A. S. Clittres D/5 I/S Garonne and Others

Vs

Commissioner of Income Tax, Kerala-Ii

Civil Appeals Nos. 8-13(Nt) of 1984

(K. S. Paripoornan, S. P. Kurdukar JJ)

03.04.1997

JUDGMENT

PARIPOORNAN, J. –

1. This batch of appeals is preferred against the common judgment delivered by the High Court of Kerala in CIT v. Clittres ((1981) 130 ITR 301 : 1981 Tax LR 742 (Ker) (FB)).

2. The appellants assessees, are non-resident shippers represented by one common agent. The ships carry goods from the Port of Cochin to various places. The ships concerned are, Fernbrook, Fernwave, Fernmoor, Ferngate and Ferndale. Fernbrook called at the Cochin Port during the previous years relating to the Assessment Years 1967-68, and 1969-70; Ferndale called at the Cochin Port during the year relating to the Assessment Year 1967-68 and the other ships, Fernwave, Fernmoor and Ferngate called at the Cochin Port during the year relating to the Assessment Year 1969-70. In respect of the freight earnings, assessments were made on the shippers under Section 172(4) of the Income Tax Act, hereinafter referred to as "the Act". The said provision enables the Income Tax Officer to make "ad hoc" assessment, on the tram-ships. The assessees paid tax so assessed under Section 172(4) of the Act. Thereafter the assessees exercised the right conferred on them under Section 172(7) of the Act and claimed "regular assessments" to be made. Returns were filed. It turned out that the total income assessed in all the cases were far less than the one earlier assessed under Section 172(4) of the Act and on which taxes were paid by the assessees. Reckoning this, the Income Tax Officer held that the assessees are entitled to refund of the excess amount paid by them. Such amounts were refunded. The assessees claimed that they are entitled to interest for the excess amounts paid by them, which were refunded. Such claims were rejected by the Income Tax Officer. The said rejection was upheld in the appeals by the Appellate Assistant Commissioner. The claims for interests were rejected on the ground that the payment made in pursuance to assessments under Section 172(4) of the Act cannot be said to be "advance income tax". In the further appeals filed by the assessees, the Income Tax Appellate Tribunal, Cochin Bench, after review of the relevant provisions of the Act, held that under Section 172(7) of the Act, the payments made [earlier in the assessments under Section 172(4) of the Act] would be on a par with "advance tax" payments. It was further held that since these payments have, by fiction, been treated as advance tax, it necessarily follows that all the provisions in respect of the payment of advance tax in the Act will apply. From the point of regular assessment, i.e., if there is any excess payment made by the assessee, then the assessee would be entitled to the interest under Section 214 of the Act. The Appellate Tribunal directed the Income Tax Officer to allow the interest claimed by the assessees.

3. As directed by the High Court, the Income Tax Appellate Tribunal referred the following question of law in all the cases for the decision of the High Court :

"Whether the amount directed under Section 172 clause (7) of the Income Tax Act, to be treated as a payment in advance of the tax leviable for the assessment year in question, would carry interest as the amount of advance tax would under Section 214 if the same is payable under Sections 207 to 213 of the Act."

4. The High Court of Kerala, by a common judgment delivered in all the references took the view that the tax paid under Section 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. It was held that Section 172(7) of the Act permits only "an adjustment" of the payment made under the section as "payment in advance of the tax leviable for the assessment year" and not a payment of advance tax made under the Act. The question referred to the High Court was answered in the negative, in favour of the Revenue and against the assessees. It is thereafter, the assessees moved this Court in SLPs (Civil) Nos. 8792-97 of 1981 and obtained special leave to appeal against the aforesaid judgment of the High Court of Kerala.

5. We heard the counsel. For the purpose of resolving the controversy in this case, it will be useful to read Section 172 of the Act :

"172. Shipping business of non-residents. - (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India.

#(2) * * *##

(3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat :

Provided that where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this subsection before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.

(4) On receipt of the return, the Assessing Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates in force applicable to the total income of a company which has not made the arrangements referred to in Section 194 and such sum shall be payable by the master of the ship.

(5) For the purpose of determining the tax payable under sub-section (4), the Assessing Officer may call for such accounts or documents as he may require.

#(6) * * *##

> (7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, what an assessment be made of his total income of the previous year and the the payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be."

Section 172 occurs in Chapter XV of the Act - Liability in Special Cases - and the heading of the Section is "Profits of non-residents from occasional shipping business".

6. At this juncture, it will be useful to bear in mind that Section 2(1) of the Act defines "advance tax". It is as follows :

> "2. Definitions. - In this Act, unless the context otherwise requires, -
>
> (1) 'advance tax' means the advance tax payable in accordance with the provisions of Chapter XVII-C;"

The above sub-section was inserted in the Act by Direct Tax Laws (Amendment) Act, 1987 with effect from I-4-1989. We are concerned in this case relating to the periods before the said Amendment Act.

7. The scheme of Section 172 of the Act appears to be this : Section 172(1) of the Act gives a right to the Income Tax Officer to levy and recover tax in the case of any ship belonging to a non-resident, in a summary manner, (ad hoc assessment) notwithstanding anything contained in the other provisions of the Act. It is an absolute right conferred on the assessing authority. The assessee has no right to object to the same. Normally, this will be assessment of the assessee for the year. But, under Section 172(7) of the Act a right is given to the assessee to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment, according to the provisions of the Act, in a regular manner be made. Thus, a right is given to the assessee to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made under Section 172(4) of the Act. It is a valuable right. If the assessee exercises the right conferred on him under Section 172(7) of the Act, the Income Tax Officer is bound to make an assessment of the total income of the previous year of the assessee and the tax payable on the basis thereof "should be determined in accordance with the other provisions of the Act" and any payment made under the section (earlier) "shall be treated as a payment in advance of the tax" leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment, shall be paid to the assessee or refunded to him. The "ad hoc" assessment made under Section 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case, it is only proper and appropriate to hold that all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted.

8. Section 172(7) of the Act provides that payment made under the section shall be treated as a

payment in advance of the tax leviable for that assessment year. It only means that such payment would be treated as advance of the tax leviable. Such payments are treated on a par with advance income tax payments. It is implicit from the tenor and phraseology employed in Section 172(7) of the Act to the effect, "payment made under the section ... shall be treated as a payment in advance of the tax leviable for that assessment year" that in substance, a legal fiction is created by which the payments have been treated as advance tax. That is the purpose for a which the legal fiction is created. In construing the said legal fiction, it will be proper and necessary to assume all those facts on which alone the fiction can operate. The law on the point has been stated in innumerable decisions of this Court. In Mohd. Iqbal Madar Sheikh v. State of Maharashtra ((1996) 1 SCC 722 : 1996 SCC (Cri) 202) (See at P. 727, para 7) a three-member Bench of this Court stated the law thus :

> "... The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs as real he has to also imagine as real the consequences which shall flow from it unless prohibited by some other statutory provision."

So, necessarily all the provisions in the Act in respect of the payment of advance tax will apply. On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payments made in excess of the tax assessed. We are unable to appreciate the distinction drawn by the High Court between "advance tax" and "payment in advance of the tax" mentioned in Section 172(7) of the Act. We hold that the distinction so drawn has no basis. The High Court has further held that the payment made under Section 172(4) of the Act is not a payment of advance tax within the meaning of the Act, as the tax under Section 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. We are afraid that the High Court has failed to give due effect to the language employed in Section 172(7) of the Act and the scope of the legal fiction enshrined therein. The reasoning of the High Court is rather strained as the distinction drawn is without any substance or difference. Section 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act (Income Tax Act, 1922 - Section 44-C), wherein there was a heading to the section - "Adjustment". Section 172 of the Act contains no such heading. We hold that the Income Tax Appellate Tribunal was justified in holding that since the payment made under Section 172(4) of the Act is, by fiction, treated as advance tax, all the provisions in respect of the advance tax will apply and if on regular assessment made under Section 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon under Section 214 of the Act. We answer the question referred to the High Court in the affirmative, in favour of the assessees and against the Revenue. The judgment of the High Court is reversed and this batch of appeals allowed with costs, including Advocates' fees quantified as Rs. 5000 payable in each appeal.