
(1961) 09 MAD CK 0041
In the Madras High Court

S. Santhosa Nadar

APPELLANT

Vs

The First Additional Income Tax Officer and Another

RESPONDENT

Date of Decision : 01-09-1961

Acts Referred:

Income Tax Act, 1961 — Section 28(1)(c), 34(3)

Citation : (1962) 1 MLJ 411

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—This is a petition for the review of the order made in the writ petition mentioned above. That writ petition sought for the issue of a writ of certiorari to call for the records of the First Additional Income Tax Officer, Tuticorin, and to quash the order of assessment, dated 26th March, 1956, for the assessment year 1947-48. In order to appreciate the point that arises in this petition for review, it is necessary to state certain facts that arose for consideration in the abovementioned writ petition and another writ petition, No. 1269 of 1960, which was also heard at the same time.

2. The petitioner, a resident of Tirunelveli, carried on business in Ceylon. He did not file any returns of his income for the assessment years 1945-46, 1946-47 and 1947-48 in response to the general notice published u/s 22 (1) of the Income Tax Act, but on 20th March, 1954, he voluntarily filed returns for all the three years. These returns were ignored by the Income Tax Officer, who, with reference to the assessment year 1945-46, initiated proceedings u/s 34 of the Act and finalised the assessment on 5th March, 1955, u/s 34 read with Section 23(4). For the assessment year 1947-48, resort was not had to Section 34, but the assessment was completed u/s 23(3) of the Act on 26th March, 1956. In the writ petition referred to, the validity of the assessments themselves was challenged on the ground that on the respective dates of assessments, they were barred by limitation. A Bench of this Court, to which I was a party, went into the question in some detail and held¹ that a return filed by the assessee, after the

expiry of the period of four years specified in Section 34(3) cannot form the basis of any valid assessment. The Bench observed:

After the expiry of four years from the end of the assessment year 1945-46, no assessment could have been made on the petitioner without recourse to Section 34(1), and recourse could be had to Section 34(1) only on the ground that no return had been filed, that is, that no return had been filed before the assessment could be lawfully completed without recourse to Section 34(1). The return filed by the petitioner on 20th March, 1954, did not, in the circumstances of this case, vitiate the notice issued u/s 34(1) on 26th March, 1954. We uphold the contention of the learned Counsel for the Department, that the initiation and completion of the assessment proceedings for 1945-46 u/s 34 were valid.

In relation to the assessment year 1945-46, the view taken was that though in fact a return had been filed by the assessee in 1954, it was not a return which could, under law, have formed the basis of a valid assessment. The position was thus as if no return had been filed at all. It was accordingly a case to which Section 34(1) applied, and if an assessee who did not file any return was to be assessed, the jurisdiction to assess him could arise under those circumstances only with the issue of a notice u/s 34(1) of the Act. That was done in relation to the assessment year 1945-46 and it was consequently held that the assessment proceedings were not invalidated for any reason whatsoever.

3. In the case of the assessment for the year 1947-48, no proceedings u/s 34 were initiated, though the assessee had not filed a return within that period of time during which there could normally be a valid assessment, that is, within the normal period of limitation of four years. But the Income Tax Officer purported to issue a notice u/s 28(1)(c) of the Act. In the order of assessment itself, there was an express statement of the Income Tax Officer that there had been a concealment of the income. Section 34(3) removes the bar of limitation in the case of an order of assessment u/s 23 to which Section 28(1)(c) applies. The Bench observed in this connection:

If as in this case, there was an express finding that there was concealment of income, that would appear to satisfy the requirements of Section 34(3) that it is a case of assessment u/s 23 to which Section 28(1)(c) would apply.

The Bench also repelled the contention that in order to bring it within the scope of what was exempted from the operation of Section 34(3) the proceedings u/s 28(1)(c) should have been finalised. In the view therefore that Section 28(1)(c) applied to the case and that the period of limitation stipulated in Section 34(3) stood excluded in such a case, the Bench reached the conclusion that the assessment for the year 1947-48 was not barred by limitation.

4. The only point raised by the petitioner in the Review Petition is shortly this. Here is a case where it has been held that a return filed beyond the period of four years from the close of the assessment year is not a return which can form the basis of a lawful assessment. Such a return is non est in law. While it was

specifically so held by the Bench in relation to the assessment year 1945-46, the position was just the same in relation to the assessment year 1947-48, the voluntary return in that case also having been filed only on 20th March, 1954. The conclusion of the Bench was that there was no return before the assessing authority. If there was no return, the contention of the petitioner is that it is a clear case which would come only within the scope of Section 28(1)(a) of the Act and not u/s 28(1)(c). For a case to fall under the latter provision which deals with "concealment of the particulars of the income" or of "deliberately furnishing inaccurate particulars of such income", there should be a return in which there has been such concealment or such furnishing of inaccurate particulars. If there is no return at all, there can be no possibility of any concealment of "particulars" or of furnishing of "inaccurate particulars" of the income. If Section 28(1)(c) does not apply to the case for the reason mentioned above, it should follow, according to the learned Counsel for the petitioner, that the exemption from the period of limitation contemplated by Section 34(3) is not taken away. The only manner in which the Department can reach the income of the assessee would be to initiate proceedings u/s 34(1), as was done in the case of the assessment year 1945-46. That not having been done, the assessment for the assessment year 1947-48 is also invalid.

5. Learned Counsel did in fact raise the question in the course of the arguments before the Bench that if a voluntary return filed by the assessee on 20th March, 1954, was not a return valid in law, then Section 28(1)(c) would not at all be attracted. He argues that this aspect of his argument and of the legal position was overlooked by the Bench in dealing with the matter and this petition for review is the consequence. Since I was a member of the Bench which disposed of the matter and the other learned Judge of the Bench has since retired, this Review Petition comes up before me for disposal under Order 47, Rule 5, Civil Procedure Code.

6. On a careful consideration of the relevant provisions, I am satisfied that the contention urged by the learned Counsel for the petitioner is sound. The short question that I have to consider is whether this is a case of "an order of assessment u/s 23 to which Clause (c) of Sub-section (1) of Section 28 applies" within the meaning of Section 34(3) of the Act. The Bench proceeded on the footing that there was a finding of the Income Tax Officer in the assessment order that this was a case to which Section 28(1)(c) applied and penalty notice had also been issued. The Bench dealt with the argument that it would not be a case to which Section 28(1)(c) applied, unless the penalty proceedings had terminated, and held against that argument. The Bench took the view that the statement of the Income Tax Officer that it was a case to which Section 28(1)(c) applied was conclusive and that operated to take away the bar of limitation otherwise imposed by Section 34(3) of the Act. The matter was not considered from the angle of the finding that a voluntary return filed after the period of four years from the close of the assessment year is turn est in law. Whether Section 28(1)(c) can ever come into play in a case where there was no return at all was

not specifically considered by the Bench, though in the notes of argument recorded by me, it is found that such a contention was in fact advanced at the tail-end of the arguments. The question that I have thus to consider is whether where no return has been filed at all, it could be said that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars of the income.

7. It is manifest that a failure to furnish a return of income which an assessee is required to furnish by a notice given under Sub-section (1) or (2) of Section 22 would fall within Section 28(1)(a). The Legislature has provided for various categories of failures and wilful omissions. Section 28(1)(a) covers cases of failure to make a return of the income in response to a general or special notice. Section 28(1)(b) takes note of cases of failure to comply with a notice u/s 22(4) calling for the production of accounts and documents or other information required by the Income Tax Officer. But this again has reference to a case where a return has been made or a notice u/s 22(2) has issued. It also takes note of failure to comply with a notice u/s 23(2) of the Act requiring the presence of the assessee or the person who made the return. When we come to Section 28(1)(c), it deals specifically with the concealment of particulars of income or the deliberate furnishing of inaccurate "particulars" of income. In the setting in which this sub-clause finds place, it is impossible to construe Section 28(1)(c) except as relating to a case where a return has been filed but from which return, particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression "particulars of his income" and "particulars of such income" would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of Section 28(1)(a) alone.

8. The further penal provisions of Section 28(1)(c) appear also to support the above view. In the case of a total failure to furnish a return, the penalty which may be imposed upon the assessee would be an amount not exceeding one and a half times the Income Tax and super-tax, if any, payable by him, in addition to any tax payable by him. But in a case which comes u/s 28(1)(c), in addition to any tax payable by him, the maximum penalty that can be imposed is a sum not exceeding one and a half times the amount of Income Tax and super-tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income. Not only has the Legislature linked the quantum of the penalty to the amount of tax which would have been avoided by the concealment or furnishing of inaccurate particulars, but the concluding portion of Section 28(1) itself indicates that in the cases falling under Sub-clause (b) or Sub-clause (c), there should have been a return made by such person which could have been accepted as correct. For my part, there can be no clearer indication that in cases that can be brought within the scope of Section 28(1)(b) and Section 28(1)(c), there must be a return. If there is no return at all in fact or in law, that case would not fall under any of the sub-sections except Sub-section (a) of Section 28(1).

9. Mr. Ranganathan, for the Department, argues that notwithstanding that the return is filed beyond the period of four years from the close of the assessment year, it is nevertheless valid. He claims that any return can be tested only at the time of the assessment and the application of Section 28(1)(c) can be examined only at that stage. He argues that for the purpose of Section 28(1)(c) there need not be a valid return in the sense that it was filed within the period of four years referred to. His alternative contention is that even if the return is invalid, the assessment which purports to have been made u/s 23(3) might nevertheless be construed as one made u/s 23(4) treating it as one where no return has been filed. This latter argument fails to satisfy me at all as sound. Obviously, if there was no return at all, a valid assessment could not be made beyond a period of four years from the close of the assessment year unless resort was had to Section 34(1). That was not the case here. For a valid assessment to be made u/s 23(4) of its own force, it is beyond dispute that such assessment should be made within the period of four years prescribed in Section 34(3). Unless it is the contention of the Department that the return filed beyond four years, as in this case, can still be held to be a valid return, enabling the making of an assessment thereon, I am unable to see how Section 28(1)(c) can at all come into play. The Bench has definitely come to the conclusion that a return filed beyond the period of the four years from the close of the assessment year is non est in law, as that cannot form the basis of a lawful assessment. The only manner in which the assessment in such a case can be made is by resort to Section 34(1) initiated by the issue of a notice. If a return filed beyond a period of four years cannot form the basis of a valid assessment without the aid of Section 34(1), I am unable to accept the contention that it can yet be a valid return for the purpose of the application of Section 28(1)(c).

10. The conclusion that I reach accordingly is that Section 28(1)(a) and Section 28(1)(c) are mutually exclusive.

11. The matter is not directly covered by any authority. But in *S. Narayanappa and Brothers Vs. Commissioner of Income Tax, Mysore*, the question arose whether the Income Tax Officer could levy a penalty u/s 28(1)(b) of the Act where the assessee failed to submit a return in response to a notice u/s 22(2) and further failed to produce his books of account when called upon to do so u/s 22(4). That was a case where there was a total failure to submit a return. The failure to produce the books of account as directed by a notice u/s 22(4) no doubt attracts the penalty provision of Section 28(1)(b), but Section 22(4) itself empowers the Income Tax Officer to call for accounts, etc., only in a case where a person has made a return either u/s 22(1) or Section 22(2). The learned Judges of the Mysore High Court held that the imposition of penalty u/s 28(1)(b) cannot be justified except in a case where the assessee has furnished a return. This decision, though not directly in point in so far as the Section 28(1)(c) is concerned, still lends considerable support for the view that I have taken that Section 28(1)(c) can operate only when there has been a return and not when there has been no return at all.

12. It should necessarily follow from the above discussion that in the case of assessment for the assessment year 1947-48, no return at all having been filed, it was not a case to which Section 28(1)(c) applied. Accordingly, the case is not taken out of the operation of Section 34(3) of the Act and the assessment made beyond the period of four years is invalid.

13. The Review Petition is allowed. In the circumstances, there will be no order as to costs.