

(1991) 04 AHC CK 0045

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 273 of 1980

Renusagar Power Company Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 25-04-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 153

Citation : (1992) 196 ITR 903

Hon'ble Judges : B.P. Jeevan Reddy, C.J.; R.A. Sharma, J

Bench : Division Bench

Advocate : Raja Ram Agarwal, for the Appellant;

Judgement

B.P. Jeevan Reddy, C.J.—This is a petition for issuance of a writ in the nature of prohibition restraining the respondents (assessing authorities under the Income Tax Act) from proceeding with, or passing any orders in, the assessment proceedings against the petitioner relating to the assessment year 1971-72.

2. The petitioner is a company registered under the, Companies Act. It is engaged in the business of generation and supply of power. It is an assessee under the Income Tax Act. For the assessment year 1971-72, the petitioner filed a return of its income, on the basis of which an order of assessment was made by the Income Tax Officer on February 27, 1975, u/s 142 of the Act. It was a case of nil assessment. Subsequently, the Income Tax Officer sought to reopen the assessment by issuing a notice u/s 148, which was questioned by the petitioner by way of a writ petition in this court (C.M.W.P. No. 578 of 1976). This aspect is not really relevant for our purpose and it is also not clear as to what happened to the said writ petition. What is, however, relevant is that by a notice dated February 7, 1977, the Commissioner of Income Tax proposed to revise the assessment order dated February 27, 1975. Under the said notice, the order of assessment was proposed to be revised on eight points. After hearing the petitioner, the Commissioner passed final orders on February 26, 1977. Of the

eight points mentioned in the show cause notice, two were held in favour of the assessee, one was held against it and with respect to the remaining five, the matter was remitted to the Income Tax Officer to make a fresh assessment in accordance with law. The assessee filed an appeal against the order of the Commissioner dated February 26, 1977, confined only to the five points which were remitted to the Income Tax Officer. The appeal did not pertain to the points which were held against the assessee. In this appeal, the petitioner filed a stay petition, but no orders were passed thereon. Ultimately, the appeal was dismissed by the Tribunal on February 28, 1979. While dismissing the appeal, the Tribunal gave certain directions, which are relevant for our present purpose, and, therefore, set out :

" 6. After carefully examining the rival submissions and examining the merits on record, we are of the opinion that the order of the Commissioner u/s 263 has to be upheld. The order of the Income Tax Officer was prima facie erroneous and prejudicial to the interests of the Revenue. The Commissioner, therefore, has rightly assumed jurisdiction u/s 263 and set aside the order.

7. Simultaneously, we feel that the Commissioner was not justified in limiting the discretion of the Income Tax Officer and moreover forcing him to take an indicated course of action while at the same time stating that he wanted him to pass the order de novo in accordance with law. When the order has to be passed in accordance with law de novo, the Income Tax Officer has to be left unfettered to act in the light of his judgment, to consider the law and to pass orders, in accordance therewith.

8. We, therefore, direct that while passing such order, the Income Tax Officer will ignore the various observations made by the Commissioner in his order enunciating his views under the law, as we have already noted that counsel for the Commissioner agreed to this course of action.

9. In the result, for statistical purposes, the appeal is allowed in part."

3. The present writ petition was filed on July 21, 1980, contending that, inasmuch as no order of assessment was made within two years from the end of the financial year in which the Commissioner passed his order u/s 263, no order of assessment can be made thereafter, by virtue of the provisions contained in Sub-Section (2A) of Section 153 of the Act. It is submitted that, according to the said sub-section, an order of fresh assessment in pursuance of an order u/s 263 can be made at any time before the expiry of two years from the end of the financial year in which the order u/s 263 is passed by the Commissioner but not thereafter. In this case, the order of the Commissioner is dated February 26, 1977. That financial year came to an end on March 31, 1977. A fresh assessment order had to be made on or before March 31, 1979. Since it has not been so made, it cannot be made thereafter. It is pointed out that though the petitioner-assessee filed an appeal against the order of the Commissioner, it was dismissed by the Tribunal on February 28, 1979. There was no stay of the assessment

proceedings pending the said appeal. In any event, it is argued, no order of fresh assessment can be made after March 31, 1979.

4. The Department's contention is that in computing the period of two years mentioned in Sub-section (2A) of Section 153, the period during which the appeal was pending before the Tribunal (against the order of the Commissioner) ought to be excluded. It is pointed out that subsection (2A) not only refers to Section 263, but also to Section 254, and, since the appellate order of the Tribunal is made u/s 254 and, more particularly, because the Tribunal had made certain specific directions relating to the manner of making the fresh assessment, the two-year period should be computed from the date of the Tribunal's order, i.e., from February 28, 1979, and not from the date of the Commissioner's order. In our opinion, the Department is right. We proceed to give reasons for our opinion.

5. Sub-section (1) of Section 153 prescribed the period of limitation within which an order of assessment has to be made. In respect of an assessment year commencing on or after April 1, 1969, it is two years from the end of the assessment year in which the income was first assessable (vide Section 153(1)(a) (iii), as it then stood). Sub-section (2) provides the period of limitation in case of assessment, reassessment or recomputation made u/s 147. In a case of assessment etc., to be made under Clause (a) of Section 147, it is four years from the end of the assessment year in which the notice u/s 148 is served while, in the case of Clause (b) of Section 147, it is four years from the end of the assessment year in which the income was first assessable, or the expiry of one year from the date of service of the notice u/s 148, whichever is later. The Taxation Laws (Amendment) Act, 1970, with effect from April 1, 1971, says that notwithstanding anything contained in Sub-Sections (1) and (2), an order of fresh assessment in pursuance of an order under Sections 250 : 254 : 263 : 264, setting aside or cancelling an assessment can be made at any time before the expiry of two years from the end of the financial year in which the order u/s 146 cancelling the assessment is passed by the Income Tax Officer or the order u/s 250 or Section 254 is received by the Commissioner or from the date the order under Sections 263 : 264 is passed by the Commissioner. Sub-section (3) was made subject to Sub-section (2A) by the very same amendment, though it was a pre-existing provision. Sub-section (3) says that the provisions of Sub-sections (1) and (2) shall not apply to certain classes of assessments, reassessments or recomputations which can be completed at any time. One of the classes of assessments specified in the sub-section is "(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 250 : 254 : 260 : 262 : 263 : 264 or in an order of any court in a proceeding otherwise than by way or appeal or reference under this Act." But, as stated above, this sub-section is expressly made subject to the provisions of Sub-section (2A) by the Taxation Laws (Amendment) Act, 1970. Explanation 1 to the section prescribes certain rules of computation. Inter alia, it says that "the period

during which the assessment proceeding is stayed by an order or injunction of any court" shall be excluded in computing the period of limitation for the purposes of this section. For the sake of convenience, we may set out Sub-sections (2A) and (3) of Section 153 and Explanation 1 thereto (in so far as it is relevant) herein below :

" (2A) Notwithstanding anything contained in Sub-sections (1) and (2), in relation to the assessment year commencing on April 1, 1971, and any subsequent assessment year, an order of fresh assessment u/s 146 or in pursuance of an order, u/s 250, Section 254, Section 263 or Section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of two years from the end of the financial year in which the order u/s 146 cancelling the assessment is passed by the Income Tax Officer or the order u/s 250 or Section 254 is received by the Commissioner or, as the case may be, the order u/s 263 or Section 264 is passed by the Commissioner.

(3) The provisions of Sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of Sub-section (2A), be completed at any time,--

(i) where a fresh assessment is made u/s 146 ;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 250 : 254 : 260 : 262 : 263 : 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act ;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm u/s 147.

Explanation 1.--In computing the period of limitation for the purposes of this section,--...

(ii) the period during which the assessment proceeding is stayed by an order or injunction of any court."

6. Though there was some discussion before us with respect to the respective fields in which Sub-section (2A) and Sub-section (2) operate, and also with respect to the doctrine of merger, we do not think it necessary to go into the same for the purposes of this case. The Commissioner directed the Income Tax Officer to make reassessment on five points (we are only borrowing the phraseology used by Mr. Raja Ram Agarwal, learned counsel for the petitioner) by his order dated February 26, 1977. While so directing, the Commissioner had given various directions which, so to speak, restricted the discretion and the judgment of the Income Tax Officer in the matter of making a fresh assessment. The assessee filed an appeal against the order of the Commissioner on the said five points. The Tribunal allowed, in part, the appeal and deleted the directions given by the Commissioner, restricting the discretion and the judgment of the

Income Tax Officer in the matter of making a reassessment. We have already extracted hereinabove the operative portion of the Tribunal's order, it expressly says : " We, therefore, direct that, while passing such order, the Income Tax Officer shall ignore the various observations made by the Commissioner in his order enunciating his views under the law." This means that the Income Tax Officer was bound to make an assessment in accordance with the directions of the Tribunal, even if he had made an assessment earlier in pursuance of the orders of the Commissioner u/s 263. Admittedly, the Income Tax Officer had not made any fresh order of assessment in pursuance of the order of the Commissioner and once the Tribunal has passed the order, there is no question of making any assessment in pursuance of the Commissioner's order. The assessment has to be made only in accordance with the Tribunal's directions and for that, the period of limitation is to expire only on March 31, 1981. (The Tribunal's order is dated February 23, 1979). This writ petition was filed long prior thereto, i.e., on July 21, 1980, and further proceedings got stayed by an order of this court on the same day. In this case, we need not decide the question what will be the position if the Tribunal had simply dismissed the appeal without making any directions. That question can be gone into if and when it arises in an appropriate case.

7. A minor point was urged by Sri Raja Ram Agarwal, learned counsel for the petitioner, as to the meaning of the words employed in the last paragraph of the judgment of the Tribunal wherein it said that the appeal was allowed for statistical purposes ; perhaps, since it set aside the directions of the Commissioner, it said that the appeal was allowed in part. But, looking to the substance of the order, it is clear that the appeal was dismissed, while deleting the directions made by the Commissioner relating to the manner of making assessment which, according to the Tribunal, restricted the discretion and the judgment of the Income Tax Officer in an uncalled for fashion. Nothing turns upon the use of the words " allowed in part."

8. For the above reasons, the writ petition is dismissed. There shall be no order as to costs.

9. A copy of this order shall be communicated to the respondents within one week from today.