

(1995) 11 MP CK 0008

In the Madhya Pradesh High Court

Case No : MCC No. 112 of 1987 & Miscellaneous Civil Case No. 112 of 1987

S.K. Salimullah

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-11-1995

Acts Referred:

Income Tax Act, 1961 — Section 139, 143, 143(1), 143(1)(a), 143(2)

Citation : (1996) 85 TAXMAN 241

Hon'ble Judges : A.K. Mathur, Acting C.J.; S.C. Pandey, J

Bench : Division Bench

Advocate : B.L. Nema, for the Appellant; V.K. Tankha, for the Respondent

Judgement

A.K. Mathur, Actg. C.J.

1. This is an IT Reference at the instance of the assessee u/s 256(1) of the income tax Act, 1961 ("the Act"). Following questions have been referred by the Tribunal for answer by this Court: 1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding in law that the legal effect of filing Form No. 6A in terms of section 143(2)(a) was not that the original order u/s 143(1) was automatically cancelled?

2. If the answer to the above question is in affirmative, whether the Tribunal was justified on the facts and in the circumstances of the case in setting aside the order of the AAC and restoring that of the ITO?

Brief facts giving rise to this reference are that that the assessee is an individual being a partner in Alimbeg Salimbhai. The original assessment of the assessee was completed on 9-2-1983 on a total income of Rs. 99,014. In the said assessment, the income of the assessee was from share from the firm was taken on provisional basis, subject to rectification u/s 155 of the Act after the assessment of the firm had been completed. Assessment in question was completed on 31-3-1983 and the notice of demand was served on the assessee on 18-4-1983. On 19-4-1983, the assessee submitted Form No. 6A in terms of

clause (a) of sub-section (2) of section 143 of the Act, objecting to the assessment made u/s 143(1) as above on the ground that enhancement of returned income from Rs. 36,204 to Rs. 41,284 was incorrect. The ITO, prima facie, took no action on receipt of the aforesaid Form No. 6A from the assessee. In the meanwhile, the assessee's assessment had been completed and the correct share income of the assessee Alimbeg Salimbhai was communicated to the ITO. On its basis, he gave notice u/s 155 to the assessee and after that rectified the original assessment u/s 143(1) made by him on 31-3-1983.

2. Against the aforesaid order u/s 155, the assessee filed an appeal to the AAC and pleaded before him that as soon as Form No. 6A was filed by the assessee, the original order u/s 143(1) was vacated and, therefore, there was no subsisting assessment order on 13-10-1983 which could be rectified by the ITO u/s 155 of the Act. The above plea of the assessee was accepted by the AAC. The revenue filed an appeal against the aforesaid order before the Tribunal and pleaded that filing of Form No. 6A did not automatically cancel the assessment u/s 143(1) made by the ITO and it only meant that the objection of the assessee, raised in Form No. 6A, would be duly considered by the ITO and thereafter he would pass the requisite order. It was contended that unless such requisite order was passed, the original order would not stand vacated and the ITO was duty bound to make an assessment within six months from the end of the month in which the application was made. It was submitted that since there was no order subsisting u/s 143(1), there was no question of rectification u/s 155.

3. The Tribunal considered the matter and after considering the controversy, the Tribunal held that-

In view of the above situation, to our mind, it would be totally wrong to say that Form No. 6A stands in the same footing as in the application requesting cancellation of an assessment made u/s 144. As already observed above, when Form 6A is so filed, till it is disposed of, the assessee shall not be deemed to be a defaulter in respect of the tax demanded on him and the same cannot be forcibly collected and that he would not be liable for any additional interest in respect of the tax so demanded. We are, therefore, unable to come to the same conclusion as has been arrived at by the AAC that the assessment gets automatically cancelled the moment Form 6A has been filed. We are also bound by the Supreme Court decision in the case of Kapurchand Shrimal Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad, where their Lordships have clearly observed that it would be the duty of the appellate authorities to set aside an order which is passed, for the reason, that it is not in accordance with the law and it would be their duty to give a specific direction for making of the proper assessment. We, therefore, quash the order of the AAC and restore that of the ITO.

Now in these circumstances, the aforesaid two questions have been referred for answer by this Court at the instance of the assessee. In view of the controversy arose in the present case, it would be relevant to refer the provisions of the law

which were existing at the relevant time pertaining to the assessment of the assessee for assessment year 1980-81. Section 143 as it stood at the relevant time reads thus:

Assessment

(1)(a) Where a return has been made u/s 139, the Assessing Officer may, without requiring the presence of the assessee or the production by him of any evidence in support of the return, make an assessment of the total income or loss of the assessee after making such adjustments to the income or loss of the assessee after making such adjustments to the income or loss declared in the return as are required to be made under clause (b), with reference to the return and the accounts and documents, if any, accompanying it, and for the purposes of the adjustments referred to in sub-clause (iv) of clause (b), also with reference to the record of the assessments, if any, of past years, and determine the sum payable by the assessee or refundable to him on the basis of such assessment.

(b) In making an assessment of the total income or loss of the assessee under clause (a), the Assessing Officer shall make the following adjustments to the income or loss declared in the return, that is to say, he shall,-

(i) rectify any arithmetical errors in the return, accounts and documents, referred to in clause (a);

(ii) ****

(iii) ****

(iv) give due effect to the allowance referred to in sub-section (2) of section 32, the deduction referred to in clause (ii) of sub-section (3) of section 32A or clause (ii) of sub-section (2) of section 33 or clause (ii) of sub-section (2) of section 33A or clause (i) of sub-section (2) of section 35 or sub-section (1) of section 35A or subsection (1) of section 35D or sub-section (1) of section 35E or the first proviso to clause (ix) of sub-section (1) of section 36, any loss carried forward under sub-section (1) of section 72 or subsection (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A and the deficiency referred to in sub-section (3) of section 80J, as computed, in each case, in the regular assessment, if any, for the earlier assessment year or years.

(2) Where a return has been made u/s 139 and-

(a) an assessment having been made under sub-section (1), the assessee makes within one month from the date of service of the notice of demand issued in consequence of such assessment, an application to the Assessing Officer objecting to the assessment, or

(b) whether or not an assessment has been made under sub-section (1), the Assessing Officer considers it necessary or expedient to verify the correctness and completeness of the return by requiring the presence of the assessee or the

production of evidence in this behalf, the Assessing Officer shall serve on the assessee a notice requiring him, on a date to be therein specified, either to attend at the Assessing Officer's office or to produce, or to cause to be there produced, any evidence on which the assessee may rely in support of the return:

Provided that, in a case, where an assessment has been made under subsection (1), the notice under this sub-section except where such notice is in pursuance of an application by the assessee under clause (a) shall not be issued by the Assessing Officer unless the previous approval of the Deputy Commissioner has been obtained to the issue of such notice:

Provided further that in a case where the assessment made under subsection (1) is objected to by the assessee by an application under clause (a), the assessee shall not be deemed to be in default in respect of the whole or any part of the amount of the tax demanded in pursuance of the assessment under that sub-section, which is disputed by the assessee, insofar as such amount does not relate to any adjustment referred to in sub-clause (i) of clause (b) of sub-section (1), and further no interest shall be chargeable under sub-section (2) of section 220 in respect of such disputed amount.

(3) On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered,-

(a) in a case where no assessment has been made under sub-section (1), the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment;

(b) in a case where an assessment has been made under sub-section (1), if either such assessment has been objected to by the assessee by an application under clause (a) of sub-section (2) or the Assessing Officer is of opinion that such assessment is incorrect, inadequate or incomplete in any material respect, the Assessing Officer shall, by an order in writing, make a fresh assessment of the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment.

Explanation - for the purposes of this section,-

(1) an assessment under sub-section (1) shall be deemed to be incorrect, inadequate or incomplete in a material respect, if -

(a) the amount of the total income as determined under sub-section (1) is greater or smaller than the amount of the total income on which the assessee is properly chargeable under this Act to tax; or

(b) the amount of the tax payable as determined under sub-section (1) is greater or smaller than the amount of the tax properly payable under this Act by the

assessee; or

(c) the amount of any loss as determined under sub-section (1) is greater or smaller than the amount of the loss, if any, determinable under this Act on a proper computation; or

(d) the amount of any depreciation allowable, development rebate or any other allowance or deduction as determined under sub-section (1) is greater or smaller than the amount of the depreciation allowance, development rebate or as the case may be, other allowance or deduction properly allowable under this Act; or

(e) the amount of the refund as determined under sub-section (1) is greater or smaller than the amount of the refund, if any, due under this Act on a proper computation; or

(f) the status in which the assessee has been assessed under sub-section (1) is different from the status in which the assessee is properly assessable under this Act;

(2) "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.

4. u/s 143(1)(a), where a return is filed u/s 139, the assessing authority may, without requiring the presence of the assessee, can assess the total income or the loss of the assessee after making such adjustment to the income or the loss declared in the return as are required to be made under clause (b), with reference to the return and the accounts and documents if any and for proper adjustments referred to in sub-clause (iv) of clause (b), also with reference to the record of the assessment of past year and determine the sum payable by the assessee or refundable to him on the basis of such assessment. In sub-section (2) of section 143, it is stated that where a return has been made u/s 139 and assessment is made under sub-section (1), and assessee makes within one month from the date of service of the notice of demand issued in consequence of such assessment, an application to the Assessing Officer objecting to the assessment, in Form No. 6A, then in that case, the second proviso to sub-section (2) says that the assessee shall not be deemed to be in default in respect of the whole or any part of the amount of the tax demanded in pursuance of the assessment under that sub-section, which is disputed by the assessee, insofar as such amount does not relate to any adjustment referred to in sub-clause (i) of clause (b) of sub-section (1), and further no interest shall be chargeable under sub-section (2) of section 220 of the Act in respect of such disputed amount. Therefore, the effect of the second proviso to sub-section (2) of section 143 is limited that any demand which is disputed by the assessee by filing an objection under sub-section 2(a) of section 143 would remain stayed and no interest would be leviable under sub-section (2) of section 220. Hence, the effect of the second proviso will be a limited effect that the disputed demand will remain stayed and it

will not be subject to interest under sub-section (2) of section 220.

5. Sub-section (3) of section 143 further says that in case any notice has been issued under sub-section 2(a) of section 143, then the assessee will be entitled to lead evidence and the Assessing Officer may also make an enquiry on specified point and after taking into account all relevant material which he has gathered, shall pass a fresh order of assessment determining the sum payable or refundable to the assessee on the basis of such assessment. Limitation is also provided u/s 153 of the Act.

Section 153 reads as under:

(1) Time limit for completion of assessments and reassessments. -No order of assessment shall be made u/s 143 or section 144 at any time after-

(a) the expiry of-

(i) four years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or before the 1-4-1967;

(ii) three years from the end of the assessment year in which the income was first assessable, where such assessment year is the assessment year commencing on 1-4-1968,

(iii) two years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or after 1-4-1969, or

(b) the expiry of eight years from the end of the assessment year in which the income was first assessable, in a case falling within clause (c) of sub-section (1) of section 271;

(c) the expiry of one year from the date of the filing of return or a revised return under sub-section (4) or sub-section (5) of section 139;

(d) the expiry of six months from the end of the month in which an application under clause (a) of sub-section (2) of section 143 is made by the assessee, whichever is latest.

It may be relevant to mention here that clause (d) of section 153(1) was inserted with effect from 1-10-1984. Therefore, in this case, the period of six months prescribed under this clause will not be applicable because we are concerned with the assessment period 1980-81. In fact, this aspect has also been missed by the Tribunal. Therefore, we have to examine the period of limitation as per provisions which existed at that time and that period will be two years u/s 153(1) (a) (iii). That means two years from the end of assessment year in which the income was first assessable and commencing on or after 1-4-1969. We are concerned with the assessment year 1980-81, i.e., after 1-4-1969. Limitation of two years has been prescribed. The Tribunal has proceeded to examine the

matter in light of clause (d) of sub-section (1) of section 153 which was not relevant as this clause came into existence for the first time with effect from 1-10-1984. Thus, the examination of the controversy with reference to this provision was not proper. However, Shri Nema, the learned counsel has made a reference of clause (a) (iii) of sub-section (1) of section 153 and submitted that the period of two years has to be counted from the end of the assessment year in which the income was first assessable. The learned counsel for the assessee submitted that the period of two years in the present case has to be counted from 31-3-1981 and no order whatsoever was passed on the application filed by the assessee u/s 143(2)(a), therefore, there is no question of rectification whatsoever as there was no assessment order in existence at that time. The learned counsel submitted that the whole order of assessment for 1980-81 should be deemed to have been annulled. The learned counsel submitted that when the original order stood annulled, then there is no order in existence for rectification u/s 155(1), read with section 154 of the Act.

6. Shri Tankha, the learned counsel for the revenue has strenuously urged before us that the whole of the order u/s 143(2), Second Proviso, will not stand annulled, but it should be given a restricted interpretation to mean to the extent of the disputed amount of tax and the whole assessment order should not be quashed because of the expiry of the period of time. We are inclined to accept the contention of Shri Tankha, Advocate. Under second proviso of sub-section (2) of section 143, what is protested by the assessee under sub-section 2(a) of section 143 is not the whole amount, but part of the amount of tax demanded in pursuance to assessment. Therefore, the demand should be confined to the extent disputed by the assessee and not the whole assessment order. If Shri Nema's contention is to be accepted, then whole of the assessment is rendered automatically nullified. That is not the intention. The idea is that assessee's right should also be protected and at the same time, the revenue should not be put to a loss on account of not adhering to the time schedule prescribed u/s 153 as mentioned above.

7. The Tribunal has reconciled both the provisions and has taken a conciliatory approach in holding that the whole assessment should not be construed to have been cancelled for not disposing of the application filed by the assessee within the time prescribed, i.e., two years u/s 153(1)(a) (iii). It is true that no order whatsoever has been passed by the assessing authority within the two years time period prescribed under section 153(1)(a) (iii) while the assessing authority was under obligation to have disposed of the said application within the time frame. If the assessing authority has failed to discharge its obligation, then the assessee should also not suffer and his rights should be protected under Second Proviso of sub-section (2) of section 143. If we harmoniously read the Second Proviso to sub-section (2) of section 143 with sub-section (1)(a) (iii) of section 153, then it would emerge that the assessee's rights could be protected to the extent of the disputed amount from tax liability. If that dispute has not been disposed of by the assessing authority, then to that extent, the demand raised

shall remain time barred and whatever assessment has been made by the assessing authority and tax deposited by the assessee will not be lost. If the interpretation suggested by Shri Nema, the learned counsel for the assessee, is accepted, then that will amount to violation of section 143 and the obligation of a citizen to pay the tax. That is not the intention of the Legislature. In our opinion, therefore, on a harmonious reading of both these provisions, the assessee's right to the extent of disputed amount shall be protected as per Second Proviso of sub-section (2) of section 143 and the whole assessment order will not go. It is true that when no order is existing at the relevant time on account of lapse of time, no order of rectification could have been passed u/s 155, read with section 154. But we need not to consider that aspect and we confine ourselves to limited question. So far as the second proviso to sub-section (2) of section 143 read with section 153 is concerned, only limited disputed demand shall not stand recoverable from the assessee because of the obligation on the part of the assessing authority to dispose of the application under sub-section 2(a) of section 143 within the time frame prescribed u/s 153(1)(a) (iii).

Both the questions are accordingly answered.