(1987) 08 AP CK 0010

In the Andhra Pradesh High Court

Case No : R.C. No. 242 of 1982

H.S. Imam APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 21-08-1987

Acts Referred:
Income Tax Act, 1961 — Section 142(1), 143(2), 143(3), 144, 144B

Citation : (1987) 66 CTR 197 : (1988) 171 ITR 214

Hon'ble Judges : Y.V. Anjaneyulu, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : S. Ravi, for the Appellant; M. Suryanarayana Murthy, for the Respondent

Judgement

Y.V. Anjaneyulu, J.—This reference arises u/s 256(1) of the Income Tax Act, 1961. At the instance of the assessee, the following question of law is referred for the consideration of this court by the Income Tax Appellate Tribunal concerning the Income Tax assessment year 1976-77.

"Whether, on the facts and in the circumstances of the case, where the Tribunal had come to the conclusion that the making of an assessment u/s 144 of the Income Tax Act, 1961, was not warranted, the Tribunal was justified in holding that it was not incumbent to annual the assessment and that it was in order to set aside the assessment and direct fresh assessment to be made in accordance with law ?"

2. A few facts may be noticed : The assessment proceedings for the year 1976-77 dragged on almost till the end of the period stipulated for the completion of the assessment. The assessment had to be completed on or before March 31, 1979. The Income Tax Officer issued a notice u/s 143(2) of the Act fixing the case for hearing on March 27, 1979. The assessee complied with the notice and at the time of hearing, the Income Tax Officer required the assessee to furnish certain information and adjourned the case to March 31, 1979, on which date the assessment had to be necessarily completed in order to save

limitation. On March 31, 1979, it appears, the assessee did not furnish the information. Consequently, the Income Tax Officer completed the assessment u/s 144 of the Act to the best of his judgment. The ground for completing the assessment ex parte was that there was non-compliance with the notice issued u/s 143(2) of the Act.

3. The assessee filed an appeal against the assessment before the Commissioner of Income Tax (Appeals) in which he questioned the validity of the ex parte assessment made. It was pointed out that there was compliance with the notice issued u/s 143(2) inasmuch as the assessee was present on March 27, 1979, and the case was heard. The failure to furnish information required by the Income Tax Officer on March 31, 1979, could not result in an ex parte assessment. Obviously, the assessee''s contention was that information can be called for by the Income Tax Officer only u/s 142(1) of the Act by the issue of an appropriate notice. Inasmuch as no such notice exists in the present case, there can be no default on the part of the assessee even if the information required was not furnished on March 31, 1979. It is not dispute that there was no notice issued to the assessee u/s 142(1) of the Act.

4. The Commissioner of Income Tax (Appeals) had no hesitation in accepting the assessee''s contention. It was found that so far as notice u/s 143(2) is concerned, the assessee complied with the same and there is no provocation for making the assessment ex parte on March 31, 1979, for the assessee''s alleged failure to company with the notice u/s 143(2) of the Act. The learned Commissioner, therefore, set aside the assessment made by the Income Tax Officer with a direction to make a fresh assessment according to law.

5. The assessee filed second appeal before the Tribunal contending that in the facts and circumstance of the case, the Commissioner should have annulled the assessment and not set aside the assessment with a direction to re-do the assessment. It was urged before the Tribunal that the assessment u/s 144 was per se illegal and, consequently, the assessment ought to have been quashed or annulled in appeal. It was further claimed that the limitation for making the assessment for the year claimed that the limitation for making the assessment for the year 1976-77 had run out of March 31, 1979, and by setting aside what was obviously an illegal assessment, the period of limitation could not be enlarged by the appellate authority. In these circumstances, the assessee urged, the more appropriate thing to do for the Commissioner should have been to annual the assessment. The Tribunal did not agree with this contention of the assessee and upheld the order of the Commissioner of Income Tax setting aside the assessment and directing the making of a fresh assessment. The assessee applied for a reference u/s 256(1) of the Act and the question of law mentioned at p. 216 referred is referred by the Tribunal for the consideration of this court.

6. Section 251(1) of the Income Tax Act sets out the powers of the Commissioner of Income Tax (Appeals) while disposing of an appeal. According to clause (a) of section 251(1), in an appeal against an order of assessment, the

appellate authority may confirm, reduce, enhance or annual the assessment; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions given by the appellate authority. It would, therefore, be seen basically that the appellate authority has the power to set aside the assessment with a direction to make a fresh assessment and also to annul the assessment. The circumstances in which an assessment should be annulled and the cases in which an assessment should be set aside, are not specified in section 251. The appellate authority will have to consider the facts and circumstances of each case and determine whether in the circumstances obtaining in a given case, the assessment should be annulled or should be set aside with a direction to make a fresh assessment. It cannot, therefore, be argued that there is lack of power so far as the Commissioner of Income Tax (Appeals) is concerned to set aside the assessment under appeal and direction making of fresh assessment. The only question for consideration is whether the facts in this case would have justified the Commissioner of Income Tax (Appeals) passing an order annulling the assessment altogether without setting aside and directing the making of a fresh assessment.

7. Learned counsel for the assessee, Sri Ravi, contends that if the facts in the present case are borne in mind, this is an eminently fit case where the Commissioner should have annulled the assessment. In the first place, it was pointed out that having dragged on the assessment till almost the period of expiry of the statutory time-limit, the Income Tax Officer made a pretence of hearing on March 27, 1979, adjourned it to March 31, 1979, and made the ex parte assessment for the real purpose of provoking the assessee to have the assessment reopened so that the Income Tax Officer could get a longer period of limitation. This circumstance, according to learned counsel, is itself sufficient for the appellate authority to annual the assessment. Whether this circumstance would justify it or not, we cannot help observing that there is sufficient justification for the grievance of the assessee in this case. The case was posted for hearing on March 27, 1979, and some information regarding cash credits, etc., was asked to be furnished giving the assessee hardly three day''s time. We cannot escape the feeling that the Income Tax Officer was fully conscious that the three days'' time given to the assessee for furnishing information was far too inadequate. Obviously, the Income Tax Officer was trying to rush through the assessment on March 31, 1979, and bargain for an enlarged period of limitation by making an ex parte assessment. We must express our disapproval of the manner in which the tax authorities take such shortcuts for making assessments almost at the last minutes causing considerable prejudice and hardship to the assessee. We do not, however, think that this circumstance alone would justify the Commissioner of Income Tax annulling the assessment altogether. The assessee''s grievance basically was that the ex parte assessment was made without the assessee having had sufficient opportunity to make representations during the course of assessment enquiry. Ends of justice would be met adequately by setting aside the assessment and giving a fresh opportunity to the

assessee to make appropriate representations in a de novo assessment enquiry before the officer. It may be true that in so doing, the period of limitation is enlarged. But this is a hazard associated with the direction to make a fresh assessment and it cannot be avoided. The assessee will have to bear with the hardship and inconvenience, if any, arising out of the setting aside of the assessment.

8. The second ground urged by learned counsel was that the Income Tax Officer made additions aggregating to over Rs. 1,00,000 to the income returned and this was, therefore, a case which should have been referred to the Inspecting Assistant Commissioner of Income Tax u/s 144B of the Act. The legal formality to refer the case to the Inspecting Assistant Commissioner u/s 144B of the Act was avoided by the Income Tax Officer by making an ex parte assessment on the last day. According to learned counsel, this is another circumstance which would have justified the Commissioner (Appeals) in annulling the assessment.

9. True, in the normal circumstances, the Income Tax Officer would have been obliged to refer the case to the Inspecting Assistant Commissioner u/s 144B. But that obligation would have arisen if the assessment were to be made u/s 143(2) and not ex parte u/s 144. Since the Income Tax officer decided to make an ex parte assessment, whether rightly or wrongly, the legal obligation to refer the case to the Inspecting Assistant Commissioner did not arise. It is not, therefore, possible to say that by reason of this circumstance, the assessment made was on the face of it invalid so as to deserve annulment in appeal.

10. In any case, we are unable to accept the proposition that the facts and circumstances of the assessee''s case necessarily required the Commissioner of Income Tax (Appeals) to annul the assessment under appeal. In our opinion, the Tribunal was correct in rejecting the assessee''s contention that the Commissioner of Income Tax (Appeals) committed no error in setting aside the assessment and directing the making of a fresh assessment. This is sufficient to dispose of the reference.

11. We may, however, in passing, observe that an essential aspect of the matter has escaped the attention of all the authorities below including the Revenue, which was trying to sustain the assessment under law. That question is, whether it is open to the assessee to canvass the correctness otherwise of the assessment made u/s 143(2) of the Act in an appeal against the quantum assessment u/s 144 of the Act. In the present case, we do not find from the record that there is any challenge against the quantum. Even if there is a challenge against the quantum, it would appear that it such as appeal if the assessee raised a plea that in the facts and circumstances, the Income Tax Officer ought not to have completed the assessment ex parte, he could not be permitted to raise this question in an appeal filed against the assessment u/s 144 of the Act. We may point out that the law is fairly well-settled that in an appeal against the assessment u/s 144 of the Act, it is not open to an assessee to raise grounds concerning the validity of the making of an assessment ex parte u/s 144

of the Act. We may refer to the decision of the Allahabad High Court in Padampat Singhania Vs. Commr. of Income Tax, U.P. and Ajmer-Merwara, Lucknow, . The aforesaid principle enunciated by the Allahabad High Court has been applied in almost every case and it was held that the assessee could not validity raise the question regarding the validity of an ex parte assessment in an appeal against the assessment u/s 144 of the Act. If that were to be the correct position in law, in the present case, the Commissioner of Income Tax (Appeals) should have refused to go into the question of the validity of the assessment u/s 144 in the appeal against the assessment. It was open to the assessee to file an application u/s 146 of the Act and seek reopening of the ex parte assessment. For his own reasons, the assessee did not choose to avail of this remedy provided by section 146 of the Act and the assessee did not seek the reopening of the assessment on the ground that the Income Tax Officer committed an error in making the assessment ex parte u/s 144. Having waived his right to avail of the remedy u/s 146 of the Act, the assessee should have been prevented from agitating that question in the quantum appeal. Obviously, this matter has escaped the attention of the Commissioner of Income Tax and also the Income Tax and also the Income Tax Appellate Tribunal, which has gone into the question and had that there was no justification for the making of an ex parte assessment. In our opinion, if the correct principles of law had been applied, the assessee in this case would not have been in a position to agitate the correctness or otherwise of the ex parte assessment in the appeal against the order u/s 144 of the Act without availing of the remedy provided by section 146 of the Act.

12. Learned counsel for the assessee pointed out that in the present case, an application u/s 146 could not have, been lied because no grievance can be put forward on any of the grounds specified u/s 144 of the Act. We think this is a matter which the assessee should have left to the authorities concerned without deciding the question himself. Learned counsel for the assessee for the assessee has also relied on the judgment of the Madhya Pradesh High Court in Suganchand Kanhaiyalal Rathi Vs. The Commissioner of Income Tax, , in support of the proposition, that in an appeal against the assessment, the question regarding the justification for making an assessment ex parte could be agitated. Having gone through the facts of that case, we do think that learned counsel is right in his submission. In that case, the challenge in the quantum appeal was against the income assessed and it became necessary to establish that certain books were not maintained, the existence of which was presumed by the Income Tax Officer. That was an entirely different circumstances and is totally unconnected with the making of an ex parte assessment.

13. Learned counsel for the assessee raised a further plea that this court would not be justified in taking into account the aforesaid legal principle inasmuch as a plea to that effect was not raised by the Revenue at any time and exercising advisory jurisdiction, this court ought not to take note of the matter. We do not which to go into this question as we have answered this reference merely on the letter ground, but we have also come to the conclusion that the Commissioner of

Income Tax (Appeals) was, on the facts and in the circumstances, justified in setting aside the assessment without annulling the same.

14. Having regard to the above, we answer the question referred in the affirmative, i.e., in favour of the Revenue and against the assessee. No costs.

