(1991) 04 AHC CK 0120

In the Allahabad High Court

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

Renusagar Power Ltd. APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 25-04-1991

Acts Referred:
Income Tax Act, 1961 — Section 142, 146, 147, 148, 152

Citation : (1991) 59 TAXMAN 492

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

Bench : Division Bench

Final Decision : Dismissed

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, 1961 (''the Act'')] from proceeding with, or passing any orders in, the assessment proceedings against the petitioner relating to the assessment year 1971-72. The petitioner is a company registered under the Companies Act, 1956. It is engaged in the business of generation and supply of power. It is an assessee under the 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 ITO on 27-2-1975 u/s 142 of the Act. It was a case of nil assessment. Subsequently, the ITO sought to reopen the assessment by issuing a notice u/s 148 of the Act which was questioned by the petitioner by way of a writ petition in this Court CMWP 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 7-2-1977 the Commissioner proposed to revise the assessment order dated 27-2-1975. 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 26-2-1977. Of the eight points mentioned in the show-cause notice, two were held for the assessee, one was held against it and with respect to the remaining five, the matter was remitted to the ITO to make a fresh assessment in accordance with law. The assessee filed an appeal against the order of the Commissioner dated 22-2-1977, confined it only to the five points which were remitted to the ITO. 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 28-2-1979. 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 262 has to be upheld. The order of the income tax Officer was prima facie erroneous and prejudicial to the interest of 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 order 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 the counsel for the Commissioner agreed to this course of action.

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

The present writ petition was filed on 21-7-1980, contending that inasmuch as no order of assessment was made within two years of the end of the Financial year, in which the Commissioner passed his order u/s 263 of the Act, 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 subsection an order of fresh assessment in pursuance of an order u/s 263 can be made at any time before the expiry of the 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 26-2-1977 that the Financial year came to an end on 31-3-1977. A fresh assessment order had to be made on or before 31-3-1979, 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 28-2-1979. There was no stay of the assessment proceedings pending the said appeal. In any event it is argued that, no order of fresh assessment can be made after 31-3-1979

2. 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 sub-section (2A) not only refers to section 263 but also to section 254 of the Act, 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 years'' period should be computed from the date of the Tribunal''s order, i.e., from 28-2-1979 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.

Sub-section (1) of section 152 of the Act prescribes the period of limitation within which an order of assessment has to be made. In respect of an assessment year commencing on or after 1-4-1968, it is two years from the end of the assessment year in which the income was first assessable vide section 153(1)(a)(m), (as it then stood). Sub-section (2) provides the period of limitation in case of assessment, reassessment or recomputation made u/s 147 of the Act. 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, which by the Taxation Laws (Amendment) Act, 1970 with effect from 1-4-1971, 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 of the Act, setting aside or cancelling an assessment, can be made at any time before the expiry of the financial year in which the order u/s 250 or 254 is received by the Commissioner or from the date the order u/s 263 or 264 of the Act is made by the Commissioner. Sub-section (2) was made subject to sub-section (2A) by the very same amendment though it was a pre-existing provision. Sub-section (2) says that the provisions of subsections (1) and (2) shall not apply to certain classes of assessment, reassessment or recomputation, which can be completed at any time. One of the classes of assessment 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 or 264 or in an order of any court in a proceeding otherwise then by way of 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 /to the section prescribes certain rules of computation. inter alia, it says that "the period during which the assessment proceedings 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 I thereto (insofar as it is relevant) herein below:

Time limit for completion of assessments and reassessments. -

(1) and (2)******

(2A) Notwithstanding anything contained in sub-sections (1) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment years, an order of fresh assessment u/s 146 are in pursuance of an order, u/s 250 or 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... 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, -

(i) ******

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

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 ITO to make reassessment on five points (we are only borrowing the phraseology used by Mr. Raja Ram Agrawal, the learned counsel for the petitioner) by his order dated 26-2-1977. While so directing, the Commissioner had given various directions, which, so to speak, restricted the discretion and judgment of the ITO in the matter of making 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, which restricted the discretion and judgment of the ITO in the matter of making 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 ITO 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 ITO had not made any fresh order or 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 31-3-1981. (The Tribunal''s order is dated 28-2-1979). This writ petition was filed long prior thereto on 21-7-1980 and further proceedings got stayed by an order of this Court on the same day. In this case, we need not decide the question as to what would 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.

3. A minor point was urged by Sri Raja Ram Agarwal, the 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 at 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, constricted the discretion and judgment of the ITO in an uncalled for fashion. Nothing turns upon the use of words ''allowed in part. For the above reasons, the writ petition is dismissed. There shall be no order as to costs.

