Income Tax Officer, Azamgarh and Another

Vs

M/s. Mewalal Dwarka Prasad

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Income Tax Officer and Another

Civil Appeals Nos. 1970 (NT) of 1975 and 855 (NT) of 1976

(CJI R. S. Pathak, Ranaganath Misra JJ)

10.02.1989

JUDGMENT

RANGANATH MISRA, J. -

1. Civil Appeal No. 1970 of 1975 is by the revenue by certificate of the High Court while the other is an appeal by the assessee by special leave. Both arise out of the same judgment of the Allahabad High Court dated April 22, 1974 in an application under Article 226 of the Constitution by the assessee challenging the notices issued under Section 148 read with Sections 142(1) and 143(2) of the Income Tax Act of 1961, all dated March 7, 1973 relating to the assessment year 1965-66. The notice under Section 148 was on the basis of three cash credit entries dated August 22, 1964 from Messrs Meghraj Dulichand, Associated Commercial Organization Private Limited and Messrs Laxminarain Atmaram, the first two being for a sum of Rs. 30,000 each and the last one for a sum of Rs. 40,000. The High Court ultimately found :

> The result is that the notice dated March 7, 1973, was within jurisdiction only in regard to the cash credit entry from the firm Meghraj Dulichand of Calcutta. In regard to the other two transactions, the case did not fall within the purview of clause (a) of Section 147.

As seen above, the Income Tax Officer had no material in his possession on the basis of which he could have reason to believe (mere suspicion apart) that income had escaped assessment. For this reason, the case was not covered by clause (b) of Section 147 either. In regard to those two items the notice was totally without jurisdiction. The Income Tax Officer had no jurisdiction to reopen the assessment in respect of these two cash credit entries.

In this view it is unnecessary to decide whether the notice was barred by time on the footing that it was covered by clause (b) to Section 147.

In the result, the petition succeeds and is allowed in part. The respondent Income Tax Officer is directed not to reopen the assessment of the petitioner firm for the assessment year 1965-66 in relation to the cash credit entries of Rs. 30,000 from M/s. Associated Commercial Organization

Private Ltd. and of Rs. 40,000 in respect of M/s. Laxminarain Atmaram.

2. The appeal by the revenue is in relation to the two transactions totalling Rs. 70,000 and the appeal by the assessee is in regard to the remaining one in respect of a sum of Rs. 30,000.

3. Dr. Gauri Shankar appearing for the revenue has contended that it was not for the High Court to go into the question as to whether the notice under Section 148 of the Act was partly valid and partly not because if the Income Tax Officer proceeded to issue notice under Section 148 of the Act for reopening the assessment, he would require the assessee to furnish a fresh return and the entire assessment proceeding has to be re-done after the assessee furnishes the return. In the present case, along with the notice under Section 148 of the Act the Income Tax Officer did call upon the assessee to furnish a return as required under Section 142 of the Act. That notice casts an obligation on the assessee to make a fresh return and therein it was obliged to make a complete disclosure of its income in accordance with law and it was open to the Income Tax Officer to examine not only the three items referred to in the notice but also whatever came within the legitimate ambit of the assessment proceeding. This being the legal position, Dr. Gauri Shankar, for the revenue contends, once the High Court sustained the notice in respect of a sum of Rs. 30,000, that gave full jurisdiction to the Income Tax Officer to reopen the assessment and take to a fresh assessment proceedings. The High Court should not have examined the tenability of the assessee's contention in regard to the two transactions of Rs. 30,000 and Rs. 40,000 and that aspect should have been left to be considered by the Income Tax Officer while making the reassessment.

4. A Division Bench of the Punjab High Court in CIT v. Jagan Nath Maheshwary ((1957) 32 ITR 418 : AIR 1957 Punj 226) examined this aspect of the matter with reference to a proceeding for reassessment under Section 34 of the earlier Act of 1922 and came to hold : (p. 438)

[W]hen a notice is issued under Section 34, based on a certain item of income that had escaped assessment, it is permissible for the income tax authorities to include other items in the assessment, in addition to the item which had initiated and resulted in the notice under Section 34.

5. A Division Bench of the Andhra Pradesh High Court in Pulavarthi Viswanadham v. CIT ((1963) 50 ITR 463 (AP HC)) considered the same position with reference to Section 34 of the earlier Act. After extracting the two clauses in sub-section (1) of Section 34, the court held : (pp. 465-66)

It is immediately plain that when once the Income Tax Officer reaches the conclusion on the material that is before him that there has been a non-disclosure as regards part of the income, profits or gains chargeable to income tax by the assessee, he is entitled to issue a notice either under clause (a) or (b), as the case may be, under Section 22(2) of the Income Tax Act.

After extracting Section 22(2) the High Court proceeded to say : (p. 466)

What emerges from sub-section (2) of Section 22 is that when once as assessee is required to submit a return of his income, he is obliged to disclose the totality of his income. The question that falls to be decided on the language of these two sections is whether after notice is issued under Section 34(1)(a) the assessment should be limited to items which escaped assessment by reason of the failure on the part of the assessee to disclose all his income, profits or gains which are subject to tax. The contention of learned counsel for the assessee is that having regard to the terms of clause (b), it was not within the powers of the Income Tax Officer to bring to charge such of the items as have escaped from being taxed without any remissness on his part. It is only items that escaped due to

omission or failure of the assessee that come within the range and sweep of Section 34, continues learned counsel for the assessee. We do not think that we can accede to this proposition. When once the assessment is reopened, no distinction could be made between items falling under clause (a) and those coming within the pale of clause (b). As pointed out by a Division Bench of this Court in R.C. No. 12 of 1960 (Parimisetti Seetharamamma v. CIT, (1963) 50 ITR 450 (AP HC), to which one of ... us was a party :

> ... when once an assessment is reopened under Section 34, the Income Tax Officer proceeds de novo under the relevant sections of the Income Tax Act, i.e., he issues notice under Section 22(2) and proceeds to assess the assessee. He has to follow the same procedure as in the case of the first assessment as is clear from the clause in Section 34 "and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section". The proceedings under Section 34 must be deemed to relate to proceedings which commence with publication of notice under Section 22(1).

6. The view taken by the two High Courts has been supported by this Court in CIT v. Jagan Mohan Rao ((1969) 2 SCC 389 : 75 ITR 373). There, repelling the same argument on behalf of the assessee this Court said : (SCC pp. 394-95, para 4)

This argument is not of much avail to the appellant because once proceedings under Section 34 are taken to be validly initiated with regard to two-thirds share of the income, the jurisdiction of the Income Tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income Tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once an assessment is reopened by issuing a notice under sub-section (2) of Section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under Section 34(1)(b) the Income Tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.

7. No serious effort, however, was made by Mr. Manchanda appearing for the assessee-respondent to counter this submission advanced on behalf of the revenue. Accepting the legal position indicated in these cases we come to the conclusion that it was not for the High Court to examine the validity of the notice under Section 148 in regard to the two items if the High Court came to the conclusion that the notice was valid at least in respect of the remaining item. Whether the Income Tax Officer while making his reassessment would take into account the other two items should have been left to be considered by the Income Tax Officer in the fresh assessment proceeding.

8. With this conclusion the decision of the High Court would ordinarily have been reversed. As we have already stated, the assessee has also appealed against that part of the judgment of the High Court which was adverse to it. Mr. Manchanda contended that in this case the regular assessment had been made for the assessment year 1965-66 on January 22, 1966. Notice under Section 148 of the Act was issued on March 7, 1973, i.e., more than seven years after the assessment had been completed. The three amounts mentioned in the notice under Section 148 of the Act were found in the assessee's accounts by the Income Tax Officer when he examined the same in the course of the assessment proceedings. He had called upon the assessee to substantiate the genuineness of the transactions and the assessee had produced material to support the same. The Income Tax Officer

accepted the documents produced and treated all the three transaction to be genuine and on that footing completed the assessment. The primary facts were before the Income Tax Officer at the time of the regular assessment and he called upon the assessee to explain to his satisfaction that the entries were genuine and on the basis of materials provided by the assessee satisfaction was reached. It was them open to the Income Tax Officer to make further probe before completing the assessment if he was of the view that the material provided by the assessee was not sufficient for him to be satisfied that the assessee's contention was correct. This Court in Calcutta Discount Company Limited v. ITO ((1961) 41 ITR 191 : (1961) 1 SCR 241 : AIR 1961 SC 372) held that the expression 'material facts' used in clause (a) referred only to primary facts and the duty of the assessee was confined to disclosure of primary facts and he had not to indicate what factual or legal inferences should properly be drawn from primary facts. In the facts appearing on the record we are in agreement with Mr. Manchanda that clause (a) of Section 147 did not apply to the facts of the case as the alleged escapement of income for assessment had not resulted from failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for that year. The notice in the instant case did not indicate whether it was a case covered by clause (a) or clause (b). On our finding that clause (a) was not invokable, the power under clause (b) could be called in aid under Section 149(1)(b) of the Act within four years from the end of the relevant assessment year. Admittedly, the notice has been issued beyond a period of four years and, therefore, the notice itself was beyond the time provided under the law. On the facts appearing in the case the High Court overlooked to consider this aspect of the matter. Since the proceedings before the High Court were under Article 226 of the Constitution and not by way of reference under the Act, the jurisdiction of this Court is not advisory and confined to the questions referred for opinion. On the facts we are satisfied that the ends of justice require our intervention and we would accordingly allow the appeal of the assessee by holding that the notice under Section 148 of the Act cannot be sustained in law for the reasons indicated below.

9. The appeal by the assessee is allowed and the appeal by the revenue is dismissed. The notice under Section 148 of the Act is quashed. Both parties are directed to bear their respective costs throughout.

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