

(1994) 09 KL CK 0029

In the High Court Of Kerala

Case No : Income-tax Reference No. 40 of 1990 and Original Petition No. 8837 of 1990

State of Kerala

APPELLANT

Vs

M.V. Ramakrishnan

RESPONDENT

Date of Decision : 19-09-1994

Acts Referred:

Income Tax Act, 1961 — Section 256(1)

Kerala Agricultural Income Tax Act, 1950 — Section 60, 60(1)

Citation : (1995) 211 ITR 45

Hon'ble Judges : T.L. Viswanatha Iyer, J;K.K. Usha, J

Bench : Division Bench

Advocate : S. Vijayan Nair, for the Appellant; O. Ramachandran Nambiar and N. Sudha, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The reference is u/s 60(1) of the Kerala Agricultural Income Tax Act, 1950, of the following question of law :

"Whether there was justification for the Tribunal in its finding of fact regarding the cultivation of tapioca contrary to the decision made by the Commissioner of Agricultural Income Tax ?"

2. The assessment year is 1980-81 corresponding to the accounting year ending on March 31, 1980. The assessee had carried on tapioca cultivation in about 50 hectares of land obtained by him on lease from the forest department. The assessee's case was that he had not derived any income from tapioca during the accounting year, his case being that the variety of tapioca cultivated by him took a longer time to mature and, therefore, income from the tapioca cultivated was not received during the relevant accounting period. The assessing authority did not accept this contention and made an assessment which included an estimated income from tapioca of Rs. 82,850. The assessee took up the matter in appeal before the Appellate Assistant Commissioner of Agricultural Income Tax and Sales Tax, Palghat, who dismissed the appeal. The contention of non-receipt of

income from tapioca was repeated before the appellate authority also, but it did not find acceptance with him. The second appeal was filed before the Appellate Tribunal. The Tribunal came to the conclusion that there was force in the assessee's contention that the variety of tapioca cultivated by him called Velangs took more time to mature and that the yield will be available only after about 11/2 years. The Tribunal, therefore, held that the income from tapioca cultivation brought to assessment would not have been derived during the accounting period in question and, therefore, there was no justification to uphold the assessment of the estimated income from tapioca cultivation made by the assessing authority. The appeal was thus allowed directing deletion of the tapioca income from the assessment.

3. Simultaneously with the appeal before the Appellate Assistant Commissioner, the assessee had also filed a revision before the Commissioner of Agricultural Income Tax, Trivandrum, u/s 34 of the Act as Agricultural Income Tax R. P. No. 22 of 1986 challenging the very same assessment, inter alia, on the ground that no income from tapioca had been received during the relevant accounting period. The Commissioner of Agricultural Income Tax dismissed the revision by his order dated April 11, 1986. The Appellate Assistant Commissioner who heard the appeal subsequently and disposed of it on September 27, 1988, relied on this order to reject another contention of the assessee raised before him, about the inclusion of the income from the property of some minors in the assessment. Curiously, however, the Appellate Assistant Commissioner did not take note of the fact that the assessee had challenged the assessment impugned before him, in revision and lost, which by itself was bound to prove fatal to the appeal. Curiously again, when the matter came up in appeal before the Tribunal, none brought the revisional order to the notice of the Tribunal and no contention was raised that the assessability or otherwise of the tapioca income was already the subject of decision by the Commissioner. The Tribunal allowed the appeal, as mentioned earlier, in ignorance of the Commissioner's order in the parallel revision petition. The Revenue thereafter sought reference of the following questions of law:

"1. On the facts and in the circumstances of the case, is the Agricultural Income Tax Appellate Tribunal justified in deciding the appeal overlooking the revision order of the Commissioner of Income Tax in Agricultural Income Tax R. P. No. 22 of 1986, dated April 11, 1986 ?

2. Is the Appellate Tribunal justified in law in accepting the contentions on questions of fact which were not raised before the lower authorities but raised at the second appeal stage unsupported by any evidence ?

3. Which of the orders should prevail in this case, whether the order of the Commissioner of Agricultural Income Tax u/s 34 or the Agricultural Income Tax Appellate Tribunal's order u/s 32 of the Agricultural Income Tax Act, who passed different orders on the same subject in the same case ?"

4. Questions Nos. 1 and 3 proceeded as if the Tribunal has decided contrary to the Commissioner's order despite it being brought to its notice while the position was that the said order was nowhere before the Tribunal when it disposed of the appeal. The second question proceeded on the basis that the assessee had not raised the contention regarding the assessability of the tapioca income before the lower authorities, and that he had raised it for the first time only before the Tribunal.

5. The application was objected to by the assessee on the ground that the bar arising out of the revisional order had not been raised before the Tribunal and, therefore, questions Nos. 1 and 3 were not liable to be referred to this court. But the Tribunal stated that the question raised was an important one, which required a decision by the High Court and accordingly referred the question extracted by us earlier for the opinion of this court. Question No. 2 was not referred. Income Tax Reference No. 40 of 1990 is the reference so made.

6. The Revenue felt aggrieved that the questions required by it had not been referred to this court in the way it wanted it, and, therefore, filed O. P. No. 8837 of 1990, to compel reference of the three questions of law framed by it u/s 60(2) of the Act. We have heard both the cases together.

7. The point highlighted before us by the Senior Government Pleader, Mr. S. Vijayan Nair, appearing for the Revenue, is that the Tribunal could not have entered a decision on the assessability of the tapioca income when it was already the subject of decision in revision by the Commissioner of Agricultural Income Tax u/s 34 of the Act. According to him, the Tribunal could not in any event have entered a decision contrary to the decision of the Commissioner. The Tribunal had not referred to this aspect or dealt with it, he complained.

8. We do not, however, find any substance in this complaint. The problem created is the making of the Revenue itself in not apprising the Tribunal at any time about the order of the Commissioner in revision or the decision rendered thereon about the assessability of the tapioca income. It is really surprising that such a vital point was not at all raised or argued before the Tribunal. Not having done so, it is not open to the Revenue to contend by way of reference that the Commissioner's order shall prevail. Section 60(1) of the Act which is analogous to Section 256(1) of the Income Tax Act, 1961, enables the party aggrieved by any order of the Tribunal to seek reference to this court of any question of law arising out of the order of the Tribunal. The condition precedent for such a reference to be made is that the question sought to be referred should arise out of the order of the Tribunal. If the question was never in issue before the Tribunal, nor posed, raised or argued before it, it could not be said to arise out of the order of the Tribunal. The contention of the assessee is that the question now raised was not at all raised before the Tribunal and, therefore, the Tribunal had no occasion to deal with the same. What exactly is a question arising out of the order of the Tribunal was explained by the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, . The Supreme

Court summarised the position thus in paragraph 31 (at page 611 of 42 ITR) :

"(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it."

9. The Supreme Court then proceeded to state that it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

10. We do not find any reference in the order of the Tribunal to the bar created by the revisional order of the Commissioner. This question was never raised before the Tribunal and the Tribunal had no occasion to deal with the matter at all. In fact, the Tribunal was not even apprised of the order of the Commissioner. The case on hand is thus one which falls within proposition No. 4 laid down by the Supreme Court, that is, of a question of law which was neither raised before the Tribunal nor considered by it, which the Supreme Court said will not be a question of law arising out of the order notwithstanding the fact that it may arise on the findings given by the Tribunal. The Revenue has no case before us that this point had been raised before the Tribunal.

11. The assessee had in fact objected to the reference of questions Nos. 1 and 3 as not arising out of the order of the Tribunal. The Tribunal referred the question only because it was an important question of law on which a decision of this court was required. But the Tribunal failed to note the parameters of a reference u/s 60(1). No question of law, however important it may be, can be referred, unless it arises out of its order. The Tribunal did not find that the question arose out of its order. The question was referred only because it was an important one. The reference is, therefore, incompetent and the question referred cannot be dealt with u/s 60(1) of the Act. The reference has to be rejected as such.

12. So far as Original Petition No. 8837 of 1990 is concerned, the only contention raised by the learned Government pleader for the Revenue is that question No. 2 should also have been referred. The assessee's case is that he had not received any income from tapioca during the relevant accounting period for the reason that the variety of tapioca cultivated by him took a longer time to mature. A perusal of the assessment and first appellate orders shows that this was the plea agitated by the assessee all along. He was not raising it for the first time in second appeal. The question as framed proceeds on a wrong premise. There is

no substance in question No. 2.

13. We, therefore, hold in Income Tax Reference No. 40 of 1990 that the question referred does not arise out of the order of the Tribunal and reject the reference as such. We dismiss Original Petition No. 8837 of 1990.