
(1998) 08 KL CK 0034
In the High Court Of Kerala
Case No : O.P. No. 17555 of 1997-M

Smt. Nilofer Hameed and Another

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 28-08-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 148, 149, 151

Citation : (1999) 152 CTR 93 : (1999) 235 ITR 161

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : P.G.K. Warriar and P. Balakrishnan, for the Appellant; N.R.K. Nair and P.K.R. Menon, for the Respondent

Judgement

G. Sivarajan, J.—The matter arises under the Income Tax Act, 1961. The petitioners are partners in a firm under the name and style "Kerala Hides and Skins" engaged in the business of purchase and sale of hides and skins. According to them, their only source of income is the share income from the said firm.

2. The firm filed its return of income for the assessment years 1986-87, 1987-88 and 1988-89. The assessment for the year 1987-88 was completed while the assessment for the years 1986-87 and 1988-89 were pending. Against the assessment order for the year 1987-88, the firm filed an appeal before the Commissioner of Income Tax (Appeals) and that was pending. While so, the firm had moved a settlement petition on September 25, 1991, before the Settlement Commission (Addl. Bench), Madras, for settling its income for all the aforesaid three years. The Settlement Commission by its order dated November 10, 1993, settled the case of the firm by determining its income on an estimated basis. The Assessing Officer passed the assessment orders in respect of the firm on December 7, 1993, relating to the assessment years 1986-87, 1987-88 and 1988-89 in compliance with the directions of the Settlement Commission. The

orders so issued were described as one issued as per the order u/s 245D, dated November 10, 1993 (exhibits P-2 to P-4).

3. As per the original return filed by the firm for the assessment years 1986-87 and 1988-89, there was no taxable income in the hands of the petitioners. Therefore, the petitioners did not file the returns for these two assessment years. However, the petitioners filed the returns for the assessment year 1987-88 declaring the share income of Rs. 16,530. The respondent issued notices dated March 21, 1994 (exhibits P-5 to P-8), u/s 148 of the Act for the assessment years 1986-87 and 1988-89 and served on the petitioners on March 29, 1994. The petitioners did not respond to the said notices, as accordingly to them, the firm was facing great financial difficulties and ultimately it was closed in 1995. It is stated that no further notice u/s 142(1) of the Act or any proposal to complete the assessments of the petitioners for the said years were issued and so by virtue of the provisions of Section 153(2) of the Act the proceedings initiated by notice dated March 21, 1994 (exhibits P-5 to P-8), according to the petitioners got barred by limitation on March 31, 1996. The respondent served another set of notices dated March 25, 1997, u/s 148 of the Act on the petitioners on March 27, 1997, evidenced by exhibits P-9 to P-12. The petitioners were also served with notices dated August 6, 1997 and September 22, 1997, respectively (exhibits P-13 and P-14), u/s 142(1) of the Act. Two notices dated August 27, 1997 and September 19, 1997, were also issued to the petitioners informing them that in case of non-compliance with the notices issued u/s 148 of the Act (exhibits P-9 to P-12) ex parte assessments will be made on the basis of the materials available on record.

4. The, petitioners have filed this original petition challenging exhibits P-9 to P-12 reassessment proceedings as illegal and without jurisdiction.

5. The petitioners have also sought to quash exhibits P-9 to P-14 notices and all further proceedings pursuant thereto. The petitioners also sought for interdicting the respondent from enforcing exhibits P-15 and P-16 or conducting any further proceedings in pursuance thereof.

6. A statement is filed on behalf of the respondent. It is stated that the petitioners, who were partners of the firm, Kerala Hides and Skins, have not filed the returns of income voluntarily for the assessment years 1986-87 and 1988-89 either before the completion of the firm's assessment as per order dated December 7, 1993, or thereafter. The Accountant General (Audit)-II, Kerala, Trivandrum, has raised objection to the effect that the partners' income for the above assessment years have escaped assessment. Accordingly, notices u/s 148 have been issued on March 21, 1994 for the above assessment years as per exhibits P-5 to P-8. It is stated that these notices were not responded by the petitioners and that the Revenue also did not/could not make any assessments in pursuance of the above notices dated March 21, 1994. Subsequently, fresh notices u/s 148 have been issued for a second time on March 25, 1997, after obtaining due sanction from the Addl. Commissioner of Income Tax, Erhakulam

Range, as per Section 151 and that since these notices were also remained unresponded by the petitioners, follow up actions were taken by the issue of notices u/s 142(1) dated August 6, 1997 and September 22, 1997, and by covering letters dated August 27, 1997 and August 19, 1997, etc., as per exhibits P-13 to P-16. It is stated that the petitioners continued their non-cooperation till the final hearing fixed on October 7, 1997. The petitioners also did not respond to the hearing notice and, therefore, orders u/s 144 have been passed in respect of the petitioners for the years 1986-87 and 1988-89 on October 7, 1997, as already proposed in the letters as per exhibits P-15 and P-16. The said orders and demand notices with challans and penalty notices were despatched on the next day, i.e., on October 8, 1997. The details of the same are furnished as follows :

Name of the assessee	Assessment year/date of order	Total income	Demand raised D and C No.
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(Rs.)	(Rs.)
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Mrs. Nilofer Hameed	1986-87	2,79,230	5,22,785 I(3)-4
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7-10-1997

97-98

1988-89	1,94,090	2,88,466 I(3)-5
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7-10-1997

97-98

Mrs. Nahid Shaffi	1986-87	2,79,230	5,22,785 I(3)-6
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7-10-1997

97-98

1988-89	1,94,090	2,88,466 I(3)-7
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97-98

7. An additional statement is also filed on behalf of the respondent. It is stated therein that no reassessment proceedings have been initiated against the petitioners as per notices u/s 148, since no original assessments have hitherto been done, and, therefore, the assessment proceedings initiated are for making original assessments and not reassessments. It is stated that in the preamble to para. 4 the petitioners themselves admit that the notices u/s 148 issued on March 21, 1994, were not responded by them, and that, alternatively, according to the petitioners, the Revenue could have acted upon as per the apportionment in exhibit P-I. It is stated that it is not clear what exactly was the action meant by the petitioners and it may perhaps be the application of Section 155, i.e., adoption of correct share income as per firm's assessment. It is stated that no

such action could be invoked in the petitioners" cases since there was no original assessments made and that the only course of action left for the Revenue is issue of notices u/s 148. The notices u/s 148 have been issued for the first time on March 21, 1994, and served on the petitioners as per exhibits P-5 to P-8. It is stated that the petitioners did not respond to the said notices and the Revenue did not/could not take follow up action and complete the assessment before the due date, i.e., March 31, 1996, prescribed as per Section 153. In these circumstances, it is stated that a notice u/s 148 has been issued on a second time on March 25, 1997, as per exhibits P-9 to P-12 after obtaining due sanction from the Additional Commissioner of Income Tax, Ernakulam Range.

8. Regarding the contention of the petitioners based on the second notice issued u/s 148 on March 25, 1997. that the Revenue cannot complete the assessment of the petitioners on the basis of the second notice in view of the provisions of Section 153(2), it is stated that proceedings initiated as per notices u/s 148 issued on March 21, 1994, as per exhibits P-5 to P-8 already got time-barred on March 31, 1996. It is also stated that the issue of notices u/s 148 and its follow up action at each time have to be treated as a separate compartment and that the fact that no assessment could be made by the Department on the basis of the notices u/s 148 dated March 21, 1994, does not debar the Department from issuing notices u/s 148 on a second time. The time-limit for issuing notices u/s 148 is dealt with in Section 149 and that in the instant case Sub-clause (iii) of Clause (b) of Sub-section (1) of Section 149 applies in which case there is no bar or restriction on the number of proceedings that can be initiated u/s 147 by issue of notice u/s 148. It is pointed out that when a return is filed in pursuance of a valid notice and proceedings are pending, the Revenue cannot initiate fresh proceedings by issuing notices u/s 148 on a second time and that in the instant case the petitioners neither filed the returns of income nor any proceedings initiated by issue of notice u/s 148 are pending or in existence. No first assessment has been completed in the case of the petitioners and therefore the notices issued by the Revenue u/s 148 on March 25, 1997 on a second time as per exhibits P-9 to P-12, it is stated, are valid and as such the Revenue can rightly issue notices for the follow up action by issuing notices u/s 142(1) and exhibits P-13 and P-14 notices and exhibits P-15 and P-16 letters are valid. It is again pointed out that all these situations have arisen only due to the non-compliance with the notices issued to the petitioners.

9. I have heard, learned counsel on both the sides. The short question arising for consideration in this case is as to whether the respondent can issue a second notice u/s 148 of the Act when a notice already issued u/s 148 of the Act has not been proceeded with and the time-limit for completion of the assessment pursuant to the said notice got barred. In order to decide the said question, it is necessary to refer to the relevant provisions of the Act, as it stood at the relevant time.

10. u/s 139 of the Act, every person, if his total income during the previous year

exceeded the maximum amount which is not chargeable to Income Tax, shall, on or before the due date, furnish a return of his income in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed. Under Sub-section (4) of Section 139, any person who has not furnished a return within the time allowed to him under Sub-section (1), or within the time allowed under a notice issued under Sub-section (1) of Section 142, may furnish the return for any previous year at any time before the expiry of one year or before the completion of the assessment, whichever is earlier. u/s 142 of the Act, the Assessing Officer, for the purpose of making an assessment under the Act, may serve on any person or in whose case the time allowed under Sub-section (1) of Section 139 for furnishing the return has expired, a notice requiring him, on a date to be specified therein to furnish a return of his income in the prescribed manner or cause to be produced, such accounts or documents as the Assessing Officer may require, or to furnish in writing and verified in the prescribed manner information in such form and on such points or matters, as the Assessing Officer may require. For that purpose, Clause (b) of the proviso to Clause (iii) of Sub-section (1) of Section 142 states that the Assessing Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year. Section 143 of the Act, as it stood at the relevant time, provides for assessment. Section 144 of the Act provides that if any person fails to make the return required under Sub-section (1) of Section 139 of the Act or fails to comply with all the terms of a notice issued under Sub-section (1) of section 142, the Assessing Officer, after taking into account all the relevant materials which he has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

11. Section 147 of the Act, as it stood during the assessment years concerned, reads as follows :--

"147. Income escaping assessment.--If-

(a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 - 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 - 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

- (a) where income chargeable to tax has been under assessed ; or
- (b) where such income has been assessed at too low a rate ; or
- (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922 (11 of 1922), or
- (d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this section."

12. As per Clause (a) of Section 147 above, if the assessee fails to file a return u/s 139 for any assessment year or to disclose fully and truly all material facts necessary for his assessment for that year, the Assessing Officer may, subject to the provisions of Sections 148 - 153, assess or reassess such income for the assessment year concerned.

13. u/s 148, the Assessing Officer, before making the assessment, reassessment or recomputation u/s 147, shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed in which case the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139.

14. Under Sub-section (2) of Section 148, the Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so. Section 149 of the Act provides the time-limit for notice as per which no notice u/s 148 shall be issued for the relevant assessment year in the following cases :--

"(a) cases falling under Clause (a) of Section 147-

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under Sub-clause (ii) ;

(ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the, income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year ;

(b) in cases falling under clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year."

15. Section 151 of the Act providing for sanction for issue of notice reads as follows :

"151. Sanction for issue of notice.-

(1) No notice shall be issued u/s 148 after the expiry of eight years from the end of the relevant assessment year, unless the Board is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such notice.

(2) No notice shall be issued u/s 148 after the expiry of four years from the end of the relevant assessment year, unless the Chief Commissioner or Commissioner is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such notice."

16. Section 153 of the Act provides the time-limit for completion of assessments and reassessments. Section 153(2) relevant for this case reads as follows :--

"(2) No order of assessment, reassessment or recomputation shall be made u/s 147--

(a) where the assessment, reassessment or recomputation is to be made under Clause (a) of that section, after the expiry of four years from the end of the assessment year in which the notice u/s 148 was served ;

(b) where the assessment, reassessment or recomputation is to be made under Clause (b) of that section, after--

(i) the expiry of four years from the end of the assessment year in which the income was first assessable, or

(ii) the expiry of one year from the date of service of the notice u/s 148, whichever is later."

17. From a reading of the provisions of Sections 147, 148, 149, 151 and 153 of the Act, it is clear that a notice u/s 148 in respect of a matter falling under Clause (a) of Section 147 can be issued only within 8 years from the end of the assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year and further in cases where Sub-clause (ii) of Clause (a) of Sub-section (1) of Section 149 is invoked sanction from the Chief Commissioner or Commissioner is obtained where the notice u/s 148 is issued after the expiry of four years and sanction from the Board is obtained in case where notice is issued after the expiry of eight years from the relevant assessment year. It is further clear that if an assessment or reassessment is to be made u/s 147 where Clause (a) is attracted, it cannot be made after the expiry of four years from the end of the assessment year in which notice u/s 148 was served.

18. In the instant case, as already stated, the assessment years concerned are 1986-87 and 1988-89. The petitioners admittedly did not file any return for the said two assessment years voluntarily u/s 139(1) of the Act. They also did not

file any return pursuant to notices dated March 21, 1994 (exhibits P-5 to P-8), issued u/s 148 of the Act for the aforesaid two years. It is also an admitted fact that the respondent did not complete the assessment of the petitioners for the aforesaid two years pursuant to the notices dated March 21, 1994. As per the provisions of Section 153(2) of the Act, in the case falling u/s 147(a) the assessment for the said two years should have been completed on or before March 31, 1998, as per the law as it stood for the relevant assessment years. As already stated, no assessments were made. The respondent issued fresh notices u/s 148 of the Act on March 25, 1997 (exhibits P-9 to P-12). Since the petitioners did not respond to the said notices also the respondent issued notices dated August 6, 1997, and September 22, 1997, exhibits P-13 and P-14, respectively, asking the petitioners to file returns and documents. Two other notices dated August 27, 1997, and September 19, 1997 (exhibits P-15 and P-16), were also issued to the petitioners posting the assessments for final hearing. The question to be decided is as to whether the second notice u/s 148 issued on March 25, 1997, is legal and valid. In other words, are not the said notices hit by the provisions of Section 149(1) of the Act ? Under the provisions of Section 149(1), no notice u/s 148 shall be issued in cases falling under Clause (a) of Section 147 for the relevant assessment year, if eight years have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to Rs. 50,000 or more for that year. But this is subject to the rider in Section 151 of the Act which says that if notice u/s 148 is to be issued beyond eight years from the end of the relevant assessment year, the sanction from the Board is required and for issuing notice u/s 148 beyond four years from the end of the assessment year the sanction of the Commissioner is required. Admittedly, the notice dated March 25, 1997, issued u/s 148 of the Act is beyond 4 years from the end of the assessment years 1986-87 and 1988-89. It is stated in the counter-affidavit that sanction from the Additional Commissioner of Income Tax was obtained as provided u/s 151 of the Act. In view of the said sanction, notice u/s 148 can be issued for the year 1986-87 till March 31, 1995, and for the assessment year 1988-89 till March 31, 1997. It is admitted by the petitioners that notice dated March 25, 1997, issued by the respondent was served on the petitioners on March 27, 1997. From the above, it is clear that the second notice u/s 148 of the Act issued by the respondent on March 25, 1997, and served on the petitioners on March 27, 1997, in so far as it relates to the year 1986-87 is beyond the time provided u/s 149(1) of the Act. But the said notice is well within the time in so far as it relates to the assessment year 1988-89. The contention of the petitioners that a second notice u/s 148 of the Act cannot be issued when the assessment pursuant to the first notice has not been completed, cannot be accepted as an absolute proposition. According to me, the Assessing Officer can issue any number of notices u/s 148 of the Act provided the conditions stipulated in Section 147 are satisfied and the same is within the period specified u/s 149 read with Section 151 of the Act. (See Commissioner of Income Tax, Bihar and Orissa Vs. Maharaja Pratapsingh Bahadur of Gidhapur, , K.E.M. Mohammad Ibrahim Maracair and

Another Vs. Commissioner of Income Tax, Madras, , GURDAYAL BERLIA Vs. COMMISSIONER OF Income Tax, CALCUTTA., and Ashok Kumar Dixit Vs. Income Tax Officer and Another,). If an assessment is pending either by way of original assessment or by way of reassessment proceedings, the Assessing Officer cannot issue a notice u/s 148 but if no proceedings are pending either by way of original assessment or by way of reassessment, he can issue a notice u/s 148 within the time mentioned above. In this case, as already stated, the first notice u/s 148 was issued on March 21, 1994, and served on March 29, 1994, and there was time till March 31, 1998, for completion of the assessment So on the date of issuance of the second notice on March 25, 1997, the assessments for the two years were pending. In such circumstances, notice issued u/s 148 on March 25, 1997, is invalid (See Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty,).

19. For the reasons stated hereinabove, I hold that the notices dated March 25, 1997, exhibits P-9 to P-12, issued u/s 148 of the Act and the further notices, exhibits P-13 to P-16, issued by the respondent are invalid and without jurisdiction. I accordingly quash the said notices.

20. This original petition is accordingly allowed. In the circumstances, there will be no order as to costs.