

(1990) 10 KAR CK 0045
In the Karnataka High Court

B.D. Basavaraj and another

APPELLANT

Vs

Agricultural Income Tax Officer and another

RESPONDENT

Date of Decision : 12-10-1990

Acts Referred:

Income Tax Act, 1961 — Section 32, 32 A, 35, 36
Karnataka Agricultural Income Tax Rules, 1957 — Rule 9 (c)
Mysore Agricultural Income Tax Act, 1957 — Section 18 (2)

Citation : (1991) 188 ITR 113 : (1990) 3 KarLJ 403

Hon'ble Judges : M.P. Chandrakantaraj Urs, J;K.B. Navadgi, J

Bench : Division Bench

Advocate : S.G. Shivaram, for the Appellant; H.L. Dattu, High Court Govt. Pleader, for the Respondent

Judgement

M.P. Chandrakantaraj Urs, J.—In this batch of writ petitions, two assesseees have assailed the validity of the second proviso to rule 9(c) of the Karnataka Agricultural Income Tax Rules, 1957, as ultra vires the Act, viz., the Karnataka Agricultural Income Tax Act, 1957 (in short the "Act"). They have further prayed for quashing of annexures E to L to the petitions which comprise assessment orders or reassessment orders u/s 36 of Act accompanied by the demand notices in accordance with such order.

2. It suffices for us to state that, in the case of B. D. Basavaraj - the petitioner in Writ Petitions Nos. 10945 of 1982-the assessment years in question are 1976-77 to 1979-80 and in the case of B. D. Viswanath - the petitioner in Writ Petitions Nos. 10948 to 10951 of 1982-the assessment years are 1976-77 to 1980-81.

3. In the course of the arguments before us, learned counsel, Sri Shivaram, has not pressed his challenge to the validity of rule 9(c) as the same has already been upheld to be valid by this court in E.M.V. Muthappan Vs. Agricultural Income Tax Officer and Another, . Therefore, what remains for our consideration is to see whether the assessment orders and the consequent demand notices suffer from want of jurisdiction inasmuch as notice required to be issued u/s 38

of the Act was not in conformity with that section as it is not a notice u/s 18(2) of the Act and, therefore, the entire proceedings are vitiated and the orders are liable to be quashed and set aside.

4. Reliance was placed on a decision of this court in almost similar circumstances in the case of C.T. Rajagopal Vs. State of Mysore, , wherein it was held that the issue of a notice u/s 36 of the Act requiring the assessee to furnish a return within a stated period was a condition precedent to the validity of the assessment on agricultural income which had escaped assessment or had been under assessed and, if no such notice was issued or if the notice was invalid, the assessment was bad in law. In the instant case, while a notice undisputedly was issued proposing to reopen the assessment, no fresh return was called for in accordance with the provisions made under sub-section (2) of section 18 of the Act.

5. Section 36 reads as follows :

"36. Income escaping assessment.-If for any reason any agricultural income chargeable to tax under this Act has escaped assessment in any financial year or has been assessed at too low a rate, the Agricultural Income Tax Officer may, at any time within five years of the end of that one the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 18 and may proceed to assess or reassess such income 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 :

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment, as the case may be :

Provided further that, in computing the period of limitation for assessment or reassessment under this section, the time during which the assessment has been deferred on account of any stay order granted by any court or other authority in any case or by reason of the fact that an appeal or other proceeding is pending before the High Court to the Supreme Court, shall be excluded :

Provided also that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to an assessment or reassessment made on the assessee or any person in consequence of, or to give effect to, any finding, direction or order made u/s 32,32A, 33,34,35 or 55 or any judgment, or order made by the Supreme Court, the High Court or any other court."

6. From a reading of the said section, it is imperative that the proceedings to be commenced u/s 36 must be preceded by issuance of a notice u/s 18(2) of the Act notwithstanding the fact that some proceedings initiated u/s 36 may not ipso facto require a fresh return. On a careful reading of the section at first we were under the impression that certain category of cases may not require the need for

a fresh return like in the case of an assessee being taxed at a lower rate than what was really applicable. Therefore, we called upon learned counsel to explain the legal principle behind the decision of the Division bench of this court to which we have referred to earlier in the course of this order. In that behalf a number of citations were cited, but income of them, we regret to say, any principle underlying the mandatory need to call for a fresh return has been explained except in the decision of V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh, , Ramaswami J., as he then was, speaking for the Bench consisting of Acting Chief Justice J. C. Shah, himself and Justice A. N. Grover, held, the need for a fresh return in all cases covered by section 34 of the Income Tax Act (which is in pari materia to section 36 of the Act) observed as follow (at p. 380) :

"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 u/s 22(2) and may proceed to assess or reassess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of section 22, the previous underassessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started u/s 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. On the facts of these cases before us, no notice calling upon the assesseees to file a fresh return was ever issued though a notice for reassessment was issued. Sub-section (2) of section 18 of the Act is similar to sub-section (2) of section 22 of the 1922 Income Tax Act since repealed. Therefore, in accordance with the law declared by the Supreme Court, the moment reassessment proceedings are initiated by issuance of a notice, then the earlier assessment order becomes non est in the eye of law and, therefore, what actually commences is a fresh proceeding and as such the mandatory requirement for a fresh return has to be called for. If such a fresh return was not called for in conformity with sub-section (2) of section 18 as mandated in section 36 of the Act itself, then the authority did not acquire jurisdiction to proceed with the assessment because the earlier assessment orders remained intact.

8. It is in that view that, for want of jurisdiction, we must set aside the impugned orders and demand notices as at annexures E to L and remand the matter to the respondent-Agricultural Income Tax Officer, Hassan, to initiate proceedings afresh in accordance with law, if such proceedings are not barred by time as specified in section 36 of the Act. Writ petitions are allowed in terms above and the rule issued earlier is made absolute. There will be no order as to costs.