

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

Writ Petition No.13675 of 2022

ORDER: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. J.D.Mistri, learned Senior counsel for the petitioner and Mr. J.V.Prasad, learned Senior Standing Counsel for Income Tax Department for respondents No.1 to 5. Also heard Mr. B. Mukharjee, learned counsel for respondent No.6.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of assessment order dated 15.04.2021 passed by respondent No.1 under Section 143(3) read with Sections 143(3A) and 143(3B) of the Income Tax Act, 1961 (briefly, 'the Act' hereinafter) for the assessment year 2018-19.

3. Though not very relevant since the assessment order has been impugned on the ground of lack of jurisdiction,

we may mention that by the aforesaid assessment order, several additions have been made by respondent No.1 to the returned income of the petitioner including an addition of Rs.1,28,22,12,496.00 under Section 68 of the Act.

4. The challenge to the assessment order was summed up by this Court when notice was issued and interim stay was granted in the proceedings held on 31.03.2022. It was ordered as follows:

“Petitioner is an assessee under the Income Tax Act, 1961 (briefly referred to hereinafter as the ‘Act’), engaged in the business of generating, accumulating, distributing, selling and supplying electricity power from non-conventional energy sources on commercial basis. For the assessment year 2018-19, petitioner filed return of income declaring total income as nil. Return of the petitioner was selected for scrutiny under a Computer Aided Scrutiny System (CASS). Ultimately 1st respondent passed the assessment order on 15.04.2021 under Section 143(3) read with Sections 143(3A) ad 143(3B) of the Act determining the total income of the petitioner at Rs.135,08,37,210.00.

Learned Senior Counsel for the petitioner submits that by way of the assessment order, 1st respondent had added the entire loan availed of by the petitioner from three financial institutions as its income.

Aggrieved by the aforesaid order of assessment, petitioner has preferred an appeal before the appellate

authority. During pendency of the appeal, petitioner filed a petition for stay of demand raised pursuant to the assessment order before the assessing authority. Assistant Commissioner of Income Tax, Circle 5(1), Hyderabad, *vide* e-mail dated 13.12.2021 directed the petitioner to pay 20% of the demand and thereafter to re-apply for stay of the balance demand.

Aggrieved thereby, petitioner filed further application for stay before the Commissioner of Income Tax, Circle-5, Hyderabad. It is stated that the said application is still pending and no decision has been taken thereon. While the matter rested thus, 4th respondent issued notice to the petitioner on 26.02.2022 directing the petitioner to liquidate the demand, failing which it was stated that coercive measures would be taken under the Act.

Referring to the order of assessment, it is submitted by Mr. Mistry that the same was passed under Sections 143(3A) and 143(3B) of the Act, but under Section 143(3B), it has been made clear that nothing contained in Sub-Section (3A) and Sub-Section (3B) shall apply to assessments made under Sub-Section (3) of Section 143 or under Section 144, as the case may be, on or after 01.04.2021. However, the assessment order was passed on 15.04.2021. Therefore, *prima facie* it appears that the assessing authority had applied provisions of law while making the assessment which were inapplicable on the date of passing the assessment order.

In view of the above, it is hereby directed that until further orders, respondents shall not take further steps on the basis of the assessment order dated 15.04.2021.”

5. Thereafter, learned Standing Counsel sought for time to file counter affidavit. In the proceedings held on 17.06.2022, this Court while granting further time to learned Standing Counsel to file counter affidavit also referred to a decision of the Delhi High Court in **Gurgaon Realtech Ltd. v. National Faceless Assessment Centre Delhi**¹ and made a *prima facie* observation that the present case appears to be squarely covered by the said decision. Relevant portion of the order dated 17.06.2022 reads as under:

“As we have already noticed in our order dated 31.03.2022, the challenge in the present writ petition is to the assessment order dated 15.04.2021 passed under Section 143(3) read with Sections 143(3A) and 143(3B) of the Act.

In the light of the provision contained in Section 143(3D) of the Act, *prima facie* the assessment order dated 15.04.2021 does not appear to be tenable in law. In fact, on this point there is already a Division Bench judgment of the Delhi High Court in **Gurgaon Realtech Ltd. v. National Faceless Assessment Centre Delhi [436 ITR 280]**. The matter appears to be squarely covered by the said decision.

Nonetheless, as requested by Mr. Prasad, we reluctantly grant two (02) weeks' further time to file counter affidavit by respondents making it clear that if

¹ (2021) 436 ITR 280 (Delhi)

counter affidavit is not filed by the next date, Court may proceed with the matter on the basis of available materials.”

6. In the hearing today, Mr. J.V.Prasad, learned Senior Standing Counsel for Income Tax Department in his usual fairness submits that counter affidavit has not been filed but having regard to the challenge made to the impugned order of assessment Court may consider passing appropriate order.

7. Section 143 of the Act deals with framing of assessment. Subsections (3A), (3B) and (3C) were inserted in Section 143 of the Act by the Finance Act, 2018 with effect from 01.04.2018. By the aforesaid provisions, the scheme of faceless assessment was introduced in the assessment proceedings so as to impart greater efficiency, transparency and accountability by eliminating interface between the assessing officer and the assessee.

8. Subsection (3D) was inserted in Section 143 of the Act by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, with effect

from 01.04.2021. As per sub-section (3D), nothing contained in sub-section (3A) and sub-section (3B) shall apply to the assessment made under sub-section (3) or under Section 144, as the case may be, on or after 01.04.2021.

9. From the above, it is evident that subsections (3A) and (3B) of Section 143 of the Act were not available to the assessing officer to frame assessment under subsection (3) of Section 143 or under Section 144 of the Act post 01.04.2021.

10. At this juncture we may mention that the provision of faceless assessment continued in the form of Section 144B of the Act which was inserted by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, with effect from 01.04.2021.

11. Reverting back to the impugned order of assessment, we find that the same was issued under Section 143(3) read with Sections 143(3A) and 143(3B) of the Act on 15.04.2021, admittedly, after 01.04.2021 when respondent

No.1 had no jurisdiction to invoke subsections (3A) and (3B) of Section 143 of the Act.

12. In the hearing today, Mr. J.D.Mistri, learned Senior counsel has submitted that to ensure that the remedy of appeal is not lost on account of limitation, petitioner had filed statutory appeal before the first appellate authority under Section 246A of the Act on 25.05.2021. An application for stay was also filed. Interestingly, petitioner was directed to pay 20% of the demand first and then reapply for stay. His submission is that when the impugned order of assessment is *ex facie* without jurisdiction, question of payment of 20% of the demand does not arise. That apart, this Court under Article 226 of the Constitution of India may set aside the impugned order of assessment notwithstanding the fact that petitioner has filed appeal before the first appellate authority.

13. In the decision rendered in **Gurgaon Realtech Ltd.** (supra), Delhi High Court was also confronted with a similar fact situation. It has been held that if the challenge to the assessment order is made on the ground that it was

passed without jurisdiction, then notwithstanding the fact that an appeal was filed, albeit, only to ensure that the limitation is not crossed, there would not be any impediment in proceeding ahead with the matter by the writ court. Finally, after adverting to Section 143 of the Act, more particularly to subsections (3A) and (3B) thereof, Delhi High Court held that after 01.04.2021, the assessment order ought to have been passed in consonance with the provisions of Section 144B of the Act.

14. We are in respectful agreement with the views expressed by the Delhi High Court.

15. That being the position and on due consideration, we are of the unhesitant view that the impugned assessment order dated 15.04.2021 is clearly without jurisdiction. The same is hereby set aside and quashed. All consequential notices issued pursuant thereto would also stand quashed. However, it would be open to respondent No.1 to proceed with the assessment in accordance with and if permissible in law.

16. Writ petition is accordingly allowed.

17. Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

UJJAL BHUYAN, CJ

SUREPALLI NANDA, J

11.07.2022
vs