2018-TIOL-706-HC-KERALA-IT

IN THE HIGH COURT OF KERALA

AT ERNAKULAM

WP(C).No. 26004 of 2017

RAGHAVAN NAIR

Vs

1) THE ASST.COMMISSIONER OF INCOME TAX
CIRCLE 2(1), AAYAKAR BHAVAN
SAKTHAN THAMPURAN NAGAR, THRISSUR - 680001

2) SPECIAL TAHSILDAR (LA) NO. I
KOCHI METRO RAIL PROJECT, ERNAKULAM

P B Suresh Kumar, J

Dated: January 4, 2018

Appellant Rep. by: Sri Harisankar V Menon, Smt Meera V Menon, Adv
Respondent Rep. by: Sri P K R Menon, Sr Counsel, Goi (Taxes), Sri Jose Joseph, SC, For Income Tax, Sri V K Shamsudheen, Govt Pleader

Income Tax - Writ - Section 143 - Constitution of India - Article 265 - Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 96.

Keywords - Acquisition of land - Capital gains - Compensation - Exempt income - Non filing of revised return.

The Assessee, an individual, filed return for the relevant AY. During the assessment proceedings, the AO noticed the the Assessee had received a sum of Rs.1,28,43,192/- in the year 2014-'15 by way of compensation for a land acquired from him for the Kochi Metro Rail Project. Accordingly, the Assessee disclosed the capital gains resulting from the acquisition of the said land and paid tax on that basis. For the said purpose, the Assessee had worked out the indexed cost of the land reckoning its fair market value as on 01.04.1981 at Rs.50,000/- per cent.

However, the AO called upon the Assessee to produce documents to establish that the fair market value of the land as on 01.04.1981 was as claimed. In the meanwhile, in the light of Section 96 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, the High Court held in a number of cases that compensation payable to persons for the lands acquired under the said statute was exempted from payment of tax under the Act. Therefore, in such circumstances, the Assessee requested the AO to drop the proceedings initiated against him u/s 143 the Act. However, the AO did not considered the request made by the Assessee and accordingly, the Assessee filed a writ petition challenging the continuance of the proceedings u/s 143 the Act. Accordingly, an interim order was passed restraining the AO from continuing the proceedings.

However, the AO completed the proceedings initiated in terms of notice raising a demand for Rs.9,95,070/- on the basis that the cost indexation of the land made by the Assessee could not be accepted and that the fair market value of the land as on 01.04.1981 could be reckoned only at

Rs.1,400/- per cent for the purpose of cost indexation. However, the Assessee contended that such order could only be a pre-dated one issued maliciously with a view to defeat writ petition instituted by the Assessee. It was also contended that order being one issued without adverting to the contention taken by the Assessee that the proceedings were liable to be dropped in the light of Section 96 of the Land Acquisition Act, the same was unsustainable.

On hearing the parties, the High Court held that,

Whether when assessee mistakenly paid taxes on a exempt income, he can still be penalised on technical ground such as non filing of revised return within due time - NO: HC

Whether therefore, since Article 265 of Constitution of India provides that no tax should be levied except by authority of law, the AO is duty bound to grant relief to assessee u/s 143 of the Act - YES: HC

++ it is beyond dispute that the powers of the assessing officers under the Act are quasi-judicial in nature and they are duty bound, therefore, to act fairly in the discharge of their functions. They are also invested with the authority to do justice to the assessees. True, in a given case where the self assessment made by an assessee is proposed to be revised on the ground that the deduction made him in the return under a particular head is inadmissible, the assessing officer, in the absence of a revised return, would proceed on the basis of the facts disclosed by the assessee in the return. But, in a case where it is apparent on the face of the record that the assessee has included in his return, an income which is exempted from payment of income tax, on account of ignorance or by mistake, according to the Court, the assessing officer is bound to take into account the said fact in a proceedings under Section 143 of the Act. In other words, if the capital gains on a transaction is exempted from payment of tax, the assessing officer has a duty to refrain from levying tax on the said capital gains and the assessing officer cannot, in such cases, refuse to grant relief under Section 143 of the Act to the assessee on the technical plea that the assessee has not filed a revised return. It is so since the paramount duty of the assessing officer is to complete the assessments in accordance with law. It is all the more so in the light of the mandate under Article 265 of the Constitution that no tax shall be levied or collected except by authority of law. The Court is fortified in such view by the observations made by the Apex Court in the case of Shelly Products and another;

++ the assessee has not filed a revised return when he was made to understand that he has no liability to pay tax on the capital gains resulting from the acquisition of land. The reason is obvious that the time prescribed under the Act for submission of revised return had expired by that time. The case of the assessee, in the circumstances, is only that he shall not be penalised for having paid tax in terms of his return, on account of ignorance, on an income not exigible to tax. When the materials on record are analysed in the above background, the Court have no hesitation to hold that Ext.P12 order, which is challenged in the writ petition, is a clear case where the AO has penalised the assessee for having paid tax on an income which is not exigible to tax. The said order, in the circumstances, is liable to be interfered with. In the circumstances, the writ petition is allowed and Ext.P12 order is quashed to the extent it assesses the assessee to capital gains resulting from the acquisition of land.

Assessee's writ petition allowed

Case followed:

Commissioner of Income Tax, Bhopal v. Shelly Products and another ***2003-TIOL-100-SC-IT***

Case distinguished:

Goetze (India) Ltd v. Commissioner of Income-Tax ***2006-TIOL-198-SC-IT***

JUDGEMENT

Petitioner is an assessee under the Income Tax Act (the Act) on the rolls of the first respondent. He received a sum of Rs.1,28,43,192/- in the year 2014-'15 by way of compensation for a land acquired from him for the Kochi Metro Rail Project. The petitioner, at the relevant time was under the impression that the capital gains resulting from the acquisition of the land is exigible to tax under the Act. Consequently, in the return filed by the petitioner under the Act for the assessment year 2015-'16, he has, disclosed the capital gains resulting from the acquisition of the said land and paid tax on that basis. For the said purpose, the petitioner has worked out the indexed cost of the land reckoning its fair market value as on 01.04.1981 at Rs.50,000/- per cent.

2. The first respondent issued Ext.P3 notice to the petitioner under Section 143(2) of the Act for scrutiny of the return filed by him. It is mentioned in Ext.P3 notice that the deduction claimed by the petitioner under the head 'capital gains' is the issue identified for examination. The petitioner sent a reply to Ext.P3 notice reiterating that the fair market value of the land as on 01.04.1981 was as disclosed by him and therefore, the deduction claimed by him under the head mentioned in the notice is in order. After examining the reply of the petitioner, in terms of Ext.P6 communication, the first respondent called upon the petitioner to produce documents to establish that the fair market value of the land as on 01.04.1981 was as claimed by the petitioner. In the meanwhile, in the light of Section 96 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (the Land Acquisition Act), this Court held in a number of cases that compensation payable to persons for the lands acquired under the said statute is exempted from payment of tax under the Act. In the circumstances, in so far as the acquisition of the land of the petitioner was under the said statute, the petitioner submitted Ext.P9 reply to Ext.P6 notice requesting the first respondent to drop the proceedings initiated against him under Section 143 the Act. Since the first respondent has not considered the request made by the petitioner in Ext.P9 reply, the petitioner filed W.P.(C).No.23113 of 2017 before this Court challenging the continuance of the proceedings under Section 143 the Act. The said writ petition was admitted on 24.07.2017. This Court also passed an interim order in the said case on 24.07.2017 restraining the first respondent from continuing the proceedings.

3. While so, the petitioner was served with Ext.P12 order dated 14.07.2017, by which the first respondent has completed the proceedings initiated in terms of Ext.P3 notice raising a demand for Rs.9,95,070/- on the basis that the cost indexation of the land made by the petitioner cannot be accepted and that the fair market value of the land as on 01.04.1981 can be reckoned only at Rs.1,400/- per cent for the purpose of cost indexation. According to the petitioner, after Ext.P6 notice, the first respondent had issued Ext.P11 notice also to the petitioner directing him to appear before him on 20.07.2017 for the hearing proposed in furtherance to Ext.P3 notice. The case of the petitioner is that in the light of Ext.P11 notice, Ext.P12 order dated 14.07.2017 can only be a pre-dated one issued maliciously with a view to defeat W.P.(C).No.23113 of 2017 instituted by the petitioner before this Court. It is also the case of the petitioner that at any rate, Ext.P12 order being one issued without adverting to the contention taken by the petitioner that the proceedings are liable to be dropped in the light of Section 96 of the Land Acquisition Act, the same is unsustainable. The petitioner, therefore, challenges Ext.P12 order in this proceedings on the aforesaid grounds.

4. A statement has been filed on behalf of the first respondent. The stand taken by the first respondent in the statement is that though the petitioner was directed to appear for hearing on 20.07.2017 in terms of Ext.P11 notice, the authorised representative of the petitioner had appeared before the first respondent on 20.07.2017 itself pursuant to the said notice and filed a written submission on behalf of the petitioner and it is in the said circumstances that Ext.P12 order was passed on 14.07.2017.

5. Heard the learned counsel for the petitioner as also the learned Standing Counsel for the first respondent.

6. The petitioner does not dispute Ext.R1(A) written submission filed on his behalf by his authorised representative on 20.07.2017 pursuant to Ext.P11 notice. If that be so, the petitioner cannot be heard to contend, relying on Ext.P11 notice, that the impugned order is a predated one. Apart from the case developed on the strength of Ext.P11 notice, petitioner has not placed on record any material to indicate that the impugned order is one issued after 24.7.2017 with a pre-date maliciously with a view to defeat W.P.(C).No.23113 of 2017 instituted by the petitioner before this Court. In the circumstances, the contention of the petitioner that Ext.P12 order dated 14.07.2017 is a predated one issued maliciously with a view to defeat W.P.(C). No.23113 of 2017 , is liable to be rejected.

7. It is seen that even while the petitioner has an effective alternative remedy by way of appeal against Ext.P12 order under the Act, he has instituted this writ petition challenging the said order in the light of his case that the same is one rendered maliciously with a view to defeat W.P.(C).No.23113 of 2017 pending before this Court. Though it is found that Ext.P12 order is not one issued maliciously as contended by the petitioner, in so far as this Court entertained W.P.(C).No.23113 of 2017 and interdicted the first respondent from proceeding further in the matter, and in so far as this Court admitted this writ petition challenging Ext.P12 order even while the petitioner has an alternative remedy by way of appeal against the same, I am of the view that it may not be appropriate now to relegate the petitioner to avail the alternative remedy available to him against Ext.P12 order. In the circumstances, I propose to examine the correctness of Ext.P12 order in this proceedings itself.

8. As noted above, the impugned order is challenged on the ground that the proceedings under Section 143(2) of the Act, which culminated in Ext.P12 order, is without jurisdiction, in the light of Section 96 of the Land Acquisition Act.

9. The learned Standing Counsel for the first respondent does not dispute the fact that in the light of Section 96 of the Land Acquisition Act, no tax is leviable on the capital gains resulting from the acquisition of land under the said statute. The learned Standing Counsel also does not dispute the fact that the only point on which Ext.P12 order has been issued is that the fair market value of the land as on 01.04.1981 adopted by the petitioner for cost indexation cannot be accepted. Nevertheless, it was contended by the learned Standing Counsel that in so far as the petitioner has disclosed the capital gains resulting from the acquisition of land in the return filed by him and paid tax on that basis, in the absence of a revised return, the assessing officer is precluded from considering the question whether the petitioner is liable to pay tax on the said capital gains. The learned counsel relied on the decision of the Apex Court in *Goetze (India) Ltd v. Commissioner of Income-Tax [(2006) 284 ITR 323 (SC)]* **=** ***2006-TIOL-198-SC-IT***, in support of the said contention.

10. The short question arising for consideration, therefore, is whether in the absence of a revised return, the assessing officer is precluded from considering, in a proceedings under Section 143 of the Act, the contention of the assessee that the capital gains disclosed in the return filed by him is not exigible to tax and that therefore, there cannot be any assessment on the basis that the deduction claimed by him under that head is not admissible.

11. It is beyond dispute that the powers of the assessing officers under the Act are quasi-judicial in nature and they are duty bound, therefore, to act fairly in the discharge of their functions. They are also invested with the authority to do justice to the assessees. True, in a given case where the self assessment made by an assessee is proposed to be revised on the ground that the deduction made him in the return under a particular head is inadmissible, the assessing officer, in the absence of a revised return, would proceed on the basis of the facts disclosed by the assessee in the return. But, in a case where it is apparent on the face of the record that the assessee has included in his return, an income which is exempted from payment of income tax, on account of ignorance or by mistake, according to me, the assessing officer is bound to take into account the said fact in a proceedings under Section 143 of the Act. In other words, if the capital gains on a transaction is exempted from payment of tax, the assessing officer has a duty to refrain from levying tax on the said capital gains and the assessing officer cannot, in such cases, refuse to grant relief under Section 143 of the Act to the assessee on the technical plea that the assessee has not filed a revised return. It is so since the paramount duty of the assessing officer is to complete the assessments in accordance with law. It is all the more so in the light of the mandate under Article 265 of the Constitution that no tax shall be levied or collected except by authority of law. I am fortified in the aforesaid view by the observations made by the Apex Court in *Commissioner of Income Tax, Bhopal v. Shelly Products and another [(2003) 5 SCC 461]* **=** ***2003-TIOL-100-SC-IT***. Paragraph 36 of the judgment of the Apex Court in the said case reads thus:

> *"36. We cannot lose sight of the fact that the failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. He can certainly make such a claim also before the authority concerned calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the assessing officer, which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the authority concerned in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by Section 240 of the Act, an obligation is cast upon the Revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases therefore, it is open to the assessee to bring facts to the notice of the authority concerned on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under Section 237 of the Act. The authority concerned, for the limited purpose of calculating the amount to be refunded under Section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantageous*

position than what he would have been, had an assessment been made in accordance with law."

(underline supplied).

In the instant case, the petitioner has not filed a revised return when he was made to understand that he has no liability to pay tax on the capital gains resulting from the acquisition of land. The reason is obvious that the time prescribed under the Act for submission of revised return had expired by that time. The case of the petitioner, in the circumstances, is only that he shall not be penalised for having paid tax in terms of his return, on account of ignorance, on an income not exigible to tax. When the materials on record are analysed in the above background, I have no hesitation to hold that Ext.P12 order, which is impugned in the writ petition, is a clear case where the first respondent has penalised the petitioner for having paid tax on an income which is not exigible to tax. The said order, in the circumstances, is liable to be interfered with.

12. The question arose in Goetze (India) Ltd (supra) was whether an assessee could make a claim for deduction other than by filing a revised return. As noted above, the question in the case on hand is whether the assessing officer is precluded from considering an objection as to his authority to make an assessment under Section 143 of the Act merely for the reason that the petitioner has included in his return an amount which is exempted from payment of tax and that he could not file a revised return to rectify the said mistake in the return. The decision of the Apex Court in Goetze (India) Ltd (supra) has, therefore, no application to the facts of the present case.

In the circumstances, the writ petition is allowed and Ext.P12 order is quashed to the extent it assesses the petitioner to capital gains resulting from the acquisition of land mentioned therein.