IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITR No. 75 of 1998
Date of decision 26. 7 .2007

The Commissioner of Income tax, Jalandhar .. appellant

Versus

Shri Prem Kumar Bhagat .. Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

PRESENT: Mr.Sanjiv Bansal, Advocate for the appellant

M.M.Kumar, J.

'Whether passing of an order under Section 163(2) of the Income Tax Act,1961 (for brevity 'the Act') declaring a person as an agent of his NRI assessee brother is mandatory' is the question which permeate through this reference made at the instance of the Revenue by the Income Tax Appellate Tribunal (for brevity 'the Tribunal') under Section 256(1) of the Act. The Revenue has claimed that three questions would emerge from the order dated 9.12.1997 passed in ITA No. 97(ASR)/1985 in respect of assessment year 1973-74 which are as under:

> "i) Whether, on the facts and in the circumstances of the case, the ld. ITAT was right in law in cancelling the assessment made by the AO and confirmed by the ld. First Appellate authority on the agent of the non resident assessee who himself admitted to be an agent by signing the return of income;
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> ii)Whether , on the facts and in the circumstances of the case, the ld. ITAT was right in law in holding that the AO was required to pass an order u/s 163(2) of the Income tax Act,1961 to treat Sh. Sudershan Kumar as an agent of the non resident

assessee, who signed and made the return himself, to be an agent of the non resident assessee?

iii)Whether, on the facts and in the circumstances of the case, the ld. ITAT was right in law in holding that the first appellate order passed on 25.8.1978 setting aside the order passed by the I.T.O. to be made afresh had become final as the same was not challenged?"

Facts are not in dispute and are being noticed in so far as relevant for the controversy raised. The assessee filed return for the assessment year 1973-74 declaring total income of Rs.6417/- as an agent of his NRI brother Shri Prem Kumar Bhagat. The I.T.O. completed the original assessment under Section 144 of the Act on 23.3.1976. No appeal was filed against this order under Section 146 of the Act but he came before the Appellate Assistant Commissioner (for brevity 'the AAC') challenging the order of the I.T.O.. The AAC vide his order dated 25.8.1978 set aside the assessment order with a direction that the I.T.O. should first of all record a finding whether Shri Prem Kumar Bhagat is an NRI. Thereafter he was to consider whether Shri Sudershan Kumar has got no objection to be appointed as an agent of his brother Shri Prem Kumar Bhagat and then to frame the assessment order after giving due opportunity to Sudershan Kumar of being heard.

The I.T.O. issued notice under Section 143(2) but the assessee did not reply to the notice. Consequently the I.T.O. proceeded to frame the best judgement assessment under Section 144 of the Act which was completed at a net income of Rs. 67,420/- vide his order dated 30.3.1981. However, no findings on the status of NRI or his agent brother Sudershan

Kumar were recorded. The assessment order was re-opened under Section 146 of the Act on 23.7.1981.Again a notice under Section 143(2) was issued and again the assessee failed to turn up despite service. The I.T.O. framed the assessment ex-parte and assessed the income at Rs. 67,420/- vide order dated 30.3.1981. The order of the I.T.O. was challenged before A.A.C. by the assessee raising the contentions that the I.T.O. was not justified in appointing Sudershan Kumar as an agent of Shri Prem Bhagat- NRI without granting opportunity of hearing under Section 163 of the Act. The A.A.C. rejected the contention and held that Sudershan Kumar held out himself as an agent by filing return of Income of his NRI brother on 18.5.1973 wherein declaration was made to the effect that he was his agent. The fact was confirmed by two letters dated 20.2.1976 and 27.2.1976 by Sudershan Kumar himself. Accordingly, assessment order passed by the I.T.O. was confirmed.

On further appeal, the order of A.A.C. was challenged before the Tribunal. There was difference of opinion between Judicial Member who expressed the opinion for affirmation of the order whereas Accountant Member expressed the opinion against the order. He observed that the issue was required to be decided concerning appointment of Shri Sudershan Kumar as an agent of non resident Shri Prem Kumar Bhagat under Section 163 of the Act prior to making of the assessment and particularly in view of the specific orders of the A.A.C. dated 25.8.1978 and 10.11.1982, which had not been complied with by the I.T.O.. He further distinguished the decision of the Bombay High Court in the case of Harak Chand Makan Ji and Co. v. CIT Bombay City 16 ITR 119 and concluded that it was not applicable to the case as that was rendered under the old Act of 1922 in

which there was no provision for filing an appeal against order of appointment of agent of non resident. The learned Accountant Member held that the issue was fully covered in favour of the assessee as per the decision of the jurisdictional High Court in the case of CIT v. Kanhaiya Lal Gurmukh Singh (1973) 87 ITR 476 which has been followed by the Madras High Court in the case of CIT Madras (Central) v. Express Newspapers (P) Ltd. (1978)111 ITR 347.

The matter was then referred to third Member who opined that matter in controversy was fully covered by the decision of the jurisdictional High Court in the case of Kanhaiya Lal Gurmukh Singh (supra) which has since been followed by the Madras High Court in the case of Express Newspapers (P) Ltd. (supra). It was concluded by the Third Member that before assessment proceedings, the ITO was required to pass order under Section 163(2) of the Act treating the assessee as an agent of non resident and it had not been done in the present case. He further opined that the ITO was given two opportunities to comply with the directions of the A.A.C. under Section 163(2) to appoint Shri Sudershan Kumar as an agent of non resident Shri Prem Kumar Bhagat after serving notice as required under law but inspite of these two opportunities he felt no need to allow fresh opportunity. The orders thus were not complied. The assessment order was found to be vitiated and bad in law for non compliance of the provisions of Section 163(2) of the Act.

Feeling aggrieved, Revenue sought reference under Section 256(1) of the Act and accordingly the Tribunal has referred the afore-mentioned questions for the opinion of this Court.

After hearing learned counsel for the parties, we are of the view

that the provisions of Section 163(2) of the Act would require examination and the same reads as under:

> "163(2) No person shall be treated as the agent of a non resident unless he has had an opportunity of being heard by the Assessing Officer as to his liability to be treated as such."

These provisions are mandatory in character because in Section 163 (2) the expression 'shall' has been used and therefore an order was required to be passed by the I.T.O. declaring Shri Sudershan Kumar as an agent of his assessee brother Prem Kumar Bhagat. The fact that he had signed and filed the return holding himself out as an agent of his NRI brother could not adversely affect his legal obligation because on two occasions on 25.8.1978 and again on 10.11.1982 the A.A.C. had asked the I.T.O. to pass a specific order on that issue and those two orders had attained finality as no appeal by the Revenue was preferred. Therefore, question nos. 1 and 2 have to be answered against the Revenue especially in view of the law laid down by a Division Bench of this Court in the case of Kanahaya Lal Gurmukh Singh (supra). It has been held that the principles of natural justice of issuing notice and granting of reasonable opportunity of being heard are mandatory which must be complied with. It has further been held that an order treating a person as an agent of NRI assessee must be made under Section 163 of the Act even in cases where a notice under Section 148 of the Act is to be issued. The afore-mentioned view taken by this Court has been followed and applied by Bombay High Court in the cases of CIT v. Belapur Sugar Mills (1983) 141 ITR 404 and CIT v. Sambanban (2000)242 ITR 708 as well as Madras High Court in the case of Express Newspapers Pvt. Ltd. (supra). It is also appropriate to mention that even if the assessee was found

to be an agent in one assessment year it does not necessarily lead to an inference that he would also be an agent in the next assessment year as has been held by Hon'ble the Supreme Court in the case of H.L.Sud v. TELCO 71 ITR 457.

It is true that Sudershan Kumar himself held out by his conduct that he was agent of his NRI brother when he filed the return and paid tax and, therefore, failure to serve notice under Section 163(2) of the Act may not have invalidated the assessment order but in the present case, the afore-mentioned view cannot be taken for the reason that the A.A.C. vide his order dated 25.8.1978 and 10.11.1982 had directed the I.T.O. to pass a specific order on the issue of appointing Sudershan Kumar as agent of his brother. Those two orders had attained finality because no appeal against those orders was filed by Revenue or by assessee. Therefore, in the facts and circumstances of this case, question No. (iii) has to be answered against the Revenue by holding that the order dated 25.8.1978 had attained finality and a specific order under Section 163(2) of the Act was required to be passed by the I.T.O..

For the reasons stated above, the questions posed are answered in favour of the assessee and against the Revenue.

(M.M.Kumar)
Judge

(Ajay Kumar Mittal)
Judge

26.7.2007
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