(1998) 12 MAD CK 0022

In the Madras High Court

Case No : Writ Petition No. 2350 of 1992 1 December 1998 A.Y. 1989-90

NRK RAMKUMAR RAJA APPELLANT

Vs

INCOME TAX OFFICER RESPONDENT

Date of Decision : 01-12-1998

Acts Referred:

Citation : (1999) 106 TAXMAN 81

Hon'ble Judges : P. D. Dinakaran, J

Bench : Division Bench

Advocate : Ms. Shanthi Devanathan, for the Assessee and S. Sundaresh, for the Revenue, for the Appellant;

Judgement

P.D. Dinakaran, J.

Heard.

2. In the above writ petition, the petitioner has prayed for issue of a writ of prohibition, prohibiting the respondent from taking any further

proceedings for the reassessment of the petitioner in respect of the assessment year 1989-90, in pursuance of the notice of the respondent dated

20-8-1991, u/s 148 of the Income Tax Act, 1961 (''the Act'').

3. Admittedly, the petitioner, a non-resident partner in the firms, namely, N. R. Krishnama Raja, N.R.K. Merchants and Srikantha Raja, filed his

returns on 30-11-1989 for the assessment year 1989-90, admitting a total income of Rs. 33,890 and a further agricultural income of Rs. 17,234

under the head ''Income from house property and other sources''. The said income was processed u/s 143(1)(a) of the Act, and an assessment

was passed on 5-12-1989, admitting his returns.

4. But, however, the respondent, by exercising power u/s 148, read with section

147 of the Act, issued notice dated 20-8-1991 for an alleged

escaped assessment. The petitioner, after receiving the said notice, submitted his explanation and also the revised return on 18-9-1991, stating

that, in view of section 182(3) of the Act, the petitioner is not assessable for the income of the firms in which he is a partner. Since the respondent

has not passed any orders on the said explanation, the petitioner has filed the above writ petition, seeking a writ of prohibition, as stated above.

5. Ms. Shanthi Devanathan, the learned counsel for the petitioner, contends that the power conferred on the respondent u/s 148, even on the

ground of alleged escaped assessment, ought to have been exercised by the respondent only if the respondent is satisfied that the petitioner has

escaped assessment; if the petitioner is not at all assessable for the income of the firms as per section 182(3), the respondent will have no

jurisdiction to enforce the powers conferred u/s 148.

6. The learned counsel for the petitioner, therefore, contends that the very notice issued u/s 148 read with section 147, is totally without

jurisdiction, and is, therefore, illegal. In this regard, she places reliance on the decision of the Division Bench in Commissioner of Income Tax Vs.

Srinivas and Co., .

7. Per contra, Mr. C.V. Rajan, the learned junior standing counsel (Income Tax), contends that it cannot be contended that the respondents have

every right to issue notice for the escaped assessment u/s 148, but, since the petitioner had not disclosed his income through the said partnership

firms, the impugned notice dated 20-8-1991 issued by the respondent cannot be stated as without jurisdiction or illegal.

8. Mr. C.V. Rajan, the learned junior standing counsel (Income Tax), further contends that, in any event, the petitioner, having filed his reply dated

18-9-1991 to the notice dated 20-8-1991 issued u/s 148, ought not to have approached this Court for the above relief and, therefore, contends

that it is suffice to direct the authorities to pass appropriate orders on the reply dated 18-9-1991 submitted by the petitioner.

9. I have given a careful consideration to the submissions of both sides.

10. In this regard, I am obliged to refer sections 147, 148 and 182, which read as follows:

147. Income escaping assessment.-If the assessing officer has reason to believe

that any income chargeable to tax has escaped assessment for

any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income

chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or

recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this

section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action

shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax

has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a

notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for

that assessment year.

Explanation 1- Production before the assessing officer of account books or other evidence from which material evidence could with due diligence

have been discovered by the assessing officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped

assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of

which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the assessing officer that the

assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. Issue of notice where income has escaped assessment.-(1) Before making the assessment, reassessment or recomputation u/s 147, the

assessing officer shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified

in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year

corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars,

as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be

furnished u/s 139.

(2) The assessing officer shall, before issuing any notice under this section, record his reasons for doing so.

182. Assessment of registered firms.-(1) Notwithstanding anything contained in sections 143 and 144 and subject to the provisions of sub-section

(3), in the case of a registered firm, after assessing the total income of the firm-

(i) the Income Tax payable by the firm itself shall be determined; and

(ii) the share of each partner in the income of the firm shall be included in his total income and assessed to tax accordingly.

(2) If such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions

of sections 70 to 75.

(3) When any of the partners of a registered firm is a non-resident, the tax on his share in the income of the firm shall be assessed on the firm at the

rate or rates which would be applicable if it were assessed on him personally, and the tax so assessed shall be paid by the firm.

(4) A registered firm may retain out of the share of each partner in the income of the firm a sum not exceeding thirty per cent thereof until such time

as the tax which may be levied on the partner in respect of that share is paid by him; and where the tax so levied cannot be recovered from the partner, whether wholly or in part, the firm shall be liable to pay the tax, to the extent of the amount retained or could have been so retained

11. A reading of sections 147 and 148 together makes it clear that the said sections confer an authority on the assessing officer, if he has reason to

believe that any income chargeable to tax has escaped assessment f or any assessment year, and, in which event, the assessing officer is expected

to give statutory notice, as contemplated u/s 182. Therefore, before issuing a notice u/s 148, the assessing officer should have reason to believe

that any income chargeable to tax has escaped assessment for any assessment.

12. The words ""the assessing officer should have reason to believe"", should be read with reference to the other provisions of the Act, under which,

the income is chargeable to tax. It is in this regard that the authorities should satisfy themselves whether such income is chargeable to tax, before

holding that the assessing officer has reason to believe that any income of the petitioner chargeable to tax has escaped assessment for any

assessment year. Therefore, in the instant case, the assessing officer, before issuing a notice u/s 148, should have tested the ground for issuing such

notice in the light of section 182(3) whether the income of the petitioner through the firms is chargeable to tax, and then, should have reason to

believe that such income chargeable to tax has escaped assessment for the assessment year 1989-90.

13. There cannot be any doubt that, as per section 182(3), the petitioner, admittedly, being a non-resident partner in the three firms referred to

above, the tax on the share in the income of the firms shall be assessed only on the firm at the rate or rates, which should be applicable, if it were

assessed on him personally, and the tax so assessed, shall be paid only by the firm. Consequently, the income of the petitioner, a non-resident

partner, through the said registered firms, cannot be said to be an income chargeable to tax from the petitioner at all, as the same is assessable only

from the respective firms, of course, at the rate or rates which would be applicable, if it were assessed on him personally; and, in which event, the

incomes through the said firms are not chargeable to tax and, therefore, the said income cannot be said to have escaped assessment, and, hence, it

cannot be said that the respondent had reason to believe that any income chargeable to tax, had escaped assessment for the assessment year

1989-90. As a result, the respondent had no jurisdiction to issue a notice dated 20-8-1991, u/s 148.

14. In fact, a Division Bench of this court in Srinivas & Co.''s case (supra), while interpreting the powers of the respondent u/s 148 read with

sections 147 and 182(3), in identical facts and circumstances of the case, has held as follows :

Under the provisions of sub-section (3) of section 182 of the Income Tax Act, 1961, the tax payable by a non-resident partner on the share

income would be charged in the hands of the partnership firm. Section 182 contemplates in the first place assessment of the total income of the firm

and the tax payable on such total income. Thereafter, the inclusion of the share income of each partner in his individual total income for the purpose

of assessment to tax has got to be considered. Sub-section (3) contemplates that when any of the partners of a registered firm is a non-resident,

the tax on his share in the income of the firm shall be assessed on tbe firm at the rate or rates which would be applicable as if it were assessed on

him personally, and the tax so assessed shall be paid by the firm. The crucial words occurring in sub-section (3) of section 182 are, ''if it were

assessed on him personally''. The sub-section does not refer to the assessment on his total income. In the case of a non-resident partner, there are

two assessments; one on the share income derived from the partnership firm and another for his individual income from other sources, apart from

the share income derived from the firm. Insofar as the circular issued by the Central Board of Direct Taxes is concerned, it relates to the 1922 Act

and the Board''s circular will not be binding upon the court. Hence, for the purpose of ascertaining the tax payable by the firm in respect of the

share income of a non-resident partner, his share income alone should be considered and tax determined accordingly and his other income from

any other source should not be included for the purpose of determining the rate of tax payable on such share income."" (p. 636)

15. Admittedly, in the instant case, Mr. C.V. Rajan, the learned junior standing counsel (Income Tax), fairly states that the income of the petitioner,

a non-resident partner in the said firms, was also assessed and the returns were submitted by the firms.

Applying the principles laid down by this court, and for the reasons as stated above, I am satisfied that the impugned notice dated 20-8-1997 issued u/s 148, is illegal and without jurisdiction and, therefore I am obliged to allow the above writ petition as prayed for. No costs.

