

(1993) 10 KL CK 0026
In the High Court Of Kerala
Case No : O.P. No. 347 of 1989-N

C.C. Jayaram

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 13-10-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 264, 264(4)

Citation : (1994) 116 CTR 33 : (1994) 2 ILR (Ker) 254 : (1994) 207 ITR 662

Hon'ble Judges : K. Narayana Kurup, J

Bench : Single Bench

Advocate : P. Balachandran, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

K. Narayana Kurup, J.—The prayer in this original petition is to quash exhibits P-1 and P-4 orders passed by the respondents and for the issuance of a writ of mandamus or any other appropriate writ, order or direction compelling the respondents not to make the additions of Rs. 90,000, Rs. 15,972 and Rs. 21,706 as they are unjustified and against the provisions of law and for other incidental reliefs.

2. The facts of the case may be briefly stated as follows : For the assessment year 1979-80, the petitioner filed a return declaring a total income of Rs. 6,92,290. The second respondent, Income Tax Officer, determined the income at Rs. 9,77,860 and in arriving at the total income, the Income Tax Officer made an addition of a sum of Rs. 1,27,678 as per exhibit P-I assessment order being income from undisclosed sources. Aggrieved by exhibit P-I order, the petitioner filed an appeal before the Commissioner of Income Tax (Appeals) who refused to entertain the same and dismissed the appeal in limine for non-payment of admitted tax without any good or sufficient reason as per exhibit P-2 order. The petitioner took up the matter in second appeal before the Appellate Tribunal and the Tribunal also, without going into the merits of the case, dismissed the appeal in limine as per exhibit P-3 order affirming the findings of the Commissioner of

Income Tax (Appeals) that the petitioner had failed to pay the admitted tax without any good or sufficient reason. Thereafter, the petitioner filed a revision petition before the first respondent against exhibit P-1 order. The said revision petition was dismissed by the first respondent as per exhibit P-4 order on the ground, inter alia, that the petitioner's case is covered by Section 264(4)(a) of the Income Tax Act, 1961, and not by Section 264(4)(C) as contended by the petitioner. The challenge in the instant original petition is against exhibit P-4 order of the first respondent.

3. The question for consideration is whether the revision petition filed by the petitioner before the first respondent is maintainable u/s 264 of the Income Tax Act. The petitioner would contend that, where an appeal is dismissed in limine instead of on the merits, a revision u/s 264 is maintainable and it is not hit by any of the fetters created against the revision in the said section. The petitioner would further submit that the fetter created by Section 264(4)(a) of the Income Tax Act to the effect that the Commissioner shall not revise any order u/s 264 of the Act where "the order has been made the subject of an appeal" to the Commissioner (Appeals) or to the Appellate Tribunal applies only where the appeal has been effectively and finally disposed of on the merits and not in a case where the appeal has been disposed of in limine without going into the merits as in the instant case. The petitioner has a further case based on Circular No. 367, dated July 26, 1983, issued by the Board according to which the Board are of the view that an order cannot be said to have been made "subject of an appeal" if the appeal has been disposed of by the Commissioner (Appeals) or the Appellate Tribunal without passing an order u/s 251(1) or 254(1) on the merits.

4. In reply, learned counsel for the Revenue would submit that the case comes squarely within the mischief of Section 264(4)(a) of the Income Tax Act since the petitioner has not waived his right of appeal. He would further submit that the petitioner has filed an appeal and it has been disposed of on the merits. He has a further submission that exhibit P-1 order has merged with exhibit P-4 with the result that now exhibit P-1 is not in existence and exhibit P-4 being an order passed by the Tribunal, the Commissioner has no jurisdiction to revise the said order.

5. Having considered the rival contentions, I am of the view that an order can be said to be "the subject of an appeal" only if the appeal was considered and disposed of on the merits ; so much so that an appeal which was dismissed as withdrawn at the instance of the assessee or where an appeal was dismissed on the ground that the same was incompetent or where an appeal was dismissed as barred by limitation or where the appeal was dismissed for non-payment of undisputed tax as a condition precedent for entertaining the appeal cannot be said to have been made "subject of an appeal".

6. Learned counsel for the petitioner placed strong reliance on the decision of the Supreme Court in Board of Revenue v. Raj Brothers Agencies [1973] 31 STC-434, where the identical expression "the order made subject of an appeal"

was construed by the Supreme Court to mean "subject of an effective appeal". There, the facts of the case lay within a narrow compass. The assessee was assessed to sales tax during the assessment years 1960-61 and 1961-62. Aggrieved by the orders of the assessing authorities, he went up in appeal to the Appellate Assistant Commissioner who dismissed his appeals. Thereafter, the assessee filed second appeals to the Sales Tax Appellate Tribunal, Madras. Those appeals were dismissed as having been time-barred. After the Tribunal dismissed the appeals, the assessee moved the Board of Revenue u/s 34(1) of the Madras General Sales Tax Act to revise the assessment orders. The Board held that it has no jurisdiction to entertain those revision petitions. The High Court, in the writ petitions filed at the instance of the assessee, held that the Board had jurisdiction to entertain those revision petitions and consequently issued a writ of mandamus to the Board to entertain the revision petitions and consider them on the merits. Being aggrieved by the said decision of the High Court, the State approached the Supreme Court in appeal and the Supreme Court was called upon to determine the true scope of Section 34 of the Madras General Sales Tax Act, 1959, which confers on the Board of Revenue suo motu power to call for and examine an order passed or proceeding recorded by the appropriate authorities under some of the provisions of the Act. Section 34(2) reads thus :

"The Board of Revenue shall not pass any order under Sub-section (1) if-

(a) the time for appeal against that order has not expired ; or

(b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the High Court ; or

(c) more than four years have expired after the passing of the order."

7. Adverting to the scope of the expression "subject of an appeal" occurring in Section 34(2) of the Madras General Sales Tax Act, the Supreme Court, affirming the decision of the Madras High Court in *Erode Yarn Stores v. State of Madras* [1963] 14 STC 724 said that, before the jurisdiction of the Board of Revenue to exercise its powers u/s 34(2)(b) of the Madras General Sales Tax Act, 1959, can be held to be taken away, the appeal filed before the Appellate Tribunal must have been an effective appeal and that an appeal which was dismissed by the Tribunal on the ground of limitation was not an effective appeal, and held that the expression "subject of an appeal" in Section 34(2)(b) meant "subject of an effective appeal". In the result, the Supreme Court held that, in a case where an appeal is time-barred, there is no effective disposal of the appeal and hence the Board of Revenue has jurisdiction to revise the order which has been made subject of the appeal to the Appellate Tribunal.

8. The next decision on which reliance was placed by learned counsel for the petitioner is the one in *CHIRANJILAL DAGA Vs. COMMISSIONER OF Income Tax, TAMIL NADU V, MADRAS, AND ANOTHER.*, wherein the assessee's appeal to the Appellate Assistant Commissioner was dismissed as time-barred and, on appeal to the Tribunal, the assessee raised grounds relating to the merits also. The

Tribunal, without dealing with the merits, dismissed the appeal as time-barred and confirmed the order of the Appellate Assistant Commissioner dismissing the appeal as time-barred. On revision to the Commissioner, it was held that the filing of an ineffective or incompetent appeal before the Appellate Assistant Commissioner or the Tribunal did not deprive an assessee of the right of revision u/s 264 of the Income Tax Act, 1961. It was also held that even though the petitioner had questioned the assessment in the grounds of appeal before the Tribunal, the order of the Tribunal related only to the question of delay and cannot be treated as one on merits and covering the entire gamut of the appeal. Accordingly, it was held that the revision petition before the Commissioner was maintainable.

9. Viewed in the above perspective, I have no hesitation in holding that there is no effective disposal of the petitioner's appeal either by the Commissioner of Income Tax (Appeals) or by the Income Tax Appellate Tribunal. In exhibit P-2, the Commissioner of Income Tax (Appeals) refused to entertain the appeal filed by the petitioner on the ground that the petitioner failed to pay the admitted tax and the said decision was confirmed by exhibit P-3 order of the Appellate Tribunal, so much so that there is no effective disposal of the petitioner's appeal and, consequently, the first respondent has jurisdiction to revise the order which has been made the subject of appeal before the Appellate Tribunal.

10. No doubt, learned counsel for the Revenue placed strong reliance on the decision in Commissioner of Wealth Tax, Bombay and Another Vs. Mrs. Kasturbai Walchand and Others, , a case under the Wealth-tax Act. However, having regard to the interpretation placed by the Supreme Court on the expression "subject of an appeal" in Board of Revenue v. Raj Brothers Agencies [1973] 31 STC 434 and the later decision of the Madras High Court in CHIRANJILAL DAGA Vs. COMMISSIONER OF Income Tax, TAMIL NADU V, MADRAS, AND ANOTHER., , construing the very same expression "subject of an appeal" occurring in Section 264 of the Income Tax Act as subject of effective appeal, I am of the view that the matter stands squarely concluded by the above decisions in favour of the petitioner-assessee and against the Revenue.

11. I, therefore, allow this original petition and quash exhibits P-1 and P-4 orders passed by the respondents. The findings of the first respondent that "the revision petition filed by the assessee is incompetent and cannot be entertained", vide paragraph 4 of exhibit P-4 order, is set aside and the first respondent is directed to take the revision petition on file and dispose of the same afresh in accordance with law.

12. There will be no order as to costs.