2020 INSC 313

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8590 of 2010

RAJASTHAN STATE ELECTRICITY BOARD JAIPUR ...APPELLANT(S)

VERSUS

THE DY. COMMISSIONER OF INCOME TAX(ASSESSMENT) & ANR. ...RESPONDENT(S)

J U D G M E N T

ASHOK BHUSHAN, J.

This appeal has been filed by the assessee challenging the Division Bench judgment dated 13.11.2007 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur by which D.B. Civil Special Appeal (Writ) No.837 of 1993 filed by the Revenue has been allowed upholding the demand of additional tax under Section 143(1-A) of the Income Tax Act, 1961.

2. Brief facts necessary to be noted for deciding this appeal are:

The assessee is a Government Company as defined under Section 617 of the Companies Act, 1956. The assessee filed return on 30.12.1991 for the assessment year 1991-92 showing a loss amounting to Rs. (-)427,39,32,972/-. Due to a bonafide mistake the assessee claimed 100% depreciation of Rs. 333,77,70,317/- on written down value of assets instead of 75% depreciation. Under the unamended Section 32(2) of the Income Tax Act, 1961 the assessee was entitled to claim 100% depreciation. However, after the amendment the depreciation could only be 75%. The assessee supported the returns with provisional revenue account, balance sheet as on 31.03.1991, details of gross fixed assets, computation chart and depreciation chart. No tax was payable on the said return by the assessee. No notice under Section 143(2) of the Income Tax Act, 1961 was received by the assessee.

3. An intimation under Section 143(1)(a) of the Income Tax Act, 1961 dated 12.02.1992 was issued by the Assessing Officer disallowing 25% of the

depreciation, restricting the depreciation to 75%. Additional tax under Section 143(1-A) of the Income Tax Act, 1961 amounting to Rs.8,63,64,827/- was demanded. The assessee filed an application under Section 154 of the Income Tax Act, 1961 dated 18.02.1992 praying for rectification of the demand. The assessee also filed a petition under Section 264 of the Income Tax Act, 1961 against the demand of additional tax. In the petition it was stated that even after allowing only 75% of depreciation the income of the assessee remained to be in loss to Rs.3,43,94,90,393/-. The assessee prayed for quashing the demand of additional tax. The application filed under Section 154 of the Income Tax Act, 1961 was rejected by the Assessing Officer on 28.02.1992. The revision petition under Section 264 of the Income Tax Act, 1961 came to be dismissed by the Commissioner of Income Tax by order dated 31.03.1992. The Commissioner of Income Tax rejected the revision petition by giving following reasoning:

> "A plain reading of the provisions of Section 143(1-A) shows that whenever adjustment is made, additional tax has to be charged @ 20% of the tax payable on such

> ‘excess amount’. The ‘excess amount’ refers to the increase in the income and by implication the reduction in loss where even after the addition there is negative income. The explanation to Section 143(1-A)(b) provides that the tax payable on such excess means the tax that would have been chargeable on the amount of adjustment to the total income. Where the adjustment exceeds the income determined. Clearly, therefore, in this case the additional tax had to be charged on the basis of the tax chargeable on the sum of Rs.83,44,42,579/- added by the Assessing Officer.”

4. Aggrieved by the order of the Commissioner of Income Tax challenging the demand of additional tax which was reduced to amount of Rs.7,67,68,717/- Writ Petition No.2267 of 1992 was filed by the assessee in the High Court of Judicature for Rajasthan, Bench at Jaipur. Learned Single Judge vide judgment dated 19.01.1993 allowed the writ petition quashing the levy of additional tax under Section 143(1-A). The Revenue aggrieved by the judgment of the learned Single Judge filed a Special Appeal which has been allowed by the Division Bench of the High Court vide its judgment dated 13.11.2007 upholding the demand of additional tax. The assessee aggrieved by the

judgment of the Division Bench has come up in this appeal.

5. We have heard Shri Arijit Prasad, learned senior counsel appearing for the appellant and Shri Rupesh Kumar, learned counsel for the respondents.

6. Shri Arijit Prasad referring to Circular No.549 dated 30.10.1989 of Central Board of Direct Taxes submits that 20% additional tax sought to be imposed under Section 143(1-A) of 1961 Act is in the nature of penalty and can be levied only when the assessee had intentionally sought to file an incorrect return. It is submitted that such additional tax could only become payable in case where assessee was assessed to an income for the purpose of tax and could not apply where there was no income or there was loss. The intent of the Legislature in enacting provision of Section 143(1-A) was to ensure that the assessee also declares his loss in the return correctly and where the assessee deliberately or intentionally filed false returns, he was liable to pay additional Income Tax. It is submitted that unabsorbed losses and unabsorbed depreciation were to be carried

forward to future years to be set off against profits and it did not in any manner affect business loss. He submits that business loss suffered by the assessee had not reduced because of the bonafide mistake committed by the appellant in calculating the depreciation. The assessee was in loss and continued to be in loss. Reduction in depreciation from 100% to 75% did not amount to reduction in loss and additional tax under Section 143(1-A) of the Income Tax Act, 1961 was only to prevent evasion of tax. He submits that when additional tax had clear and specific imprint of penalty, the Revenue could not be heard to say that the levy of additional tax is automatic under Section 143(1-A) of the Act. If additional tax could be levied in such circumstances, it would be punishing the assessee for no fault of his and that too without giving him a hearing.

7. Learned counsel for the Revenue submits that provision of Section 143(1-A) demonstrates that it is not penal in nature. It is the device to check evasion of tax. It is submitted that challenge to vires of Section 143(1-A) has been repelled by

different High Courts and this Court. Section 143(1-A) has been inserted in the Income Tax Act so that the assessee may not be able to evade tax by resorting to the method of showing loss first and then reducing the loss. Learned counsel submits that the Division Bench of the High Court has rightly allowed the appeal of the Revenue upholding the demand of additional tax.

8. We have considered the submissions of the learned counsel for the parties and perused the records.

9. Only question to be answered in this appeal is as to whether the demand of additional tax under the provisions of Section 143(1-A) in the facts of the present case was justified or not.

10. Before we enter into the rival submissions of the learned counsel for the parties, it is relevant to have a look on the statutory scheme under Section 143 and 143(1-A). Section 143(1)(*a*) reads thus:

> "143. (1)(*a*) Where a return has been made under Section 139, or in response to a notice under sub-section (1) of Section 142,—

(*i*) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and

(*ii*) if any refund is due on the basis of such return, it shall be granted to the assessee:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely—

(*i*) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(*ii*) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed;

(*iii*) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed:

Provided further that where adjustments are made under the first proviso, an intimation shall be sent to the assessee, notwithstanding that no tax or interest is found due from him after making the said adjustments:

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which income was first assessable."

11. Sub-section (1-A), as it originally read, was thus:

"143. (1-A)(*a*) Where, in the case of any person, the total income, as a result of the adjustments made under the first proviso to clause (*a*) of sub-section (1), exceeds the total income declared in the return by any amount, the Assessing Officer shall,—

(*i*) further increase the amount of tax payable under sub-section (1) by an additional income tax calculated at the rate of twenty per cent of the tax payable on such excess amount and specify the additional income tax in the intimation to be sent under sub-clause (*i*) of clause (*a*) of sub-section (1);

(*ii*) where any refund is due under sub-section (1), reduce the amount of such refund by an amount equivalent to the additional income tax calculated under sub-clause (*i*)."

12. Sub-section (1-A) was amended by the Finance Act, 1993 with effect from 1-4-1989, which was the date

upon which sub-section (1-A) had been introduced into the Act. The substituted sub-section (1-A) read thus:

> "143. (1-A)(*a*) Where as a result of the adjustments made under the first proviso to clause (*a*) of sub-section (1),—
>
> (*i*) the income declared by any person in the return is increased; or
>
> (*ii*) the loss declared by such person in the return is reduced or is converted into income,
>
> the Assessing Officer shall,—
>
> (*A*) in a case where the increase in income under sub-clause (*i*) of this clause has increased the total income of such person, further increase the amount of tax payable under sub-section (1) by an additional income tax calculated at the rate of twenty per cent on the difference between the tax on the total income so increased and the tax that would have been chargeable had such total income been reduced by the amount of adjustments and specify the additional income tax in the intimation to be sent under sub-clause (*i*) of clause (*a*) of sub-section (1);
>
> (*B*) in a case where the loss so declared is reduced under sub-clause (*ii*) of this clause or the aforesaid adjustments have the effect of converting that loss into income, calculate a sum (hereinafter referred to as additional income tax) equal to twenty per cent of the tax that would have been chargeable on the amount of the adjustments as if it had been the total income of such person and specify the

> additional income tax so calculated in the intimation to be sent under sub-clause (*i*) of clause (*a*) of sub-section (1)
>
> (*C*) where any refund is due under sub-section (1), reduce the amount of such refund by an amount equivalent to the additional income tax calculated under sub-clause (*A*) or sub-clause (*B*), as the case may be."

13. The amendments brought by Finance Act, 1993 with retrospective effect i.e. from 01.04.1989 are fully attracted with regard to assessment in question i.e. for assessment year 1991-92. The substituted sub-section (1-A) makes it clear that where the loss declared by an assessee had been reduced by reason of adjustments made under sub-section(1)(a), the provisions of sub-section (1-A) would apply. As noted above the Commissioner of Income Tax while rejecting the revision petition of the petitioner has taken the view that whenever adjustment is made, additional tax would be charged @ 20% of the tax payable on such excess amount. The excess amount refers to the increase in the income and by implication the reduction in loss where even after the addition there is negative income. Whether there should be levy of

additional tax in all circumstances and cases where loss is reduced, is the question to be answered in the present case.

14. By Taxation Laws (Amendment) Act, 1991 in Section 32 third proviso was inserted to the following effect:

> "Provided also that, in respect of the previous year relevant to the assessment year on the 1st day of April, 1991, the deduction in relation to any block of assets under this clause shall, in the case of a company, be restricted to seventy-five per cent of the amount calculated at the percentage, on the written down value of such assets, prescribed under this Act immediately before the commencement of the Taxation Laws (Amendment) Act, 1991."

15. Prior to insertion of the above proviso the depreciation was not restricted to 75% of the amount calculated at the percentage on the written down value of such assets. The return was filed by the assessee on 31.12.1991, prior to which date the Taxation Laws (Amendment) Act, 1991 had come into operation. It was due to bonafide mistake and oversight that the assessee claimed 100% depreciation instead of 75%. The 100% depreciation of Rs.333,77,70,317/- was claimed on written down value

of assets, 25% depreciation was, thus, disallowed restricting it to 75% and after reducing 25% of the depreciation loss remained to the extent of Rs. (-)3,43,94,90,393/-. Even as per reduction of 25% depreciation the return of loss income of the assessee remained. In claiming 100% depreciation the assessee claims that there was no intention to evade tax and the said claim was only a bonafide mistake. As noted above by the Finance Act, 1993 Section 143(1-A) was substituted with retrospective effect from 01.04.1989. The memorandum explaining the provisions of the Finance Bill with retrospective effect was to the following effect:

> "The provisions of Section 143(1-A) of the Income Tax Act provide for levy of twenty per cent additional income tax where the total income, as a result of the adjustments made under the first proviso to Section 143(1)(*a*), exceeds the total income declared in the return. These provisions seek to cover cases of returned income as well as returned loss. Besides its deterrent effect, the purpose of the levy of the additional income tax is to persuade all the assesses to file their returns of income carefully to avoid mistakes.

In two recent judicial pronouncements, it has been held that the provisions of Section 143(1-A) of the Income Tax Act, as these are worded, are not applicable in loss cases.

The Bill, therefore, seeks to amend Section 143(1-A) of the Income Tax Act to provide that where as a result of the adjustments made under the first proviso to Section 143(1)(*a*), the income declared by any person in the return is increased, the assessing officer shall charge additional income tax at the rate of twenty per cent, on the difference between the tax on the increased total income and the tax that would have been chargeable had such total income been reduced by the amount of adjustments. In cases where the loss declared in the return has been reduced as a result of the aforesaid adjustments or the aforesaid adjustments have the effect of converting that loss into income, the Bill seeks to provide that the assessing officer shall calculate a sum (referred to as additional income tax) equal to twenty per cent of the tax that would have been chargeable on the amount of the adjustments as if it had been the total income of such person.

The proposed amendment will take effect from 1-4-1989 and will, accordingly, apply in relation to Assessment Year 1989-1990 and subsequent years.”

16. Learned counsel for the Revenue has rightly submitted that object of Section 143(1-A) was the prevention of evasion of tax. The memorandum explaining the provisions of the Finance Bill as noted above was also to persuade to the assessee to file Income Tax Return carefully to avoid mistakes.

17. This Court in **Commissioner of Income Tax, Gauhati vs. Sati Oil Udyog Limited and another, (2015) 7 SCC 304,** had occasion to consider elaborately the provisions of Section 143(1-A), its object and validity. There was a challenge to the retrospectivity of the provisions of Section 143(1-A) as introduced by Finance Act, 1993. The Gauhati High Court had held that retrospective effect given to the amendment would be arbitrary and unreasonable. The appeal was filed by the Revenue in this Court in which appeal, this Court had occasion to examine the constitutional validity of the provisions. This Court in the above judgment held that object of Section 143(1-A) was the prevention of evasion of tax. In paragraph 9 of the judgment following has been laid down:

> **"9.** On a cursory reading of the provision, it is clear that the object of Section 143(1-A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax."

18. Relying on earlier judgment of this Court in **K.P. Varghese v. ITO, (1981) 4 SCC 173,** this Court in the above case held that provisions of Section 143(1-A) should be made to apply only to tax evaders. In paragraphs 21 and 25 following was laid down:

> **"21.** In the present case, the question that arises before us is also as to whether bona fide assessees are caught within the net of Section 143(1-A). We hasten to add that unlike in *J.K. Synthetics case*, Section 143(1-A) has in fact been challenged on constitutional grounds before the High Court on the facts of the present case. This being the case, we feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in *K.P. Varghese* v. *ITO*. The Court in that case was concerned with the correct construction of Section 52(2) of the Income Tax Act: (*K.P.*

Varghese case, SCC p. 179, para 4 : SCR p. 639)

> "**52. (2)** Without prejudice to the provisions of sub-section (1), if in the opinion of the Income Tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital asset by an amount of not less than fifteen per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer."

25. Taking a cue from *Varghese case*, we therefore, hold that Section 143(1-A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the Revenue which may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section 143(1-A), we uphold the retrospective clarificatory amendment of the said section and allow the appeals. The judgments of the Division Bench[2] of the

Gauhati High Court are set aside. There will be no order as to costs."

19. This Court in the above case upheld the constitutional validity of Section 143(1-A) (as inserted by the Finance Act, 1993) subject to holding that Section 143(1-A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully by the assessee.

20. Applying the ratio of the above judgment in the present case, we need to find out as to whether 100% depreciation as mentioned in return filed by the assessee was a result of an attempt to evade tax lawfully payable by the assessee.

21. We have seen from the facts, as noted above, that even after dis-allowing 25% of the depreciation, the assessee in the return remained in loss and the 100% depreciation was claimed by the assessee in the return due to a bonafide mistake. By Taxation Laws (Amendment) Act, 1991, the depreciation in the case of Company was restricted to 75% which due to

oversight was missed by the assessee while filing the return. The Commissioner of Income Tax by deciding the revision petition has also not made any observation to the effact that 100% depreciation claimed by the assessee was with intend to evade payment of tax lawfully payable by the assessee, rather the Commissioner in his order dated 31.03.1992 has observed that whenever adjustment is made, additional tax has to be charged @ 20% of the tax payable on such excess amount.

22. It is true that while interpreting a Tax Legislature the consequences and hardship are not looked into but the purpose and object by which taxing statutes have been enacted cannot be lost sight. This Court while considering the very same provision i.e. Section 143(1-A), its object and purpose and while upholding the provision held that the burden of proving that the assessee has attempted to evade tax is on the Revenue which may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to

evade tax lawfully payable by it. In the present case, not even whisper, that claim of 100% depreciation by the assessee, 25% of which was disallowed was with intend to evade tax. We cannot mechanically apply the provisions of Section 143(1-A) in the facts of the present case and in view of the categorical pronouncement by this Court in **Commissioner of Income Tax, Gauhati vs. Sati Oil Udyog Limited and another(supra)**, where it is held that Section 143(1-A) can only be invoked when the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. In view of the above, we hold that mechanical application of Section 143(1-A) in the facts of the present case was uncalled for.

23. In the result, we allow the appeal, set aside the judgment of the Division Bench of the High Court as well as demand of additional tax dated 12.02.1992 as amended on 28.02.1992.

.....J.
(ASHOK BHUSHAN)

.....J.
(MOHAN M.SHANTANAGOUDAR)

New Delhi,
March 19, 2020.