THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.04.2013

+ W.P.(C) 7944/2011

RURAL ELECTRIFICATION CORPORATION LTD. ..... Petitioner

versus

COMMISSIONER OF INCOME TAX-(LTU) AND ANR ..... Respondents

AND

+ W.P.(C) 7945/2011

RURAL ELECTRIFICATION CORPORATION LTD. ..... Petitioner

versus

COMMISSIONER OF INCOME TAX-(LTU) AND ANR ..... Respondents

AND

+ W.P.(C) 7946/2011

RURAL ELECTRIFICATION CORPORATION LTD. ..... Petitioner

versus

COMMISSIONER OF INCOME TAX-(LTU) AND ANR ..... Respondents

AND

+ W.P.(C) 7947/2011

RURAL ELECTRIFICATION CORPORATION LTD. ..... Petitioner

versus

COMMISSIONER OF INCOME TAX-(LTU) AND ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr M.S. Syali, Sr. Advocate with Mr Satyen Sethi, Mr Mayank Nagi and Mr Arta Trana Panda, Advocates.

For the Respondent : Mr Kiran Babu, Sr. Standing Counsel.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These writ petitions pertain to the assessment year 1999-2000, 2000-2001, 2001-2002 and 2002-2003. In these petitions the common issue relates to the initiation of reassessment proceedings by issuance of notices under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). All the four notices were issued on 23.03.2011.

2. The purported reasons for believing that income had escaped assessment have been disclosed as under:-

> "**11. Reasons for the belief that income has escaped assessment**.
> 1. In this case assessment under section 147/148 was completed on 17.2.2005 at an income of Rs.249,38,81,974/-. The assessee company is a public financial institution engaged in business of providing finance for rural electrifications.
>
> 2. Information was received from Addl. CIT, Karimnagar Range, Karimnagar vide his letter No. Addl. CIT/KNR/Appeals/2010-11 dated 1.11.2010 that the assessee company had advanced a loan to M/s. The Cooperative Electrical Supply Society Ltd., Siricilla. This Society has created a corpus of special fund amounting to Rs.10 crores. The society earned interest

on this special fund but did not disclose it in its return for the reason that the money belonged to M/s. REC i.e. Assessee Company and any income earned was also on behalf of Assessee Company. The ITAT, Hyderabad in its consolidated order in ITA No. 1112 to 1115 & 1198 to 1199 of 2005, 1635 of 2008 and 570 of 2009 dated 13.01.2010 for assessment year 1999-00 to 2006-07 had held that this income was not taxable in the hands of the society but ought to be taxed in the hands of the assessee company. The ACIT-Cir-1, Karimnagar vide his letter No.F.No. CESS/ACIT/Knr. has forwarded the details or such income at Rs.73,50,000/- on account of interest on REC Bonds & Rs.9,80,877/- on account of interest from commercial banks for the relevant assessment year.

3. Therefore, I have reasons to believe that income of Rs.83,30,877/- has escaped assessment within the meaning of section 147 which warrants issue of notice under section 148 r.w.s. 150 of the Income tax Act, 1961."

3. We may point out at this stage that subsequent to the reasons being supplied to the petitioner, objections were filed and the same had been rejected by virtue of order dated 20.10.2011. Shortly thereafter these writ petitions were filed before this court. At the initial stage, this court had directed that the proceedings may go on pertaining to the said notices under Section 148 of the said Act and orders may also be passed but the same shall not be given effect to. Subsequently, the Assessing Officer had passed assessment orders in respect of each of the years. Although those orders were served on the petitioner, we had, by virtue of an order dated 01.02.2012, indicated that those orders would be of no effect.

4. Coming back to the purported reasons indicated by the Assessing Officer, which we have extracted above, we find that the assessments are sought to be reopened on the ground that the Income Tax Appellate Tribunal, Hyderabad had

passed a consolidated order dated 13.01.2010 pertaining to assessment years 1999-2000 to 2006-2007 and held that the interest income was not taxable in the hands of the Co-operative Electrical Supply Society Ltd., Siricilla but, was taxable in the hands of the petitioner. As can be seen from the purported reasons, the petitioner had advanced loans to the said Co-operative Electrical Supply Society Ltd. which created a special corpus fund. The said society earned interest on the special fund but did not disclose it in its returns of incomes on the ground that the money, as mentioned in the purported reasons, actually belonged to the petitioner and that any income earned thereon was on behalf of the petitioner. The Tribunal agreed with the submissions of the said Co-operative Electrical Supply Society Ltd. and held that the said interest income was not taxable in the hands of the society but ought to be taxed in the hands of the petitioner.

5. The learned counsel for the petitioner pointed out that though the Tribunal had returned a finding that the said interest income was not taxable in the hands of the said society, there was no specific or clear finding that the same should be taxed in the hands of the petitioner. The exact findings returned by the Tribunal are as under:-

> "… Applying the aforesaid tests to the facts of the case before us, it is clear that there is no diversion of income by overriding title by M/s. REC in favour of the assessee-society. The income by way of interest, etc. has accrued to M/s. REC in its own right. The amount so collected was retained by M/s. REC and was available with it for use and application as per its directions. The income in this case never reached the assessee by Virtue of any overriding title. A reading of various clauses of the Revised Rules on the Constitution and Administration of Special Fund dated 30.1.1997 makes it clear that the first charge on the Special Fund Account shall be of M/s. REC and that it shall be the outstanding loan against the assessee and the assessee is merely a custodian of the amount in the Special

> Fund created as per instructions and rules framed by M/s. REC. In these facts of the case, we hold that there is no diversion of income at source by overriding title by M/s. REC in favour of the assessee society and the ownership of the special fund remains with M/s REC and therefore, the income from the special fund amount does not accrue to the assessee. In this view of the matter, we hold that the interest accrued on the special fund amount including the FDs made there from does not accrue to the assessee society and the assessee is accordingly not liable to pay tax thereon. Accordingly, the grounds of appeal taken by the assessee in its appeals are allowed."

It is, therefore, apparent that the Tribunal had come to the clear conclusion that the interest income was not to be taxed in the hands of the said society but was taxable in the hands of the petitioner. It is on this basis that the Assessing Officer issued the impugned notices under Section 148 seeking to reopen the assessments for the assessment years 1999-2000 to 2002-2003.

6. Mr. Syali, senior advocate, appearing on behalf of the petitioner submitted that all the notices under Section 148 had been issued beyond the period of six years stipulated in Section 149 of the said Act. He submitted that the bar of limitation prescribed in Section 149 would be applicable unless the revenue was able to establish that the present cases fell within Section 150 of the said Act read with Explanation 3 to Section 153.

7. The relevant provisions need to be referred to at this juncture. They are as under:-

> **"150. Provision for cases where assessment is in pursuance of an order on appeal, etc. –** (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or

recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

(2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."

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"**153. Time limit for completion of assessments and reassessments. –**

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(3) The provisions of sub-sections (1), (1A), (1B) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time—

(*i*) xxxx xxxx xxxx xxxx

(*ii*) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263, or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

xxxx xxxx xxxx xxxx xxxx

Explanation 2.— Where, by an order referred to in clause (*ii*) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

Explanation 3.— Where, by an order referred to in clause (*ii*) of sub-section (3), any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."

(underlining added)

8. After reading the said provisions, Mr Syali submitted that Section 150 could be invoked only if the reassessment was sought to be done as a consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the said Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

9. Referring to the specific provisions of Section 150(1) of the said Act, Mr Syali submitted that these provisions were in pari materia to the second proviso to Section 34(3) of the Income Tax Act, 1922 which had been interpreted by the Supreme Court in the case of ***ITO Vs. Murlidhar Bhagwan Das*****: 52 ITR 335 (SC)**. For the sake of convenience the provisions of Section 34(3) of the 1922 Act are reproduced below:-

"(3) No order of assessment or reassessment, other than an order of assessment under Section 23 to which clause (c) of sub-section (1) of Section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section

(1) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable:

Provided that where a notice under clause (b) of sub-section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if at the time of the assessment or re-assessment the four years aforesaid have already elapsed:

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a re-assessment made under Section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to given effect to any finding or direction contained in an order under Section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A."

(underlining added)

The said decision was that of a Constitution Bench in which the Supreme Court took the view that the said proviso was applicable in respect of an order passed against the person whose assessment was sought to be reopened and only to such other persons who were intimately connected such as a partner or member of the HUF. The Supreme Court held as under:-

> "We would, therefore, hold that the expression "any person" in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

10. As mentioned above, an illustration of such a category of 'intimately connected' persons, the Supreme Court referred to a partner or partners of a firm and a member of a Hindu Undivided Family. The Supreme Court observed that in such cases though the persons may not have been parties by name to the appeal, their assessments would depend on the assessments of the partnership firm or the

Hindu Undivided Family. It is obvious that it would not include the assessment of any other person who was not intimately connected with the person in whose case the order had been passed. The Supreme Court also held that the said proviso to Section 34(3) of the 1922 Act would not save the time limit prescribed under Section 34(1) of the 1922 Act in respect of an escaped assessment of a year other than that which was the subject-matter of the appeal or the revision, as the case may be.

11. When the Income Tax Act, 1961 was enacted, Section 153 did not contain the Explanations 2 and 3. Those explanations were introduced subsequently in 1964 after the Supreme Court decision in ***Murlidhar Bhagwan Das*** *(supra).* It is therefore, apparent that the two explanations were added so as to supersede the view taken by the Supreme Court in respect of the 1922 Act. Explanation 2 in Section 153 makes it clear that even where any income is excluded from the total income of the assessee from a particular assessment year, then an assessment of such income for another assessment year shall, for the purpose of Section 150 as also of Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. In other words, a finding in respect of a different year can also be used for the purposes of invoking the provisions of Section 150 of the said Act, by virtue of the deeming provision contained in Explanation 2 in Section 153 of the said Act. This would otherwise not have been available in view of the decision of the Supreme Court in ***Murlidhar Bhagwan Das*** *(Supra).* Similarly, Explanation 3 stipulates that where, by an order inter-alia passed by the Tribunal in an appeal, any income is excluded from the total income of one person and held to be the income of another person, then, assessment of such income on such other person shall, for the purposes of Section 150 as also Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said

order. However, this deeming provision is subject to a proviso that such other person ought to be given an opportunity of being heard before such an order is passed.

12. Coming back to the factual matrix of the present case, Mr Syali submitted that the provisions of Section 150 read with Explanation 3 in section 153 would apply only if an opportunity of hearing had been given to the petitioner herein, before the Tribunal passed the order dated 13.01.2010 in the case of the said society wherein the Tribunal held that the interest income was not taxable in the hands of the said society but ought to have been taxed in the hands of the petitioner herein. Mr Syali submitted that this was a condition precedent before the deeming clause could be invoked and thereby the provisions of Section 150 could be attracted so as to lift the bar of limitation prescribed under Section 149 of the said Act.

13. Mr Syali placed reliance on the decision of the Gujarat High Court in the case of ***A.B. Parikh vs. Income - tax Officer*: 203 ITR 186 (GUJ)**. In particular, he placed reliance on the following observations of the said High Court:

> "Section 149 lays down the time limits for issuance of notice under section 148. Section 150(1) forms an exception to it and provides that a notice under section 148 could be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to, any finding or direction contained in an order in appeal, reference or revision under the Act. Similarly, section 153(3)(*ii*) using the same language as could be seen from the extract made above, provides that no time limit applies for completion of assessment which is made in consequence of, or to give effect to, any such finding or direction. Exclusion of time limit will depend on the same contingencies in both the cases. *Explanations 2* and *3* to section 153 deem certain assessments to

have been made in consequence of, or to give effect to, a finding or direction. We need not advert to *Explanation 2*, since it concerns the very assessee covered by the order in question. *Explanation 3* referring to "another person" is relevant for our case, and the fiction enacted therein applies for the purposes of both section 150 and section 153. This is evident from the user therein of the set of expressions "for the purposes of section 150 and this section."

There is no gainsaying that this specific reference gives no room for exclusion of the application of the fiction set forth in *Explanation 3* to section 153 even in respect of section 150. The result is for the purpose of section 150, so as to enable the authority to issue the notice under section 148 at any time without being curtailed by the time limit prescribed under section 149, there must be satisfaction of the ingredients under *Explanation 3* to section 153. The endeavour of Mr. M.R. Bhatt, learned counsel for the respondent, was to bring the matter within the ambit of *Explanation 3* to section 153."

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"We must point out that there is no discussion in the pronouncement of the implications of *Explanation 3* to section 153. Even otherwise, we are unable to spell out any parity between the facts of the case dealt with by the High Court of Patna and the facts of the present case. There the parties were very much in the picture from the inception putting forth the stand with reference to status and, in that view, it was held that they were vitally interested in the firm in which they were partners and in that context *Explanation 3* to section 153 would come to the rescue of the Revenue and against the assessee. Our analysis of the implications of the provisions of the Act relevant for the purpose of our case, as done above, has left us with no other alternative but to allow this special civil application. Since we have sustained the first point relating to bar of limitation and that has served the cause of the petitioner, we have not gone to the second point. Accordingly, we allow this special

civil application and the impugned show cause notice as per annexure A is quashed. We make no order as to costs."

14. It is apparent from the said decision that before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied. Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person. The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard. In the context of the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner. The fact that such an opportunity was not given, has been recognized by the revenue in the order disposing of the objections dated 20.10.2011, where it has been observed that there was no need to have afforded an opportunity to the petitioner. Even in the counter affidavit, the revenue has taken the stand that it was not at all necessary for the Income Tax Appellate Tribunal to have allowed an opportunity of hearing to the petitioner because that was in respect of the assessment proceedings pertaining to the said society.

15. From the above, it is clear that no opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society. As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered. That being the position, Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted.

16. The learned counsel for the revenue submitted that an opportunity of hearing could not be given to the petitioner because at the stage when the Tribunal at Hyderabad was hearing the appeal pertaining to the said society, there was no way to ascertain as to whether the decision would go in favour of the said society or not. In particular, the learned counsel for the respondent / revenue submitted that the question as to whether the interest income could be taxed at the hands of the petitioner would only come to be decided after the Tribunal came to the conclusion that it was not to be taxed in the hands of the society and, till that stage, there was no question of granting any opportunity of hearing to the petitioner. Be that as it may, the specific condition for attracting the deeming provision of Explanation 3 to Section 153 requires that the person ought to be given an opportunity of being heard before an order is passed whereunder any income is excluded from the total income of one person and held to be the income of another person. It is not as if the revenue is being faulted or the Tribunal is being faulted for not granting an opportunity of hearing to the petitioner. The placing of a blame is not the issue. What is relevant is whether the petitioner had been given an opportunity of hearing before the Tribunal concluded that the interest income was taxable in its hands and not in the hands of the society. It is obvious that this flows from the general principle that no prejudice should be caused to anybody without that person having been heard.

17. In view of the fact that the deeming provision provided in Explanation 3 to Section 153 does not get attracted in the present case because an opportunity of hearing had not been given to the petitioner, the provisions of Section 150 would also not be attracted. In such a situation, the normal provisions of limitation prescribed under Section 149 of the said Act would apply. Those provisions restrict the time period for reopening to a maximum of six years from the end of

the relevant assessment year. In the present writ petitions, the notices under Section 148 have all been issued beyond the said period of six years. Therefore, we are of the view that the said notices are time barred.

18. Consequently, the writ petitions are allowed. The impugned notices under Section 148 of the said Act are set aside and so, too, are all the proceedings pursuant thereto, including the assessment orders that have been passed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

APRIL 23, 2013
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