

(1997) 11 MAD CK 0099
In the Madras High Court
Case No : TC No. 1139 of 1983

A. Arumugam

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 13-11-1997

Acts Referred:

Income Tax Act, 1961 — Section 41(1)

Citation : (1997) 11 MAD CK 0099

Hon'ble Judges : P. Thangavel, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : P.P.S. Janarthana Raja, for the Appellant; C.V. Rajan, for the Respondent

Judgement

N.V. Balasubramanian, J.—The assessee was carrying on the business styled as Anand Benefit Scheme as a proprietary concern. The said

proprietary concern was taken over by a firm on and from 1st April, 1976, consisting of three partners including the assessee on the basis of a

deed of partnership dt. 1st April, 1976. The assessee while he was running the business as a proprietary concern, has been collecting sales-tax

from the customers and paying the same to the Government. The amount of sales-tax paid to the Government was allowed as deduction in the

individual assessment of the assessee. Subsequently, this Court in the case of Srinivasa Sales Circulation vs. State of Tamil Nadu (1976) 33 STC

359 (Mad) has taken a view that the circulation scheme adopted by the assessee were not liable to be taxed under the provisions of the Tamil

Nadu Gen. ST Act and on the basis of the decision of this Court, the assessee got a refund in his name a sum of Rs. 97,845 during the previous

year relevant to the assessment year ended on 31st March, 1977. In the

assessment made on the assessee, the ITO held that the amount was liable to be assessed in the hands of the assessee under the provisions of s. 41(1) of the IT Act, 1961. The assessee contended before the AO that the amount actually belonged to the firm and cannot be considered as the assessee's income and further the provisions of s. 41(1) of the IT Act, 1961, were not applicable to the facts of the case. The ITO however, held that the sales-tax refund received by the assessee was the property of the proprietary concern of the assessee and it did not belong to the firm and the assessee after the receipt of the refund, made over the same to the firm and, therefore, the assessee alone was assessable to tax. The ITO also invoked the provisions of s. 41(1) of the Act and held that the said amount was assessable in the assessee's hand.

2. The assessee preferred an appeal before the AAC and according to the AAC there was an effective alienation of the sales-tax refund in favour of the firm and hence the refund could not be assessed as the assessee's income.

3. The Revenue carried the matter in appeal before the Tribunal. The Tribunal considered the provisions of the partnership deed and held that the sales-tax refund was the property of the proprietary concern and handing over the sales-tax refund by the assessee to the firm would amount only to an application of his income. In this view, the Tribunal held that the amount is deemed to be the income under the provisions of s. 41(1) of the

Act. The assessee raised an alternative contention before the Tribunal that the sales-tax refund received by the assessee cannot be regarded as the income of the assessee on the ground that as against the decision of this Court in *Srinivasa Sales Circulation vs. State of Tamil Nadu* (supra), the

Government of Tamil Nadu has preferred an appeal before the Supreme Court and since the appeal was pending before the Supreme Court, there

is no finality attached to the judgment of this Court holding that there was no sales-tax liability and, therefore, the amount cannot be regarded as the

income of the assessee at all. The Tribunal, however, felt handicapped to consider the new ground raised before it as there were no sufficient

materials before the Tribunal to decide as to whether the Government of Tamil Nadu has preferred an appeal to the Supreme Court in the

assessee's case and it was also not clear whether the decision of the Supreme Court to be rendered would directly affect the case of the assessee.

The Tribunal due to the paucity of the materials before it felt that the matter should be remitted to the ITO to verify the entire aspect and adjudicate

on the assessee's alternative argument advanced before the Tribunal.

4. It is this order that is the subject-matter of the present tax case reference and at the instance of the assessee the following two questions of law

have been referred to us under s. 256(1) of the IT Act 1961 :

1. Whether, on the facts and in the circumstances of the case the Tribunal was right in holding that the sales-tax refund of Rs. 97,845 is assessable

in the assessee's hands under s. 41(1) of the IT Act, 1961 ?

2. Whether the Tribunal was right in holding that the receipt of Rs. 97,845 is not diverted by an overriding title ?

5. Mr. P. P. S. Janarthana Raja, learned counsel for the assessee submitted that the Supreme Court subsequently in the case of State of Tamil

Nadu vs. Sri Srinivasa Sales Circulation 103 STC 485 (SC) has considered the nature of the circulation scheme adopted by the assessee and has

come to a conclusion that the transaction involved in the scheme adopted by the assessee is a sale attracting the provisions of Tamil Nadu Gen. ST

Act and the assessee is liable to sales-tax. According to Mr. P. P. S. Janarthana Raja, learned counsel for the assessee, since the Supreme Court

has held that the assessee is liable to sales-tax, the question of getting refund from the Government of Tamil Nadu by the assessee does not arise

and whatever amount of refund the assessee has received, has to be repaid to the Government of Tamil Nadu and, therefore, the provisions of s.

41(1) of the Act are not attracted to the facts of the case.

6. Mr. C. V. Rajan, learned counsel for the Revenue, brought to our notice the order of the ITO giving effect to the order of the Tribunal which is

the subject-matter of the tax case reference and in the order passed by the ITO on 28th March, 1985, in A4753/I(A) Erd. for the asst. yr. 1977-

78, he held that the refund of the sales-tax was not treated as the assessee's income and the total income of the assessee would be a net loss of

Rs. 18,615. According to the learned counsel for the Revenue that since the ITO has subsequently held that the amount was not income assessable

to tax, the entire reference has become academic in view of the order passed by the ITO and there is no need to answer the question of law

referred to us.

7. We have carefully considered the submissions of learned counsel for the Revenue as well as learned counsel for the assessee. The fact remains that the Tribunal while considering the alternative argument advanced by the assessee directed the ITO to verify the question whether the amount was properly assessable to tax under the provisions of s. 41(1) of the Act and adjudicate on the assessee's alternative claim with reference to the taxability of the refund of sales-tax received by the assessee. The ITO gave effect to the order of the Tribunal and in the order passed by him on 28th March, 1985, for the asst. yr. 1977-78 he excluded the refund of the sales-tax amounting to Rs. 97,845 from the assessee's total income and held that it was not assessable in the assessment year as assessee's income. In view of the subsequent order passed by the ITO, the issue as to whether the amount is properly assessable under the provisions of s. 41(1) of the Act has become academic as the ITO has not assessed the refund as income at all in the order passed by him to give effect to the order passed by the Tribunal. In view of the definite stand taken by the Department in the subsequent proceedings, we are of the view that it is unnecessary for us to consider the question whether the amount received was the income of the assessee or that of the firm. Furthermore, the Supreme Court in the case of State of Tamil Nadu vs. Sri Srinivasa Sales Circulation (supra) has held that the circulation scheme adopted by the assessee has all the attributes of the sale and the assessee is liable to pay sales-tax. The decision of the Supreme Court makes it clear that the liability to the sales-tax is attracted and to amount of refund the assessee received is not assessable as the income of the assessee. Therefore, we are of the view that it is not necessary to answer the questions of law referred to us in view of the subsequent development in the case and hence we return the reference without answering the questions of law but at the same time, recording the fact that the ITO in the proceedings has accepted the assessee's case that the amount was not assessable to income under the provisions of the IT Act. In view of the order of the ITO, we are not answering the questions of law and we are returning the questions of law unanswered. No costs.