
(1963) 08 KL CK 0031
In the High Court Of Kerala
Case No : O.P. No. 2606 of 1962

E.P. Eappen

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 28-08-1963

Acts Referred:

Income Tax Act, 1961 — Section 158, 183(1), 183(3), 189, 189(1)

Citation : AIR 1965 Ker 167

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : S. Easwara Iyer and L. Gopalakrishnan Potti, for the Appellant; Govt. Pleader for (Nos. 1 and 2) and G. Rama Iyer, (for No. 3), for the Respondent

Final Decision : Partly Allowed

Judgement

C.A. Vaidialingam, J.—In tills writ petition Mr. S, Easwara Iyer, learned counsel for the petitioner challenges the two notices, issued by the Income Tax Officer, Trivandrum, evidenced by Exts. P-1 and P-2. Those two notices are both dated 20-10-1962 and have been issued u/s 22(3)(i) of the Indian Income Tax Act, 1961. The effect of these notices is to ask the Board of Revenue, the 2nd respondent in these proceedings, to pay the amounts, which, according to the Income Tax Officer, are held as amounts due to the petitioner, partner of the two firms mentioned therein, namely the Trivandrum Tobacco Combines, Trivandrum under Ext. P-1, and the Trivandrum Tobacco Corporation, Trivandrum, under Ext. P-2.

2. It will be seen that according to the petitioner he was a partner in two firms, namely Trivandrum Tobacco Combines, Trivandrum, and the Trivandrum Tobacco Corporation, Trivandrum. According to the petitioner, in respect of the arrears of Income Tax stated to be due by the Trivandrum Tobacco Combines, an amount of Rs. 78,607-04 is sought to be recovered by the Income Tax Officer from the petitioner, who was a partner in the said firm at the material time. Similarly, the petitioner alleges that he was a partner of the Trivandrum Tobacco Corporation,

Trivandrum, and that in respect of the arrears of Income Tax stated to be due from that firm in the sum of Rs. 1,00,578-81, the said amount is again sought to be recovered from the amounts held by the Board of Revenue really as amounts due to the petitioner himself.

3. The petitioner states that the State Government have directed the refund of a fairly large amount to him on the basis of the decision of the Supreme Court reported in A.B. Abdulkadir and Others Vs. The State of Kerala and Another, . In brief, according to the petitioner, certain amounts have been recovered from him by the State Government under the Travancore-Cochin Tobacco Act and the rules framed thereunder, and though the challenge that was made by him before the High Court in respect of that matter was unsuccessful, the petitioner appears to have ultimately succeeded in his contention before the Supreme court. On the basis of the said decision of the Supreme Court, the State Government, as I mentioned earlier, has directed refund of certain amounts to the petitioner.

4. According to the petitioner the amounts so directed to be refunded to the petitioner, are really amounts which do not legally belong to him, but they really represent monies which are to be received by him only as agent on behalf of the wholesale or B Class licensees. Then the petitioner refers to the two notices issued by the Income Tax Officer, namely Exts. P-1 and P-2. According to the petitioner, these two notices are Illegal and Invalid because the amounts which are sought to be attached are really amounts which the petitioner charges not in his own individual capacity, but really on behalf of the wholesale or B Class licensees; and inasmuch as the amounts do not belong to the petitioner, the Income Tax Officer cannot exercise the powers u/s 226(3) of the Income Tax Act in Issuing the notices Exts. P-1 and P-2.

The further contention that has been taken by the learned counsel for the petitioner is that in any event, inasmuch as the assessments in question were not as against the petitioner in his Individual capacity, but only as against the firms as such, the petitioner cannot be considered to be an "assessee" and therefore no action can be taken u/s 226(3)(1) of the Act.

The petitioner no doubt adverts to two other circumstances, namely the attachment through Revenue Recovery proceedings in the sum of Rs. 66,900/- which is said to be in deposit in O. 8. no. 64/1961 on the file of the Sub Court, Trivandrum, and that attachment is stated to be in respect of arrears of Income tax due from the Trivandrum Tobacco Corporation. The petitioner also states that by virtue of his filing writ petition In, this Court, namely O. P. 310/57, he has also got an order for refund of the sum of Rs. 81,871-11-0, being ..the amount, which according to him, has been illegally collected by way of sales tax; and that amount again. According to the petitioner, has been attached under revenue recovery proceedings in respect of arrears of Income Tax stated to be due from the Trivandrum Tobacco Combines.

5. So far as the amounts that are now under attachment are concerned, the

petitioner's grievance is, as I have already indicated, two-fold, namely that those amounts do not belong to him, and that in respect of those amounts, which are now standing to his credit in the hands of the Board of Revenue, no action can be taken u/s 226 (3) (1) of the Income Tax Act.

6. The stand taken by the revenue is that the amounts that are standing to the credit of the petitioner with the Board of Revenue and in respect of which action has been taken, are really amounts which belong to the petitioner himself and that no one else has got any right over them. The contention that the petitioner is only an agent of wholesale B licensees and that he is bound to hand over the refund amount to them, is very strenuously controverted by the revenue, and, in any event, it is stated that so far as the wholesale B licensees are concerned, none of them have made any claims in respect of those amounts. Regarding the further contention that no action can be taken u/s 226 (3) (i) of the Income tax Act, the stand taken by the revenue is that the objections raised in this regard cannot also be accepted. In fact the large stand that has been taken in the counter affidavit filed on behalf of the revenue is that inasmuch as the petitioner was admittedly a partner of the two firms in question, he is liable for payment of the firms' Income tax liabilities, and therefore he is the person who is liable to pay the tax and he should be considered to be an "assessee" as that expression is defined in Section 2 (7) of the Income tax Act, 1961.

7. Mr. G. Kama Iyer, learned counsel appearing for the revenue has filed a memo on 27-8-1968, to the effect that the arrears of Income Tax for which attachment u/s 226 (3) of the Income tax Act was effected, is due from Messrs. The Trivandrum Tobacco Corporation, that the petitioner was a partner in that firm and the firm was dissolved on 26-10-1963, and that the arrears in question represent the tax and penalty for the years before the dissolution.

8. The learned counsel for the petitioner has not controverted the statement made on behalf of the revenue that the arrears of income tax for which attachment u/s 220 (3) of the Act has been effected under the notice Kxt. P is really in respect of the arrears due from the Trivandrum Tobacco Corporation. That the petitioner was a partner in that firm is not also challenged. The further claim made by the revenue that the said firm was dissolved on 26-10-1953, has also not been challenged, it is really having due regard to these various aspects that the contention of the learned counsel for the petitioner will have to be considered and adjudicated upon.

9. Even for that purpose, in my view, the notices evidenced by Exts. P-1 and P-2 will have to be kept separate; because, according to Mr. G. Kama Iyer, learned counsel appearing for the revenue, the Trivandrum Tobacco Corporation, which is stated to be liable by way of Income Tax and in respect of which the notice Ext. P 2 has been issued, has been dissolved already as mentioned, and the assessments for the years 1952-53, 1953-54 and 1954-55 have been made as on a dissolved firm. And in this connection the learned counsel has very strenuously relied upon the provisions contained in Section 189 (3) of the

statute, under which, according to the learned counsel, the petitioner can certainly be considered to be an "assessee" as that expression is defined in Section 2 (7) of the Act.

10. Pausing here for a minute, it may be stated that Mr. Kama Iyer, learned counsel for the revenue found considerable difficulty in sustaining the notice Ext. P 1 relating to the Trivandrum Tobacco Combines. So far as that is concerned, it is not clear from the proceedings, as to whether the said firm is still continuing or not. According to the petitioner, it is still continuing; but according to Mr. Kama Iyer, learned counsel for the revenue, it is not possible to say from the records whether this statement is correct or not. Therefore, I have to proceed on the basis that so far as the Trivandrum Tobacco Corporation, in respect of which the notice Ext. P 2 has been issued, is concerned, is a firm which has been dissolved and assessment made against it as a dissolved firm under the provisions of Section 189 (3) of the Act. So far as the other firm namely the Trivandrum Tobacco Combines, is concerned, I have again to proceed on the basis that that firm still continues to function and prima facie the provisions of Section 189 (3) of the Act cannot apply to this firm as I will indicate presently.

11. A few sections of the Act relevant to this matter will have to be considered. Section 2 (7) defines the expression "assessee" as a person by whom Income tax or super tax or any other sum of money is payable under the Act. There are various categories of persons also included in the expression; but it is not really necessary for me to consider such persons mentioned in clauses (a) to (c) of the sub-section. According to Mr. Kama Iyer, learned counsel for the revenue, inasmuch as the assessment in respect of the Trivandrum Tobacco Corporation, in respect of which the notice Ext. P 2 has been issued, is an assessment u/s 189 of the Act as a dissolved firm, there is a liability on the part of every person who was a partner of the firm at the material time of paying the tax payable, by virtue of Section 189 (3). Therefore, according to Mr. Kama Iyer, the petitioner must certainly be considered to be an "assessee" u/s 2 (7). No doubt, I am aware of the contention of the learned counsel for the petitioner that the liability to pay the tax is no doubt fixed u/s 189 (3) when an assessment is made on a dissolved firm on the persons as partners at the time of the dissolution. That liability, according to the learned counsel, is something totally different from saying: that the partners therein can be considered to be "assessee" u/s 2 (7). This is an aspect which will have to be considered.

12. The other provision that is to be considered is Section 168 of the Act wherein provision is made that whenever a registered or unregistered firm is assessed under; the provisions of Clause (b) of Section 183, the Income tax Officer is to notify to the firm by an order in, writing the amount of its total Income assessed and the apportionment, thereof between the several partners. I am particularly referring to this Section because it gives a clear indication regarding the assessment of a firm as such and that may have some bearing in considering the question as to whether the notice Ext. P 1, issued in respect of the firm which is

still in existence, is valid, u/s 228 of the Act.

13. Another provision that has to be considered is Section 183 which occurs in Chapter XVI of the Act, dealing with special provisions applicable to firms. Section 182 deals with the assessment of registered firms, and 183 deals with assessment of unregistered firms. That again will clearly show,. In my view, that an assessment can be made on an. unregistered firm, end when such assessment is made the "assessee", u/s 2 (7) must be the unregistered firm as such, and not certainly the partners constituting the firm, though they may be liable under general law for meeting the liability of the income tax that has been assessed by the officer,

14. The other provision that has been very strenuously relied upon by Mr. Rama Iyer, learned counsel appearing for the revenue, is Section 189 which deals with assessment of a firm dissolved or assessment of a firm the business of which has been discontinued. Under Sub-section (1) of Section 189 jurisdiction is given to the Income tax Officer to make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place. There are other provisions in this sub-section which are not necessary to be noted for the present purpose. Sub-section (3) of Section 189 in particular has to be noted. It is as follows:

"Every person who was at the time of such discontinuance or dissolution a partner of the firm, and the legal representative of any such person who is deceased, shall be jointly and severally liable for the amount of tax, penalty or other sum payable, and all the provisions of this Act, so far as may be, shall apply to any such assessment or imposition of penalty or other sum."

The sub-section extracted above will clearly allow that in respect of an assessment that has been made on a dissolved firm or a firm which has discontinued the business u/s 189(1), a liability has been cast upon every person who was, at the time of discontinuance or dissolution, a partner of the firm and the legal representative of any such person who is deceased, as jointly and severally liable for the amount of tax, penalty or other sum payable under the provisions of the Act. It is on this particular provision that Mr. Rama Iyer, learned counsel for the revenue has placed considerable reliance at any rate to sustain the notice Ext. P 2 relating to the Trivandrum Tobacco Corporation. I have already referred to the contention that has been taken by the learned counsel for the petitioner that so far as Sub-section (3) of Section 189 is concerned, it merely makes the partners liable, or rather creates a liability in respect of the tax that is assessed as against the firm itself. But according to the learned counsel, that by itself will not make the partners liable to pay the amount as "assesses" u/s 2 (7). I am not Inclined to accept this contention of the learned counsel for the petitioner at any rate so far as the notice evidenced by Ext. P 2 is concerned. I will revert to this aspect after dealing with the material provisions contained in Section 226 (3) (i) and (ii) on the basis of which the notice in question has been issued by the officer concerned.

15. Section 226 provides for other modes of recovery of the arrears of income tax, in particular, so far as Sub-section (3) of that Section is concerned, power is given under Clause (1) to the Income Tax Officer to require by notice in writing any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Income tax Officer in the manner referred to therein. And for this purpose, under clause (ii) of Sub-section (3) the Income tax Officer is to issue the necessary notice in question, in this case, It will be seen that the two notices evidenced by Exts. P 1 and P 2 are Issued really u/s 226 (a) (1) of the Act, But in order to invoke the provisions of clause (ii) of Sub-section (3) of Section 22S, It is really necessary that the matters provided for in Sub-section (3) should exist, namely that the person to whom the notice is issued must be a person who has got money due to the assessee or he must be a person who holds money for or on account of the assessee.

It is really in connection with this aspect that the learned counsel for the petitioner has raised the contention that inasmuch as the refunds that have been directed to be made in favour of his client by the State Government and which amount is being held by the Board of Revenue, is really an amount due to him in his individual capacity, the Income Tax Officer has no jurisdiction to issue the notice under Clause (11) of Sub-section (3) of Section 226. That is, according to the learned counsel for the petitioner, in this case, the Board of Revenue, namely the 2nd respondent, to whom the notice has been issued, cannot be considered to be a person who can be considered to hold money for and on account of the assessee, namely either the Trivandrum Tobacco Combines as such in Ext. P 1, or the Trivandrum Tobacco Corporation in Ext. P 2. The question is whether this contention of the learned counsel can be accepted.

16. I have already referred to the definition of the expression "assessee" in Section 2 (7) of the Act, as also the provision referred to by Mr. C. Kama Iyer, learned counsel for the revenue, namely Sub-section (3) of Section 189 of the Act. I have also indicated that there is no controversy that at any rate so far as the Trivandrum Tobacco Corporation is concerned, that is a dissolved firm and assessment has been made as on a dissolved firm u/s 189 (3). If that is so, in my view, the petitioner, who was admittedly a partner at the material date, namely the date of dissolution of the firm, must be a person who is liable to pay the income tax liability as an assessee u/s 2 (7) of the Act, read with Section 189 (3). If that is so, he will certainly be an assessee u/s 2 (7); in which case, the notice Issued under Ext. P 2 dated 20-10-1962 by the Income Tax Officer is perfectly justified and within his jurisdiction. Therefore, I am not Inclined to accept the contention of the learned counsel for the petitioner that the Income tax Officer had no Jurisdiction to take action u/s 226 (3) (1) of the Income Tax Act, 1961, at any rate so far as the notice Ext. P 2 is concerned.

17. So far as the second notice, namely. Ext, P 1 dated 20-10-1962 is concerned, I have already stated that It refers to the liability of the Trivandrum Tobacco

Combines. I have also adverted to the fact that the statement made on behalf of the petitioner that it is still a going concern, and Mr. Rama Iyer, learned counsel appearing for the revenue has not been able to controvert it. If that is so, Section 189 of the Act, or the particular provision, namely Sub-section (3) of that Section, will have no application at all. I have also referred to Sub-sections (1) and (3) of Section 189 which will, in my view, clearly indicate that the assessee in those circumstances must be considered to be the firm as such, though there may be a liability on the partner under the general law for meeting the liability that is imposed as against the firm as such. NO doubt Mr. G. Rama Iyer, learned counsel for the revenue strenuously urged that even a partner of an unregistered firm must be considered to be an assessee u/s 2 (7). I am not inclined to accept this contention of the learned counsel at any rate regarding the notice Ext. P 1. I have already accepted his contention in respect of the notice Ext. F 2. In view of the fact that the learned counsel is well founded in his contention that the assessment in respect of the Trivandrum Tobacco Corporation is as on a dissolved firm, the provisions of Section 189 will apply; in which case it follows that Section 389 (3) will also apply. That is a special provision made to meet such contingency. No such provision has been made so far as I could see in respect of partners being considered as assesses when the firm itself is a going concern.

18. Therefore, the position is that while sustaining the contentions of the learned counsel for the revenue regarding the attack raised about the Jurisdiction of the Income Tax Officer with reference to Ext. P 2, the contention of Mr. Easwara Iyer, learned counsel for the petitioner regarding the issue of the notice Ext. P 1 with reference to the Trivandrum Tobacco Combines will have to be accepted.

19. Therefore, the result is that Ext, P 1 will stand cancelled and Ext. P 2 will be sustained. To this limited extent the writ petition is allowed and in all other respects it will stand dismissed. Parties will bear their costs.