

(2003) 07 KL CK 0051

In the High Court Of Kerala

Case No : W.A. No"s. 106 and 233 of 2000

Commissioner of Income Tax

APPELLANT

Vs

Leelamma John

RESPONDENT

Date of Decision : 24-07-2003

Acts Referred:

Income Tax Act, 1961 — Section 264

Citation : (2004) 186 CTR 575 : (2004) 267 ITR 289 : (2003) 3 KLT 1006

Hon'ble Judges : K.A. Abdul Gafoor, J;J.M. James, J

Bench : Division Bench

Advocate : P.K. Raveendranatha Menon and George K. George, for the Appellant; P.G.K. Warriar and P. Balakrishnan, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—The question agitated in this appeal at the instance of the Revenue is whether Ext. P3 declaration filed by the respondent can be one which could be considered in terms of Kar Vivad Samadhan Scheme, 1998. It is contended by the Revenue that, to consider a declaration applying the scheme, there shall be some proceedings pending before the concerned authority, and such proceedings shall be in terms of the law providing for such proceedings.

2. It is not in dispute before us that the assessing officer has passed orders against the respondent assessing him for tax and interest. It is also not in dispute that the respondent had filed Ext. P2 revision petition (in both cases) u/s 264 of the Income Tax act, 1961, before the Commissioner of Income Tax, on 28.10.1998. It is also not in dispute that the respondent has filed Ext. P3 declaration in terms of the said scheme before the designated officer to avail of the benefit under the scheme, promulgated in the Finance Act 2 of 1998. That declaration was filed on 2.11.1998, that means, after filing of the revision petition Ext. P2. The revision petition was dismissed as per Ext. P5 stating that "it cannot be treated as a valid revision petition". Ext. P5 is dated 14.12.1998. It is an admitted case that until that date, no orders has been passed on Ext. P3 declaration. Later, the respondent filed application for reconsideration of Ext. P5.

That also was dismissed as per Ext. P6. Still later, the respondent-assessee was informed as per Ext. P7 that "on the date of filing the declaration (Ext. P3), there was no valid revision pending in the eye of law; hence, Kar Vivad Samadhan Scheme declaration is not being entertained as a valid one". Thus, Ext. P3 was not entertained on the ground that no valid revision petition was pending as on the date of its filing. The respondent challenged it contending that Ext. P2 was a valid revision petition, as in Ext. P2, he had claimed appropriate reliefs including that relating to the alleged wrong calculation of interest contained in the assessment order. Section 264 of the Income Tax Act enables an assessee to file revision petition before the Commissioner against any order passed by the subordinate authority. So, the respondent could have filed a revision u/s 264 of the Income Tax Act, alleging wrong calculation of interest as well. Therefore, Ext. P2 was a valid revision petition. It ought to have been kept in abeyance until an order has been passed on Ext. P3 declaration. Hence, the respondent submits that Exts. P3, P6 and P7 are bad in law.

3. It was contended by the revenue that in order to say that an application for revision was pending, as provided for in Section 95(i)(c) of Kar Vivad Samadhan Scheme, the revision shall be one which the assessee has filed in terms of a statute before the appropriate statutory authority. The complaint in Ext. P2 was about interest alone and not about the assessment of tax. His prayer was to waive interest. Waiver of interest is a matter to be considered by the Chief Commissioner, and not the Commissioner. Ext. P2 was filed before the Commissioner and not before the Chief Commissioner. Therefore, it was not a valid revision petition filed before a competent authority. It cannot be stated to be pending in the eye of law to attract Section 95(1)(c) of the Kar Vivad Samadhan Scheme.

4. This contention of the revenue was turned down by the learned Single Judge and held that Ext. P2 was a valid revision, and therefore, quashed Exts. P5, P6 and P7, and directed re-consideration.

5. Therefore, the issue that arises in these Writ Appeals is whether Ext. P2 can be considered as a revision petition pending to attract the application of the Kar Vivad Samadhan Scheme, 1998, in terms of Section 95(i)(c) thereof.

6. The receipt of Ext. P2 is admitted. It is a revision petition which reads as under, "I am in respect of the assessment order for the assessment year 1992/93 u/s 125. The balance payable as per the assessment order is Rs. 532341/- out of which interest u/s 234A is Rs. 175642/- and u/s 234B is Rs. 195526/-. The interest levied is exorbitant and I am unable to pay the same. The interest calculation is also not correct in law and I may request that suitable relief may be granted by either cancelling the interest or reducing the same".

The grievance voiced in Ext. P2 by the respondent is that "the interest levied is exorbitant and I am unable to pay the same. The interest calculation is also not correct in law." The prayer in the revision was that "suitable relief may be

granted by either cancelling the interest or reducing the same. This prayer in the light of grievance included complaint about the calculation of the interest as well. If at all, request for waiver of interest can be discerned from Ext. P2, it can also be seen that a dispute regarding the arrear in calculation is also raised in Ext. P2 revision. The power of the Commissioner to entertain a revision petition is as contained in Section 264 of the Income Tax Act, which reads as follows:

"264 (1). In the case of any order other than an order to which Section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) The Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.

(3) In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier:

Provided that the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period.

(4) The Commissioner shall not revise any order under this section in the following cases-

(a) Where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or, in the case of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals); or

(c) where the order has been made the subject to an appeal to the Commissioner (Appeals) or to the Appellate Tribunal.

(5) Every application by an assessee for revision under this section shall be accompanied by a fee of twenty-five rupees.

(6) On every application by an assessee for revision under this sub-section, made on or after the 1st day of October, 1998, an order shall be passed within one year from the end of the financial year in which such application is made by the assessee for revision.

Explanation - In computing the period of limitation for the purpose of this sub-section, the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

(7) Notwithstanding anything contained in Sub-section (6), an order in revision under Sub-section (6) may be passed at any time in consequence of or to give effect to any finding or direction contained in an order of the Appellate Tribunal, High Court or the Supreme Court.

Explanation 1 - An order by the Commissioner declining to interfere shall for the purposes of this section, be deemed not to be an order prejudicial to the assessee.

Explanation 2- For the purposes of this section, the Deputy Commissioner (Appeals) shall be deemed to be an authority subordinate to the Commissioner".

7. In terms of the said provision, the Commissioner has got the power to enquire into the legality or otherwise of any order passed by an authority subordinate to him, and he can also "pass such order thereon". Therefore, even if waiver of interest as per the assessment order is within the domain of the Chief Commissioner, it cannot be said that the correction with respect to the calculation of the interest complained of in Ext. P2 is not within the jurisdiction of the Commissioner before whom Ext. P2 had been filed. In terms of Section 264 extracted above, the Commissioner can necessarily consider the grievances regarding the error in calculation of interest contained in an order passed by his subordinate authority. Therefore, to that extent, Ext. P2 revision u/s 264 filed before the Commissioner was maintainable. That aspect has never been considered either in Ext. P5 or in Ext. P6 by the Commissioner. Hence, the view of the Commissioner that the revision petition was not at all maintainable, is erroneous.

8. When the revision petition is so maintainable, necessarily, Kar Vivad Samadhan Scheme, 1998, is applicable. The relevant provisions, Section 95, with regard to the application of the said Scheme reads as under,

95. Scheme not to apply in certain cases -

The provisions of this Scheme shall not apply,

(i) in respect of tax arrear under any direct tax enactment.

(a)xxx xxx xxx (b)xxx xxx xxx

(c) to a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or no application for revision is pending before the Commissioner on the date of filing declaration.

9. As already mentioned above, this is a case where a revision u/s 264 of the Income Tax Act has been pending, at least in respect of the calculation of interest complained of in Ext. P2. Necessarily, it cannot be said that the provisions of this scheme does not apply to the case of the respondent. A reading of Sections 90 and 92 of the Scheme together indicates that it was incumbent on the designated authority who is none other than the Commissioner before whom Ext. P2 was pending, to pass appropriate orders as he thinks fit on Ext. P3. The commissioner should not have dismissed Ext. P3 by Ext. P7 on the ground that "there was no valid revision petition pending in the eye of law on the date of filing declaration, Ext. P3" when Ext. P2 was so pending. Therefore, Ext. P7 also is illegal.

10. While coming to the aforesaid conclusion, we had in our mind the contention urged by the counsel for the revenue at the time of hearing that even if Ext. P2 can be taken as a revision petition to the extent of calculation of interest, subject matter of this revision also shall be to the extent of interest alone. We need not detain ourselves to consider this aspect as the learned Single Judge has remitted the entire matter to the authority concerned, who will be free to consider all aspects, in accordance with law.

Accordingly, there is no reason for interference with the judgment appealed against. The Writ Appeals are hence dismissed.