

(2001) 11 KL CK 0049

In the High Court Of Kerala

Case No : Income Tax A. No's. 67 and 120 of 1999 and 55 of 2000

Commissioner of Income Tax

APPELLANT

Vs

P.K. Aboobacker

RESPONDENT

Date of Decision : 27-11-2001

Acts Referred:

Income Tax Act, 1961 — Section 154, 155, 155(1), 182, 183

Citation : (2002) 173 CTR 411 : (2002) 254 ITR 51

Hon'ble Judges : P.K. Balasubramanyan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K.R Menon and George K. George, for the Appellant; K.M.V. Pandalai, for the Respondent

Judgement

P.K. Balasubramanyan, J.—The firm of which the respondent before us is the managing partner was assessed for the assessment years 1986-87, 1987-88 and 1988-89 as an unregistered firm. The Commissioner of Income Tax in exercise of his power u/s 263 of the Income Tax Act, 1961, set aside the order of the Assessing Officer and directed the Assessing Officer to assess the firm after assigning it the status of a registered firm as provided u/s 183(b) of the Act. There was also a direction to reconsider the question of depreciation. We are not concerned with that aspect here.

2. The Assessing Officer, pursuant to the direction of the Commissioner of Income Tax issued u/s 263 of the Act, completed the assessment of the firm. Thereupon, he issued notice to the respondent herein u/s 155 of the Income Tax Act proposing that the share of income of the respondent in the firm be properly included in the assessment of the respondent under the Income Tax Act. No objection was filed by the respondent to that notice. But in response to the notice the assessee appeared before the Assessing Officer through an advocate. The representative of the assessee did not object and requested to adopt the correct share of the income. This is what is recorded by the Assessing Officer :

"A notice u/s 155 has been issued, in response to which Shri P.J. Jacob,

advocate, appeared and the assessee has no objection to adopt the correct share income. The computation of income is as under :"

3. Thus, the assessment was completed. The respondent filed an appeal before the Commissioner of Income Tax (Appeals) contending that what is reopened in exercise of power u/s 263 of the Act is only the assessment of the firm, which was directed to be assigned the status of a registered firm and there was no reduction or enhancement made u/s 263 of the Act and, therefore, Section 155 of the Act had no application. The Commissioner of Income Tax (Appeals) purported to accept that objection and held that Section 155 of the Act could not be applied in the case and it applies only when a rectification or enhancement in the income of the firm is made u/s 263 of the Act. The Commissioner of Income Tax (Appeals) also held that Section 154 of the Act could also not be applied. Thus, the appeal filed by the assessee was allowed. On further appeal by the Revenue before the Income Tax Appellate Tribunal, the Appellate Tribunal agreed with the approach and conclusion of the Commissioner of Income Tax (Appeals) and dismissed the appeal. The Tribunal also referred to the decision in *Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others*, , in support of its conclusion that Section 154 of the Act has no application. It is being aggrieved by the decision of the Tribunal that the Revenue has come up with these appeals. This court admitted these appeals on the following substantial questions of law :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that rectification u/s 155(1)(b) is not permissible ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that no rectification of the assessment of the assessee is permissible u/s 154 of the Income Tax Act ?

3. Whether, on the facts and in the circumstances of the case and in the absence of a challenge against the order of the Commissioner of Income Tax passed u/s 263, the assessee is right in law in challenging the consequential rectification orders passed by the officer in conformity with the order of the Commissioner of Income Tax ?"

4. Pursuant to the notice issued by this court the assessee has appeared through counsel and both sides were heard on the above questions.

5. It is argued by learned counsel for the Revenue that when the firm which was originally assessed as an unregistered firm, was directed to be assigned the status of a registered firm by the Commissioner of Income Tax, in exercise of his jurisdiction u/s 263 of the Act which was not in question, the consequences of carrying out the directions of the Commissioner of Income Tax should follow and one of the essential consequences was that the share of the partner from the firm to which the registered status had been assigned, was liable to be taxed at his hands. Counsel therefore, submitted that the Assessing Officer was well within his jurisdiction in completing the assessment of the firm as also the

respondent who was the managing partner of that firm on the basis of the share of income derived by him from the firm. Counsel for the assessee, on the other hand, submitted that while exercising power u/s 263 of the Act, the Commissioner of Income Tax had only directed a fresh assessment of the firm and had not touched the orders of assessment against the partners and in view of this, the Assessing Officer did not get any authority to reopen the assessments of the partners and to complete the assessment afresh. Counsel submitted that an assessment made pursuant to an order u/s 263 of the Act was not a regular assessment and consequently Section 155(1)(a) could not also be invoked. According to him Section 155(1)(b) also could not be invoked in view of the fact that there was no reduction or enhancement in the assessment of the firm but only a change in the status of the firm.

6. In our view, when the Commissioner of Income Tax directed, in exercise of his power u/s 263 of the Income Tax Act, to invoke Section 183(b) of the Act and to complete the assessment on that basis, the carrying out of that order would involve not only a fresh assessment of the firm, but also of the partners to the extent of the share of income derived by them from the registered firm. Therefore, it appears to us that even without recourse to Section 155 or 154 of the Act, the Assessing Officer had the jurisdiction to complete the assessment not only in respect of the firm but also in respect of the partners in view of the direction of the Commissioner in the presence of the managing partner, the respondent, to complete the assessment in terms of Section 183(b) of the Act. Once the firm is assigned the status of a registered firm pursuant to the order u/s 263 of the Act and in terms of Section 183(b) of the Act, it is an assessment or a reassessment of the firm leading to the consequences provided for in Section 155(1)(a) of the Act. Similarly, when an assessment is made pursuant to an order u/s 263 of the Act by changing the status of the firm as contemplated by Section 183(b) of the Act, the same would also attract Section 155(1)(b) of the Act. Since, it would certainly involve a variation from the original assessment which does attract Section 155(1)(b) of the Act, in our view, the expression deduction or enhancement cannot be understood in a technical sense and it only means that there is a variation in the assessment pursuant to an order made u/s 263 of the Act. We think that neither the Commissioner of Income Tax nor the Appellate Tribunal has properly adverted to the relevant aspects while taking the view that the Assessing Officer was not justified in making a fresh assessment on the respondent as a partner of the firm which was directed to be assigned the status of a registered firm by the Commissioner of Income Tax in exercise of his power u/s 263 of the Act.

7. We find from the order of the Assessing Officer that the respondent through his counsel submitted that the assessee had no objection to adopt the correct share of income and to complete the assessment when the notice u/s 155 of the Act was issued to him. Therefore, it is obviously an agreed assessment. It is thereafter that the assessee filed an appeal before the Commissioner of Income Tax (Appeals). On a scrutiny of the memorandum of appeal not even a ground is

found that no such concession was made before the Assessing Officer. In such circumstances, it is highly doubtful whether an appeal at the instance of the assessee was maintainable in this case. It is one thing to say that the assessee is not bound by a concession on a question of law and he is entitled to challenge the order of the original authority even if it be passed on a concession. But it is another thing to say that when a concession is made of the nature involved herein by agreeing to have the correct share of income assessed at the hands of the assessee and thereby making it unnecessary for the Revenue to take any other action that may be needed under the provisions of the Act is not binding on the assessee. But, of course, this aspect is not very relevant here in view of our conclusion recorded earlier that the carrying out of the order u/s 263 of the Act itself would include the assessment of the firm pursuant thereto as well as that of the partners in the light of Section 183(b) of the Act.

8. In view of the conclusions as above, the substantial questions of law formulated in the appeal have to be answered in favour of the Revenue and against the assessee. We, therefore, answer those questions in favour of the Revenue and we set aside the orders of the Income Tax Appellate Tribunal and that of the Commissioner of Income Tax (Appeals) and restore the order of the Assessing Officer. We direct the parties to suffer their respective costs.