A.F.R.
RESERVED

INCOME TAX APPEAL NO. 89 OF 2003

Commissioner of Income-tax, Gorakhpur----**Appellant**

Versus

M/s All India Children Care & Educational

Development Society, Azamgarh ----------**Respondent**

Hon'ble Prakash Krishna,J
Hon'ble Manoj Kumar Gupta,J

(Delivered by Prakash Krishna,J)

Present appeal has been filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by the department against the order dated 26th June, 2002 passed by the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as 'the Tribunal') in I.T.A. Nos. 21, 22, 23 & 24(Alld)/2002 for the assessment years 1993-94, 1994-95, 1995-96 and 1997-98.

The assessee-respondent did not file returns of its income voluntarily for the assessment years 1993-94 to 1995-96. The Income Tax Officer, Azamgarh issued notice under Section 142(1) dated 31st July, 1997 and notices issued under Section 148 for the assessment years 1993-94 to 1995-96. In response, the assessee-respondent filed returns for all these assessment years. The cases were transferred to the Deputy/Joint Commissioner of Income Tax (Asstt.) Special Range Varanasi who was having jurisdiction as the return of loss for the assessment year 1997-98 was more than Rs.10 Lakhs. The assessee participated in the assessment and reassessment proceedings and claimed exemption initially under Section 11 and subsequently under Section 10(22) of the Act. The claim of exemption was denied by the Assessing Authority for the reasons recorded in the assessment order and the assessment was completed by determining the

positive income for all these assessment years. The matter was carried in appeal before the Commissioner of Income Tax (Appeal), Varanasi. All of them were dismissed by a common order dated 10th January, 2002. The assessee carried the matter in further appeal before the Tribunal who allowed all these appeals by the order under appeal holding that the Assessing Officer who framed the assessment/reassessment proceedings was not the competent authority and the reasons recorded for initiating the reassessment proceedings are bad. Hence, the present appeal.

Present appeal has been admitted on the following substantial questions of law as framed in the memo of appeal :–

(1) "*Whether on the facts and circumstances of the case, the I.Tax Appellate Tribunal is legally justified to hold that since there was no jurisdiction order u/s 124 or u/s 127 of the I.T. Act, 1961 conferring jurisdiction over the case to the Joint Commissioner of I.Tax, Varanasi, the assessment order passed by him is a nullity and without jurisdiction.*

(2) Whether on the facts and circumstances of the case, and having regard to the fact that the assessee never raised the issue of jurisdiction during the course of assessment proceedings nor was it taken as a ground of appeal filed before the Commissioner of Income Tax (Appeals), was the Tribunal legally justified in allowing the assessee's preliminary objection that the Joint Commissioner of I.Tax, Varanasi did not have the jurisdiction to pass the assessment order, particularly when it was raised before the Tribunal for the first time.

(3) Whether the Tribunal erred both in law and on facts in holding that the assessment order is without and jurisdiction and hence a nullity in view of the statutory provisions provided in Ss. 124(2), (3) (a) and (b) and Ss. 124(4) of the I.Tax Act, 1961 whereby the assessee was not entitled to raise any question relating to the jurisdiction of the Assessing Officer and if question of jurisdiction is raised, it shall be determined by the Commissioner, Chief Commissioner, the Director General or the CBDT, as the case may be, instead of being raised as a preliminary objection for the first time before the Tribunal.

(4) Whether having regard to the basic fact that due to internal administrative changes made in May, 1997 whereby the charge of C.I.T. Varanasi was created, and vide Notification No. 54 dated 30.5.1997 issued by Chief C.I.T. Lucknow, the CIT Varanasi was assigned

territorial jurisdiction over Gorakhpur Range thereby bringing cases over income or less of Rs.10 lakhs or above in the jurisdiction of Jt. CIT Varanasi, was the Tribunal legally justified and correct in taking the view that an order was necessary for conferring jurisdiction u/s 124 or u/s 127 upon the Jt. C.I.T., Varanasi for passing the assessment order in the instant case and since such an order was not produced therefore the assessment order was without jurisdiction and hence a nullity in law.

(5) *Whether on the facts and circumstances of the case and in the light of the statutory provisions relating thereto and in view off the administrative charges made in May 1997 whereby the jurisdiction of the C.I.T., Varanasi was enlarged to cases of Gorakhpur Range thus bringing the assessee within the jurisdictional area of the Joint C.I.T., Varanasi who was the Assessing Officer in the instant case, was any opportunity of hearing to the assesse necessary and was any order conferring jurisdiction upon the Assessee Officer necessary in the eyes of Law?*

(6) *Whether on the facts and circumstances of the case, was the Tribunal legally justified in holding that there was no nexus between reasonable belief and escapement of the assessee's income and consequently the notices u/s 148 are void ab-initio being based on imagination, presumptions and assumptions of the Assessing Officer.*

(7) *Whether having regard to the fact that Assessing Officer had duly recorded reasons before issuing notices u/s 148 and had formed a belief that the assessee was running the educational institutions for profit and had undisclosed investments in fixed assets, could it be held by the Tribunal that the Assessing Officer had not recorded any valid reasons regarding the escapement of the assessee's income before issuing notices u/s 148 and whether the Tribunal was legally justified in its view.*

(8) *Whether on the facts and circumstances of the case was the Tribunal legally justified in holding that since the Assessing Officer had not recorded reasons for issuing notices u/s 148 in the name of the assessee consequently the notices cannot be said to have been validly served upon the assessee.*

(9) *Whether on the facts and circumstances of the case and having regard to the fact that the notices u/s 148 were issued and served in the name of "The Manager, All India Children Care and Welfare Society", was the Tribunal justified in law and on facts to hold that the notices were neither validly recorded nor correctly served upon the assessee and, if so, could, it not have been covered and serve by s.292B of the Income-Tax Act?*

(10) *Whether the Tribunal's order dated 26th June 2002 having been decided only on preliminary issues without going into he merits of the case and without giving any findings on the various points raised by the Revenue relating to the Profit earning activities of the assessee and siphoning off of funds, can be said to be legally justifiable and legally sustainable order in the eyes of Law.*"

Heard Sri Shambhu Chopra, learned counsel for the appellant and Sri Ashish Bansal, learned counsel for the assessee-respondent.

Question Nos. 1 to 5 :-

Questions no. 1 to 5 are intermingled and basically they relate to the question whether the question of jurisdiction of the Assessing Authority not raised before, it could be raised for the first time in second appeal before the Tribunal. Therefore, we are proposing to consider the question nos. 1 to 5 together.

Learned counsel for the appellant submits that in view of the Chapter XIII, *B.—Jurisdiction* of the Income Tax Act, 1961, question of jurisdiction is primarily required to be agitated first before the Assessing Authority itself, within the period prescribed under sub-section (5) of Section 124 of the Act. The Act provides the complete mechanism for raising such question of jurisdiction and its determination as also the authority who will determine it. Submission is that the Tribunal is not the competent authority under the scheme of the Act to entertain such kind of question for the first time nor it could venture to do so.

In reply, learned counsel for the respondent submits that question of jurisdiction of the Assessing Authority goes to very root of the matter and as such, it can be raised at any stage in appeal before the Tribunal also. He further submits that sufficient opportunity was afforded by the Tribunal to establish that the authority who passed the assessment order was competent authority by producing the relevant documents but the department failed. He further submits that the notice of assessment was

issued by the I.T.O. Azamgarh and no opportunity before transfer of cases to the Joint Commissioner of Income Tax (Asstt.) Special Range, Varanasi, was afforded.

Considered the respective submissions of the learned counsel for the parties and perused the record.

A perusal of the assessment order would show that the assessee filed the return in response to the notice issued to it. Sub-section (3) & (4) of Section 124 reads as follows:

> *"Jurisdiction of Assessing Officers.*
>
> *124. (1) ….*
>
> *….*
>
> *(2) ….*
>
> *….*
>
> *(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer-*
>
> *(a) where he has made a return [under sub- section (1) of section 115WD or] under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub- section (1) of section 142 or [sub-section (2) of section 115WE or] subsection (2) of section 143 or after the completion of the assessment, whichever is earlier;*
>
> *(b) where he has made no such return, after the expiry of the time allowed by the notice under [sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144] to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.*
>
> *(4) Subject to the provisions of sub- section (3), where an assessee calls in question the jurisdiction of an- Assessing Officer, then the Assessing Officer shall, if not satisfied with*

> *the correctness of the claim, refer the matter for determination under sub- section (2) before the assessment is made."*

Section 124(3)(a) provides that no person shall be entitled to call in question the jurisdiction of an Income-tax Officer after the expiry of one month from the date on which he has made a return under sub-section (1) of section 139 or after the completion of the assessment, whichever is earlier.

A perusal of the assessment order would show that no such question of jurisdiction of the Joint Commissioner of Income Tax (Asstt.) was raised before it. This factual aspect of the case could not be disputed even by the learned counsel for the respondent. The circumstances under which the file was transferred from Income Tax Officer, Azamgarh to Joint Commissioner of Income Tax finds mention in the following words therein:

> "Since the return of loss for the Assessment Year 1997-98 was above Rs.10 lakh, the case records were received on transfer from the ITO, Azamgarh on 7.7.1999 as the correct jurisdiction over the case lies with this office. Since in this case there are common issues involved, the assessment order for all four years is being passed by way of common order."

The question of jurisdiction could have been raised before the Assessing Officer within the period of one month from the date of filing of return as envisaged under sub-section (3)(a) of Section 124, but it was not raised. Even after assessment before the First Appellate Authority, any such plea was not put forward. This fact finds mention in para-5 of the order of C.I.T. that no objection regarding jurisdiction or otherwise was raised during all these proceedings. The A.O. has passed the assessment order on the basis of the return filed by the assessee and details furnished by the assessee during the proceedings in response to notices under Section 143(2) and 143(1).

The Apex Court in ***Rai Bahadur Seth Teomal versus The Commissioner of Income Tax and the Commissioner of Exces***, AIR 1959 SC 742 considered the similar provisions as they existed under the Income Tax Act, 1922 in the light of its earlier pronouncement and of the Fedral Court. Heading of Section 64 of old Income Tax Act was "place of assessment" and its third proviso reads as follows:

> "Provided further that if the place of assessment is called in question by an assessee the Income Tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made."

The Apex Court has held as follows:

> "Thus under s. 64(3) the question of determination as to the place of assessment only arises if an objection is taken by the assessee and the Income Tax Officer has any doubts as to the matter. But the determination is to be by the Commissioner of Income Tax or the Central Board of Revenue. The Act does not 'contemplate any other authority."

We find that similar kind of provision is contained in sub-section (4) of Section 124. In this view of the matter, it is the Commissioner; or where the question is one relating to areas within the jurisdiction of different Commissioners concerned or, if they are not in agreement, by the Board lies. It necessarily excludes any other Court or authority. Complete machinery for determination of place of assessment or the authority for assessment is provided for under Section 124.

Respondent in the present case submits that there is a illegal assumption of jurisdiction as the officer who made assessment had no jurisdiction at all to make the assessment. Opportunity was given by the Tribunal to the department to produce the transfer order transferring the case from office of Income Tax Officer, Azamgarh to Joint Commissioner of

Income Tax (Asstt.), Varanasi but no such order was produced. In any case, no opportunity of hearing before passing of the transfer order was given.

The answer to the question posed by the respondent is pure and simple. The scheme of the Act shows that no appeal in regard to the place of assessment is contemplated under the Act. Under Section 124, a question as to the place of assessment, when it arises is determined by the Commissioner, by the Commissioners if more than one Commissioner is involved and then by the Board. The Apex Court in the case of Seth Teomal (supra) has quoted with approval a judgment in the case of ***Wallace Brothers & Co. Ltd. v. Commissioner of Income-tax, Bombay, Sind and Baluchistan***, AIR 1945 F. C. R. 65. The relevant extract is reproduced below:

> "The question then-arises whether the objection as to the place of assessment, i. e., by the Income-tax Officer of Calcutta could be challenged in appeal to the Appellate Assistant Commissioner and then before the Appellate Tribunal. In our opinion it could not be. The scheme of the Act shows that no appeal in regard to the objection to the place of assessment is contemplated under the Act. Under s. 64(3) of the Act a question as to the place of assessment, when it arises, is determined by the Commissioner. Any such order cannot be made a ground of appeal to the Appellate Assistant Commissioner under s. 30 of the Act which provides for appeals against orders of assessment and other orders enumerated in s. 30 but no appeals is there provided against orders made under s. 64(3). Similarly appeals to the Appellate Tribunal which lie under s. 33 of the Act also do not provide for any appeal on the question of the place of assessment. In Wallace Brothers' case (3) at p. 79 Spens, C. J., after referring to s. 64(3) and the proviso thereto said: " These provisions clearly indicate that the matter is more one of administrative convenience than of (1) (1927) I.L.R. 49 All. 616. (2) [1936] 5 I.T.R. 739. (.3) [1945] F.C.R. 65: 13 I.T.R. 39.jurisdiction and in any event it is not one for adjudication by the Court..... This confirms us in the view that the scheme of the Act does not contemplate an objection as to the place of assessment being raised on an

> appeal against the assessment after the assessment has been made. As we have already pointed out, the objection was not raised in the present case even before the Appellate Income-tax Officer but only before the Appellate Tribunal ". There is nothing in the Bidi Supply case (1) which in any way detracts from the efficacy of the decision of the Federal Court in Wallace Brothers' case (2). We have already said that Bidi Supply case (1) deals with the vires of s. 5(7A).”

In view of the above, question as to place of assessment could not have been gone into by the Tribunal and it definitely committed error of law on the facts of the present case in entertaining it and adjudicating it. The decision taken by the Tribunal is based on ignorance of scheme of the Income Tax Act, 1961 as also Section 124 thereof. Probably, attention of the Tribunal was not drawn to the relevant statutory provisions by the department.

Our above view find support from the following decisions of this Court :—

(1) *Commissioner of Wealth Tax versus Ravi Malhotra, (2007) 292 ITR 171 ; and*

(2) *Hindustan Transport Co. versus Inspecting Assistant Commissioner of Income-tax and another, (1991) 189 ITR 326.*

After close of the argument, learned counsel for the assessee-respondent has filed photo copies of the following judgments.

(1) *Ajantha Industries and others v. Central Board of Direct Taxes, (1976) 102 ITR 281 ;*

(2) *National Thermal Power Co. Ltd. v. Commissioner of Income Tax, (1998) 229 ITR 383 ;*

(3) *West Bengal State Electricity Board v. Dy. Commissioner of Income Tax, (2005) 278 ITR 218 ;*

(4) *Commissioner of Income Tax v. Bharat Kumar Modi, (2000) 246 ITR 693 ;*

(5) *Commissioner of Income-tax, Meerut versus Hari Raj Swarup & Sons, (1982) 138 ITR 462;*

(6) *Swaran Yash v. Commissioner of Income Tax, (1982) 138 ITR 734 ;*

(7) *Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, (1971) 82 ITR 147 ;*

(8) *Income Tax Officer, I Ward v. Lakhmani Mewal Das, (1976) 103 ITR 437 ;*

(9) *Ganga Saran & Sons P. Ltd. v. Income Tax Officer, (1981) 130 ITR 1 ; and*

(10) *Indra Prastha Chemicals Pvt. Ltd. v. Commissioner of Income Tax, (2004) 271 ITR 113.*

It is not necessary to deal with them individually as none of them has any bearing to the issue involved in the appeal. Section 124 of the Income Tax Act and the scheme laid down therein is not subject matter of consideration in any of these decisions. They laid down broad proposition of law that question of jurisdiction and/or question of law can be raised at the subsequent stages of the proceedings i.e. in appeal or revision. In view of specific provisions as contained in Section 124 as already discussed above, the applicability of above broad proposition of law stands excluded. For stance, the case of Ajantha Industries (supra) has been decided in the light of section 127 and not 124 of the Act.

The contention that no opportunity of hearing was given before transferring raised for the first time before the Tribunal could not be substantiated by producing any evidence. The assessee was the appellant before the Tribunal and it was for him to establish that before transferring the cases, no opportunity of hearing was given and in which he failed. Mere raising the argument which requires determination of fact in absence of any supporting material is liable to be ignored.

In view of the above, we answer all the five substantial questions of law in favour of the department and against the assessee by holding that the question of jurisdiction of the Assessing Authority in view of Section 124 of the Act could not have been raised by the assessee before the Tribunal and the Tribunal is not the competent authority to adjudicate upon when it was not raised in terms of Section 124 before the Assessing Authority.

Question Nos. 6 to 10 :-

All these questions relate to the issue whether the reasons for reopening the assessment are sufficient to hold that there was no nexus between reasonable belief and escapement of assessee's income. All questions are interwoven and intermingled and are taken up together as was suggested by the learned counsel for the parties also. The following reasons have been recorded for believing that the income of the assessee-respondent has escaped assessment.

> "It has come to my notice that the assessee runs an Institution in the name of All India Children Care Welfare Society, Azamgarh and earns income from it. In addition, the assessee purchased buses etc. and invested huge amount. For this institution, building is also constructed. Since the assessee earns huge income and invested in buses and building, therefore, I have reason to believe that the assessee in the years 1993-94, 94-95, 95-96 has concealed the income. Therefore, notice u/s

148 of the Income-tax Act is issued for the assessment years 1993-94, 94-95, 95-96."

The Tribunal has held that these reasons do not meet the requirement of law. After making such observations, it proceeded to consider certain well known judgments of the Apex Court and concluded that in the case of the assessee before it, it is clear that no reason has been mentioned by the A.O. to come to the conclusion that the income has escaped income. We find that the Tribunal has not considered the matter in depth. The issue has been dealt with by ignoring the background facts of the case. The fact remains that no such objection was made before the authorities subordinate to the Tribunal. The assessee filed the return of its income and participated in the assessment proceedings. During the course of reassessment proceedings and assessment proceedings, the huge investment made in immovable property etc. were found recorded in the account books of the assessee which could not be properly explained.

Learned standing counsel for the department submits that the reasons may be brief but they contain substance and gives due notice to the assessee. We are proposing not to dwell upon this issue and leaving it open for reconsideration by the Tribunal a fresh in view of the fact that we are remanding the matter to the Assessing Authority to decide the appeals on merits. The findings recorded by the Tribunal on the above issues are, hereby, set aside and the questions of law are decided by asking the Tribunal to reconsider the matter in the background of the facts of the case. Noticeably, in any case, the assessment year 1997-98 was a case of regular assessment which too has been set aside apparently due to oversight by the Tribunal. Therefore, all the questions are decided in favour of the department and against the assessee.

A feeble attempt was made by the learned counsel for the assessee that the Tribunal has decided the appeal on merits also but on consideration

we find that the Tribunal itself has noted that the findings recorded by it are only prima facie findings. Therefore, argument of the learned counsel for the assessee in this regard is not acceptable.

In view of the above, the order of the Tribunal cannot be allowed to stand. All the questions of law are decided in favour of the department and the matter is restored back to the Income Tax Appellate Tribunal to revisit and redecide the appeals filed by the assessee-respondent before it on merits by restoring them to their original numbers.

In the result, the appeal succeeds and is allowed. The order of the Tribunal is, hereby, set aside. No order as to costs.

(Manoj Kumar Gupta,J) (Prakash Krishna,J)

Dated:- 30th May, 2013

MK/