
(1972) 12 KL CK 0002
In the High Court Of Kerala
Case No : O.P. No. 177 of 1970

H.A. Mohammed Haneef

APPELLANT

Vs

ITO, Quilon

RESPONDENT

Date of Decision : 06-12-1972

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 264, 264(4)

Citation : (1973) KLJ 219

Hon'ble Judges : M.U. Issac, J

Bench : Single Bench

Advocate : K. Sukumaran and K.K. Usha, for the Appellant; P.A. Francis, for the Respondent

Judgement

M.U. Issac, J.—The petitioner is an assessee within the jurisdiction of the first respondent, the Income Tax Officer, Quilon. He has been carrying on business in tea and cashew nut. In respect of assessment years 1951-52 to 1954-55 both inclusive a question arose whether the interest paid by him on amounts borrowed for the cashew nut business, which was defunct during the relevant accounting years was an allowable deduction in computing his total income. The claim was disallowed by the Income Tax authorities. But it came up for decision in a reference before this Court in H.A. Mohammed Haneef Noorjahan Manzil Vs. Commissioner of Income Tax, Kerala at Ernakulam, . This Court answered the question in favour of the petitioner. That judgment was pronounced on 14-10-1966. The petitioner claimed a deduction of Rs. 29,690 on the same account for the assessment year 1961-62. The claim was naturally disallowed by the Income Tax Officer and the Appellate Assistant Commissioner in the light of the decision of the Income Tax authorities on the said question in respect of the previous assessment years. The petitioner did not file an appeal before the Income Tax Appellate Tribunal, apparently in view of the pendency of the aforesaid reference in this Court. But the Income Tax Officer filed an appeal from the assessment order in respect of another point, and the petitioner also filed a

cross objection. The appeal was dismissed and the cross objection was allowed by the Appellate Tribunal. After the decision of the reference by this Court, the petitioner filed a revision before the third respondent, the Commissioner of Income Tax, Kerala, taking objection to the order of the Appellate Assistant Commissioner, in so far as it did not allow the deduction claimed by the petitioner for the interest paid on account of the cashew nut business. The third respondent, by his order Ex. P4 dated 24-11-1969 dismissed the revision holding that it was not maintainable by virtue of Clause (c) of Sub-s. (4) of S. 264 of the Income Tax Act, since the order of the Appellate Assistant Commissioner has been subject to an appeal to the Appellate Tribunal. The petitioner has, therefore, filed this writ petition to quash the orders of the Income Tax Officer, the Appellate Assistant Commissioner and the Commissioner of Income Tax, in so far as the petitioner's claim for deduction of the interest paid by him in the cashew nut business was disallowed. There is no dispute in the light of the decision of this Court in Mohammad Haneef v. Commissioner of Income Tax Kerala that the amount claimed by the petitioner is an allowable deduction. But the contention of the Revenue is that the petitioner should have filed an appeal from order of the Appellate Assistant Commissioner and that the remedy by way of revision was lost to him in view of the appeal filed by the Income Tax Officer from the order of the Appellate Assistant Commissioner. Reliance was placed by counsel for the Revenue in support of the above contention on the decision of the Madras High Court in C. Gnanasundara Nayagar Vs. The Commissioner of Income Tax, Before I refer to the above decision, it is necessary to read sub-s. (4) of S. 264 of the Act, in order to appreciate the argument.

264 (4). The Commissioner shall not revise any order under this section in the following cases:

(a) where an appeal against the order lies to the Appellate Commissioner or to the Appellate Tribunal but has not been made and not expired, or in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Appellate Assistant Commissioner; or

(c) where the order has been made the subject of an appeal to the Appellate Tribunal.

The Madras decision related to an assessment under the Indian Income Tax Act, 1922 wherein there was a similar provision in S. 33A. In that case, the assessee filed appeals before the Appellate Tribunal, which were disposed of by the Tribunal in the usual course. But shortly before filing the said appeals, he filed revisions before the Commissioner claiming a deduction in respect of rents received by him from two houses. That was a claim which he did not make either before the Income Tax Officer or before the Appellate Authorities. The Commissioner dismissed the revisions on the finding that the deduction claimed

was inadmissible. The assessee moved the High Court in revision under Art. 227 of the Constitution. The High Court held that the view taken by the Commissioner was erroneous. Then counsel for the Revenue took an objection that the cases cannot be remitted to the Commissioner, as he had no jurisdiction to deal with them in view of Clause (c) in S. 33A(2) of the Act which is the same as Clause (c) of S. 264(4) of the present Act. The objection was upheld by the Court.

2. I respectfully agree with the decision of the Madras High Court. There is, however, one distinction between the Madras case and the case before me. In the Madras case, the appeal before the Appellate Tribunal and revision before the Commissioner of Income Tax were both filed by the same party. No doubt, they raised different points. In the instant case, the appeal was filed by one party, while the revision was filed by the opposite party. Here also the points raised in the appeal and the revision were different. Therefore, it was argued that the fact that one party filed an appeal before the Tribunal from the order of the Appellate Assistant Commissioner would not affect the right of the other party to file a revision from the same order before the Commissioner. It was submitted that what is barred by Clause (c) of S. 264(4) of the Act is the seeking of the same remedy or different remedies by an assessee against the order of the Appellate Assistant Commissioner before different authorities. On a careful reading of the section in the light of the object underlying it, it is difficult for me to accept the above argument. If what Sub-s. (4) enacts is a bar against a remedy, the argument is good. But in my view, it is not so. It contains a prohibition against the exercise of the revisional jurisdiction of the Commissioner in the cases mentioned therein. It is, therefore, irrelevant whether the jurisdiction is sought to be invoked by the assessee or the Revenue. Clause (c) of Sub-s. (4) is attracted if the order sought to be revised has been made the subject of an appeal to the Appellate Tribunal; whether it may be by the assessee or by the Revenue. The principle underlying the prohibition seems to be that an order of the Appellate Assistant Commissioner merges in the order the Appellate Tribunal; and in such a case, the order of the Appellate Assistant Commissioner would not be there for being revised by the Commissioner; and he should not be permitted directly or indirectly to interfere with the order of the Appellate Tribunal under the colour that he is revising the order of the Appellate Assistant Commissioner. In this view of the matter, the objection taken to the order of the Commissioner of Income Tax cannot succeed. Then the question arises whether the petitioner can have any relief from this Court, though his right cannot be disputed. The jurisdiction of this Court under Art. 226 of the Constitution is very wide; and at the same time discretionary. I think in a case where the right is clearly there, and the remedy provided by the Statute was not availed of for sufficient reason, it would be a sound exercise of jurisdiction to give relief under Art. 226 of the Constitution. In the instant case, the petitioner did not file an appeal before the Appellate Tribunal, as it had already decided the point against him in a number of appeals which he filed in respect of previous assessment years, and the matter

was pending decision before this Court. As soon as the question was decided in his favour by this Court, he moved the Commissioner for relief; and the Commissioner dismissed the revision on the technical ground that he had no jurisdiction to entertain it since the Revenue happened to file an appeal from the order sought to be revised. It is almost clear that the Commissioner would have granted relief to the petitioner, but for the above difficulty. Therefore, the only thing that can be done under the circumstances is to direct the Appellate Assistant Commissioner to reconsider and dispose of the petitioner's claim for deduction in the light of the decision of this Court on that point. Accordingly, I quash the order, Ex. P2 of the Appellate Assistant Commissioner, and direct him to dispose of the appeal afresh after considering the petitioner's claim for deduction of the interest paid by him on the account of his cashew nut business according to law. This writ petition is disposed of in the manner stated above. There will be no order as to costs.