
(1975) 06 KL CK 0003
In the High Court Of Kerala
Case No : Writ Appeal No. 213 of 1973

K.C. Luckose

APPELLANT

Vs

Income Tax Officer, B-Ward and Another

RESPONDENT

Date of Decision : 27-06-1975

Acts Referred:

Income Tax Act, 1922 — Section 33

Income Tax Act, 1961 — Section 263, 264, 264(1)

Citation : (1976) 105 ITR 418

Hon'ble Judges : V.P. Gopalan Nambiyar, J; George Abraham Vadakkal, J

Bench : Division Bench

Advocate : T.S. Venkateswara Iyer and P.K. Balasubramoniam, for the Appellant; P.A. Francis and P.K.P. Menon, for the Respondent

Judgement

Gopalan Nambiyar, J.—After careful and anxious consideration of the interesting question of law involved in this appeal, we think the learned judge was right in his reasoning and conclusion. We have no hesitation in agreeing with the same. The appellant was assessed to Income Tax for the year 1964-65. Exhibit P-1 dated January 18, 1967, is a copy of the order of assessment. It was found that the appellant had sold eight vehicles for a sum of Rs. 2,05,000 ; out of which a sum of Rs. 10,000 had to be deducted for the value of four routes as fixed in 1957-58 assessment. The sale proceeds of the vehicles alone was thus worked out at Rs. 1,93,000. From this was deducted a sum of Rs. 83,919 representing the cost of two new vehicles and the balance sale price was Rs. 1,11,081. After allowing deduction for the written down value, the profit u/s 41(2) was computed at Rs. 65,077 and the income from the vehicles at Rs. 15,470, to make up a total income of Rs. 80,547. This was rounded up to Rs. 80,550 and on this income the assessee was assessed. The assessee preferred a revision to the Commissioner u/s 264 of the Income Tax Act, 1961. This was disposed of by exhibit P-5 order dated February 5, 1970. The Commissioner maintained the total sale price at Rs. 2,05,000 less Rs. 10,000, viz., Rs. 1,95,000. From out of this he deducted the cost of two vehicles, viz., Rs. 92,943, and the balance sale price of three vehicles

was computed at Rs. 1,02,057. The original cost of the three vehicles being Rs. 88,450 and their written down value Rs. 37,748 the profit u/s 41(2) was worked out at Rs. 50,702. To this extent, the assessee gained an advantage. But the Commissioner also took the view that the difference between the sale price of Rs. 1,02,057 and the original cost of the three vehicles, Rs. 88,450, viz., the sum of Rs. 13,607, attracted liability for capital gains, The business income of the assessee was also reduced by the Commissioner. Ultimately, as a result of this revision the tax liability of the assessee was fixed on the basis of a total income of Rs. 70,160 as against the total income of Rs. 80,550 arrived at by the Income Tax Officer. The assessee filed O.P. No. 2923 of 1970 to quash exhibit P-5 order of the Commissioner on the ground that in the revision filed by him u/s 264 of the Income Tax Act the Commissioner had no jurisdiction to vary an assessment order to the prejudice of the assessee. The learned judge held that the revision was one really u/s 264 of the Income Tax Act, but was of the opinion that the order cannot be said to be one prejudicial to the assessee as the net result of the tax liability arrived at by the Commissioner was favourable to the assessee, and not prejudicial to him. In that view the learned judge dismissed the writ petition. Sections 263 and 264(1) of the Income Tax Act, 1961, read as follows:

"263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems, necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under Sub-section (1)-

(a) to revise an order of reassessment made u/s 147, or

(b) after the expiry of two years from the date of the order sought to be revised.

(3) Notwithstanding anything contained in Sub-section (2), an order in revision under this Section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation.--In computing the period of limitation for the purposes of Sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

264. (1) In the case of any order other than an order to which Section 263 applies passed by an authority subordinate to him, the Commissioner may, either

of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit....."

After Clause 5 of Section 264 there is an Explanation, which reads as follows:

"Explanation 1.--An order by the Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudicial to the assessee."

It is well-known that in the prior Act of 1922 there was originally no provision enabling the revenue to file appeals against assessment orders prejudicial to its interests. The omission was repaired by the enactment of Section 33 more or less in the same terms as Section 263(1) of the 1961 Act which empowered the Commissioner to revise orders passed by subordinate authorities and pass such orders as he deems fit, "not being an order prejudicial to the assessee". Later, Section 33A provided for revision and passing of orders not prejudicial to the assessee; and Section 33B provided for revision of orders prejudicial to the interests of the revenue. Sections 33A and 33B correspond to Sections 263 and 264. The expression "prejudicial to the interests of the assessee" in Section 33 came up for interpretation before the Judicial Committee of the Privy Council in *Commissioner of Income Tax v. Tribune Trust*, [1948] 16 ITR 214. Lord Simonds, who spoke for the Judicial Committee, observed:

"It appears to them that an order, made by the Commissioner u/s 33 can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order under review. If the assessee has a complaint against any assessment or order made by a subordinate officer, he has the appropriate and specific remedy which the Act provides. The Commissioner may act u/s 33 with or without the invitation of the assessee; if he does so without invitation, it is clear that, if he does nothing to worsen the position of the assessee, the latter can acquire no right; the review may be a purely departmental matter of which the assessee knows nothing. If, on the other hand, the Commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification for giving him a new right of appeal. He has a specific right of appeal against the assessment or order of the subordinate officer, which is subject to its own time limit. That he cannot enlarge by taking a course which is on his part purely voluntary. This view of the Section is confirmed by the exception. For it is proper that, where the Commissioner does make an order which worsens the position of the assessee, the latter should have a right of appeal, since against that order he has no other right. It is further confirmed by the proviso to Section 66(2) which limits a reference from an order u/s 33 to cases where the question of law arises out of that order itself and excludes it where the question of law arises out of a previous order u/s 31 or Section 32 which is revised u/s 33, In the case in which

a reference is permitted, there is a new point of law which could not be otherwise the subject of appeal; in the case in which it is excluded, the point of law was one that could already have been appealed under the appropriate section."

The decision interprets the term "prejudicial to the assessee". Going by this interpretation, it is plain that the incidence and operation of the tax on the assessee after the order passed on revision, do not certainly leave him in a worse position than what he was in, prior to the revision. Therefore, it cannot be said that the order passed by the Commissioner was "prejudicial to the assessee" within the meaning of Section 264 of the Act. The assessee's objection to this effect is, therefore, groundless.

2. Before us, however, counsel for the appellant maintained that the revisional power could properly be exercised only u/s 263 of the Act, and, therefore, would attract to itself the limitation of two years from the date of the order sought to be revised, provided for by Clause 2(b) of that section. We are satisfied that this contention also should fail. u/s 263, it is only an order which is "erroneous in so far as it is prejudicial to the interests of the revenue" that can be revised by the Commissioner, Counsel for the assessee contended that an order can be said to be "prejudicial to the interests of the revenue" even where there had been an omission to tax certain heads of income such as, in this case, the assess-ability to tax on capital gains, and that it did not matter that the ultimate effect of the tax distributed among the newly included heads of income was less onerous to the assessee. Giving the matter our careful attention, we feel that there is no warrant for such a conclusion. It is true that the Commissioner on revision brought to book the tax on capital gains which had escaped taxation at the hands of the Income Tax Officer. But even after such recomputation the ultimate incidence of tax liability on the assessee was lesser than what it was prior to the order passed on revision. As noticed earlier, the tax liability was reduced from one on an income of Rs. 80,558 to one on an income of Rs. 70,160, On the analogy of the Privy Council decision in the Tribune Trust's case, [1948] 16 ITR 214 we cannot hold the order revised to be erroneous in so far as it is prejudicial to the interests of the revenue. As a result of that order the revenue was not placed in a different and worse position than the Commissioner's order passed in revision. Section 263 is not attracted. The two years" period of limitation also cannot apply to the assessment.

3. The view taken by the learned judge was correct. We affirm the same and dismiss this appeal; but, in the circumstances, without costs.