

(1981) 12 AHC CK 0048

In the Allahabad High Court

Case No : Income-tax Reference No. 884 of 1976

Gupta Traders

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-12-1981

Acts Referred:

Income Tax Act, 1961 — Section 143, 144, 147, 148, 150(1)

Citation : (1982) 28 CTR 270 : (1982) 135 ITR 504 : (1982) 10 TAXMAN 199

Hon'ble Judges : R.R. Rastogi, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; M. Katju, for the Respondent

Final Decision : Disposed Of

Judgement

Rastogi, J.—This is a reference u/s 256(1) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), It relates to the assessment year 1965-66, the previous year ended on March 31, 1964. The assessee, M/s. Gupta Traders Kanpur, a partnership firm, had filed its return of income on September 27, 1965. The assessee-firm was constituted of two partners. Deo Prakash Gupta with a 10 annas share and his son, Sheo Autar Gupta, with 6 annas share. In his order made u/s 185(1)(b) of the Act on March 16, 1970, the ITO found that the assessee-firm had not carried on any business in the status of the firm and the business actually belonged to Deo Prakash Gupta, As such the proceedings in the case of the firm were filed (sic). The income shown in the return filed by the firm was to be considered in the case of Deo Prakash Gupta in his individual capacity. Deo Prakash Gupta in his individual return, had disclosed an income of Rs. 20,100. However, the assessment was framed in his case on a total income of Rs. 48,801. In other words, the entire income of the assessee-firm was included in the case of Deo Prakash Gupta, individual.

2. The assessee filed an appeal against the order made u/s 185(1)(b) of the Act. The AAC allowed that appeal and held that the assessee-firm was a genuine firm. Thereafter, the ITO made the assessment on the assessee-firm on 30th

November, 1970. From that order the assessee filed an appeal before the AAC and it was contended that since no assessment had been made on the assessee-firm on the basis of the return filed by it within the period of four years from the end of the relevant assessment year and also as no action had been taken u/s 147 of the Act, the assessment having been made beyond the period of limitation, was not legal and valid. That contention found favour with the AAC and the assessment was cancelled.

3. The ITO thereafter initiated proceedings u/s 147 of the Act and issued a notice u/s 148 on January 18, 1972. In response to that notice the assessee filed a return with a forwarding letter dated February 25, 1972. It was contended by the assessee in that letter that the initiation of the proceedings was bad inasmuch as these proceedings were barred by time. The ITO did not accept that contention and completed the assessment on January 25, 1973, determining the total income at Rs. 48,861.

4. The assessee filed an appeal. The AAC dismissed the appeal by order dated February 16, 1974. The reason given was that in the appeal filed by Deo Prakash Gupta, who had 10 annas share in the firm, it will be presumed that the assessee had full knowledge of the proceedings and hence the present proceedings did not suffer from any legal defect. The assessee then took up the matter in further appeal before the Appellate Tribunal, The Appellate Tribunal on a consideration of the provisions contained in Section 150(1) read with Explan. 3 to Sub-section (3) of Section 153 posed the question as to whether in the instant case the AAC can be said to have allowed the, assessee-firm an opportunity of hearing while disposing of the appeal filed by Deo Prakash Gupta ? The Tribunal found that technically no notice had been given to the assessee-firm, but since "it was the case of the firm itself that it was genuine and Sri Deo Prakash Gupta was a 10 annas partner in the firm and the other partner was his son only, we are inclined to hold that the assessee-firm was virtually given an opportunity if not technically". In this view of the matter, the Tribunal held that the assessment made in pursuance of the notice u/s 148 was not barred by limitation.

5. At the instance of the assessee, the Appellate Tribunal has referred the following questions of law for our opinion :

"1. Whether, on the facts and in the circumstances of the case, it can lawfully be said that the proceedings pursuant to the return filed on September 27, 1966 (sic), September 27, 1965, were closed on March 16, 1970 ?

2. Whether, on the facts and in the circumstances of the case, the proceedings u/s 147 were bad in law ?

3. Whether, on the facts and in the circumstances of the case, the provisions of Section 150(1) and Explanation 3 to Section 153 are attracted and the Tribunal was correct in holding that Sri Deo Prakash Gupta, one of the partners. having 10 annas share in the firm, could be said to have been given opportunity entitling the assessment of the firm within the meaning of Explanation 3 of

Section 153 ?"

We were addressed by Sri R.K. Gulati, learned counsel for the assessee, on question No. 3 alone and we agree with him that if on this question we accept the assessee's case, we need not answer questions Nos. 1 and 2. Therefore, we shall first take up question No. 3.

6. We have narrated the facts in detail above. We would only like to add that it is not disputed that the opening of the assessment can be only under Clause (b) of Section 147, Clause (a) thereof not being attracted because it was not the case of the department that the assessee-firm had not disclosed fully and truly all material facts necessary for its assessment for the year under consideration. It is also not disputed that action u/s 147(b) in the instant case was barred by limitation. Limitation can be saved only if Section 150(1) read with Section 153(3) (ii), Expln. 3, is attracted to the case. We shall hence extract these provisions :

"150. (1) Notwithstanding anything contained in Section 149, the notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision."

"153. (3) The provisions of Sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of Sub-section (2A), be completed at any time--...

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;...

Explanation 3.--Where, by an order referred to in Clause (ii) of Subsection (3), any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of Section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."

It would be seen that Sub-section (1) of Section 150 forms an exception to Section 149 which provides for a notice u/s 148 being issued at any time for the purposes of making assessment or reassessment in consequence of, or to give effect to, any finding or direction contained in an order passed in appeal, reference or revision under this Act. Similarly, Sub-section (3) of Section 153 provides for exceptional cases in which the time-limit laid down in Sub-section (1) for the completion of an assessment u/s 143 or Section 144 and the time-limit under Sub-section (2) for the completion of an assessment or reassessment

u/s 147 do not apply. This provision is, however, subject to the provisions of Sub-section (2A). Explanation to this Sub-section embraces within its scope persons other than the assessee as well but lays down the condition that the third party should be given an opportunity of hearing before the order depriving him of the right of pleading limitation is passed.

7. It was submitted before us by Sri R.K. Gulati that in the instant case the assessee-firm was not given an opportunity by the AAC while disposing of the appeal filed by Deo Prakash Gupta and, secondly, that in the order made in that appeal no direction was given by the AAC to include the income, which had been included in the assessment of Deo Prakash Gupta, in the case of the assessee-firm. After hearing counsel, we find considerable merit in both these contentions. It is not disputed that no notice whatsoever was given to the assessee-firm when the appeal filed by Deo Prakash Gupta came up for hearing before the AAC. In the proceedings taken subsequently u/s 147(b) of the Act, the revenue authorities as well as the Appellate Tribunal repelled the contention of the assessee-firm that these proceedings were barred by limitation on the assumption that the assessee-firm had full knowledge of the aforesaid appellate proceedings because one of its partners, Deo Prakash Gupta, having 10 annas share, was the appellant. This assumption is erroneous in law. A partnership firm has got its own entity independent from that of the partners constituting it. For that matter, the expression "person" as denned in Section 2(31) of the Act includes, inter alia, an individual and a firm. Apart from that in Clause(23) of this section, "firm", "partner" and "partnership" are provided to have the meanings respectively assigned to them under the Partnership Act except for the difference that the expression "partnership" also includes any person, who being a minor, has been admitted to the benefits of the partnership. The expression "registered firm" has been defined in Clause (39) of this section to mean a firm registered under the provisions of Clause (a) of Sub-section (1) of Section 185 or under that provision read with Sub-section (7) of Section 184. Thus, though under the general law a firm is not a legal person or juridical entity, but for the purposes of this Act a firm is treated as an; entity distinct from the persons who constitute the firm: [See Commissioner of Income Tax, Bihar and Orissa Vs. Kirkend Coal Co., . Therefore, in the case of Deo Prakash Gupta before making an order that a part of the income which had been assessed in his case was the income of the assessee-firm, it was necessary to give an opportunity of a hearing to the assessee-firm. Admittedly, no notice was given to the assessee-firm and, therefore, in the present proceedings benefit of Section 150(1) read with Section 153(3)(ii), Expln. 3, is not available to the revenue.

8. Our attention was invited by Sri Gulati to certain decisions on these questions. In C.A. Gulanikar, Income Tax Officer Vs. Ramnarain Sons Private Ltd., it was laid down that under Expln. 3 to Section 153(3) of the Act the person whose assessment is to be reopened should be given an opportunity of being heard in the proceedings as a result of which the assessment is sought to be reopened. In that case, during the course of the assessment proceedings of a firm, the

director of the petitioner-company was examined. As a result of those proceedings the assessment of the petitioner-company was opened taking advantage of Explan. 3 to Section 153(3). The petitioner-company itself had not been given an opportunity in the proceedings of the firm. The petitioner-company challenged those proceedings as barred by time. That challenge was accepted on the view that the mere examination of a director of the petitioner-company in the proceedings of the firm as a result of which the assessment of the petitioner-company was sought to be reopened, could not be equated with an opportunity of being heard given to the petitioner-company. In Commissioner of Income Tax, Madras Vs. K.R. Patel and Others, an appeal filed by a firm challenging the assessability of the amount invested by its partners was allowed by the AAC who issued a direction to the officer to proceed against the individual partners under the second proviso to Section 34(3) of the Indian I.T. Act, 1922, and consider the assessability or otherwise of the part or whole of their investments in the firm. On the basis of that direction the officer reopened the assessment of the partners and assessed the amounts in their hands as income from undisclosed sources. The AAC, on appeal, held that the direction in the firm's appeal was not valid and hence the proceedings of the officer were time barred. The Tribunal agreed with that view. On a reference, the Mysore High Court upheld that view and observed that even Explan. 3 to Section 153(3) cannot assist the department as the AAC had not recorded a finding that the sum which was excluded from the total income of the firm was the income of the three partners and the partners of the firm had no opportunity of being heard when the AAC made his direction.

9. Similar view has been taken by this court in Pt. Deo Sharma Vs. Income Tax Officer, B-Ward, .

10. We thus conclude that the revenue could not take advantage of the provisions contained in Section 150(1) read with Section 153(3)(ii), Explan. 3, and the initiation of proceedings in the case of the assessee-firm u/s 147(b) was barred by limitation.

11. Coming to the second contention, agreeing with Sri Gulati, we find that in the order passed by the AAC in the appeal of Deo Prakash Gupta, as a consequence of which the assessment of the assessee-firm was sought to be reopened there was no direction as to how the income excluded from the assessment of Deo Prakash Gupta was to be dealt with. All that was said by the AAC was :

"The impugned assessment also is, therefore, liable to be set aside directing the Income Tax Officer to assess the appellant on his 10 annas share in the income of the firm instead of the entire income in the above manner."

The assessment was accordingly set aside with a direction to make it afresh. In other words, there was no direction given by the AAC in that appeal for the inclusion of any income in the firm's case.

12. In the result, we answer question No. 3 in the negative, in favour of the

assessee and against the department. Questions Nos. 1 and 2 are returned unanswered. The assessee is entitled to costs which we assess at Rs. 250.