

(1958) 09 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 143 of 1958

CHERIAN

APPELLANT

Vs

Income Tax OFFICER, ERNAKULAM, AND ANOTHER.

RESPONDENT

Date of Decision : 12-09-1958

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 29, 46, 53

Citation : (1959) 36 ITR 210 : (1958) 2 KLJ 1089

Hon'ble Judges : Joseph, J

Bench : Division Bench

Judgement

JOSEPH, J. - This is a petition under article 226 of the Constitution for quashing certain orders passed in Income Tax proceedings against an unregistered firm of which the partners were the petitioner and one P. J. George. They were conducting distillery business in the year 1124, the petitioner having a four annas share in the business. The first respondent is the Income Tax Officer, Ernakulam, and the second respondent, the Commissioner of Income Tax, Kerala and Coimbatore. The petitioner was served with a letter exhibit P-1 dated October 27, 1955, by the first respondent together with a notice of demand to remit a sum of Rs. 9,851-11-0 alleged to be the tax due pursuant to and assessment in the name of P. J. George for the year 1950-51. On receipt of exhibit P-1 the petitioner filed an appeal before the Appellant Assistant Commissioner, Ernakulam. He also applied to the Inspecting Assistant Commissioner of Income Tax, Ernakulam, to stay the collection of the tax covered by the demand till the disposal of the appeal and the latter directed the petitioner to remit the sum of Rs. 2,463 pending final disposal of the petition. The petitioner complied with this direction. P. J. George had also filed an appeal from the order of assessment and the two appeals were heard and disposed of together, setting aside the assessment and directing re-assessment after proper enquiry. Exhibit P-2 is copy of the order passed on appeal. As the order of assessment was set aside in appeal, the petitioner applied for refund of the sum

of Rs. 2,463 paid by him pursuant to the order of the Inspecting Assistant Commissioner of Income Tax. The first respondent passed an order exhibit P-3 dated September 4, 1957, stating that a sum of Rs. 1,000 out of the amount remitted by the petitioner was adjusted towards penalty levied by him for non-payment of the tax in time and that the balance would be refunded. A refund order for Rs. 1,463 was sent to the petitioner along with a covering letter exhibit P-4. The petitioner was unaware that penalty had been imposed and on his requisition, a copy of the order levying penalty was supplied to him. Exhibit P-5 is the said copy. On September 16, 1957, the petitioner filed a revision petition before the second respondent who dismissed the same by order exhibit P-6 dated December 20, 1957. The order, exhibits P-3, P-5 and P-6, are sought to be quashed. The grounds relied on by the petitioner are that the order imposing the penalty was not validly passed, that the same could not stand as the order of assessment was set aside, that the first respondent had no jurisdiction to pass the order exhibit P-3, that the petitioner was not a defaulter as contemplated by section 46(1) of the Income Tax Act, that no notice had been served on him for payment of the tax before imposing penalty, that no notice of the order imposing penalty was given to him, that in view of the appellate decision setting aside the order of assessment, the amount remitted by him as a condition for stay of proceedings could not be adjusted against the penalty and that the amount remitted by him was not towards tax due from the partnership but in his individual capacity. On these grounds the petitioner seeks for quashing the orders imposing the penalty and appropriating the sum of Rs. 1,000 towards the same. The first respondent has filed a counter-affidavit stating that the notice of demand was served on P. J. George who was the managing partner of the firm, that such service was binding on the petitioner and that penalty was imposed on account of the default of the firm. It is also contended that the sum of Rs. 2,463 was paid by the petitioner on behalf of the firm, that the imposing on penalty was proper and that he was competent to adjust the sum of Rs. 1,000 towards penalty. The other contentions are that the order of the Appellate Assistant Commissioner does not ipso facto amount to cancellation of the order imposing penalty and that there is no lack of jurisdiction or error apparent on the face of the record justifying cancellation of the impinged orders. The petitioner filed an affidavit in reply stating that the firm had become dissolved at the time of the assessment and that the assessment and penalty could be made only in the name of the individuals and not the firm.

The point for decision is whether the petitioner is entitled to refund of the whole sum paid by him and whether the Income Tax Officer was justified in adjusting Rs. 1,000 against the penalty levied by him. This depends on the question whether the levy of the penalty in the circumstance is proper. It is urged on behalf of the petitioner that there was no demand on him to pay tax and that he cannot therefore be deemed to be in default. Section 46 of the Income Tax Act provides that when an assessee is in default in making a payment of Income Tax the Income Tax Officer may in his discretion direct that in addition to the amount

of the arrears a sum not exceeding that amount shall be recovered from the assessee by way of penalty. The argument advanced is that the petitioner could not be treated as a defaulter so long as notice of demand of tax or penalty was not served on him and that there was no valid order levying penalty.

It is necessary to state a few facts for the decision of this question. The assessee in this case was an unregistered firm and the name of the assessee is described in the order of assessment as "Messrs. P. J. George and T. J. Cheriyan." The first notice of demand was sent on March 30, 1955, to "P. J. George for P. J. George and T. J. Cheriyan." There was no response and on October 3, 1955, the order exhibit P-5 levying a sum of Rs. 1,000 as penalty was passed by the first respondent. It appears from exhibit P-5 that the penalty was imposed on the firm. The first notice of demand to the petitioner is exhibit P-1 which was issued on October 27, 1955, i.e., 24 days after the order levying penalty was passed. Even though penalty had been levied before that date, exhibit P-1 does not contain any reference to the same and it is a demand for payment of tax only. In fact no demand for payment of penalty has ever been made on the petitioner.

The assessee being an unregistered firm it was open for the first respondent to assess either the firm or the partners u/s 23(5)(b) of the Income Tax Act. He chose to adopt the former course. The next stage is that of issuing notice of demand u/s 29 which provides as follows :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

In the case of an unregistered firm, the partners would come within the expression "other persons liable to pay". This is the view taken by a Division Bench of the Bombay High Court in *Gokuldas v. Kikabhai Abdulali*. It was open for the first respondent to issue a notice of demand to the petitioner for payment of the tax assessed on the firm but he did not choose to do so till a later stage of the proceedings for recovery of tax when penalty had already been imposed. I do not see how the petitioner can be deemed to be "in default" so long as notice of demand for payment of tax has not been served on him. Shri Rama Iyer, learned counsel for the respondent, contends that notice of demand was served on the firm and as such it was open for the first respondent to levy penalty on the firm and recover the same from the partners. Assuming for the sake of argument that the levy of penalty on the firm is sufficient to enable the Department to recover the same from the partners, the question arises whether there was a proper demand on the firm. The notice of demand issued u/s 29 is not addressed to the firm as such but to P. J. George for "P. J. George and T. J. Cherian". This in my opinion is not a proper demand on the firm. No doubt u/s 53, service of the notice in the case of a firm may be made on any partner but the essential thing is that there should be a notice to the firm. The notice of demand issued to P. J. George cannot be deemed to be a notice to the firm. This argument of the

respondent cannot be accepted.

Another point raised by Shri Rama Iyer was that the payment made by the petitioner was towards the liability of the firm and that as the order levying penalty is not open to objection so far as the firm is concerned, it was competent for the first respondent to adjust the sum of Rs. 1,000 against the penalty. This argument presupposes that the levy of penalty so far as the firm is concerned is valid. I have already pointed out that there was no proper demand on the firm to pay the tax and in the absence of such a demand, the levy of penalty cannot be deemed proper even in respect of the firm. Again the payment by the petitioner was not on behalf of the firm. It appears from the records produced by the first respondent at the hearing that after the said sum was paid by the petitioner, the first respondent sent a communication to the other partner P. J. George stating that T. J. Cherian had paid Rs. 2,463 being his share of the tax in the firm and that P. J. George was liable to remit his share, viz., 75 per cent. before December 15, 1955. It is, therefore, clear that the Income Tax authorities did not treat the payment made by the petitioner as one on behalf of the firm. It may also be pointed out that a notice of demand was not served on the petitioner to pay the penalty before he paid the sum of Rs. 2,463 pursuant to the order passed by the Inspecting Assistant Commissioner of Income Tax as a condition for obtaining an order staying proceedings for recovery of tax pending disposal of the appeal.

Section 49E enables the Income Tax authorities to set off any amount found refundable to a person against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due. Even if the order levying penalty was proper it cannot be held that the petitioner was liable to pay the same before notice of demand was served on him. In view of the conclusions reached above, the set-off of Rs. 1,000 against penalty is improper and the orders exhibits P-3, P-5 and P-6 have to be quashed.

The petitioner had a case that the firm had become dissolved even before the commencement of the assessment proceedings. This is a question of fact which has to be raised before the Income Tax Officer. Now that the order of assessment has been set aside in appeal and the petitioner gets an opportunity to contest the assessment proceedings, it is open for him to raise the same before the Income Tax Officer.

In the result the orders exhibits P-3, P-5 and P-6 are quashed. A writ in the nature of mandamus will issue directing the second respondent to refund the sum of Rs. 1,000 to the petitioner. The original petition is thus allowed. In the circumstances I make no order as to costs.

Petition allowed.