(1987) 02 KL CK 0031

In the High Court Of Kerala

Case No : O.P. No. 9861 of 1986

N. Rajan Nair — APPELLANT

Vs

Income Tax Officer and Another — RESPONDENT

Date of Decision : 04-02-1987

Acts Referred:
Income Tax Act, 1961 — Section 139(8), 217(1), 220(6)

Citation : (1987) 63 CTR 33 : (1987) 165 ITR 650

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : P. Ravindran, for the Appellant; P.K. Ravindranatha Menon and N.R.K. Nair, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The petitioner is stated to be a junior lawyer of about six years vintage in the Kozhikode Bar. He was assessed to tax under the Income Tax Act, 1961 ("the Act" for short), for the assessment year 1984-85. As a junior lawyer, he does not have much of income. He had actually returned an income of Rs. 12,500 from the profession, besides agricultural income of Rs. 1,000. The Income Tax Officer completed the assessment on September 26, 1986, determining his total income at Rs. 1,39,770 by making various additions. A copy of the order of assessment is exhibit P-l. Consequent thereon, a total amount of Rs. 71,817 was demanded as Income Tax and surcharge besides Rs. 17,593 by way of interest u/s 139(8) and Rs. 24,950 as interest u/s 217(1)(b). The demand was thus for Rs. 1,14,360 in the aggregate.

2. The petitioner filed an appeal against this order before the second respondent, namely, the Commissioner of Income Tax (Appeals), Kozhikode. A copy of the appeal is exhibit P-2. It is dated November 10, 1986. The petitioner also filed an application before the second respondent praying for stay of collection of the tax pending the disposal of the appeal. He also appears to have moved the Income Tax Officer for "stay of collection". The Income Tax Officer wrote to the petitioner as follows on November 20, 1986, by his letter, exhibit P-4:

"Your request for stay of collection of tax till disposal of appeal cannot be acceded to in toto. However, you are permitted to pay the demand in five equal monthly instalments payable on or before 30th of every month commencing from November, 1986."

3. Apparently this was made in exercise of the discretion vested in the Income Tax Officer u/s 220(6) of the Act, which empowers the assessing authority to treat an assessee as not being in default in respect of the amount in dispute in the appeal as long as the appeal remains undisposed of It is this proceeding that is under challenge in this original petition.

4. Mr. N. R. K. Nair, standing counsel, appeared for the respondents and was heard.

5. The power under Clause (6) of Section 220 is indeed a discretionary power. However, it is one coupled with a duty to be exercised judiciously and reasonably (as every power should be), based on relevant grounds. It should not be exercised arbitrarily or capriciously or based on matters extraneous or irrelevant. The Income Tax Officer should apply his mind to the facts and circumstances of the case relevant to the exercise of the discretion, in all its aspects. He has also to remember that he is not the final arbiter of the disputes involved but only the first amongst the statutory authorities. Questions of fact and of law are open for decision before the two appellate authorities, both of whom possess plenary powers. In exercising his power, the Income Tax Officer should not act as a mere tax-gatherer but as a quasi-judicial authority vested with the power of mitigating hardship to the assessee. The Income Tax Officer should divorce himself from his position as the authority who made the assessment and consider the matter in all its facets, from the point of view of the assessee without at the same time sacrificing the interests of the Revenue. Says Viswanatha Sastri J. in VETCHA SREERAMAMURTHY Vs. THE Income Tax OFFICER VIZIANAGARAM, AND ANOTHER., (at pages 268 and 269):

" The Legislature has, however, chosen to entrust the discretion to them. Being to some extent in the position of judges in their own cause and invested with a wide discretion u/s 45 of the Act, the responsibility for taking an impartial and objective view is all the greater. If the circumstances exist under which it was contemplated that the power of granting a stay should be exercised, the Income Tax Officer cannot decline to exercise that power on the ground that it was left to his discretion. In such a case, the Legislature is presumed to have intended not to grant an absolute, uncontrolled or arbitrary discretion to the Officer but to impose upon him the duty of considering the facts and circumstances of the particular case and then coming to an honest judgment as to whether the case calls for the exercise of that power."

6. Being a matter of discretion, it is not possible to strait-jacket or lay down the principles on which the discretion is to be exercised. The question as to what are the matters relevant and what should go into the making of the decision by the

Income Tax Officer in such circumstances has been explained by D. N, Sinha J. (in the context of the corresponding provisions of the Wealth-tax Act) in Aluminium Corporation of India Ltd. Vs. Mr. C. Balakrishnan and Others, . The learned Judge states (at pages 269 and 270):

"A judicial exercise of discretion involves a consideration of the facts and circumstances of the case in all its aspects. The difficulties involved in the issues raised in the case and the prospects of the appeal being successful is one such aspect. The position and economic circumstances of the assessee is another. If the officer feels that the stay would put the realisation of the amount in jeopardy, that would be a cogent factor to be taken into consideration. The amount involved is also a relevant factor. If it is a heavy amount, it should be presumed that immediate payment, pending an appeal in which there may be a reasonable chance of success, would constitute a hardship. The Wealth-tax Act has just come into operation. If any point is involved which requires an authoritative decision, that is to say, a precedent, that is a point in favour of granting a stay. Quick realisation of tax may be an administrative expediency, but by itself it constitutes no ground for refusing a stay. While determining such an application, the authority exercising discretion should not act in the role of a mere tax-gatherer."

7. An order similar to the one challenged in this case came up for consideration before this court in Yusuf Jan Sahib Vs. Additional Income Tax Officer, Quilon, . Velu Pillai J. held that the Income Tax Officer had not exercised any discretion and quashed the order in question and directed the Officer to dispose of the application in accordance with law.

8. I may also point out the instructions issued by the Central Board of Direct Taxes in their F. No. 1/6/69-IT CC dated August 21, 1969 (reproduced at page 4190 of volume 4 of Iyengar on Income Tax, seventh edition) (See Direct Taxes Circulars by J. P. Bhatnagar, Vol. 1, p. 1308) which runs as follows :

" Section 220. When tax payable and when assessee deemed in

default.

1020. MINUTES OF THE 8TH MEETING OF THE INFORMAL CONSULTATIVE COMMITTEE HELD ON 8TH MAY, 1969--IMPLEMENTATION OF ASSURANCE GIVEN REGARDING STAY OF RECOVERY IN CERTAIN CASES--ITEM 1(VI).

One of the points that came up for consideration in the 8th meeting of the Informal Consultative Committee was that Income Tax assessments were arbitrarily pitched at high figures and that the collection of disputed demands as a result thereof was also not stayed in spite of the specific provision in the matter in Section 220(6) of the Income Tax Act, 1961.

2. The then Deputy Prime Minister had observed as under :

''Where the income determined on assessment was substantially higher than the returned income, say, twice the latter amount or more, the collection of the tax in dispute should be held in abeyance till the decision on the appeals provided there were no lapses on the part of the assessees.''

3. The Board desire that the above observations may be brought to the notice of all the Income Tax Officers working under you and the powers of the stay of recovery in such cases up to the stage of first appeal may be exercised by the Inspecting Assistant Commissioner/Commissioner of Income Tax."

9. The instructions indicate the departmental thinking on the subject which is also relevant in the context of exercising the discretion u/s 220(6).

10. In this case, the assessee had returned only an income of Rs. 12,500. That stands enhanced to Rs. 1,39,770 by various additions. It is not as if the order of assessment is the last word. The assessee has his own contentions against the various additions made. Questions of fact and of law are all open to the assessee before the first appellate authority and before the Tribunal. There is also a remedy of reference to this court. In these circumstances, it is not open to the Income Tax Officer to place himself merely in the position of an assessing authority and then to adjudicate whether collection of the tax should be stayed or not, pending the appeal. He is bound to apply his mind to relevant factors and circumstances like the assessment history of the assessee, his conduct and co-operation in relation to the Department, points raised in the appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment and the like. He is not entitled to project his mind as an Income Tax Officer or as to what he did in the assessment, in exercising his discretion u/s 220(6).

11. The Officer is bound to act in a reasonable manner, in a manner intended to subserve the purpose of the section, namely, to alleviate the distress that may be caused to the assessee by insistence on immediate pay ment of the tax, keeping in mind the fact that the entire assessment is open for adjudication before higher forums of fact and of law. It is true that Governments cannot run on bank guarantees or assurances, but that does not absolve the Income Tax Officer from exercising his discretion fairly, impartially and judiciously.

12. The order, exhibit P-4, does not satisfy any of these requirements. It is apparent that the Income Tax Officer has been guided solely by conside rations of collection of revenue. The order does not disclose that any factor, which is relevant, as pointed out above, has been kept in mind. Exhibit P-4 order is not at all one passed in exercise of the income tax Officer''s discretion. It is not in accordance with law and deserves to be quashed.

13. The appeal is still pending before the second respondent. It is also necessary to direct the second respondent to dispose of the appeal expeditiously.

14. I, therefore, allow the original petition, I quash the order evidenced by exhibit P-4 and direct the first respondent to pass fresh orders in exercise of

discretion u/s 220(6) in accordance with law and in the light of the observations contained hereinabove. I also direct the second respondent to hear and dispose of the appeal pending before him against the order, exhibit P-l, and evidenced by exhibit P-2 within a period of six weeks from today.

