

No. 76 *ad valorem*, but are to be charged under item No. 145 per weight. We hereby accept the appeal and after setting aside the judgment of the learned Single Judge, allow the writ petition and quash the order dated 4th May, 1988 Annexure P-8. No costs. The excess amount recovered by Chief Administrator-respondent No. 2 shall be refunded to the appellant-Company within three months.

P.C.G.

Before : Gokal Chand Mital & S. S. Sodhi, JJ.

M/S. DES RAJ KUL BHUSHAN,—Applicant

versus

THE COMMISSIONER OF INCOME-TAX, JULLUNDUR
—Respondent

Income Tax Reference No. 60 of 1981.

19th April, 1989.

Income-tax Act, 1961—Ss. 143(3), 144-B, 145, 147, 153(1), (2) & (2-A), 251(1)(a), 256(1), 271(1)(c) & 273—Draft assessment served on assessee treated as final—I.T.O. adding more than one lac rupees—Assessee not filing objections—Procedure enshrined under S. 144-B not followed—Validity of such order—Remand order by C.I.T.—Valid.

Held. that the Tribunal and Commissioner of Income Tax (Appeals) were right in coming to the conclusion that it was not a draft order under S. 144-B of the Income-tax Act, 1961, but was a final order under S. 143(3) of the Act, and since the Income Tax Officer had made additions of more than a lac of rupees, although he had the jurisdiction to add more than a lac of rupees, this he could do by following the procedure laid down in S. 144-B of the Act and not in the manner he has done in this case. Once order dated 29th March, 1976 was not a draft order and was a final order, the assessee was not obliged to file objections within 7 days of the receipt of the order and thus the order dated 7th April, 1976 passed by the Income Tax Officer also could not be allowed to stand. Whether provisions contained in S. 144-B of the Act, are called mandatory or statutory, the result is the same, namely that if the Income Tax Officer wants to add more than a lac of rupees in the returned income, he has to follow the procedure contained in S. 144-B of the Act, before doing so.

(Para 3)

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Held, that the Commissioner of Income Tax (Appeals) exercised his power under the aforesaid provision for setting aside the illegal order of the Income Tax Officer and rightly remanded the case to the Income Tax Officer for fresh determination in accordance with law.

(Para 4)

Reference under Section 256(1) of the Income Tax Act, 1961 by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar, to the Hon'ble High Court of Punjab and Haryana for opinion of the following questions of law arising out of the Tribunal's order dated 19th September, 1980 I.T.A. No. 412 (Chandi)/1979. Assessment year 1973-74:

1. *Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the assessment framed is not null and void?*
2. *Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the provisions of Section 144-B of Income-tax Act 1961 are not mandatory but are only advisory and that the Income-tax Officer is not bound to conform to the provisions of Section 144-B in case the addition to be made to the declared income of the assessee exceeds prescribed amount and further that he is not bound by the directions of the Inspecting Assistant Commissioner, if given u/s 144-B?*
3. *Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the jurisdiction of the Income-tax Officer to frame assessment does not cease when he finds that the addition to be made to the declared income of the assessee exceeds prescribed amount?*
4. *Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the failure of the Income-tax Officer to follow the procedure laid down in Section 144-B does not violate the principles of statutory and of natural justice and is not fatal to assessment order's validity?*
5. *Whether, on the facts and circumstances of the case, the Tribunal is correct in law in holding that the appellate orders of the Commissioner of Income-tax (Appeals) setting aside the assessment for framing the same afresh was correct and did not amount to circumventing the time limit prescribed for completion of assessment?*

Sanjiv Walia, Advocate with Inder Pal Bansal, Advocate, for the Appellant.

L. K. Sood, Advocate, for the Respondent.

JUDGMENT

Gokal Chand Mital, J.

(1) For the assessment year 1973-74, the assessee filed return declaring income of Rs. 2,77,264. The Income Tax Officer considered the matter under section 143(3) of the Income Tax Act, 1961 (for short 'the Act') in great detail and computed the income at Rs. 3,96,168. Since the assessee was a registered firm, the share allocation amongst partners was also made. Finally, the following words were added in the assessment order dated 29th March, 1976.

"Penalty notice under section 271(1)(c) and 273 have already been issued. Assessed. Issue documents."

The assessment order was duly signed by the Income Tax Officer, and below the assessment order there was added a depreciation chart and certain Annexures. This was also signed by the Income Tax Officer. A copy of the assessment order is Annexure 'A' in the paper book. However, at the top of the order 'draft order is written'. The Income Tax Officer communicated the order dated 7th April, 1976 passed under Section 144-B(3) of the Act, to the assessee. It is in the following terms:

"The draft assessment order served on 30th March, 1976 on you should be treated as Final as statutory period of one week has already lapsed and no objection has been filed. Demand notice, challan and penalty notices have already been issued and served. However, copies of the same are again enclosed for necessary action."

The aforesaid order shows that the Income Tax Officer considered order dated 29th March, 1976 as a draft order under section 144-B, although a reading of the order dated 29th March, 1976 shows that it was a complete order duly signed by the Income Tax Officer and that was served on the assessee on 30th March, 1976 together with the demand notice and challan, although notice for imposition of penalty was yet to be issued.

(2) The assessee filed appeal against both the orders dated 29th March, 1976 and 7th April, 1976 and the Commissioner of Income Tax (Appeals), consolidated both the appeals and came to the conclusion that order dated 29th March, 1976 was final order and since he had not followed the procedure laid down in

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Section 144-B of the Act, the same was illegal, and the matter was thus set aside and was remanded to the Income Tax Officer for passing a fresh order after following the procedure laid down by law. In view of the above, order dated 7th April, 1976 passed by the Income Tax Officer was cancelled. The assessee's effort to challenge the remand order remained un-successful before the Income Tax Appellate Tribunal, Amritsar, and at the instance of the assessee, it has referred the following questions for opinion:

- “1. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the assessment framed is not null and void?
2. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the provisions of Section 144-B of the Income Tax Act, 1961 are not mandatory but are only advisory and that the Income Tax Officer is not bound to conform to the provisions of Section 144-B in case the addition to be made to the declared income of the assessee exceeds prescribed amount and further that he is not bound by the directions of the Inspecting Assistant Commissioner, if given under section 144-B?
- (3) Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the jurisdiction of the Income-tax Officer to frame assessment does not cease when he finds that the addition to be made to the declared income of the assessee exceeds prescribed amount ?
4. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the failure of the Income tax Officer to follow the procedure laid down in section 144-B does not violate the principles of statutory and of natural justice and is not fatal to assessment order's validity ?
5. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the Appellate Orders of the Commissioner of Income-tax (Appeals) setting aside the assessment for framing the same afresh was correct and did not amount to circumventing the time limit prescribed for completion of assessment ?

(3) After going through the order dated 29th March, 1976 passed by the Income Tax Officer, we are of the opinion that the Tribunal and Commissioner of Income Tax (Appeals) were right in coming to the conclusion that it was not a draft order under section 144-B of the Act, but was a final order under section 143(3) of the Act, and since the income Tax Officer had made additions of more than a lac of rupees, although he had the jurisdiction to and more than a lac of rupees, this he could do by following the procedure laid down in section 144-B of the Act and not in the manner he has done in this case. Once order dated 29th March, 1976 was not a draft order and was a final order, the assessee was not obliged to file objections within 7 days of the receipt of the order and thus the order dated 7th April, 1976 passed by the Income Tax Officer also could not be allowed to stand. Whether provisions contained in section 144-B of the Act, are called mandatory or statutory, the result is the same, namely that if the Income Tax Officer wants to add more than a lac of rupees in the returned income, he has to follow the procedure contained in section 144-B of the Act, before doing so.

(4) The next question is what is the power of the Commissioner of Income Tax (Appeals) in such a situation. Section 251(1)(a) of the Act authorises the Commissioner of Income Tax (Appeals) to annul or set aside the assessment order and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions and if necessary to make further enquiry, and thereupon the Income Tax Officer shall proceed to make fresh assessment and determine the amount of tax payable on the basis of such fresh assessment. The Commissioner of Income Tax (Appeals) exercised his power under the aforesaid provision for setting aside the illegal order of the Income Tax Officer and rightly remanded the case to the Income Tax Officer for fresh determination in accordance with law.

(5) Another point, that has specifically come up for consideration is whether the order of the Income Tax Officer without following the procedure laid down in Section 144-B of the Act is null and void and the Appellate Court on noticing the infirmity, could set aside and remand the case to the Income Tax Officer to frame fresh assessment after following the due procedure. To highlight, the argument of the counsel for the assessee was that a null and void order is either no order in the eye of law or can be said to be a non-existent and if that is so, question of filing an appeal against

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such an order does not arise. Similarly, even if appeal is filed, the Appellate Court have no jurisdiction to set it aside and remand the matter except declaring that the order of the Income Tax Officer was null and void.

(6) It cannot be disputed that an Appellate Authority has jurisdiction to notice the error in the order or the lower Authority and to grant appropriate relief. Where the mistake can be corrected at the appellate stage after due opportunity decision can be rendered. Where it becomes necessary to remand the matter to the original authority, that course can be followed. All illegal and erroneous orders are not null and void but all null and void orders also partake the character of being illegal and erroneous and can be rectified in appeal. Illegal and erroneous orders if not appealed against, bind the parties, but if null and void order is not appealed against, it may not bind the party, against whom it is passed, and it will be open to the aggrieved party either to challenge it by filing appeal or in collateral proceedings when the order is sought to be enforced against it. In the present case, the assessment order made by the Income Tax Officer without following the procedure laid down in Section 144-B of the Act was challenged in appeal by the assessee and the Commissioner of Income Tax (Appeals) after setting aside that order remanded the case to the Income Tax Officer for making fresh assessment after following the due procedure. The Commissioner of Income Tax (Appeals) had power/jurisdiction to do so and it cannot be said that he had only to declare the order of the Income Tax Officer to be null and void and was in error in remanding the case to the Income Tax Officer.

(7) Another point raised was that by passing the remand order the time limit for making the assessment was sought to be circumvented. Since law permits enlargement of limitation on remand, there is no question of circumventing the time limit for framing the assessment. Section 153(1) of the Act provides for time limit for completion of assessment under section 143 or 144 of the Act. Section 153(2) of the Act provides for time limit for framing assessment, re-assessment and re-computation under Section 147 of the Act. Section 153(2-A) is *non obstante* clause in relation to the assessment years commencing on the 1st day of April, 1971 and consequent years. Notwithstanding sub sections (1) and (2), in relation to such assessment years, a fresh assessment can be framed before the expiry of two years from the end of the

financial year in which order under Section 145 of the Act cancelling the assessment is passed by the Income Tax Officer or in pursuance to an order passed under Sections 250, 254, 263 and 264 of the Act, Section 250 of the Act pertains to the first appellate order and section 254 of the Act pertains to orders of the Appellate Tribunal. Since the order of remand is passed for framing fresh assessment, the limit would stand enlarged as indicated by sub-section (2-A) of section 153 of the Act.

(8) There is yet another *non obstante* clause in Section 153(3) of the Act. It provides that provisions of sub-sections (1) and (2) shall not apply to the classes of assessments, re-assessments and re-computation, which may be completed at any time as mentioned in clause (i) to (iii), subject to the provision of sub-section (2-A) to section 153 of the Act. Explanation added to Section 153 of the Act, further provides for excluding certain time and periods in computing the period of limitation provided by the Section. Therefore, when pursuant to the remand order passed by the Commissioner of Income Tax (Appeals), which was upheld by the Tribunal, fresh assessment is made, it will be open to the assessee to raise the question of limitation as point of limitation does not arise at this stage.

(9) In view of the aforesaid decisions of ours, we proceed to give our answer to the referred questions.

Question 1

This question is decided in favour of the revenue that the assessment framed could be set aside by the Tribunal and Commissioner of Income Tax (Appeals) with a direction to the Income Tax Officer to frame fresh assessment and on peculiar facts of this case, the Tribunal was right in law that the assessment framed was not null and void so as to take away the jurisdiction to remand the matter to the Income Tax Officer for fresh assessment.

Question 2.

Our answer to question No. 2 is that provisions of section 144-B of the Act are mandatory-cum-statutory and if facts of the case fall within the ambit of that provision, the Income Tax Officer is bound to conform to those provisions in case he wants to make additions, which exceed the prescribed amount. The directions issued by the Inspecting Assistant Commissioner given under

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Section 144-B of the Act are no doubt for the guidance of the Income Tax Officer but are binding upon him by virtue of Section 144-B(5) of the Act.

Question 3.

This question is answered in favour of the Revenue, that is, in the affirmative. The Income Tax Officer has the jurisdiction to add over a lac of rupees but before doing so he has to follow the procedure given in Section 144-B of the Act.

Question 4.

Under this question, it is answered that if the Income Tax Officer does not follow the procedure laid down in Section 144-B of the Act, it is not fatal to the framing of fresh assessment after following the procedure within the period of limitation.

Question 5.

This question is answered in favour of the Revenue, that is, in the affirmative that the Tribunal was right in upholding the order of the Commissioner of Income Tax (Appeals) provided fresh assessment is made within the period of limitation.

(10) The parties are left to bear their own costs

P.C.G.

Before : G. R. Majithia, J.

SMT. SHEELA,—Appellant.

versus

THE REGIONAL DIRECTOR, EMPLOYEES STATE INSURANCE CORPORATION, CHANDIGARH AND ANOTHER,—Respondents.

First Appeal from the Order No. 926 of 1983.

31st August, 1989.

Employees State Insurance Act, 1948—Ss. 2(6-A), 75 & 82—Death of employee taking place while he was on his way to factory—Occurrence of death—Whether during the course of employment—Theory of notional extension—Applicable.