

(1985) 11 KL CK 0013

In the High Court Of Kerala

Case No : Income-tax Reference No's. 180 and 181 of 1980

Rafeeq Timbers

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-11-1985

Acts Referred:

Income Tax Act, 1961 — Section 185, 246, 246(1)

Citation : (1986) 162 ITR 839

Hon'ble Judges : T. Kochu Thommen, J; K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer, P.S. Narayanan, N. Subramaniam and P. Krishnan, for the Appellant; P.K.R. Menon and N.R.K. Nair, for the Respondent

Judgement

T. Kochu Thommen, J.—The following two questions have been, at the instance of the assessee, referred to us by the Income Tax Appellate Tribunal, Cochin Bench :

" 1. Whether, on the facts and circumstances of the case, the appeal preferred by the assessee to the Appellate Assistant Commissioner against the order passed by the Income Tax Officer, refusing to condone the delay in filing the application for registration for the assessment year 1974-75 was competent ?

2. Whether, on the facts and circumstances of the case, the appeal preferred by the assessee against the assessment made on it for the assessment year 1974-75, disputing the status adopted as unregistered firm, was competent?"

2. The assessee-firm made an application to the Income Tax Officer for registration u/s 184 of the Income Tax Act, 1961. Since the application was filed 37 days out of time, it was accompanied by a separate application for condonation of delay. The application for condonation of delay was rejected by the Income Tax Officer by his order marked as annexure C. By his order marked as annexure D, the assessee was assessed on the basis that it was an unregistered firm. The assessee challenged both the orders by separate appeals. The appeal against the order refusing to condone the delay was rejected by the

Appellate Assistant Commissioner by annexure H dated July 12, 1977, on the ground that it was not an appealable order. However, he allowed the appeal against the assessment order by his order dated September 3, 1977 (annexure F), on the ground that the Income Tax Officer was, in the circumstances, not justified in refusing to condone the delay. The Appellate Assistant Commissioner accordingly set aside the order of assessment, condoned the delay in filing the application for registration and remanded the case to the Income Tax Officer to dispose of the application for registration on merits after giving proper opportunity to the party. The assessee, however, appealed against the order of the Appellate Assistant Commissioner refusing to interfere with the order of the Income Tax Officer rejecting the application for condonation of delay. The Department also appealed against the order of the Appellate Assistant Commissioner. The Tribunal allowed the Department's appeal, but did not express any view as regards the merits of the assessee's appeal.

3. An application for registration is made u/s 184. The procedure that the Income Tax Officer has to adopt on receipt of an application is laid down u/s 185. Section 246 specifies appealable orders.

4. Section 246, in so far as it is material, reads :

"246. Appealable orders.--(1) Subject to the provisions of Sub-section (2), any assessee aggrieved by any of the following orders of an Income Tax Officer may appeal to the Appellate Assistant Commissioner against such order...

(c) an order against the assessee, where the assessee denies his liability to be assessed under this Act or any order of assessment under Sub-section (3) of Section 143 or Section 144, where the assessee objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed :... (j) an order under Clause (b) of Sub-section (1) or under Sub-section (2) or Sub-section (3) or Sub-section (5) of Section 185." (emphasis * supplied)

5. The powers of the Appellate Assistant Commissioner are mentioned u/s 251. This reads :

"251. (1) In disposing of an appeal, the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) shall have the following powers-

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) and after making such further inquiry as may be necessary, and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel

such order or vary it so as either to enhance or to reduce the penalty ;

(c) in any other case, he may pass such orders in the appeal as he thinks fit."

6. Explanation (2) to Section 143 says :

""status", in relation to an assessee, means the classification of the assessee as an individual, a Hindu undivided family, or any other category of persons referred to in Clause (31) of Section 2, and where the assessee is a firm, its classification as a registered firm or an unregistered firm."

7. These provisions show that where an assessment is made and the assessee objects to the status under which he is assessed, an appeal will lie against the order of assessment (Section 246(1)(c)--see Explanation (2) to Section 143). It is open to the assessee to challenge an order on the ground that it has been assessed by imputing to it the wrong status. The question whether it ought to have been assessed as a registered firm is a matter relating to status. The order u/s 185(1)(b) or (2) or (3) and (5) is also appealable [Section 246(1)(j)], The Appellate Assistant Commissioner has all the powers of the Income Tax Officer in exercising his appellate power in so far as he can confirm, reduce, enhance or annul the assessment or set aside the same and refer the case back for fresh consideration (Section 251).

8. If the assessee's application for registration had been considered and allowed by the Income Tax Officer, it would have been assessed as a registered firm and not as an unregistered firm. That advantage was denied to it because its application for registration was rejected on the ground of delay.

9. It is true that Clause (j) of Sub-section (1) of Section 246 would not be of any avail because no order was made by the Income Tax Officer u/s 185 as the application for registration was not considered on merits. The Appellate Assistant Commissioner was perfectly justified in rejecting the appeal against the decision of the Income Tax Officer refusing to condone the delay ; see the decision of this court in Commissioner of Income Tax Vs. Pushpaka Travels, . But the question is whether the Appellate Assistant Commissioner rightly allowed the appeal against the order of assessment by setting aside the same, condoning the delay in filing the application for registration and remanding the case for fresh consideration on merits.

10. Counsel for the Revenue points out that after dismissing the appeal challenging the order of the Income Tax Officer rejecting the application for condonation of delay, the appellate authority was not justified in setting aside the assessment, condoning the delay and directing reconsideration of the case on merits with reference to the application for registration. These two orders of the appellate authority, counsel for the Revenue points out, are inconsistent.

11. We see no inconsistency between these two orders. In the light of the decision (see Commissioner of Income Tax Vs. Pushpaka Travels,) the Appellate Assistant Commissioner was justified in refusing to interfere with the order

rejecting the application for condonation of delay. But he was equally justified in expressing his view that the delay should be condoned and that the case reconsidered with reference to the merits of the application for registration. Clause (c) of Sub-section (1) of Section 246 specifically provides for an appeal where the assessee objects to the status under which he is assessed.

12. The assessee's objection on the merits of the assessment is that the rate applied by the assessing authority was inapplicable to the assessee, for according to it, it was not, during the relevant period, liable to be treated as an unregistered firm and its application for registration was wrongly rejected. The status of the assessee was a material question to be determined in the appeal and the determination of that question depended upon the correctness of the decision of the Income Tax Officer rejecting the application, albeit, on the ground of delay.

13. The appellate authority, as we have stated earlier, has all the powers of the Income Tax Officer. It is within his power to confirm, reduce, enhance or annul the assessment. It is also within his power to set aside the order and direct fresh consideration. His powers are co-extensive with those of the Income Tax Officer. In considering the merits of the appeal, he was satisfied that the delay in filing the application was properly explained and the application for registration ought to have been duly considered on merits in terms of Section 185 and the status determined accordingly before the assessment was finalised.

14. In the circumstances, we are of the view that the Tribunal was in error in holding that the appeal filed by the assessee before the Appellate Assistant Commissioner against the order of assessment on the merits was incompetent. In so saying, we find support in *Income Tax Officer Vs. Vinod Krishna Som Prakash*, .

15. We answer question No. 2 in the affirmative, that is, in favour of the assessee and against the Revenue. In the light of what we have stated, we do not find it necessary to answer question No. 1.

16. We direct the parties to bear their respective costs in these tax referred cases.

17. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.