(1994) 03 AP CK 0027

In the Andhra Pradesh High Court

Case No : Referred Case No. 19 of 1986

Commissioner of Income Tax — APPELLANT

Vs

Supreme Constructions Co. — RESPONDENT

Date of Decision : 01-03-1994

Acts Referred:

Income Tax Act, 1961 — Section 125, 125A, 139, 139(2), 142

Citation : (1994) 2 ALT 639 : (1995) 213 ITR 137

Hon'ble Judges : T.C. Rangarajan, J;M.N. Rao, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

M.N. Rao, J.—The question referred for our decision u/s 256(1) of the Income Tax Act, 1961, is :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in cancelling the assessments for the assessment years 1973-74 and 1974-75 as invalid and without jurisdiction ?"

2. The assessee is a firm of contractors. The original assessment for the assessment year 1973-74 was completed on December 22, 1973, on a returned income of Rs. 5,37,780 and the assessment for the year 1974-75 was completed on November 5, 1975, on a returned income of Rs. 3,28,795. The assessments were reopened u/s 147 on the basis of information received from the Judicial Commission of Inquiry headed by Shri Justice Alladi Kuppuswamy as regards certain tenders accepted by the assessee-company. Notice u/s 148 was served on the assessee on March 26, 1978, and the last date for finalising the assessment was March 26, 1979, u/s 153(2)(b). However, the Income Tax Officer made a draft assessment u/s 144B and referred the matter to the Inspecting Assistant Commissioner who gave directions on August 2, 1979. The assessment was completed on August 10, 1979, following the directions issued by the Inspecting Assistant Commissioner. The case of the assessee was that section

144B not have been invoked for a reassessment u/s 147 and, therefore, the assessment order dated August 10, 1979, was barred by time.

3. The Income Tax Appellate Tribunal accepted the contention of the assessee and, at the instance of the Revenue, referred the question stated above for our decision.

4. As the question framed does not bring out precisely the matter at issue, we reframe the question in the following terms :

"Whether section 144B has no application in respect of assessments and reassessments made u/s 147 ?"

5. It is the contention of Shri S. R. Ashok, learned counsel for the Revenue, that the entire gamut of statutory provisions that come into play in consequence of issue of a notice under sub-section (2) of section 139 are attracted to a notice u/s 148. Whenever a notice was issued u/s 139(2), there was no bar for the assessing authority to invoke section 144B since that would be attracted by virtue of section 143(3). Controverting this, Shri Bheemsen, learned counsel for the assessee, says that inasmuch as section 147 is independent of section 143, the classes of assessments that fall within the ambit of section 144B are excluded from the purview of section 148.

6. In order to appreciate the rival contentions advanced before us it is useful to notice the relevant provisions as obtaining then. Section 148, which confers power to issue notice where the income has escaped assessment, is in the following terms :

"Issue of notice where income has escaped assessment. - (1) Before making the assessment, reassessment or recomputation u/s 147, the Income Tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income Tax Officer shall, before issuing any notice under this section, record his reasons for doing so."

Sub-section (2) of section 139 reads as under :

"In the case of any person who, in the Income Tax Officer''s opinion is assessable under this Act, whether on his own total income or on the total income of any other person during the previous years, the Income Tax Officer may, before the end of the relevant assessment year, issue a notice to him and serve the same upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed :

Provided that, on an application made in the prescribed manner, the Income Tax

Officer may, in his discretion, extend the date for furnishing the return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)."

Sub-sections (5), (6), (6A), (7) and (8) refer to sub-section (2) providing for corrections of errors on filing revised returns. Then comes section 142 which speaks of enquiry before assessment. The power to make assessment is incorporated in section 143(3) :

"143(3). On the date specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Income Tax Officer may require on specified points, and after taking into account all relevant material which he has gathered, -

(a) in a case where no assessment has been made under sub-section (1), the Income Tax Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment;"

If an assessee fails to make a return pursuant to receipt of notice under sub-section (2) of section 139, the assessing authority is empowered to make a best judgment assessment u/s 144. This is the normal procedure for making an assessment. We may also mention that the expression "assessment" as defined by clause (8) of section 2 reads as follows :

"''assessment'' includes reassessment;"

7. The Government of India had appointed a High Power Committee, headed by Justice Wanchoo, former Chief Justice of India, to study the then existing tax pattern and recommend amendments. One of the recommendations made by the Committee relates to ensuring safeguards to assessees by giving opportunity in the form of reassessment notice. The relevant recommendation is as follows :

"As regards disputed additions in assessments, a point has been made before us that often decisions are taken by the Income Tax Officer behind the assessee''s back and the assessee comes to know of additions and disallowances only after the assessment has been made and an order is received by him. In many cases, the dispute could have been avoided if adequate opportunity had been given to the taxpayer to explain the position. We are aware that such situations do frequently arise. To ensure that the assessee gets a reasonable opportunity of meeting the objections of the Income Tax Officer before an assessment is finalised, we recommend that there should be provision in the law requiring the Income Tax Officer to send a draft assessment order to the assessee, to start with, in all cases where the additions or disallowances proposed to be made in an assessment order under sub-section (3) of section 143 exceed in the aggregate Rs. 25,000. Where the taxpayer objects to the assessment being made on the basis of the draft order, he should intimate his objections within seven days to the Inspecting Assistant Commissioner who will, after hearing the assessee and the Income Tax Officer, pass the final order of assessment himself. For this purpose, the Inspecting Assistant Commissioner should have the power to accept, reduce or enhance the income proposed in the draft order. Such a measure will also ensure that major disputes with the taxpayers are settled or dealt with at a level higher than that of the Income Tax Officer."

8. In consequence of the above recommendation, section 144B was enacted. It is in the following terms :

"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 assess 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.

(4) If any objections are received, the Income Tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income Tax Officer to enable him to complete the assessment :

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income Tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work as assessment, by order, fix, from time to time, such amount as it deems fit :

Provided that different amounts may be fixed for different years :

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where in Inspecting Assistant Commissioner exercises the power or performs the functions of an Income Tax Officer in pursuance of an order made u/s 125 or section 125A."

Section 153 provides for time-limit for completion of assessments and reassessments. Clause (iv) of Explanation 1 lays down that with 180 days proceedings u/s 144B shall be completed in cases where the assessee has submitted objections. In other cases, the time-limit prescribed is thirty days.

9. From a reading of the relevant statutory provisions extracted supra, it appears to be fairly clear that whenever a notice was issued u/s 148 by the Assessing Officer, the provisions of the Act, so far as may be, would come into play as if the notice issued was a notice under sub-section (2) of section 139. What needs to be considered in this context is whether section 144B is one of the statutory provisions that are attracted in cases where a notice was issued u/s 139(2). Whenever a notice was issued u/s 139(2), an enquiry is held u/s 142 and an assessment is made u/s 143. In assessments made u/s 143, it is specifically laid down by section 144B that the draft assessment procedure should be followed. It would thus appear that the procedure laid down by section 144B is part of the procedure contemplated u/s 143(3).

10. A reading of section 144B, at first sight, may give the impression that assessment or reassessment proceedings u/s 147 are outside its purview since it mentions only section 143(3). Such a construction ignores the specific language employed in section 148 under which the assessing authority gets power to issue notice for reopening the assessments u/s 147. As already noticed, section 148 lays down that the provisions of the Act shall, so far as may be, apply to a reassessment made u/s 147. The phrase "so far as may be" implies that if there is anything inconsistent in the statutory provisions that come into play pursuant to a notice u/s 139(2), to the extent of that inconsistency resort cannot be made to any other section of the Act. By necessary implication, we must conclude that section 144B not being inconsistent with section 148, that procedure has to be followed in an assessment or reassessment u/s 147. In Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others, , the expression "so far is may be" came up for consideration. Section 37(1) of the Foreign Exchange Regulation act obligates the officer issuing a search warrant, to record in writing, the grounds of his behalf. Sub-section (2) provides that the provisions of the Code of Criminal Procedure relating to searches shall, so far as may be, apply to searches under that section, subject to certain modifications. The Supreme Court observed (at page 173) :

"The expression''so far as may be'' has always been construed to meant the those provisions may be generally followed to the extent possible."

11. In Commissioner of Income Tax Vs. Usha Aggarwal, , the question for consideration before the Punjab and Haryana High Court was : Whether in

respect of assessments made u/s 147, the provisions of section 144B were applicable ? The Punjab and Haryana High Court, on a literal interpretation of section 144B, in isolation and without referring to section 148, has held that it would not apply to section 147 proceedings because section 147 is not mentioned in section 144B. With great respect, we are unable to follow that view. The Madras High Court view, as contained in Commissioner of Income Tax Vs. Simson and Mc Conechy Limited, , is based upon the language of section 153 which provides for separate limitations for assessments and reassessments. The Madras High Court has assumed that exclusion of the time taken for section 144B proceedings as incorporated in clause (iv) of Explanation 1 to section 153 will not apply to reassessment proceedings u/s 153(2). But the opening words of Explanation 1 of section 153," In computing the period of limitation for purposes of this section......." which refer to assessments and reassessments under sub-sections (1) and (2) of section 153. Moreover, u/s 147, assessment can be made, for the first time also, in cases where no return was filed and no assessment has been made earlier and information had reached the assessing authority that income assessable to tax has escaped assessment. We, therefore, with great respect, are unable to agree with the Madras High Court view.

12. A contrary view was taken by the Kerala High Court in Kerala Kaumudi (P.) Ltd. Vs. Commissioner of Income Tax, . After referring to the relevant case law on this question, the Kerala High Court observed (at page 37) :

"A survey of the above decisions establishes that there can be only one assessment for each year, that once proceedings u/s 147 of the Act are initiated by issuing a notice u/s 148 read with section 139(2) of the Act, the assessment proceedings start afresh, and that the proceedings for assessment of that year will be pending and will continue until a final order of assessment is rendered."

We respectfully agree with the Kerala High Court view. We, therefore, concluded that, without reference to section 143(3), reassessment cannot be made u/s 147 and, therefore, by virtue of the specific language employed in section 148, there is not embargo for the assessing authority to invoke the provisions of section 144B introduced for the protection of the assessee by providing for a reassessment notice. We, therefore, hold that the assessment in question was within time. The view taken by the Tribunal is unsustainable in law. The question referred for our decision is answered in the negative, i.e., in favour of the Revenue and against the assessee. No costs.