counsel appearing for the petitioner. None appears for the respondents.

By these Writ Petitions, petitioner has challenged the impugned orders dated 24th March, 2014 in respect of Assessment Years 2007-008 and 2008-09 respectively, passed by the Commissioner of Income Tax, under Section 264 of The Income Tax Act, 1961, rejecting the petitioner's applications under the aforesaid section of the Act.

Case of the petitioner in brief is that petitioner is an old lady of advancing age and being unaware of the technicalities of the income tax law, committed mistake in her return by including

the exempted income in question relating to dividend and long term capital gain as income payable to tax and

such mistake was realised by her only upon receipt of the orders passed under Section 143 (1) of The Income Tax Act, 1961, and it is her case that since the filing of original return itself was delayed no revised return could be filed by her under Section 139 (5) of the Act for claiming deduction of the income exempted from income tax which was included as taxable income due to bonafide mistake and having no other recourse like filing of revised return or appeal, she filed revision applications under Section 264 of the aforesaid Act before the Commissioner of Income Tax concerned. Respondent CIT concerned dismissed the revision applications of the petitioner in question by the aforesaid impugned orders by holding that since the orders passed under Section 143 (1) of the Act relating to relevant assessment years could not be called erroneous and that the petitioner did not file the revised return under Section 139 (5) of the Act for the claim in question he could not allow such claim in the revision application under section 264 of the Act and further by holding that since the original return under Section 139 (5) of the Act was filed beyond the specified date, petitioner was debarred from filing revised return through which the mistake of unclaimed deduction could have been claimed and further held that the scope of revision by the Commissioner is not an alternative path to the revised return by relying on a judgment of the Hon'ble Supreme Court in the case of Goetze (India) Limited –Vs- CIT (2006) 284 ITR 323 (SC).

Mr. Sen, Ld. Advocate for the petitioner challenged the aforesaid impugned orders of revision passed by the Commissioner, under Section 264 of the Act by contending that nowhere on merit Commissioner has held that the income in question claiming for deduction by the petitioner was not an exempted income or the same is a taxable income under the Act in the facts and circumstances of the case. He also submits that without going into the merit of claim by considering the records of the case including relevant income tax returns on the basis of which orders under Section 143 (1) of the Act were passed, CIT erroneously tried to draw similarity between the revised return and revision and dismissed the revision applications in question.

Mr. Sen submits that power conferred on the Commissioner, under Section 264 of the Act is not only wider in its scope rather it is also intended for the purpose of preventing miscarriage of justice and providing relief to an assessee which an assessee is otherwise entitled to. He submits that expression "such enquiry" and "such order" under Section 264 of the Act are wide enough to

include a situation like present one where a bonafide mistake has been committed in her return for which she was made liable to pay tax which is exempted under the Act. He submits that the learned Commissioner has misinterpreted and misconstrued the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Limited (supra) which relates to exercise of power by an Assessing Officer in allowing any deduction without claiming in any return or without filing a revised return and not relates to power to be exercised by the Commissioner under Section 264 of the Income Tax Act, 1961.

He submits that the aforesaid decision of the Hon'ble Supreme Court is restricted to the power of the Assessing Officer to enter into the claim for deduction without filing revised return but the same does not include the exercise of power by the Appellate Tribunal under Section 254 of the Act or by the Commissioner under Section 264 of the Act.

Mr. Sen in support of his aforesaid contentions relies on the judgment of this Court in the case of Smt. Phool Lata Somani v. Commissioner of Income-tax reported in 2006 150 TAXMAN 225 (CAL.) particularly paragraph 15 of which is relevant and is quoted hereunder :

"15. According to me the Commissioner in this case on receipt of the application instead of relying solely on the reports or the records of the case should have made enquiry considering the documents placed before him by the petitioner. At least this should have been reflected in the impugned order that he had taken note on the date of making application of the revision, of the tax exempting investment. There might be varieties of reasons for not producing evidence at the time of the assessment; this does not mean that the assessee is precluded from producing evidence of contemporaneous nature at a later stage by filing an application for revision. The power under section 264 of the Commissioner in my opinion is to do the justice, to prevent miscarriage of justice being rendered. It appears from the records that the petitioner produced unimpeachable documents showing investment which is otherwise liable to be taken note of for granting exemption and if it were allowed by the Commissioner then the petitioner would not have suffered for over-assessment. The expression "or prejudicial" means the prejudicial effect of an order passed by the revising officer on the merits."

He also relies on a judgment of the Hon'ble Madras High Court in the case of Sharp Tools v. Principal Commissioner of Income-tax reported in [2020] 421 ITR 90 (Mad) particularly paragraphs 22 to 26 which are relevant and are quoted as hereunder :

"22. It is contended by the learned counsel appearing for the Revenue by that exercise of power and granting the relief to the assessee under section 264 of the Income-tax Act, 1961, is subject to the provision of the Income-tax Act and therefore, the assessee herein, having not filed revised return within the time stipulated under section 139(5) of the Income-tax Act, is not entitled to the relief even under section 264 of the Income-tax Act.

23. I am unable to appreciate the above contention, as it appears that the Revenue by making such contention, is sought to justify the collection of excess tax over and above the tax payable by the assessee, even though they admit that only due to inadvertent mistake, a wrong entry was made by the assessee with lesser figure of the relevant expenses than the actual expenses met out.

At this juncture, it is relevant to note that Article 265 of the Constitution of India specifically states that no tax shall be levied or collected except by authority of law. Therefore, both the levy and collection must be done with the authority of law, and if any levy and collection, later are found to be wrong and without authority of law, certainly, such levy and collection cannot withstand the scrutiny of the above constitutional provision and thus, such levy and collection would amount to violation of Article 265 of the Constitution of India.

24. Therefore, it is apparent on the facts and circumstances of the present case, that a mere typographical error committed by the assessee cannot cost them payment of excess tax as collected by the Revenue. Certainly, the denial for repayment of such excess collection would amount to great injustice to the Assessee.

25. Even though the Statute prescribes a time limit for getting the relief before the Assessing Officer by way of filing a revised return, in my considered view, there is no embargo on the Commissioner to exercise his power and grant the relief under Section 264 of the Income-tax Act. In other words, for granting the relief to an assessee, which the Commissioner finds that the Assessee is entitled to otherwise, no time restriction is provided under Section 264 of the Income-tax Act, if such revisional jurisdiction is invoked by the assessee by making an application under Section 264 of the Income-tax Act. However, the Commissioner is not entitled to revise any order under Section 264 on his own motion, if the order has been made more than an year previously. Thus, it is manifest that only suo-motu power of the Commissioner

under Section 264 of the Income-tax Act, is restricted against an order passed within one year, whereas no such restriction is imposed on the Commissioner to exercise his power in respect of an order, which has been passed more than on year, if such revisional power is sought to be invoked at the instance of the Assessee by making an application under Section 264 of the IT Act.

26. Considering the above stated facts and circumstances, this Court is of the firm view that the order of the respondent impugned in this writ petition cannot be sustained. Accordingly, this writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the respondent for considering the claim of the petitioner and pass appropriate orders in the light of the observations and findings rendered supra. The respondent shall, accordingly, pass such fresh order within a period of six weeks from the date of receipt of a copy of this order. No costs."

He also relies on a judgment of the Hon'ble Punjab and Haryana High Court in the case of Kewal Krishnan Jain v. Commissioner of Income-tax, jalandhar reported in [2014] 42 taxman.com 84 (Punjab & Haryana) particularly paragraphs 7 and 8 which are relevant and are quoted as hereunder :

"7. In the light of above discussions, we have no hesitation to hold that the Commissioner of Income-tax committed an error of law in holding that it is not open to him for the first time to entertain a relief of the kind pleaded by the assessee and in denying jurisdiction. We hold, that even though a mistake was committed by the assessee and it was detected by him after the order of assessment, and the order of assessment is not erroneous, none the less it is open to the assessee to file a revision before the Commissioner under Section 264 of the Act and claim appropriate relief. But it should not be forgotten that the power to be exercised under Section 264 is a revisionary one. The limitations implicit in the exercise of such power are well known. The jurisdiction is discretionary. Whether in a particular case, on the basis of facts disclosed, the Commissioner will exercise his jurisdiction and interfere in the matter, is a matter of discretion. It is certainly a judicial discretion vested in the Commissioner, to be exercised in accordance with law. We are not called upon to pronounce on the scope and amplitude of the revisional power. The only question mooted for our consideration in this case is whether the Commissioner has got revisional jurisdiction at all, where the assessee having included the income for assessment, can claim the relief of weighted deduction under Section 35B of the Act, for the first time, in a petition filed under Section 264 of the Act. On that aspect of the question, we have no doubt in our mind that the Commissioner has jurisdiction to entertain a revision petition under Section 264 of the Act."

8. To similar effect, are judgments of the Allahabad High Court in Rashtriya

Vikas Ltd. (supra), Gujarat High Court in C.Parikh & Co. (supra), Ramdev Exports (supra) and Digvijay Cement Co. Ltd. (supra). We, however, express our respectful disagreement with the judgment of the Jammu & Kahsmir High Court in M.Qasim Brothers (supra). Thus, we hold that a bonafide error committed by an assessee in claiming an admissible exemption, during assessment proceeding, would not prohibit the assessee from approaching the

Commissioner or the Commissioner from considering a petition under Section 264 of the Act, provided other conditions contained in Section 264 are

satisfied."

Considering the facts and circumstances of the case as appears from record, submission of the petitioner and ratio laid down in the judgments cited, I am of the considered view that the respondent Commissioner of Income Tax concerned in the facts and circumstances of the case has committed error in law in dismissing the revision applications of the petitioner filed under section 264 of The Income Tax Act, 1961, by refusing to consider the claim of the petitioner on merit that the income in question was exempted from tax and not liable to tax under The Income Tax Act, 1961, which according to the petitioner was included in her return as taxable income due to bonafide mistake and which she could not rectify by filing revised return since original return itself was belatedly filed and petitioner had no other remedy except taking recourse to filing of revision application under section 264 of The Income Tax Act, 1961.

In my considered view, in the facts and circumstances of the case, Commissioner in refusal to consider the aforesaid claim of the petitioner has misinterpreted and misconstrued the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Supra as well as the scope of jurisdiction conferred upon him under section 264 of The Income Tax Act, 1961 by equating the same with that of the jurisdiction of the Assessing Officer in considering the claim of any allowance / deduction by an assessee in return or without filing any revised return.

In view of the reasoning and discussions made above, , I am of the considered view that the impugned orders dated 24th March, 2014 under Section 264 of The Income Tax Act, 1961, relating to assessment years 2007-08 and 2008 -09 in WPA No. 16473 of 2014 and WPA No. 16476 of 2014 are not sustainable in law and accordingly the same set aside and the matters are remanded back to the Commissioner of Income

Tax concerned to reconsider and dispose of the applications in question under Section 264 of The Income Tax Act, 1961, by passing a reasoned and speaking order in the light of the discussion and observation made

in this judgment, within a period of eight weeks from the date of communication of this judgment, after giving opportunity of hearing to the petitioner or her authorised representative.

Accordingly, these writ petitions being W.P.A No. 16473 of 2014 and W.P.A. No. 16476 of 2014 stand disposed of by allowing the same. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)