(1991) 11 KL CK 0022

In the High Court Of Kerala

Case No : O.P. No. 1503 of 1988

M.S. Joseph Michael and Bros. — APPELLANT

Vs

Income Tax Appellate Tribunal — RESPONDENT

Date of Decision : 06-11-1991

Acts Referred:
Income Tax Act, 1961 — Section 271(1)(a), 273(1)(b)

Citation : (1992) 65 TAXMAN 195

Hon'ble Judges : K. Sreedharan, J

Bench : Single Bench

Judgement

K. Sreedharan, J.—The issues raised in these Original Petitions are inter-related and the parties are same. So, I consider it advantageous to dispose of them by a common judgment. Petitioner in O.P. 1503 of 1988 is a partnership firm engaged in the business of purchase and sale of arrack and also Indian-made foreign liquor. For the assessment year 1983-84, the assessee filed return declaring a net loss of Rs. 14.27,810. The second respondent completed the assessment, estimating the total income at Rs. 27,13,850. Accordingly, the firm was called upon to pay a sum of Rs. 9,76,199 as income tax. Aggrieved by the order of assessment, the firm filed an appeal before the Commissioner (Appeals). That appeal was rejected by order dated 16-12-1986. A second appeal was preferred to Tribunal, Ernakulam. against the order of the Commissioner (Appeals). A petition for stay of collection of tax was also moved before the Tribunal. The Tribunal granted stay subject to the condition that the assessee should furnish sufficient security to the satisfaction of the department. The assessee complied with the conditions stipulated in the stay order. The Tribunal posted the appeal for hearing for 5-5-1987. It was the first posting of the appeal. The assessee was not aware of the posting since the matter was entrusted to their advocate. As the Advocate was away in Bangalore for arguing a case before the Settlement Commissioner, New Delhi, in his camp sitting, his junior moved an application on 4-5-1987 for adjourning the case posted for 5-5-1987. The Tribunal did not accept the request for adjournment and dismissed the appeal ex parte after hearing the departmental representative.

2. The petitioner received the order passed by the Tribunal on 30-5-1987. Immediately, the petitioner moved an application. MP 14 of 1987 in IT Appeal No. 29 (Coch.) of 1987 under proviso to rule 24 of the income tax Appellate Tribunal Rules, praying for restoration of the appeal and for hearing the case on merits. Along with that petition counsel who represented the petitioner also produced notice received by him from the Deputy Director of Investigation requiring him to appear before Settlement Commissioner at 10.30 a.m. on 5-5-1987 at Bangalore. The Tribunal dismissed that application by order dated 17-8-1987 holding that the Tribunal has no power of review and, hence, it cannot review the earlier judgment. The counsel representing the petitioner then moved MP 37 of 1987 in MP 14 (Coch.) of 1987 under rule 24 of the income tax Rules. In that the learned counsel gave the entire circumstances under which he happened to be absent before the Tribunal when the appeal came up for hearing on 5-5-1987 and prayed for re-hearing the appeal. That application was rejected by the Tribunal by its order dated 20-1-1988 on the ground that the assessee has not brought out any mistake as such arising from the order of the Tribunal. Hence this Original Petition.

3. Petitioner moved CMP 4551 of 1988 in O.P. 1503 of 1988 praying for stay of all proceedings for the recovery of income tax for the assessment year 1983-84. On 24-2-1988, this Court directed the petitioner to pay 50 per cent of the tax due for the year 1983-84 within one month. In compliance with that order, the assessee paid Rs. 4,63,650 on 23-3-1988.

4. Immediately after the disposal of the appeal by the Tribunal, respondents passed orders of assessment on the partners of the firm on the share income, as evidenced by Exhibits P2(a) to P-2(g) in O.P. No. 1859 of 1988. The partners were also informed that penalty proceedings under sections 271(1)(a) and 273(1)(b) of the income tax Act have been initiated separately. Partners of the firm challenged the above orders of assessment in appeal before the Commissioner (Appeals), Ernakulam. The appellate authority rejected those appeals on the grounds that the share income from the firm is per the assessment order of that firm and the firm had filed an appeal separately and, consequently, partners are barred from agitating in appeals preferred against their own assessment orders. This order is under challenge, in O.P. 1859 of 1988.

5. Petitioners in O.P. 1859 of 1988 moved C.M.P. 5613 of 1988 praying for stay of all proceedings for the realisation of the tax assessed against them. This Court on 29-3-1988 directed the petitioners to remit a sum of Rs. 7,50,000 towards the tax liability within one month. The learned counsel representing the petitioners submitted that the said amount has already been remitted.

6. Assessment order passed against petitioners in O.P. 1859 of 1988 will depend on the decision in O.P. 1503 of 1988. In O.P. 1503 of 1988 the short question that arises for consideration is whether the Tribunal had complied with the

principles of natural justice in disposing of appeal, IT Appeal No. 29 (Coch.) of 1987.

7. It is common case that IT Appeal No. 29 (Coch.) of 1987 came up before the Tribunal for the first time on 5-5-1987. It has also come out that Shri P. Ramanarayanan was the counsel representing the appellant before the Tribunal. Since Shri P. Ramanarayanan was out of station, his junior filed an application on 4-5-1987 praying for an adjournment of the case. That application for adjournment was rejected and the Tribunal proceeded to dispose of the appeal on the basis of records, because it had stayed the recovery of the tax on the assessee, furnishing security for the amount. By this no effective opportunity was afforded to the appellant to argue the case before the Tribunal. As observed by a Bench of this Court in Thampiv, Collector of Central Excise, (1) the concept of fair play in action which is the basis of natural justice must depend upon the particular. In his between the parties, rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood. The order passed by the Tribunal adversely affects the firm and its partners. It has resulted in civil consequences. The firm had entrusted the matter to an Advocate. On account of the absence of the Advocate, the Appellant sought an adjournment. The Advocate himself filed MP 37 of 1987 in MP 14 of 1987 explaining the reason for his absence. In spite of all these facts. Tribunal did not afford the firm an opportunity to represent its case in detail. Hence, according to me, the Tribunal committed a breach of the rule audi alteram partem in disposing of the appeal before it. The further question that is to be considered in this case is whether the Tribunal has the jurisdiction to rehear the appeal, which was disposed of on merits. This issue was considered by a Division Bench of this Court in Commissioner of Income Tax Vs. Income Tax Appellate Tribunal and Another, . In that case the ITO preferred an appeal to the Tribunal. The assessee filed a cross-objection supporting the order of the AAC. On the date appointed for hearing, neither the assessee nor his representative was present. The Tribunal allowed the appeal and dismissed the cross-objection. The decision was rendered on merits. The assessee filed a miscellaneous petition before the Tribunal for the restoration of the appeal and the cross-objection, for fresh hearing and disposal. The Tribunal allowed the miscellaneous petition and re-posted the appeal for hearing. That action of the Tribunal was challenged before this Court by the Commission on the ground that the Tribunal has no power to review its earlier order. This contention was negatived, observing:

The power of setting aside an ex parte order to afford an opportunity of being heard to the aggrieved party is not the same as the power of review. The question of review ordinarily arises where the order impugned is vitiated on account of some mistake or error apparent on the face of the record or where there was failure to consider the material on record. The purpose of setting aside an exparte order is to consider the whole matter afresh affording an opportunity of being heard to the respondent. When this distinction is borne in mind, there is no scope for the argument that because the Tribunal has no power to review its own order, it cannot also set aside its ex parte order for affording an opportunity of being heard to the respondent." (p. 232)

This statement of law applies on all fours to the facts in this case. The assessee was not represented before the Tribunal on account of his counsel being away at Bangalore to appeal before the settlement Commissioner. The Tribunal disposed of the appeal after perusing the records. That decision had far reaching civil consequences on the assessee. Consequently, the disposal of the appeal was in violation of the principles of audi alteram partem. The prayer in such a situation for rehearing the appeal is not a prayer to review its earlier decision. It is to set aside its ex parte order for affording an opportunity of being heard. This power is inherent in the Tribunal. The Tribunal has refused to exercise that power for no justifiable reason. Therefore, I quash Exhibits P-9 and P-11 orders and direct the Tribunal, Cochin, to restore ITA 29 (Coch.) of 1987 and to dispose of the same afresh, after affording the appellant a reasonable opportunity of being heard in the matter. Depending on the result in that appeal ITO, Central Circle-H, Ernakulam and ITO, Kottayam, are directed to pass fresh orders of assessment, if any, as required by law, on the share income of the partners of the firm.

Original petitions are disposed of in the above terms.

