

(1980) 06 KAR CK 0005

In the Karnataka High Court

Case No : Writ Petition No's. 1288 and 1289 of 1980

R. Gopal Ramnaryan

APPELLANT

Vs

Third Income Tax Officer, Circle-II, Bangalore

RESPONDENT

Date of Decision : 18-06-1980

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143 (4), 210, 240, 254 (4)

Citation : (1980) 19 CTR 391 : (1980) 126 ITR 369 : (1981) 5 TAXMAN 71

Hon'ble Judges : M.P. Chandrakantaraj, J

Bench : Single Bench

Advocate : K.R. Prasad, for the Appellant; S.R. Rajasekhara Murthy, for the Respondent

Judgement

This Judgment has been overruled by : Commissioner of Income Tax, Bhopal Vs. Shelly Products and Another, AIR 2003 SC 2532 : (2003) 181 CTR 564 : (2003) 261 ITR 367 : (2003) 4 JT 528 : (2003) 4 SCALE 674 : (2003) 5 SCC 461 : (2003) 1 SCR 79 Supp : (2003) AIRSCW 2719 : (2003) 4 Supreme 192

Chandrakantaraj, J.—These two writ petitioners are disposed of by the following common order inasmuch as the petitioner is one and the same as well as the questions of fact and questions of law are common to both.

2. The petitioner was a partner in a firm known as "Ramco Swadeshi" having 31 per cent. interest in the firm. For the assessment year 1973-74, pursuant to an order passed under s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") the petitioner paid a sum of Rs. 94,179 as advance tax and also a further sum of Rs. 4,883.89 had been deducted as tax at source under the Act. The petitioner also paid for that assessment year a sum of Rs. 2,367 on self-assessment when he filed his return before any assessment order was passed by the respondent IIIrd ITO, II Circle, Bangalore. Thus, the total tax paid by the assessee petitioner for the relevant assessment year was Rs. 1,01,420.89. Similarly, for the assessment year 1975-76, in W.P. No. 1289/1980, he had paid

advance tax of Rs. 51,966 and tax deducted at source amounted to Rs. 5,580.75. He paid the tax on self-assessment in the sum of Rs. 11,850 making up the total sum of Rs. 69,396.75 before any assessment order was passed for that assessment year. The assessment orders came to be passed, namely, in respect of the assessment year 1973-74 on October 1, 1975, and in respect of the assessment year 1975-76 on August 20, 1976. Aggrieved by certain legal infirmities in the assessment orders, the assessee petitioner filed two appeals before the AAC which came to be dismissed. Against those orders, he preferred statutory second appeal before the Income Tax Appellate Tribunal, Bangalore Bench, Bangalore, relating to the assessment years 1973-74 and 1975-76 in Appeals Nos. ITA 586 and 588/1977-78. The above two appeals and another appeal filed by the assessee petitioner concerning the assessment year 1974-75 (with which we are not concerned in these writ petitions) and the Income Tax Appeals Nos. 578 and 598 filed by the respondent-ITO were clubbed together and disposed of by a common order. Several contentions were raised before the Tribunal for and on behalf of the assessee petitioner and we are concerned only with the contention which was upheld by the Tribunal. That contention was that the assessment orders in question were bad in law because the respondent-ITO had not quantified the tax in the assessment order as required under s. 143(3) of the Act. As a matter of fact the Appellate Tribunal found that while the respondent-ITO had signed the assessment order, he had quantified the tax due in a separate sheet annexed to the assessment order. In the result, the Tribunal agreeing with the contention raised for and on behalf of the assessee petitioner, annulled the assessment orders and the matter rested there. Thereafter, the petitioner not hearing from the respondent in regard to refund of tax paid by him for the two relevant assessment years, made a demand for the refund. In response to the said demand, the respondent in his letter dated October 29, 1979, rejected the demand. Aggrieved by such rejection, the assessee petitioner has moved this court under art. 226 of the Constitution praying for an appropriate direction to the respondent to refund the tax paid by the assessee petitioner for the relevant assessment years, inter alia, contending that there being no assessment order validly made in accordance with law, the tax retained by the respondent was without the authority of law and was liable to be refunded under s. 240 of the Act.

3. A common statement of objections has been filed. While, the facts are admitted in the statement of objections, an effort has been made in detail to point out that the Tribunal was in error in following the decision of the Jammu and Kashmir High Court and allowing the appeals of the assessee petitioner for the relevant assessment years 1973-74 and 1975-76. A further attempt also is made in the statement of objections that there need not be an assessment order for the purpose of levying and collecting the tax due under the Act having regard to the scheme of the Act and the various provisions contained therein. Therefore, in these circumstances, the writ petitions and in the unusual circumstances of the annulment of the assessment orders, the only, question which falls for

consideration is whether the petitioner is entitled to appropriate directions for refund of the tax paid by him for the relevant assessment years or whether the same should be refused.

4. Shri K. R. Prasad, learned counsel appearing for the assessee petitioner, has placed reliance on the decision of a learned single judge in *Suburban Bank Ltd., In re SUBURBAN BANK, LTD., IN RE.*, In the said case, the learned judge was considering whether the official liquidator of the company was bound to treat as preferential payment the advance Income Tax under s. 18A of the Indian I.T. Act, 1922 (corresponding to s. 210 of the I.T. Act, 1961), as against the contentions of the official liquidator that such demand could not be treated as preferential payment. In that context, the learned judge has observed as follows (p. 68) :

"In my opinion the said sum which was demanded u/s 18A of the Income Tax Act was not a tax which became due and payable within the meaning of the said section. It is an amount payable in advance in respect of tax before it became due. It would become due after regular assessment. This in my opinion is the real character of the payment to be made u/s 18A of the Income Tax Act. This is also evident from the fact that if on regular assessment nothing or a lesser amount is found due and payable then the Government shall have to return the amount paid or the excess with interest at 2 per cent. per annum from the date of payment to the date of such assessment."

5. Mr. Prasad, the learned counsel appearing for the petitioner, has drawn my attention to another decision in *PURSHOTTAMDAS THAKURDAS Vs. COMMISSIONER OF Income Tax, BOMBAY CITY I.*, in which the Supreme Court has clearly laid down that the advance tax was essentially a measure introduced to combat the inflation brought about by the war and postwar years which had unfortunately come to stay in the statute book even after the war was over. In other words, the Supreme Court was of the view that payment of advance tax a mere convenience of collection which was liable to be adjusted against the actual tax due when the final assessment order was made. From the above ruling of the Supreme Court, Shri Prasad contended that if there was no assessment order at all, then there was no tax liability and if there was no tax liability, it necessarily followed that the amount paid by way of tax ought to be refund and the purported tax was liable to be refunded.

6. Shri Prasad further drew my attention to the decision of the High Court of Allahabad in the case of *L. DWARKA DASS Vs. Income Tax OFFICER, SPECIAL CIRCLE "A" WARD, KANPUR.*, wherein the learned single judge of that High Court has ruled thus (headnote) :

"(iii) That advance tax was in the nature of a loan to be adjusted in the regular assessment and on which Government had to pay interest; the payment of advance tax or its refund also concerned the revenue of the Central Government and came under the expression "financial obligations; in article 9 of the Indian Independence (Rights, Property and Liabilities) Order, 1947; therefore the

liability in respect of the advance tax devolved after partition on the Dominion of India which again by article 294(b) of the Constitution devolved on the Union of India."

7. No doubt the above observation has been made by the learned judge in a totally different context. But, what the learned counsel contended for was to the effect that the Income Tax paid in advance in accordance with the provisions relating thereto in the I.T. Act, 1961, was an amount paid and depending on the facts of each case part or the whole of it was liable to be refunded at a subsequent date and in that manner constituted a loan advanced to the Government even before the actual levy had become complete.

8. On the other hand, Shri S. R. Rajasekhara Murthy, learned counsel appearing for the respondent-ITO (Revenue), has strenuously contended that in the scheme of the Act, the income becomes liable to tax as soon as the charging section is attracted to the case of an individual or a body corporate or other persons liable to pay tax under the Act. It is true the tax legislation, particularly one dealing with income, not only in this country but also in most of the countries, is a highly complicated and long drawn out legislation providing for several contingencies and situations in order to prevent evasion or avoidance of tax to the extent possible. I have already set out earlier that the system of payment of advance tax came to vogue on account of the inflationary tendency created by the second world war and stayed in the statute book as a matter of convenience.

9. Now, therefore, the principal question for determination is as to when the tax can be said to be levied. There is no direct decision of the Supreme Court in so far as the peculiar and extraordinary facts of this case are concerned. However, it is a well-settled principle of interpretation of taxation laws that if more than one view is possible on the construction of a taxing statute, the one which leans in favour of the assessee should be accepted by the courts. It is equally well settled in this country that no tax can be levied except with the authority of law as enjoyed in art. 265 of the Constitution. In the case of *Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others*, , a Division Bench of the Madras High Court had occasion to consider the meaning and scope of art. 265 of the Constitution. Balakrishna Ayyar J., speaking for the Bench and repelling the contentions of the learned Advocate-General of Madras at the relevant time, ruled as follows (p. 386 of AIR 1959)

"We do not by any means feel assured that article 265 can or ought to be cut up in the manner that the argument of the learned Advocate-General requires. The word "levy" is frequently used to include both of the first two stages involved in the process of taxation, viz., the levy properly so called and the determination of the amount of the tax. It appears to us that the words "levy" and "collection" are used in art. 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen. And, what art. 265 enjoins is that every stage in this entire process must

be authorised by the law."

10. I am in most respectful agreement with the above enunciation of the law. Therefore, it is necessary for me to examine s. 240 of the Act which provides for the refund of tax, which is as follows :

"240. Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Income Tax Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."

11. As it apparent from the language of the section, it is very wide in its scope and application. There is a mandate on the revenue to make the refund even without a demand. That, in turn, leads me to the irresistible conclusion that if a demand is properly made then it certainly cannot be refused. Section 240 of the Act provides for refund of any amount that becomes due to the assessee. It cannot be restricted to excess payment only. It is possible in many instances that for a good number of reasons the whole of the advance tax paid may become refundable, if the assessee is ultimately found not liable to pay tax after the assessment proceedings are completed. Such a possibility cannot be ruled out. If that be the position, the mere fact of the compulsion of payment under s. 210 of the Act, as contended by Shri Rajasekhara Murthy, cannot be accepted to mean that, by the operation of that section, that tax had been levied, assessed and collected. Assessment is the final process which completes the levy of tax under s. 4 of the Act.

12. This leads me to examine the question as to what is the effect of assessments made in the case of the petitioner for the two relevant assessment years, his appeals to the AAC and subsequently the annulment of those assessments by the Income Tax Appellate Tribunal. As rightly contended by Shri Prasad, the Appellate Tribunal which had the jurisdiction and the power vested in it to set aside the assessment, has annulled it. The effect of annulment is that there is no assessment at all in the eye of law. If the revenue was aggrieved by that order, the Act provides adequate remedies to rectify any error committed by the Tribunal. The revenue not having had recourse to those remedies available to it cannot now take the stance that even without an assessment order in existence, the petitioner, for the relevant assessment years, is liable to tax under s. 4 of the Act. Until and unless the quantum of tax is determined in accordance with the procedure laid down by law, the revenue has no right to collect the tax and if tax, by way of advance tax or on self-assessment or having been deducted at source has been paid by the petitioner, the same cannot be retained contrary to the requirements of art. 265 of the Constitution. This view has been expressed by the Supreme Court in several decisions arising under the Central Excises and Salt Act, 1944. In the case of Patel India Private Limited Vs. Union of India and Others, , the Supreme Court was dealing with the question of refund claimed pursuant to an order made under that Act by the revisional authority. The revenue resisted the claim on the ground that s. 40 of that Act had application

and the claim for refund being belted in terms of that section, the appellant therein was not entitled to refund. Negating the contention, the Supreme Court first held that s. 40 of the Act had no application to the facts of that case at all and, therefore, the entire levy of excess excise duty on the appellant therein was on without jurisdiction and, therefore, without the authority of law, and in that circumstance, the Supreme Court laid down that since s. 40 of the Act did not apply to the facts, the respondent could not retain the excess duty except upon the authority of some other provisions of law. Similarly, in the instant case, unless the respondent-revenue is able to show as to under what provision of the Act the revenue can retain the tax paid without assessment being made or when the power to make the assessment afresh has ceased to be vested in the respondent by virtue of the operation of s. 153(1)(a)(iii) of the Act inasmuch as more than two years have elapsed from the time the return was filed, the revenue cannot retain the amount from the time the return was filed, the revenue cannot retain the amount collected as tax. This is not disputed by the learned counsel appearing for the revenue, nor has he placed any authority to the contrary before me.

13. Before parting with this case, it is necessary to note a decision of the Allahabad High Court in the case of MESSRS. SOHAN PATHAK AND SONS Vs. COMMISSIONER OR Income Tax, LUCKNOW, AND ANOTHER., That decision was rendered by a learned single judge of that High Court. The matter arose under the Excess Profits Tax Act. But nevertheless the High Court had to consider the question of making a refund on demand by virtue of the success of the party in appeal in the Supreme Court. It was argued by the learned counsel appearing for the writ petitioners therein that refund was not being claimed under the provision made in s. 21 of the Excess Profits Tax Act read with s. 66A of the Indian I.T. Act, 1922, which enjoined the revenue to carry into effect the decisions of the High Court or the Supreme Court. Similarly, in the instant case, under the Act, s. 254 provides for two things. Under sub-s. (3) of that section, the Appellate Tribunal shall send a copy of any order passed by it under that section to the assessee and to the Commissioner and sub-s. (4) of that section makes the order of the Appellate Tribunal in appeal, final. As earlier stated, nothing was done by the revenue after the assessments in question were annulled by the Tribunal. In the result, there are no assessments at all of the petitioner for the relevant assessment years. The Appellate Tribunal's order having become final in terms of s. 254(4) of the Act, the retention of moneys, paid by the assessee petitioner, by the respondent without any assessment and without the ITO being capable of making fresh assessments in accordance with law is impermissible.

14. Therefore, the petitioner succeeds in both the petitions and a writ in the nature of mandamus will issue to the respondent-revenue to refund all amounts paid by way of tax whether as advance tax or on self-assessment or deducted at source for the relevant assessment years, namely, 1973-74 and 1975-76. Any endorsement issued by the respondent-ITO refusing this amount is also hereby quashed as one made without jurisdiction and without the authority of law.

15. In the circumstances of these cases, parties will bear their own costs.