(1996) 06 KL CK 0088

In the High Court Of Kerala

Case No : IT Ref. No''s. 205 to 228 of 1988, 77 to 80 of 1989 and 11 of 1990, June 20, 1996.

COMMISSIONER OF INCOME TAX — APPELLANT

Vs

GEORGE JACOB. — RESPONDENT

Date of Decision : 20-06-1996

Acts Referred:
Income Tax Act, 1961 — Section 132, 139, 148, 154, 182

Citation : (1997) 137 CTR 538

Hon'ble Judges : V. V. Kamat, J

Bench : Division Bench

Judgement

V. V. KAMAT, J. :

In all these 29 references the question is as to whether the ITO is justified in exercise of powers under s. 154 of the IT Act, 1961 for the purpose of modifying the order passed earlier whereby the exclusion of income declared by the assessees concerned under s. 3(1) of the Voluntary Disclosure Act could be annulled, modified or otherwise.

2. The question is as follows, which is the same in all these references :

"Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law and fact in finding that the ITO was not competent to invoke s. 154 for the purpose of modifying the order originally made allowing the exclusion of the income declared by the assessee under s. 3(1) of the Voluntary Disclosure Act ?"

These assessees are partners in different firms of Muthoottu Group and their main source of income is the share income from these firms.

3. Under s. 132 of the IT Act, 1961, the firms were searched in pursuance of the seizures in accordance therewith.

4. On 8th Oct., 1975 the Voluntary Disclosure of Income and Wealth Act, 1976

came into force. Sec. 3 of the said Act required any person, before 1st Jan., 1976 to make a declaration in accordance with the provisions of s. 4 thereof in respect of any income chargeable to tax under the IT Act, 1961 for any assessment year, provided in regard to the said income, such person had failed to furnish a return under s. 139 of the IT Act or for which he failed to disclose any return of income furnished by him under the IT Act, before the commencement of this Act or in regard to such income assessment has escaped by reason of the omission or failure on the part of such person to make a return under the IT Act or to disclose the same fully and truly with reference to all material facts necessary for the assessment or otherwise. When such person satisfies these situations, the provision enacts that in that situation (then) notwithstanding anything contained in the IT Act, 1961, or in any Finance Act, Income Tax shall be chargeable in respect of the income so declared which is described under the Act as "the voluntarily disclosed income" at the rate or rates specified in the schedule to the Act. These assessee-partners accordingly filed the returns with regard to the income which could not be understood as income as qualified by the above three situations.

5. Apart from the firm filing the declaration under s. 14(1) of the Act in pursuance of the search and seizure, these partner-assessees also filed individual declarations under s. 3(1) of the said Act. In accordance with the provisions of s. 8 of the said Act, the CIT granted certificates to them, specifically as per the provisions of s. 8(2) of the Act.

6. On the strength of the certificates under s. 8(2) of the Act, the assessees approached the ITO and by the first order the ITO granted deduction, presumably in accordance with the provisions of s. 8 of the Voluntary Disclosure Act, 1976. By and large, these orders would be found as Annexure A to all these references.

7. However, by the subsequent order the ITO acting under s. 154 of the IT Act, 1961, specifying that the amount was deduction from the assessees total income on the ground that it represented the amount disclosed under s. 3(1) of the Voluntary Disclosure Act, the ITO observed that the amount represented the assessees respective share in the income of the firm as was disclosed under s. 14(1) of the Act for the assessment year in question, the share of each partner, under s. 182 of the Act would be included in his total income assessable to tax accordingly. The ITO observed further that earlier deduction from the total income was not in order; the ITO found it to be a mistake apparent from the record and, acting in pursuance of the notice under s. 154 of the Act, rectified the earlier order in exercise of powers under s. 154 of the Act. The ITO rejected the contention that there was no mistake apparent from the record.

8. The first appellate authority - CIT(A), Ernakulam, took the view that when the assessee produced the certificate issued by the CIT, the ITO rectified the various assessment orders on the basis of certificate excluding the income - the amount as disclosed under s. 3(1). The discussion continued that subsequently the ITO

issued notice under s. 154 of the Act, that under s. 182 of the Act, the amount in the hands of the partner as his share is also assessable. The first appellate authority considered that there is no provision in the IT Act, 1961 by which income covered by Voluntary Disclosure Act, 1976 can be taken up for assessment by the IT authority under the provisions of the IT Act, 1961. The first appellate authority placed reliance on s. 8 of the Voluntary Disclosure Act, 1976 to mean that the amount of the disclosed income shall not be included in the total income of the declarant for any assessment year under the IT Act, 1961, if the conditions mentioned therein are satisfied. The discussion further proceeds to state that the certificate under s. 8(2) of the Act confers the immunity on the declaration (declarant).

9. The first appellate authority has further emphasised that at the inception, the ITO had accepted the assessees views as correct and the present approach is diametrically opposite and, therefore, does not show a clear error apparent from the records in the original order. The discussion concluded that such a situation cannot be altered in exercise of powers under s. 154 of the Act. The Department took up the matter before the Tribunal, Cochin. The Tribunal has reproduced the rival contentions in paragraphs 2 and 3 and in paragraph 5 of its order.

10. The Tribunal took the view that the ITO was not competent to invoke powers under s. 154 for the purpose of modifying the orders originally passed whereby the exclusion of the income declared by the assessees under the Voluntary Disclosure Act were allowed. The Tribunal took the view that there is a debate involved in settling the question. According to the Tribunal the question was as to whether the assessees were required or entitled to file declarations under s. 3(1) of the Voluntary Disclosure Act in respect of part of income declared by the firm under s. 14 of the Voluntary Disclosure Act. The Tribunal also observed that s. 8 of the Voluntary Disclosure Act, 1976 clearly provides for the exclusion of the income declared under s. 3 from the total income. The Tribunal has taken care further to pinpoint that there are no qualifications of any manner to exclude from its purview the share of a partner in the income declared by a firm under s. 14(1) of the Act. It is observed further that there is yet another question that would arise and it is as to whether the share income is to be included because of the assessment made on the firm taking into account the declaration made by the firm under s. 14 of the Act. The Tribunal observes in the context that the question is as regards the provisions of s. 182 of the Act, such share will have to be understood as the consequent allocation of such share income amongst the partners and also whether such income, in view of the declaration under s. 3(1) of the Act, could be excluded in the teeth of such declaration having been accepted by the CIT as evidenced by the issue of a certificate under s. 8 of the Act. The Tribunal felt that this was a debatable question which cannot be the subject-matter of rectification or modification in exercise of powers under s. 154 of the Act.

11. We have heard the learned senior standing counsel for taxes. He contended

that mere reading of the statutory provisions of the Voluntary Disclosure Act, 1976 would create no difficulty whatsoever. In regard to the situation that the income has to be included in the concerned assessment year, with vehemence at his command, the learned counsel showed us his anxiety that the two appellate authorities have reached conclusions without perusing the statutory provisions. The learned counsel further contended that the statutory provisions of the Voluntary Disclosure of Income and Wealth Act, 1976 would lead to only one and one conclusion in his favour. The learned counsel took us through the statutory provisions, especially ss. 3, 4, 8 and 14.

12. At the other end, we have also heard the learned counsel for the assessees, the team lead by Sri Chacko, the learned senior counsel. Sri Chacko also took us through the statutory provisions and particularly brought to our attention the provisions of the Voluntary Disclosure of Income and Wealth Tax Rules, 1975. In the first instance, the submission of the learned counsel was that on a true and proper interpretation of the provisions of the Act and Rules, the amounts disclosed by the declarants and certificates by the CIT in accordance with the provisions of s. 8(2) would conclude the question and cannot be included in the total income in any way whatsoever. The learned counsel also further reiterated that the two appellate authorities have styled the situation as a debatable one and continued to urge on the basis thereof that in such a situation, the provisions of s. 154 of the Act are not available for exercise, to reach a diametrically opposite conclusion in regard thereto. In the process of submissions, the learned counsel also took us through the provisions of the Act. The learned counsel in fact also brought to our attention Form A in the Appendix to the Voluntary Disclosure Rules, 1975, which is required to be filled in and presented to the CIT by the declarant. He wanted us to concentrate our attention to item 9 of the said form, which requires the declarant to clarify as to whether the amount of the voluntarily disclosed income has been credited in the books of accounts or in other record and if so, attaching copies of the relevant entries in duplicate. The learned counsel based his submission with reference to item No. 9 to argue that the certificate under s. 8(2) of the Act is the be all and end all and is conclusive in character not only with regard to the proceedings under the Voluntary Disclosure Act, 1976, but also with regard to the contemplated proceedings under the IT Act, 1961 of any character whatsoever. The learned counsel submitted that item No. 9 in Form A has to be meaningfully understood in the context of the statutory position given to the certificate under s. 8(2) of the Act. The learned counsel further submitted that if the ITO has already understood the position that the income covered by the certificate under s. 8(2) of the Act is not to be included in the total income, such conclusion should be understood to receive finality in regard thereto. It is not open to any kind of change. It will have to be treated as a legal and valid order, on the strength of the conclusive character of the certificate under s. 8(2) of the Act. Consequently the learned counsel urged that what has been done by the ITO subsequently is opening the door which was jammed and closed. Alternatively, the learned counsel submitted

that even though any other view is possible and the learned counsel reinforced his submission by referring to the approach of the two appellate authorities that the question is a debatable one, the learned counsel emphatically attempted to emphasise that exercise of power under s. 154 of the Act would not be available because when a question is debatable, the error could not be styled as error apparent on the face of the record.

13. In this manner, after hearing the learned counsel for both sides, we must express that we were at pains that the two appellate authorities atleast from the contents of the two orders, are seen to have taken no trouble to go through the text of the statute. Had they, the result would have been otherwise on plain language of the statute. In the process of consideration of the question involved before us, plain analysis of s. 3 becomes inevitable. The provision speaks of "any person" to make a declaration as required according to the provisions of s. 4. Such a declaration is in respect of any income ordinarily chargeable to tax under the IT Act. There is no time limit. Such income chargeable to tax can relate to any of the assessment year in the past obviously. The provision also qualifies in a three-fold manner. The income should be such that there is no return under s. 139 of the IT Act any time. The income should be such in regard to which this "any person" has failed to disclose in a return of income furnished by him under the IT Act before the date of commencement of this Act, i.e. before 8th Oct., 1975. Such income also should be such that the record should not show that assessment has escaped by reason of omission or failure on the part of such "any person" to make a return under the IT Act or to disclose fully and truly all material facts necessary for its assessment or otherwise.

14. In other words, such person who is expected to make a declaration of his income must qualify the three statutory requirements in regard not only to him, but with regard to income proposed to declare under this enactment. It is only such income specifying the qualifications in regard thereto as will be seen, that can be charged in respect of the income at the rate or rates specified in the schedule to this Act. In this context, the statute provides the well-known non obstante clause, with regard to the charge of Income Tax at the rate or rates specified in the schedule. The said non obstante clause would read :

"Notwithstanding anything contained in the Indian IT Act, 1922 (XI of 1922), or the IT Act or in any Finance Act...."

This would mean that the provisions of IT Act, 1961 are kept apart.

15. The provisions of s. 3(2) also further particularizes that nothing contained in s. 3(1) would apply to situations specified therein. They are as follows :

"3(2). Nothing contained in sub-s. (1) shall apply in relation to -

(i) the income assessable for any assessment year for which a notice under s. 139 or s. 148 of the IT Act has been served upon such person and the return has not been furnished before the commencement of this Act;

(ii) Where any books of account, other documents, money, bullion, jewellery or other valuable articles or things belonging to the person making the declaration under sub-s. (1) (hereafter in this section, in ss. 4 to 11 and in the Schedule referred to as the declarant) have been seized as a result of any search under s. 132 of the IT Act or under s. 37A of the WT Act, the income in respect of the previous year in which such search was made or any earlier previous year."

It would thus be clear at once that pending proceedings under the IT Act, 1961 have also been taken outside the purview of what is understood as "income" that could be legitimately the income in regard to which a declaration can be made by any person. Apart therefrom, s. 3(3) enacts a further requirement of investment of a sum equal to 5% of the amount of the voluntary disclosures. This aspect is not really necessary in the matter under consideration. Sec. 4 deals with the particulars and the persons who can present the application under the signature.

16. Sec. 8 of the Act has a marginal note "voluntarily disclosed income not to be included in the total income". This would normally mean that the income which is shown in proceedings of the Voluntary Disclosure Act, 1976 is not to be included in the total income and it is so stated in s. 8(1) of the Act. However, the situation is not wholly unconditional. The three conditions for not including the said income in the total income under the IT Act are reproduced as follows :

"(i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the ITO;

(ii) the Income Tax in respect of the voluntarily disclosed income is paid by the declarant; and

(iii) the amount required to be invested in the securities referred to in sub-s. (2) of s. 3 is so invested by the declarant."

When these conditions are satisfied, s. 8(2) provides consequently that the CIT has to grant a certificate. It is also necessary to see the text of s. 8(2) and it is as follows :

"The CIT shall, on an application made by the declarant, grant a certificate to him setting forth the particulars of the voluntarily disclosed income, the amount of Income Tax paid in respect of the same, the amount of investment made in the securities referred to in sub-s. (3) of s. 3 and the date of payment and investment."

The learned counsel submitted that the scope of the finality of this certificate has to be appreciated with reference to the contents of Form A, especially item No. 9 thereof, requiring to state as to whether the amount voluntarily disclosed has been credited in the books of account or any other record or not. It would be appropriate to quote the text of item 9 of Form A and it is as follows :

"Whether the amount of the voluntarily disclosed income has been credited in the books of account or any other record (If so, attach copies of the relevant entries in duplicate)."

17. Relying on s. 8(2) of the Act the learned counsel submitted that certificate to be granted is on setting forth the particulars of the voluntarily disclosed income. The learned counsel emphasised upon the word "particulars" to contend that it is only on the basis of Form A the proceeding is initiated and is culminated into the issuance of the certificate.

18. The provisions of s. 3 requiring the special characteristics of such "any person" with regard to the "income" - the subject-matter of the declaration gets well known by a new Act, s. 3(1) (a), (b) & (c) of the Act. Added to these, the provisions of s. 8(1) (i), (ii) and (iii) reinforce these characteristics of "any person" who is thought of in a declaration under the Voluntary Disclosure of Income and Wealth Act. A bare look at these provisions would show that no debate is necessary to know that any person keeping books of accounts knowing the source of income cannot be considered to be the person in the mind of the legislative provision of the Act -Voluntary Disclosure of Income and Wealth Act, 1976. The two provisions are crystal clear that they are applicable to a person in regard to the income to be disclosed which is not in any way near about the records of the IT Department on the one hand and also the record of accounts of the concerned assessee. The provisions of the Act also are crystal clear that such person who is the declarant is not also required to disclose the source of income. All that he has to do is to make a declaration to satisfy the requirements of s. 3 of the Act in regard to which the CIT would grant a certificate. Sec. 8(1) (i), (ii) and (iii) of the Act makes it abundantly clear that if such a person knows the source of the amount, shows the same in the books of account maintained by him, such a person would not be entitled to the benefits of the Voluntary Disclosure Act, 1976.

19. Illustratively, the provisions of ss. 9 and 10 also can be seen in the aid of the situation for understanding the clear statutory provisions discussed above. Completed assessments reaching to the situation of finality are not to be opened. Similarly in any situation, the amount of tax paid in accordance with the rates specified in the schedule is not to be refunded under any circumstances. This would show that such "any person" that is contemplated under the Act is understood by these provisions as having to be dealt with by the said Act which is a self-contained and complete code. If it is found that the declarant is not a person who could be understood as such in accordance with the provisions of the Act, he cannot be an expected declarant under the provisions of the Act. Similarly if such declarant cannot be understood in regard to the income he proposes to declare under the Act cannot be understood as income as specifically provided by the concerned provisions discussed hereinbefore, then it is equally true that such a person with regard to the income he proposes to declare will not be entitled to any benefits of the Act. In other words, the plain language of the Act shows that if the person is qualified, the income is also qualified. To be

precise and in the context of the situation at hand, if the income is such in regard to which the source is certain, in regard to which the account books are sure to debit them and credits in regard thereto are traceable in the accounting system of such person, then such person cannot have the benefit of this Act, but will have to look after himself under the provisions of the IT Act. In such a situation, these aspects will have to be ascertained in the light of the statutory provisions of s. 8 of the Act.

20. The learned counsel submitted that the certificate under s. 8(2) of the Act would be conclusive. Reading of the said statutory provision which is reproduced hereinbefore, it would be seen that the certificate requires statement of the disclosed income, the amount of Income Tax paid and the amount of investment under securities is also made in accordance with s. 3(3) of the Act. Sec. 11 of the Act makes the things clear. It enacts again by prefix of non obstante clause "Notwithstanding anything contained in any other law for the time being in force", that nothing contained in any declaration would be admissible. There it is obvious that in regard to the proceedings under the Act and consequence in regard to the person and the income covered by the proceeding under the Act, the contents of the certificate would be of conclusive character. It is so also on the basis of intrinsic material in the language of s. 8 itself. Sec. 8(i), (ii) and (iii) provide ample aid to the situation. What is required is that Income Tax is paid and the amount is invested. These are conclusive situations. In our judgment the language of s. 8, as stated above, is more than clear.

21. This takes us to consider the statutory provisions of s. 14 of the Act. The factual matrix of these references shows that under s. 132 of the IT Act, 1961, the firms were searched and documents were seized. These are partnership firms and are not different from its partners. The law of partnership, though elementary, tells us that partnership is only in the nature of a contract amongst persons who are partners in relation to the agreed activity and in the sense are not different from the firm in any sense of the term. In fact, the firm is not a legal person although the IT Act treats it as an assessee. In any sense of the situation the consequence of an action under s. 132 of the Act would visit the assessees. By a second way, looking the partners as individual assessees, the statutory provision is plain and simple that such a declaration by the assessees would only benefit them in regard to payment of interest, under s. 139(8) of the Act, under s. 215 or s. 217 of the Act, imposition of penalty and prosecution as specifically enacted in regard thereto. In this situation also the assessees could be understood with reference to the income declared by them, with reference to the payment of interest, penalty and prosecution only.

22. As stated at the outset, a bare look at the statutory provisions of the Voluntary Disclosure of Income and Wealth Act, 1976 and especially the non obstante clauses referred to hereinbefore together with the clear statutory provisions that persons who are regular in maintenance of accounts knowing the source of accounts, are not persons contemplated under the Act, would show

that the assessees would not get benefit either of s. 8 of the Act or even s. 14 thereof.

23. If this position is not to be considered as a mistake apparent from the record, in our judgment, there can be no better case for the exercise of powers under s. 154 of the Act. The Supreme Court as far back as in 1957 in the case of SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS., had an occasion to consider the identical provision under the IT Act, 1922. The summary is in the following manner :

"The position that emerges from the decided cases is that :

(i) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the Court under s. 66(1).

(ii) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the Court.

(iii) A finding on a question of fact is open to attack under s. 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(iv) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact."

It is plain that the plain language makes no difficulty. We have done nothing more than that. We have also found that both the appellate authorities have not considered the statutory provisions, if this is not a mistake apparent on the record, then which one, we do not know and we do not want to speculate.

24. For the above reasons the question is answered in the negative, in favour of the Revenue and against the assessees.

