

(1989) 03 KL CK 0059

In the High Court Of Kerala

Case No : I. T. R. No. 112 of 1983 & Income-tax Reference No. 112 of 1983

Crossfield Traders

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-03-1989

Acts Referred:

Income Tax Act, 1961 — Section 129, 144B, 153

Citation : (1989) 77 CTR 26 : (1989) 179 ITR 606

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : P. Balachandran, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

K.S. Paripoornan, J.—At the instance of the assessee, the Income Tax Appellate Tribunal has referred the following question of law for the decision of this court u/s 256(1) of the Income Tax Act:

"Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the time taken for affording an opportunity of being heard to the assessee in terms of the proviso to Section 129 of the Income Tax Act, 1961, is to be excluded in computing the time limit within which the assessment has to be passed in terms of Section 153 of the Act ?"

2. The respondent is the Revenue. We are concerned with the assessment year 1977-78. u/s 153 of the Income Tax Act, the assessment should normally be over on or before March 31, 1980. The disparity between the income returned by the assessee and the income proposed to be assessed by the Income Tax Officer was more than Rs. 1 lakh. Therefore, the Income Tax Officer forwarded a draft assessment order to the assessee in terms of Section 144B of the Act. It was received by the assessee on March 5, 1980. The assessee sent a reply on March 12, 1980, raising certain objections. The Income Tax Officer forwarded the draft assessment order with the objections of the assessee to the Inspecting Assistant Commissioner. It was pending with the Inspecting Assistant Commissioner. While

so, there was a change in the office of the Income Tax Officer. The Inspecting Assistant Commissioner, on August 7, 1980, ascertained from the assessee as to whether it required an opportunity of being heard to be given to it by the successor Income Tax Officer. On receipt of this, on August 12, 1980, the applicant/assessee made a request for a hearing by the successor Income Tax Officer on August 13, 1980. The rehearing was made by the successor Income Tax Officer on September 15, 1980. The Income Tax Officer intimated the Inspecting Assistant Commissioner that the order u/s 144B of the Act does not require any modification. The Inspecting Assistant Commissioner passed his order u/s 144B of the Act on September 30, 1980. The Income Tax Officer passed the consequential assessment order on September 30, 1980. It was served on the assessee on October 15, 1980, though sent by registered post on September 30, 1980, itself. Since the assessment should have been completed u/s 153 of the Income Tax Act, normally on or before March 31, 1980, the assessee contended that the assessment is time barred. This plea was negated by the Commissioner of Income Tax (Appeals) and also by the Income Tax Appellate Tribunal. Thereafter, at the instance of the assessee, the Appellate Tribunal has referred the above question of law, for the decision of this court.

3. We heard counsel for the applicant/assessee. It was argued that the assessee was not entitled to be reheard by the successor Income Tax Officer and the time taken for rehearing should not have been taken into account in deciding whether the assessment is time barred. Counsel for the assessee submitted that the fact that the assessee made a request for a hearing, when he was not entitled to it, and that it was allowed by the authorities will not be a case governed by the proviso to Section 129 of the Income Tax Act. In this connection, counsel for the applicant/assessee relied on the decision in *K. Venkata Ramana and Budha Appa Rao Vs. Commissioner of Income Tax*, . Counsel for the Revenue submitted that having availed of the opportunity to be heard, in terms of the proviso to Section 129 of the Income Tax Act, it is not open to the assessee to turn round and contend that he was not entitled to be afforded the said opportunity and the fact that such an opportunity was afforded to the assessee was irrelevant in considering whether the assessment is passed in terms of Section 153 of the Income Tax Act.

4. On hearing the rival contentions of the parties, we are of the view that the submission on behalf of the applicant/assessee should fail. Section 129 of the Income Tax Act is as follows :

"129. Change of incumbent of an office--Whenever in respect of any proceeding under this Act, an Income Tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the Income Tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor :

Provided that the assessee concerned may demand that before the proceeding is so continued, the previous proceeding or any part thereof be reopened or that

before any order of assessment is passed against him, he be reheard."

5. It is common ground that the assessment should have been normally completed on or before March 31, 1980. The draft assessment order was received by the assessee on March 5, 1980 and the assessee filed objections thereto on March 12, 1980. The draft assessment order was sent along with the objections of the assessee by the Income Tax Officer to the Inspecting Assistant Commissioner. At this juncture, there was a change in the office of the Income Tax Officer. It was in these circumstances and in order to conform to the statutory requirements (Section 129 of the Income Tax Act), the Inspecting Assistant Commissioner sent a letter to the assessee on August 7, 1980, to ascertain whether the assessee required an opportunity of being heard by the successor Income Tax Officer. The applicant/ assessee made a request for a hearing by the successor Income Tax Officer on August 13, 1980. The rehearing was afforded and the applicant/assessee was heard. However, the draft assessment order was not modified. The Inspecting Assistant Commissioner passed his order u/s 144B of the Act on September 30, 1980. The consequential assessment order was passed by the Income Tax Officer on September 30, 1980, itself. Though the assessment order was sent by registered post on September 30, 1980, itself, it was received by the assessee on October 15, 1980. We are of the view that it is not open to the assessee to contend that the opportunity of being heard afforded to the assessee, in terms of the proviso to Section 129 of the Act, was uncalled for and that the opportunity availed of by the assessee should not be taken into account for the purpose of removing the bar of limitation. Having elected to avail of the opportunity, in terms of the proviso to Section 129 of the Act, it is not open to the assessee to contend either that he need not have been given the opportunity or that the availing of that opportunity was of no consequence. The applicant/assessee, by his own conduct, cannot put forward such a plea.

6. We hold that the Commissioner of Income Tax (Appeals) as also the Income Tax Appellate Tribunal were justified in holding that the time required for affording an opportunity of being heard to the assessee, in terms of the proviso to Section 129 of the Income Tax Act, should be excluded in computing the time limit for the purpose of completing the assessment. The decision reported in K. Venkata Ramana and Budha Appa Rao Vs. Commissioner of Income Tax, cannot apply to the facts of this case, where the conduct of the assessee had intervened to decide the scope of the proceedings.

7. In the light of the above discussion, we hold that the order passed by the Appellate Tribunal is valid and justified in law. We answer the question referred to us, in the affirmative, against the assessee and in favour of the Revenue.

8. The assessee shall pay the costs of the Revenue including advocate's fee of Rs. 500.

9. A copy of this judgment under the seal of this court and the signature of the

Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, as required by law.