IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

ITA No. 110 of 2009 (O&M)

COMMISSIONER OF INCOME TAX, HISAR

Vs

SMT SHAKUNTALA DEVI

Adarsh Kumar Goel And Daya Chaudhary, JJ

Dated : July 21, 2009

Appellant Rep. by : Mr. Sanjeev Kaushik, Adv
Respondent Rep. by : Mr. Pankaj Jain, Adv

Income tax - Sec 147, 143(2) - AO invokes powers u/s 147 during pendency of assessment - CIT(A) and Tribunal hold that when the assessment was not done, the AO should have issued Sec 143(2) notice rather than Sec 148 notice during the pendency and hold the notice invalid - held, the lower appellate authorities have overlooked the amendment carried out in Sec 147 by way of Explanation 2(b) which imposes no bar on Revenue to initiate proceedings u/s 143(2) even if Sec 147 proceedings are not valid in this case - Issue remanded

JUDGEMENT

Per : Adarsh Kumar Goel, J :

1. The revenue has preferred this appeal under Section 260A of the Income Tax Act, 1961 (for short, "the Act") against the order of the Income Tax Appellate Tribunal, Chandigarh Bench"A" Chandigarh dated 31.7.2008 passed in I.T.A.No. 314/Chandi/2008 for the assessment year 2004-05, proposing to raise the following substantial question of law:

"Whether on the facts and in the circumstances of the case and in law, the Ld. ITAT was justified in holding that proceedings initiated under Section 147 of the Act were not in accordance with law by ignoring the specific provisions contained in Explanation 2(b) to Section 147 of the Income Tax Act, 1961 substituted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989?"

2. The assessee filed her return on 1.11.2004. The Assessing Officer came across certain material showing escapement of income, on which proceedings were initiated under Section 147 of the Act and notice was issued on 18.8.2005. After considering the reply of the assessee, assessment was made on 7.12.2006, making additions to the declared income.

3. On appeal, the CIT(A) set aside the notice under Section 148 of the Act on the ground that the same could not be issued during the pendency of the assessment and only remedy for the assessing officer was to proceed under Section 143(2) of the Act. The said view has been upheld by the Tribunal. The Tribunal, inter alia, relied upon the judgment of Calcutta High Court in CESC Ltd and another v. DCIOT 263 ITR 402, judgment of Bombay High Court in CIT vs. Rajendra G.Shah 247 ITR 772 and judgment of this Court in Vipin Khana vs. CIT and others 255 ITR 220. In Vipin Khanna's case, reference was made to Circular of CBDT explaining that after April 1989, it was necessary to frame assessment in each and every case and the Assessing Officer could

process the return under Section 143(1)(a) of the Act. If he wanted to verify the return, he could issue notice under Section 143 (2) requiring the assessee to produce books of account and other material in support of the return. Thereafter, he could make an assessment under sub-section (3) of Section 143 of the Act. The said notice had to be issued within 12 months of the end of month in which the return was furnished. If return was not processed within 12 month of the end of the month in which the return was taken, the processing was deemed to have been done in terms of the return. It was further held that unless the return was disposed of, no notice in respect of the same could be issued as held by the Hon'ble Supreme Court in Trustees of H.E.H. The Nizam's Supplemental Family Trust v. CIT 242 ITR 381. The judgments of the Calcutta High Court and Bombay High Court in CESC Limited's case and Rajendra G.Shah's case (supra) are based on the said judgment of the Hon'ble Supreme Court. It was further observed that there was no bar for the AO to proceed under Section 143(2) of the Act.

4. We have heard learned counsel for the parties.

5. Learned counsel for the Revenue at the time of hearing made an alternative submission that once the Assessing Officer had right to proceed under Section 143(2), the proceedings for assessment would not be vitiated merely because the notice was under Section 147 instead of Section 143(2) of the Act.

6. Learned counsel for the revenue pointed out that if the notice was under Section 143(2) of the Act, the assessment would have been perfectly valid and in such a situation, the same could not be invalid, as no prejudice was caused in any manner. The assessee was given full opportunity and she gave reply which was duly considered in the assessment made.

7. Learned counsel for the assessee submitted that since notice was under Section 147 of the Act and was invalid, the view taken by the CIT(A) as well as by the Tribunal was correct.

8. The judgments relied upon in the impugned orders do not consider the effect of amendment by way of explanation 2(b) to Section 147. Even if we assume that proceedings could not be initiated under Section 147 in respect of pending assessment, there being no bar in the present case to proceed under Section 143(2), proceedings were valid. It is true that this aspect was not raised by the revenue before the CIT(A) or before the Tribunal but this being purely legal point arising out of the admitted facts, we allow this point to be raised at this stage.

9. Accordingly, we hold that the view taken by the CIT (A) and the Tribunal in holding that the assessment was vitiated is not correct.

10. We, thus, allow this appeal and set aside the orders of CIT(A) and the Tribunal. However, we remand the matter to CIT(A) for fresh examination.