

(1994) 01 OHC CK 0024
In the Orissa High Court
Case No : S.J.C. No. 9 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Om Agencies

RESPONDENT

Date of Decision : 21-01-1994

Acts Referred:

Income Tax Act, 1961 — Section 143, 144B, 144B(1), 153

Citation : (1994) 117 CTR 385 : (1994) 207 ITR 794

Hon'ble Judges : R.K. Patra, J;A. Pasayat, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant; Arjun Agrawalla, Amicus Curiae, for the Respondent

Judgement

A. Pasayat, J.—On being moved by an application u/s 256(1) of the Income Tax Act, 1961 (in short, "the Act"), by the Commissioner of Income Tax, Orissa, the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (in short, "the Tribunal") has referred the following questions for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the assessment for the assessment year 1979-80 made u/s 143(3) read with Section 144B was barred by limitation ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that a draft order made within the period of limitation should be forwarded to the assessee within the aforesaid period in order to make a valid assessment ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in annulling the order of assessment for the assessment year 1979-80 ?"

2. The background facts as culled out from the statement of case are as follows :

Messrs. Om Agencies, Puri (in short, "the assessee"), which is a partnership firm,

filed two returns for the assessment year 1979-80, declaring incomes of Rs. 56,070, and Rs. 47,020 for the periods : (i) from April 1, 1978, to May 31, 1978 ; and (ii) from June 1, 1978, to December 31, 1978, respectively. The Income Tax Officer, Special Investigation Ward-A, Bhubaneswar, being of the view that the partnership was not a genuine one but a mere benami concern of Messrs. Puri Marine Products, concluded that the income of Rs. 2,59,330 earned by the assessee should form part of the total income of Messrs. Puri Marine Products. Accordingly, the assessment was completed in the case of the assessee on the said Rs. 2,59,330 on a protective basis.

3. Since the variation in the income returned by the assessee for the assessment year in question and the income proposed to be determined by the Assessing Officer exceeded Rs. 1 lakh, a draft assessment order was made u/s 144B(1) by the Income Tax Officer on March 16, 1982. The said draft order was sent to the assessee on April 8, 1982, for filing objections, if any, in terms of Section 144B(2). The assessee received the same on April 19, 1982. By letter dated April 26, 1982, it raised several objections including one to the effect that the assessment in question was barred by limitation. The Inspecting Assistant Commissioner (Assessment), Bhubaneswar, noted the following in the course of the proceedings u/s 144B(4) :

(i) The last date of hearing was March 11, 1982.

(ii) The Income Tax Officer after hearing the case had made a noting on this very date that it was pending for orders.

(iii) The order sheet dated March 16, 1982, clearly indicated that the draft assessment has been made u/s 144B on a total income of Rs. 2,59,330.

4. On the basis of these conclusions, he held that though the issue of the draft order was made on April 8, 1982, and the same was served on the assessee on April 19, 1982, it did not vitiate the order of assessment. Accordingly, the assessment was finally completed on September 3, 1982, u/s 143(3)/144B and the order was despatched on September 10, 1982. Being aggrieved by the order, the assessee went in appeal before the Commissioner of Income Tax (Appeals), Orissa, and among other grounds contended that the assessment itself was barred by limitation inasmuch as the draft order was forwarded to the assessee only on April 8, 1982, after the proceeding was barred by limitation on March 31, 1982. The plea was not accepted by the Commissioner of Income Tax (Appeals) who was of the view that even though the letter forwarding the order was despatched on April 8, 1982, a perusal of the order dated March 16, 1982, made it clear that the assessment was completed u/s 144B, on a total income of Rs. 2,59,330 that day, and there was a direction to forward a copy of the order to the assessee inviting objections. It was concluded by the Commissioner of Income Tax (Appeals) that the Income Tax Officer had clearly indicated in the order sheet to forward a copy of the draft order to the assessee, and time was taken for issue of the copy of the draft order. Accordingly, it was held that the

draft order having been made on March 16, 1982, the same was within the financial year 1981-82, and the "assessment was not barred by limitation. The assessee carried the matter in appeal before the Tribunal taking the stand that the assessment made by the Income Tax Officer was barred by limitation. The Tribunal held that the noting in the Income Tax file was a mere direction" to the office to forward the draft order, and actual forwarding of the draft order of assessment was on April 8, 1982, after the assessment was barred by limitation. It was observed that the term "forward" as appearing in Clause (iv) of Explanation 1 to Section 153 of the Act means "to put in course of transmission" or "to transmit". The Tribunal noticed that though the draft order was purportedly signed on March 16, 1982, the same was not in existence on that date as evident from the fact that the accompanying letter carried the type dated April 8, 1982. It was further noticed that when the forwarding letter itself was typed on April 8, 1982, the same could not have been signed on March 16, 1982, much less to say that the order was forwarded to the assessee before March 31, 1982. There was no enabling provision contained in the Act to condone the delay in making or forwarding the order of assessment. Accordingly, the assessments were nullified. On being moved by the Revenue, the questions as indicated above have been referred to this court for opinion.

5. The primary stand of the Revenue is that the draft order having been made on March 16, 1982, and there being a specific direction to forward the same to the assessee that very day, the delay in the despatch of the same cannot be construed to mean that there was no forwarding as contemplated under the statute. Since there was no appearance on behalf of the opposite party in spite of notice, Mr. Arjun Agrawalla, learned counsel, volunteered to assist the court, in view of the interesting points involved in the reference. He submitted that the use of the expression "forward" clearly indicates that the legislative intent is that the actual act of putting the order into motion should be within the stipulated period of limitation.

6. Under the scheme of the Act, the assessment is to be completed before expiry of two years from the end of the assessment year in which the income was first assessable. An exception is provided in Clause (iv) of Explanation 1 appended to Section 153 to the effect that where the Income Tax Officer forwards the draft order under Sub-section (1) of Section 144B to the assessee, the period not exceeding 180 days commencing from the date on which the draft order is forwarded and ending with the date on which the Assessing Officer receives the direction from the Inspecting Assistant Commissioner under Sub-section (4) of that section, or, in a case where no objections to the draft order are received from the assessee within a period of thirty days, shall be excluded in computing the period of limitation for the purposes of Section 153. Explanation 1 was substituted by the Taxation Laws (Amendment) Act, 1975, with effect from January 1, 1976, as regards Clause (iv) with which we are concerned. The provision so far as relevant at the relevant time read as follows :

"153. Time-limit for completion of assessments and reassessments.--(1) No order of assessment shall be made u/s 143 or Section 144 at any time after-

(a) the expiry of--

(iii) two years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or after the 1st day of April, 1969 ; or

Explanation I.--In computing the period of limitation for the purposes of this section--

(iv) the period (not exceeding one hundred and eighty days) commencing from the date on which the Income Tax Officer forwards the draft order under Sub-section (1) of Section 144B to the assessee and ending with the date on which the Income Tax Officer receives the directions from the Inspecting Assistant Commissioner under Sub-section (4) of that section, or, in a case where no objections to the draft order are received from the assessee, a period of thirty days, or"

7. The provisions of Section 144B deal with reference to the Inspecting Assistant Commissioner in certain cases. Section 144B applies where the Assessing Officer proposes to make any variation, adverse to the assessee, in the income or loss returned, and the amount of such variation exceeds the amount fixed by the Board. By an order F. No. 201/121/75-IT(A-II), dated December 23, 1975, the Board has fixed the amount at Rs. 1,00,000 u/s 144B(6). The provisions of Section 144B, so far as relevant for adjudication of the dispute at hand, read as follows :

"144B. Reference to Inspecting Assistant Commissioner in certain cases.--(1) Notwithstanding anything contained in this Act, where, in an assessment to be made under Sub-section (3) of Section 143, the Income Tax Officer proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under Sub-section (6), the Income Tax Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Income Tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income Tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Income Tax Officer the acceptance of the variation, the Income Tax Officer shall complete the assessment on the basis of the draft order...."

8. Section 144B concerns two acts, i.e., (a) the making of a draft order, and (b)

forwarding the same to the assessee. Extension is available where it is shown that the Assessing Officer had forwarded a draft assessment order in terms of Section 144B before expiry of the two-year period applicable in normal cases. If the Income Tax Officer fails to establish that he has forwarded the draft assessment order before the prescribed period of two years, the proceeding shall be barred by limitation. According to the Revenue, the order dated March 16, 1982, amply shows that the requirements were complied with. The assessee's contention, however, is based on the entry dated April 8, 1982. Since the controversy revolves round the two entries, it would be profitable to quote both the orders. They read as follows :

"16-3-1982 :

Assessment u/s 144B (protective) on a total income of Rs. 2,59,330. Forward a copy of the order to the assessee inviting objections to it, if any.

(Sd.) Illegible

8-4-1982 :

Copy of the draft order forwarded to the assessee calling for objections, if any, within seven days from the date of receipt of the order."

9. The Revenue stresses on the fact that the draft order was prepared and a direction was given to forward a copy to the assessee inviting objections. The order dated April 8, 1982, however, shows that the draft order was forwarded on April 8, 1982. In other words, the actual act of forwarding was done on April 8, 1982. A conjoint reading of sections 144B and 153 (Explanation 1) makes it clear that the Assessing Officer is required to "forward" a draft of the proposed order of assessment, which is referred to as the draft order in Section 144B. The preparation of the draft order is not really of consequence. Even if a draft order is made and the same is not forwarded to the assessee within the time stipulated, the same loses its value. The word "forward" has been used at many places in sections 144B and 153 (Explanation 1) with which we are presently concerned. The expression "forward" in the context used means to "to send forward, post on farther (letter, parcel, etc.) to person for whom it is intended, (for example, to forward letters to a new address) ; to despatch, send". (See Webster's Universal Dictionary). In Oxford English Dictionary, it is described as "to send, forward, send to an ulterior destination ; in commercial language to despatch, send by some regular mode of conveyance". The term "forward" means "to put in course of transmission" or "to transmit". In order to constitute an act of forwarding, the actual sending, despatching is necessary. A direction to send or despatch, without the act being actually carried on, cannot constitute forwarding. The order dated April 8, 1982, makes it clear that the draft order was put into motion on April 8, 1982. In our view, merely making a direction to forward a copy, without the actual act being done cannot be construed to be forwarding of an order as required u/s 144B. In an extreme case, there may be a direction to forward a copy, but it may not be carried out at all. A mere direction to do an act without

the actual act being done cannot constitute that act itself. The whole purpose of the enactment of the provisions of Section 144B is to give the assessee an opportunity to be heard in respect of the proposed line of action of the Assessing Officer. What is required is the actual forwarding of the draft order by the Assessing Officer. The mere direction to do so, without the actual act being done does not meet the requirements of Section 144B. The language used in Clause (iv) of Explanation 1 appended to Section 153 is "commencing from the date on which the Income Tax Officer forwards the draft order" (underlined* for emphasis). Use of the term "forwards" leaves no manner of doubt that the actual act of forwarding is necessary.

10. The Tribunal was, therefore, justified in holding that the proceeding was barred by limitation. Our answer to the first question is in the affirmative, in favour of the assessee and against the Revenue. In view of the analysis made above, the second and third questions are answered in the affirmative, in favour of the assessee and against the Revenue.

11. The reference application is disposed of. No costs.

R.K. PATRA J.

12. I agree.