(1983) 01 MP CK 0024

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Matter No. 296 of 1981

Harish Agrawal APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 20-01-1983

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1922 — Section 22(1), 22(2), 22(3), 26, 34
Income Tax Act, 1961 — Section 139, 147, 148

Citation : (1983) 14 TAXMAN 462

Hon'ble Judges : R.K. Vijayvargiya, J;G.G. Sohani, J

Bench : Division Bench

Advocate : Bagadiya, for the Appellant; R.C. Mukati, for the Respondent

Final Decision : Allowed

Judgement

R.K. Vijayvargiya, J.—The material facts giving rise to this petition under articles 226 and 227 of the Constitution are as follows : The petitioner is the karta of the HUF known as Harish Agrawal, HUF. The petitioner voluntarily submitted return of his income in the status of HUF for the assessment year 1978-79. The previous year having ended on 31-3-1978. In the return the petitioner disclosed his income as Rs. 266 derived from property, being 10 per cent share of the income from the property, held in co-ownership concern, Sadhna Enterprises as per computation of income. It is alleged that the respondent-ITO made enquiry into the aforesaid return. However, on 23-3-1981 the respondent sent a letter (Annex. ''B'') to the petitioner stating that as the above return is claimed to have been filed voluntarily by him declaring total income below the non-taxable maximum limit for the respective assessment year the same is not covered by any of the sub-sections of section 139 of the income tax Act, 1961 (''the Act''). The same, therefore, could not be proceeded with for making of regular assessment. On the same day the respondent issued notice to the petitioner u/s 148 of the Act, stating therein that he has reason to believe that the petitioner''s income in respect of which he is assessable for the assessment year 1978-79 has escaped assessment within the meaning of section 147 of the Act. The respondent proposed to assess the income for the said assessment year. The petitioner was, therefore, required to deliver to the respondent, within 30 days from the date of the service of the said notice (Annex. ''A''), a return in the prescribed form of his income in respect of which he was assessable for the said assessment year. The petitioner has prayed that as the respondent had no jurisdiction to issue notice u/s 148 to him, the notice (Annex. ''A'') deserves to be quashed.

Along with the return the respondent filed; a copy (Annex. R-3) of the proceedings dated 23-3-1981 which contains reasons for issuance of notice u/s 148. la Annex. R-3 it is stated as follows :

Record of proceedings in the assessee''s case clearly indicates that proceedings for assessment were wrongly continued on invalid return. Fresh proceedings are considered necessary for obtaining a valid and legal return with the issue of notice u/s 148 for the reasons discussed in the following para. If an assessment is made on the return already filed, such an assessment shall remain liable to be challenged even by the assessee on the ground that it were made on a return which was invalid being not covered by any of the sub-sections of section 139. The said return had accordingly to be so ignored and this action initiated in the light of Supreme Court''s judgment in the case reported on 65 ITR 607.

2. The learned counsel for the petitioner contended that the respondent committed a patent error of law in holding that the return submitted by the petitioner was invalid and that he had no jurisdiction to issue notice u/s 148 ignoring the return voluntarily filed by the petitioner. He placed reliance upon the decision of the Supreme Court in The Commissioner of Income Tax, Bombay Vs. Ranchhoddas Karsondas, Bombay, . The contention is well founded. In the aforesaid decision the assessee voluntarily submitted return of his income beyond time, disclosing income below taxable limit. The ITO did not act on the return submitted; by the assessee but issued a notice purporting to be u/s 34 of the Indian income tax Act, 1922 (''the 1922 Act'') calling upon the assessee to submit his return. The ITO assessed the assessee on the basis of the second return adding a sum of Rs. 59,026 in the income of the assessee from undisclosed sources, disallowing the cash credits standing in the name of the assessee''s wife in the firm of which the assessee was a partner. This amount of cash credits was disclosed by the assessee in the footnote to the return Voluntarily filed by him. On these facts after considering the difference of opinion between the Bombay High Court and the Calcutta High Court, the Supreme Court held as follows :

We are unable (and we say this with due respect) to accept the view adumbrated in the Calcutta High Court cases. The contrary view is expressed by the Bombay High Court in the earlier case of HARAKCHAND MAKANJI and CO. Vs. COMMISSIONER OF Income Tax, BOMBAY CITY., and in the judgment under appeal. That view was accepted by the Madras High Court in P. S. Rama Iyer Vs.

Commissioner of Income Tax, Madras, , and also, in our opinion is the sounder view of the two. In the earlier of the two Bombay High Court cases Chagla, CJ. and Tendolkar, J., held (as stated in the headnote):

''Notice u/s 34 is only necessary if at the end of the assessment year no return has been made by the assessee and the authorities wished to proceed u/s 22(2), but, where the assessee himself chooses voluntarily to make a return, no question can arise u/s 34 of assessment escaping and therefore there is no necessity to serve any notice u/s 34.''

This represents the law applicable to the facts as they are to be found in this case. In the assessment year no return of income was filed, nor was any notice served u/s 22(2). There was, however, the general notice u/s 22(1). A return in answer to that notice could be filed u/s 22(3) before assessment, and for this there is no limit of time. It was filed on January 5, 1950. There was nothing to prevent the income tax Officer from taking up the return and proceeding to assess the income of the assessee. It was open to him, if there was sufficient justification for it, to hold that the amount noted in the footnote was really the assessee''s income, in which case an assessable income would have been found and the tax could be charged thereon. If the income tax Officer had acted on that return and assessed the assessee before March 31, 1950, the assessment would have been valid. He chose to ignore the return, and served on the assessee a notice u/s 34(1). This notice was improper, because with the return already filed, there was neither an omission nor a failure on the part of the assessee, nor was there any question of assessment ''escaping''. The notice u/s 34(1) was, therefore, invalid and the consequent assessment, equally so...." (p. 576)

The ratio of the aforesaid Supreme Court decision applies to the present case with full force.

3. In the present case, the return filed by the assessee disclosing income below taxable limit was a good return and if an assessment was framed on the basis of that return the assessment could not have been assailed on the ground that it was based on an invalid return. The respondent seems to have lost sight of the aforesaid decision of the Supreme Court in holding that the return filed by the assessee petitioner was invalid and assessment could not be framed on the basis of that return. The respondent had, therefore, no jurisdiction to issue a notice u/s 148 because with the return already filed there was neither an omission nor a failure on the part of the petitioner nor was there any question of assessment escaping.

4. The decision of the Supreme Court in Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty, relied upon by the ITO for holding that if the assessment was framed on the basis of the return filed by the assessee it would be invalid, is not applicable to the present case and it was not relied upon by the learned counsel for the department in support of the notice issued by the

respondent u/s 148. The notice GIR No. H-201 dated 23-3-1981 (Annex. ''A'') issued by the respondent u/s 148 to the petitioner, therefore, deserves to be quashed.

5. The respondent issued notice u/s 148 to the petitioner on the ground that the return filed by the assessee was an invalid return and on that basis no assessment could be framed. As stated above the view taken by the ITO is patently erroneous and contrary to law laid down by the Supreme Court. In the circumstances, the letter dated 23-3-1981 (Annex. ''B''), sent by the respondent to the petitioner, stating that, the return filed by the assessee is not covered by any sub-section of section 139 and, therefore, cannot be proceeded with for making of regular assessment, also deserves to be quashed.

6. According to the department, the Sadhna Enterprises of which the petitioner is a member is an AOP and has to be assessed as such. The petitioner contends that the property purchased by the petitioner and others under the name and style of Sadhna Enterprises is a co-ownership property and, therefore, income there from deserves to be assessed u/s 26of the Act. The respondent has also issued notices to the petitioner and other members of the Sadhna Enterprises to show cause why they should not be assessed as an AOP. The respondent shall be free to proceed with the assessment of Sadhna Enterprises in accordance with law and if the impugned notice (Annex. ''A'') relates also to the assessment of Sadhna Enterprises as stated in the return this order shall not have any effect on the said notice in that respect. As a result of the discussion aforesaid, this petition is allowed. Both the notice dated 23-3-1981 (Annex. ''A'') and the letter dated 23-3-1981 (Annex. ''B'') issued by the respondent to the petitioner are quashed. The respondent shall be at liberty to proceed with the assessment of the petitioner in respect of his income for the assessment year 1978-1979 on the basis of the return voluntarily filed by the petitioner in accordance with law. In the circumstances, the parties hall bear their own costs of this petition. The outstanding amount of security deposit, if any, be returned to the petitioner after verification.