(2000) 07 KL CK 0024

In the High Court Of Kerala

Case No : Income Tax A. No. 43 of 1999

P. Abdul Kadar Hamza APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 27-07-2000

Acts Referred:

Income Tax Act, 1961 — Section 143, 143(2), 260A, 260A(1), 260A(6)

Citation : (2000) 163 CTR 560 : (2000) 246 ITR 14

Hon'ble Judges : G. Sivarajan, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : P. Balachandran, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The assessee to Income Tax is the appellant. He is an engineer by profession and a contractor engaged in the execution of civil works for and on behalf of the Central Government. In this appeal, he has raised the following questions of law on which this court issued notice to the Department.

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in confirming the order of the Commissioner of Income Tax u/s 263 of the Act in respect of an order of assessment which was barred by limitation and non est in law ?

2. Whether, on the facts and in the circumstances of the case, the assessment order annexure A was passed beyond the period of limitation mentioned u/s 143(2) of the Income Tax Act, 1961 ?

3. Whether the Appellate Tribunal was justified in law in holding that there was no infirmity in the order passed u/s 263 and is not that conclusion perverse for the reasons mentioned in the memorandum of appeal ?

4. Whether there were materials to hold that the order of assessment was erroneous and prejudicial to the interests of the Revenue ?

5. Whether the Appellate Tribunal was justified in holding that the Commissioner of Income Tax was correct in law in exercising his powers u/s 263 of the Act merely on the basis of report of the internal audit party of the Revenue ? Whether the Commissioner of Income Tax was justified in setting aside the assessment order which was subject of an appeal before the Commissioner of Income Tax (Appeals), Cochin ?"

2. The assessment year concerned is 1992-93, the relevant previous year ended on March 31, 1992. The assessee filed the return for the year declaring an income of Rs. 2,00,100. The assessing authority, viz., the Income Tax Officer, Ward No. III, Trichur, processed the said return u/s 143(1)(a) and issued intimation to the assessee on February 26, 1993. Later, the case was selected for scrutiny u/s 143(2) and issued notice proposing to complete the assessment u/s 143(3) of the Act. The assessment was accordingly completed on February 17, 1995, on a total income of Rs. 3,02,420, evidenced by annexure A. Against the said order, the assessee filed appeal before the Commissioner of Income Tax (Appeals), Erna-kulam, and the same is pending. While so the assessing authority issued a notice u/s 154 of the Act on March 15, 1996, proposing to rectify certain mistakes in annexure A order. It appears that the same was not pursued. Later, the Commissioner of Income Tax issued a notice dated November 5, 1996, u/s 263 of the Act proposing to revise annexure A order as the same is erroneous and prejudicial to the interests of the Revenue. Rejecting the objections taken by the assessee, the respondent set aside annexure A order with a direction to the Assessing Officer to make fresh assessment in accordance with law after giving an opportunity to the assessee. This order was challenged by the assessee in appeal before the Income Tax Appellate Tribunal, Cochin Bench. Annnexure F is the appeal memorandum filed before the Tribunal. The Tribunal by order dated December 18, 1998 (annexure G), dismissed the said appeal thereby confirming the order passed by the respondent. Hence, this appeal at the instance of the assessee.

3. We have heard Sri P. Balachandran, learned counsel for the assessee, and Sri P. K. R. Menon, senior counsel appearing for the respondent. Though as many as five questions are formulated for consideration in this appeal, counsel for the assessee submitted that the assessee challenges annexure E order as confirmed by the Tribunal by annexure G order mainly on the ground that annexure A order set aside by the respondent is not a legal and valid order. Counsel submitted that in the instant case the assessee filed the return of income on February 26, 1993, and intimation u/s 143(1)(a) was received on February 26, 1993. If the assessing authority has got a case that the return is not acceptable and therefore an assessment order u/s 143(3) has to be made after conducting" enquiry he has to serve a notice on the assessee within twelve months from the end of the month in which the return is furnished. He submitted that in the instant case notice u/s 143(2) was issued only on June 2, 1994, that too to the representative of the assessee. Counsel submitted that since the return was filed on February 26, 1993, the time for serving notice on the assessee as provided under the

proviso to Section 143(2) of the Act expired on February 25, 1994. He accordingly submitted that since the return was filed on February 26, 1993, the notice u/s 143(2) of the Act issued on June 2, 1994, is beyond the period of one year provided under the proviso to the said section. It is in this view of the matter, counsel submitted that annexure A order is without jurisdiction. Counsel further submitted that the assessee has taken a specific contention in this regard in the appeal memorandum filed before the Tribunal. But the Tribunal failed to consider the same, as evident from annexure G order. Counsel in the above circumstances submitted that this court must consider the said question in the light of the documents produced along with the appeal.

4. Counsel for the Revenue then submitted that this is not one of the issues agitated before the authorities and the Tribunal and, therefore, it is not open to the assessee to raise it before this court. Counsel further submitted that since the Tribunal did not have the occasion to consider the said question and since a finding in this regard has to be rendered on evidence if this court is inclined to consider the said question, the matter must be remitted to the Tribunal.

5. We have considered the rival submissions. As already stated, the return of income for the year 1992-93 was filed on February 26, 1993. The said return was provisionally accepted and intimation issued as contemplated u/s 143(1)(a) of the Act on February 26, 1993. In such circumstances, if aa assessment has to be made u/s 143(3) of the Act the assessing authority has to issue a notice u/s 143(2) within a period of 12 months from the end of the month in which the return was filed. Since the return was filed on February 26, 1993, the twelve months'' period expired on February 25, 1994. According to the assessee such notice u/s 143(2) of the Act was issued only on August 2, 1994, which is beyond the period of limitation provided in the said sub-section, as is evident from annexure B. A perusal of annexure B notice would show that there is a reference to an earlier notice dated January 31, 1994. If the notice referred to in annexure B is a notice u/s 143(2) of the Act then the notice is within time in which case the contention taken by the petitioner cannot be sustained. However, counsel for the assessee submitted that the assessee did not receive any such notice. This is a matter for verification. It must be noted here that under the proviso to Section 143(2) of the Act, the notice is required to be served on the assessee within the period of twelve months from the end of the month in which the return is filed. So this is a matter for evidence. It is seen that the assessee has taken a specific ground in annexure F memorandum of appeal as ground No. 8 to the effect that the entire order of assessment is null and void as the notice of assessment was issued well beyond the time prescribed under the statute. It is an admitted position that this ground in the appeal memorandum was not dealt with by the Appellate Tribunal in annexure G order. As already stated, the order which is impugned in the appeal before the Tribunal is the order setting aside the assessment order annexure A. If the contention of the assessee that the assessment order itself is null and void as one passed without jurisdiction, there is no scope for setting aside such an order by invoking Section 263 of the Act.

That apart, the assessee had challenged annexure A assessment order in appeal before the Commissioner of Income Tax (Appeals) and the same is pending. Question No. 2 raised by the assessee on which notice was issued by this court relates to the said assessment, but we are not in a position to decide the said question in view of the non-consideration of the said issue by the Tribunal, which is the final fact-finding authority.

6. The appellate jurisdiction of this court is contained in Section 260A of the Act. Under Sub-section (1), an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. Under Sub-section (3) where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. Under Sub-section (5), the High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded. Sub-section (6) gives power to the High Court to determine any issue which has not been determined by the Appellate Tribunal or has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law, as is referred to in Sub-section (1). As already noted, Sub-section (6) specifically gives the power to the High Court to determine any issue which has not been determined by the Tribunal.

7. Admittedly this court was satisfied that a question regarding the jurisdiction in passing annexure A assessment order is involved in the appeal and that is why notice was ordered on question No. 2. However, we are disabled from determining the question for the reason that all the relevant materials are not available on record. Of course, the assessee has produced annexure B notice and contends that that was the only notice issued u/s 143(2) of the Act. However, we find that there is a reference to an earlier notice dated January 31, 1994. What is relevant in this case is as to whether the notice dated January 31, 1994, referred to in annexure B was served on the assessee within the period of limitation provided in the proviso to Sub-section (2) of Section 143 of the Act.

8. In the above circumstances, we are of the view that the matter must be remitted to the Tribunal for consideration of the said issue. In this view of the matter, we decline to answer all the questions of law raised in this appeal. We remit the matter back to the Tribunal to consider the issue raised in ground No. 8 of the appeal memorandum (annexure F). Parties are free to adduce evidence on that question before the Tribunal. The appeal is allowed to the above extent. But in the circumstances of the case, there will be no order as to costs.