(1967) 07 MAD CK 0004

In the Madras High Court

Case No : Tax Case No. 285 of 1964

M.V.P.C. Ramaswami Naicker — APPELLANT

Vs

The State of Madras — RESPONDENT

Date of Decision : 06-07-1967

Acts Referred:

Income tax Act, 1922 — Section 33A(1), 33A(2), 34(2), 34(3)
Tamil Nadu Agricultural Income Tax Act, 1955 — Section 29(1), 33A(2), 34, 34(1), 34(2)

Citation : (1968) ILR (Mad) 475

Hon'ble Judges : Veeraswami, J;Ramaprasada Rao, J

Bench : Division Bench

Advocate : S. Narayanaswami, for Aiyar, Dolia and N.R.V. Veerappa, for the Appellant; K. Venkataswami, for V. Ramaswami, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Veeraswami, J.—The Petitioner one M.V.P.C. Ramaswami Naicker applies u/s 54(1) of the Madras Agricultural Income Tax Act (V of

1955) to revise an order of the Commissioner of Agricultural Income Tax, dated August 1, 1964. The Petitioner had been permitted to compound

the agricultural income tax payable by him for the assessment years 1958-59 to 1960-61 in his capacity as the Kartha of a Hindu undivided family.

For the assessment year 1961-62 he applied to the Agricultural income tax Officer having jurisdiction for an order u/s 29(1) of the Act on the

ground that there has been a partition of the joint family properties between him and his six minor sons, after setting apart certain properties

towards the marriage expenses and provision of his daughters and for the maintenance of his two wives. The income tax Officer found, after notices to the concerned parties and enquiry that the Petitioner had a business and other assets, which had not been brought into the partition, and

that the division was only of agricultural lands. On the view that this was a case of partial partition and the status of the joint family had not been

disrupted by the partition, he rejected the request for an order u/s 29(1). At the same time he felt that the partial partition was true and directed

that the income from the lands allotted to each of the sharers should have to be assessed at their respective hands separately. This order was made

by the Agricultural Income Tax Officer on May 14, 1961. By a notice, dated April 26, 1962, the Commissioner of Agricultural income tax called

upon the Petitioner to show cause why the order of the Agricultural Income Tax Officer be not set aside After consideration of the objections, the

Commissioner passed an order, which, as we said, was dated August 1, 1964. He agreed with the view of the income tax Officer that the partition

being a partial one it could not be recognised u/s 29(1) of the Act; but he was of the view that the partition could not be regarded as a genuine one

and that in any case, it must be held to be a settlement rather than a partition. The reason he gave for holding the partition to be not a genuine one

was that only agricultural lands had been brought into the hotchpot and that this circumstance showed that the partition was only a device to escape

that. He thought that it was also a settlement, for, in his view, the female members like wives and daughters could not claim a partition as a son of

the family could and that, therefore, the lands, allotted to the wives and daughters of the Petitioner would be hit by Section 9(2)(a) (iii) and (iv) of

the Act. The Commissioner added as additional reason for regarding the partition as not a genuine one, that the father and his two wives were

living together along with the children and that there was no change in the nature of the family or in the enjoyment of the properties.

2. On behalf of the Petitioner his Counsel Mr. Narayana swami raises two points, (i) as to propriety of the Commissioner''s finding on the partition

deed and (ii) as to limitation. For the reasons, which will presently appear, we are of opinion that both the points are well founded. The reasons,

which prevailed with the Commissioner for regarding the partition as not a genuine one, do not commend themselves to us. The personal law of the

Petitioner allows a partial partition. The Commissioner was wrong in his view that, because the partition was only of agricultural lands, that by itself was indicative of the bogus nature of the partition. He seems to think that, if there is a partial partition which cannot be recognised for purposes of

Section 29(1), it is not bona fide, as the motive is to defeat revenue. It is well known that it is quite open to a tax payer to avoid tax if he can do so

within the limits of the law and without violating it. No doubt a father and his two wives might be taken to have been living during the accounting

year along with their children. Not that we find it so on evidence. But being a partial partition we do not see how the fact of their living together will

militate against the partition deed being otherwise than genuine. On this matter the income tax Officer made a correct approach. As he has

indicated, there has been a transfer of registry following the scheme of partition and the lands allotted to the minors have been looked after by their

guardians and the list was being paid separately for each of the shares allotted. We are also unable to agree with the Commissioner that the

partition deed could in any way be regarded as a settlement. The daughters under the Succession Act of 1956, will each be entitled to a share. In

that case at a partition, in effect they merely work out that right in severalty. A settlement presupposes that the settlee has no pre-existing right in

the subject matter settled on him. The wife, no doubt, may have no share as such in the joint family properties, though even here under the old

Hindu law the point may be stretched in her favour, as the Courts have now recognised that her right to maintenance is in lieu of her time-old but

obsolete share of hers in the joint family properties. The Commissioner''s order is thus vitiated by several errors and has to be set aside.

3. The point as to limitation does not appear to have been urged before the Commissioner, and, if urged, it finds no place in his order. Section

34(1) of the Act entrusts the Commissioner with the power to call for the records either suo motu or on application by an Assessee, of any

proceeding under the Act taken by his subordinate, and after enquiry to pass such orders thereon as he thinks fit. He shall not, of course, pass, any

order prejudicial to an Assessee without hearing him or giving him a reasonable opportunity of being heard Sub-section (2) of Section 34 places a

restriction by way of a time limit for the exercise of the revisional powers by the Commissioner. Clause (c) of the sub-section is to the effect that

the Commissioner shall not revise any order under Sub-section (1) if the order has been made more than three years previously. The language employed by Section 34(2)(c), to our minds, presents no difficulty and its plain meaning is that the Commissioner cannot make on order in revision

beyond three years of the date of the order of his subordinate. This language makes no distinction between exercise of power on application and

suo motu and in either case, Clause (c) of Sub-section (2) of Section 34 speaks the same language. It does not say that, if the revisional powers

are invoked on an application within three years of the date of the order of the subordinate officer, the Commissioner may pass his orders even

after the expiry of that period. It seems to us that Clause (c) provides for limitation for the Commissioner''s exercise of his powers rather than for

initiating action u/s 34 by an application. This construction is supported by a dictum in Muthia Chettiar v. Commissioner of Income tax, Madras v.

ILR (1951) Mad. 815. Section 33A(1) of the Income tax Act, 1922, is for present purposes in terms identical with Section 34(2)(c) of the

Madras Agricultural income tax Act, 1955 so far as suo motu exercise of revisional power is concerned. Actually that was a case arising out of an

application u/s 33A(2) of the income tax Act. The order against which the application was directed was dated February 4, 1948, and the

application itself was made only on February 18, 1949, more than a year after the date of the income tax Officer''s order. The order of the income

tax Officer was found to have been received by the Applicant only on February 24, 1948. For the Revenue it was argued that Section 33A(2) was

not a provision prescribing a time limit for the exercise of the right of the party aggrieved but it imposed a time limit for the exercise of the revisional

powers by the Commissioner, and it was, therefore, said that time must be computed from the date when the order was actually passed. The

Court declined to accept the contention and held that time did not commence to run u/s 33A(2) before the Applicant had notice of the order. In

dealing with the contention for the Revenue and arriving at that conclusion, the Court referred to Section 33A(1) and observed (at page 818):

Plausible though this argument may be, so far as Sub-section 1 of Section 33A is concerned, we are of opinion that it is not sound so far as the

right given to the party aggrieved under Sub-section 2 is concerned. In a case falling under Sub-section 1 the Commissioner acts of his is own

motion. There is no question of the aggrieved party invoking his jurisdiction.... It may be said that the Commissioner''s power to call for the record ceases with the lapse of one year from the date of the order by the subordinate authority. But in a case falling under Sub-section 2 the party

aggrieved has got to take the step of applying for revision and he is allowed one year from the date of the order. The provision is, therefore,

certainly in the nature of a time limit for the application for revision.

4. This case clearly shows that the time limit u/s 33A(1) of the Income tax Act is for the exercise of the suo motu revisional powers and the time

limit under Sub-section(2) is for the aggrieved party to apply to the Commissioner invoking his revisional powers. Section 34 of the Madras

Agricultural income tax Act, 1965, did away with the distinction between the two kinds of time limit and expressly adopted the language of Section

33A(1) of the income tax Act. The Legislature must have known the fiscal legislative practice, at least so far as the income tax Act of 1922 was

concerned and if it still chose to follow the language of only Section 33A(1) of the income tax Act, it is not, in our opinion, for the Court to import

into Section 34 considerations, which will legitimately apply only to the language of Section 33A(2) of the income tax Act.

5. In Viswanathan v. Commissioner of Income tax ILR (1955) Mad. 489 Section 34(3) then Section 34(2) of the income tax Act came up for

construction. That Sub-section said that no order of assessment or re-assessment shall be made after the expiry of four years from the end of the

year in which the income, profits or gains were first assessable. The Court observed that the time limit prescribed was for exercise of the power,

and followed the view of the learned Chief Justice in Muthia Chettiar v. Commissioner of income tax, Madras ILR (1961) Mad. 815 with

reference to Section 33A(1) of the Income tax Act.

6. We are, however, confronted by the Revenue with Kadirvel v. State of Madras ILR (1962) Mad. 327. That was a case also relating to Section

34 of the Madras Agricultural income tax Act with this difference that, unlike in the instant case where suo motu power of revision is invoked, the

power in that case was invoked by an application. Though the application was made within one year from the date of the order of the subordinate

office, it was dismissed by the Commissioner on the ground that, as by the time he came to deal with it, one year had expired, he could no longer

exercise his revisional power. A division Bench of this Court disagreed with that view. In its opinion, the criterion for purposes of Section 34(2)(c)

of the Madras Agricultural Income tax Act was not the point of time when the application was disposed of or the proceedings were terminated but

the point of time when the proceedings were initiated or the Commissioner''s jurisdiction was invoked. The Court was apparently persuaded to

take that view, because, as the Bench considered the right of the Assessees to apply for revision should not depend on the hazard of the revising

authority disposing of the matter within a particular period and could not be defeated by the failure of the authority to discharge the statutory

functions. With due respect, we are not able to share that view and would wish that, if a case like that invoking the revisional power by an

application arose, the question will have to be reconsidered. To the instant case before us, however, the actual ratio of that case may not apply,

because, as we said, we are here concerned with the Commissioner''s exercise of his suo motu powers. In such a case we adopt the pattern of

construction placed by Muthia Chettiar v. Commissioner of Income tax, Madras ILR (1951) Mad. 815 on Section 33A(1) of the Income tax Act,

1922, the language employed by that Sub-section so far as the time limit is concerned being identical with that employed by Section 34(2)(c) of the

Madras Agricultural Income Tax Act. On that view, we are of opinion that the suo motu power was exercised by the Commissioner in this case

after the time limit had expired.

7. The petition is allowed with costs.

