
(1974) 02 CAL CK 0012
In the Calcutta High Court
Case No : Civil Rule No. 685 (W) of 1972

Hansraj Dhingra

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-02-1974

Acts Referred:

Income Tax Act, 1961 — Section 141, 143, 143(3), 155, 165

Citation : 78 CWN 824 : (1975) 98 ITR 397

Hon'ble Judges : Anil Kumar Sen, J

Bench : Single Bench

Advocate : A.P. Choudhury and Sudhir Kar, for the Appellant; Nanda Lal Pal, for the Respondent

Judgement

Anil Kumar Sen, J.—An order of assessment dated February 1, 1970, made by the Income Tax Officer, "A" Ward, SSC-I/Cal , u/s 143(3)/155 of the Income Tax Act, 1961, and the consequent demand dated March 12, 1970, issued u/s 156 thereof are the subject-matter of challenge along with an order dated July 20, 1971, passed by the Additional Commissioner rejecting a revision petition u/s 264 of the Act against the said order of assessment. The facts are not in dispute and may briefly be set out as hereunder.

2. Petitioner filed his return of income in respect of the assessment year 1963-64 on June 27, 1963. In this return he showed his total income to be Rs. 24,396, the only source of his income being said to be the share of profit received by him from Messrs. India Trading Corporation, a partnership firm of which the petitioner was a partner. On August 3, 1963, the Income Tax Officer made a provisional assessment u/s 141 of the Act and issued a demand notice on such assessment. The records of the assessment proceeding show that the assessee appeared even thereafter on a notice u/s 143(2), but no regular assessment was made u/s 143(3).

3. In the meantime the partnership firm as aforesaid filed its return in respect of the assessment year 1963-64. It also filed an application for registration u/s 184

of the Act. The application for registration was rejected and on March 28, 1968, the firm was assessed as an association of persons. The firm preferred appeals both against the assessment as also against the order refusing registration. In October, 1969, the firm's appeal against the refusal of registration succeeded and grant of registration in favour of the firm was directed. The firm's appeal against the assessment also succeeded in part. Consequent thereto, on January 9, 1970, the Income Tax Officer made an order apportioning the total income of the said firm between the partners thereof.

4. It is only after the aforesaid order of apportionment that the Income Tax Officer proceeded to pass the impugned order dated February 2, 1970. Such an order was passed on a notice u/s 155 of the Act. The order itself makes it clear that the Income Tax Officer proceeded to recompute the total income of the petitioner in view of the apportionment order. According to the Income Tax Officer the assessment was earlier completed at N. A. when the firm was assessed as A.O.P. and the recomputation was considered necessary as a result of the firm's success in its appeals. By this order the Income Tax Officer computed petitioner's total income at Rs. 1,72,126 comprising of Rs. 50,057 as business income and Rs. 1,22,069 as income from other sources for the assessment year 1963-64. Consequent to such assessment the Income Tax Officer issued a notice of demand dated March 12, 1970, demanding payment of the assessed tax of Rs. 1,21,766.75 together with a sum of Rs. 38,988 as interest less a sum of Rs. 5,149.65 being the tax already paid. Against the aforesaid order of assessment the petitioner preferred a revision petition u/s 264 of the Act raising an objection that the entire proceeding for recomputation by the Income Tax Officer is without jurisdiction. According to the petitioner there being no completed assessment earlier made, Section 155 could not be taken recourse to. The Additional Commissioner of Income Tax overruled the objection so raised and dismissed the revision petition by his order dated July 28, 1971. Feeling aggrieved by such orders and demand the petitioner has now moved this court in the writ jurisdiction and has prayed for issue of an appropriate writ for quashing the impugned orders and the demand dated March 12, 1970.

5. Mr. Chowdhury, appearing in support of this rule, has contended that the assessment as made is wholly without jurisdiction. According to Mr. Chowdhury, the Income Tax Officer was quite conscious of the position that his authority to assess u/s 143 of the Act had become barred on the relevant date on the earlier expiry of four years ; to meet such a situation the Income Tax Officer took recourse to Section 155 of the Act. But Mr. Chowdhury contends that Section 155 was inappropriately taken recourse to; that section can have no application as, on facts, there was no completed assessment made previously.

6. In my view there is ample substance in this contention of Mr. Chowdhury. Section 155 is a provision for amendment of assessment and the relevant Sub-section (1) reads as follows:

"155. (1) Where in respect of any completed assessment of a partner in a firm it

is found-

(a) on the assessment or reassessment of the firm, or

(b) on any reduction or enhancement made in the income of the firm under this Section 154, Section 250, Section 254, Section 260, Section 262, Section 263 or Section 264,

that, the share of the partner in the income of the firm has not been included in the assessment of the partner or, if included, is not correct, the Income Tax Officer may amend the order of assessment of the partner with a view to the inclusion of the share in the assessment or the correction thereof, as the case may be; and the provisions of Section 154 shall, so far as may be, apply thereto, the period of four years specified in Sub-section (7) of that section being reckoned from the date of the final order passed in the case of the firm."

7. Plainly this provision authorises amendment of an order of assessment where the assessment had earlier been completed. Therefore, the distinct implication is that completion of the assessment had earlier been made by an order. Here, in the present case, admittedly there was no order made u/s 143(3). After the provisional assessment was made u/s 141, the Income Tax Officer allowed his authority to assess to lapse and get barred by expiry of the time limit prescribed by the Act. While the Income Tax Officer thought "No assessment" is completion of the assessment, the learned Additional Commissioner was of the view that the provisional assessment became final and complete when it was not followed by a regular assessment u/s 143. Neither of these two views commend to me. Here on the record, the Income Tax Officer had not even recorded any order of "No assessment". Section 155 authorises him to amend an order of assessment and not the assessment and far less "no order of assessment" as in the present case. Seeking to amend, he purported to make the assessment itself for the first time. That apart, it was pointed out by the Supreme Court in the case of Commissioner of Income Tax v. M. K. K. R. Muthukaruppan Chettiar that an order recording no assessment does not so conclude the proceeding as to authorise issue of a notice of a proceeding u/s 34 of the Indian Income Tax Act, 1922. There is no provision in the statute which renders the provisional order to be final on the same not being followed by a regular assessment. "Completed assessment" in Section 155(1) means a positive act of completion which should be clearly distinguished from lapse of authority to assess on the expiry of the period of limitation prescribed. There the act is not done or completed but is forgone. This distinction, in my view, finds support from the following observations of Hidayatullah J. in the Supreme Court decision in the case of Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. S. G. Mehta:

"It must be remembered that if the Income Tax Act prescribes a period during which the tax due in any particular assessment year may be assessed, then on the expiry of that period the department cannot make an assessment. Where no period is prescribed the assessment can be completed at any time but once

completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (Section 35) or to reassess where there has been an escapement of assessment of income for one reason or another (Section 34). Both these sections which enable reopening of back assessments provide their own periods of time for action but all these periods of time, whether for the first assessment or for rectification or for reassessment, merely create a bar when that time passed against a machinery set up by the income tax Act for the assessment and levy of the tax. They do not create an exemption in favour of the assessee or grant an absolution on the expiry of the period. The liability is not enforceable but the tax may again become exigible if the bar is removed and the taxpayer is brought within the jurisdiction of the said machinery by reason of a new power."

8. Therefore, it is not possible to agree with the learned Additional Commissioner that on the lapse of the authority to assess on the expiry of the period of limitation, the provisional assessment became final and complete in this case.

9. There is another reason why the recomputation as made u/s 155 cannot be held to be within jurisdiction. There can be no dispute that Section 155 gives a limited jurisdiction to amend an order of assessment with a view to include the proper share in the assessment or correction thereof as may be found necessary as a consequence of the assessment or reassessment of the firm or on any reduction or enhancement of the income thereof. In the present case, proceeding u/s 155 the Income Tax Officer not only purported to add the enhanced share of profit but to add a huge amount as income from other sources to the total income of the petitioner. This the Income Tax Officer could not have done in exercise of his powers u/s 155 and this is wholly beyond the scope of the authority thereunder. Reference may be made to decisions in the cases of *Commissioner of Income Tax v. M.M. Thimmaiah* and *Commissioner of Income Tax v. Balkishan Bhatia*.

10. Incidentally, Mr. Pal wanted to support the order of assessment by contending that the assessment can well be supported as an assessment made in exercise of powers only u/s 143 itself. Such is also the view expressed by the learned Additional Commissioner. According to Mr. Pal, the period of limitation for an assessment u/s 143 is four years in ordinary circumstances, but is eight years if the case falls within Section 271(1)(c) of the Act. Reference is made to Section 153(b) of the Act, Mr. Pal contends that when on the facts of the present case the Income Tax Officer added a sum of Rs. 1,26,069 as income from other sources, the said amount must be deemed to be a concealed income of the assessee-petitioner and such concealment brings the case within Section 271(1)(c) extending the limitation to eight years u/s 153(b). Such a view cannot be accepted. First of all the Income Tax Officer in the present case had not made the assessment u/s 143 read with Section 271(1)(c). But that apart, in my opinion, the major obstacle to the application of Section 271(1)(c) is the fact that in order to bring it within the said provision, the Income Tax Officer has to satisfy

himself that the assessee had concealed the particulars of his income or had deliberately furnished inaccurate particulars thereof. Such a satisfaction had never been recorded in the proceeding and I entertain a great doubt whether such a satisfaction could have been recorded at all without giving an appropriate opportunity to the petitioner to have his say in the matter. In the circumstances, I am unable to uphold the assessment as proposed in the manner suggested by Mr. Pal and as indicated by the learned Additional Commissioner or to hold that even if the assessment was not within the sanction of Section 155 it will be within the sanction of Section 143 read with Section 271(1)(c).

11. Lastly, Mr. Pal on behalf of the respondent, contends that when the petitioner submitted to the jurisdiction by recording no objection to the assessment proposed, he is not entitled to dispute the same. The records indicate that the petitioner was not appearing himself but appearing through his brother on a notice being issued u/s 135. On my findings made hereinbefore the Income Tax Officer had no jurisdiction whatsoever to proceed u/s 155 and that being the position, any amount of consent could not have conferred such jurisdiction on the Income Tax Officer. Therefore, I find no substance in this contention of Mr. Pal,

12. On the conclusions as above, this application succeeds.

13. The rule is made absolute.

14. The impugned orders and the demand are hereby quashed.

15. Let a writ in the nature of certiorari do issue incorporating the above direction.

16. There will be no order for costs.

17. Let the operation of this order remain stayed for a period of six weeks from this date.