
(1974) 05 KAR CK 0003

In the Karnataka High Court

Case No : Writ Petition No's. 2087 and 2808 of 1971

Sterling Construction and Trading Company

APPELLANT

Vs

Income Tax Officer, Central Circle 1, Bangalore and Others

RESPONDENT

Date of Decision : 31-05-1974

Acts Referred:

Income Tax Act, 1922 — Section 3 (3), 31, 31 (3)

Income Tax Act, 1961 — Section 251, 251 (1)

Citation : (1974) ILR (Kar) 730 : (1975) 99 ITR 236

Hon'ble Judges : E.S. Venkataramaiah, J

Bench : Single Bench

Advocate : K. Srinivasan, for the Appellant; S.R. Rajasekhara Murthy, for the Respondent

Judgement

Venkataramiah, J.—The petitioner is common in these two writ petitions. The petitioner is a firm carrying on mining business. The petitioner was assessed by the Income Tax Officer under the provisions of the Indian Income Tax Act, 1922, in respect of the assessment year 1960-61 and under the provisions of the Income Tax Act, 1961, in respect of the assessment year 1961-62. The Income Tax Officer did not accept the returns filed by the petitioner in respect of both the years and added Rs. 3,36,962 as income which the petitioner had derived from business during the assessment year 1960-61 and Rs. 4,45,726 to the business income of the assessment year 1961-62. On the above basis the Income Tax Officer proceeded to pass the orders of assessment. Against the said orders of assessment, the petitioner preferred appeals before the Appellate Assistant Commissioner u/s 30 of the 1922 Act and section 246 of the 1961 Act respectively. The Appellate Assistant Commissioner was of the opinion that the addition made to income of the assessment year 1960-61 to the extent of Rs. 53,559 had to be deleted and that a sum of Rs. 83,600 had to be added as income from undisclosed source. Similarly, in the case of assessment year 1961-62 he was of the view that the addition of Rs. 4,45,726 to income from business had to be deleted, but addition of Rs. 1,82,887 had to be made as

income from undisclosed source. Against the orders passed by the Appellate Assistant Commissioner, the petitioner filed revision petitions before the Commissioner of Income Tax. The revision petition in respect of the assessment year 1960-61 was disposed of by one Commissioner of Income Tax and the revision petition filed in respect of the assessment year 1961-62 was disposed of by a different Commissioner of Income Tax. Both the Commissioners were of the view that there was no substance in the revision petitions and they rejected them. Aggrieved by the orders passed by the Commissioners of Income Tax, the petitioner has filed these two writ petitions.

2. It is not disputed that the only source of income that was disclosed before the Income Tax Officer and which was dealt with by him in these two cases was the business of the petitioner. The submission made on behalf of the petitioner before the Commissioners of Income Tax and before this court is that the Appellate Assistant Commissioner had no jurisdiction u/s 31 of the 1922 Act and section 251 of the 1961 Act to add a certain income from a source not dealt with by the Income Tax Officer or disclosed before the Income Tax Officer while passing an order in the appeal. The Commissioners of Income Tax who heard the revision petition rejected the above contention. While doing so, whereas the Commissioner of Income Tax who dealt with the revision petition in respect of the assessment year 1960-61, was of the opinion that the Appellate Assistant Commissioner has not in fact taken into consideration the income derived from the petitioner from a source of income which had not been considered by the Income Tax Officer, the Commissioner who dealt with the revision petition in respect of the assessment year 1961-62 was of the opinion that inasmuch as the Income Tax Officer had dealt with the income in question the fact that it was derived from a different source was of no materiality in so far as the jurisdiction of the Appellate Assistant Commissioner to dispose of the appeal was concerned.

3. On going through the orders of assessment passed by the Income Tax Officer and the orders passed by the Appellate Assistant Commissioner in appeal, I am of the view that the Appellate Assistant Commissioner had in fact traced the sum of Rs. 83,600 relating to the assessment year 1960-61 and the sum of Rs. 1,45,867 relating to the assessment year 1961-62 to certain undisclosed sources and not to the business of the petitioner which was the only source with which the Income Tax Officer was concerned.

4. The question for consideration in these two writ petitions is whether it is permissible for the Appellate Assistant Commissioner while exercising his jurisdiction either under the 1922 Act or under the 1961 Act to add any amount of income which is traced to a source which is neither disclosed by the assessee nor dealt with by the Income Tax Officer while disposing of the appeal. The relevant provisions of the two Acts which are in pari materia are as follows :

Section 31(3) of 1922 Act :

"In disposing of an appeal the Appellate Assistant Commissioner may, in the case

of an order of assessment -

(a) confirm, reduce, enhance or annual the assessment, or

(b) set aside the assessment and direct the Income Tax Officer to make a fresh assessment after making such further enquiry as the Income Tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income Tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment..."

Section 251(1) of 1961 Act :

"In disposing of an appeal, the Appellate assistant Commissioner shall have the following powers -

(a) in appeal against an order of assessment, he may confirm, reduce, enhance or annual the assessment; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner and after making such further enquiry as may be necessary, and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment..."

5. In Commissioner of Income Tax v. Shapoorji Pallonji Mistry the Supreme Court observed that in an appeal filed by an assessee, the Appellate Assistant Commissioner had no power to enhance the assessment by discovering a new source of income not mentioned in the return of the assessee or considered by the Income Tax Officer in the order appealed against. Following the above decision, this court in P. Vasudeva Setty v. Commissioner of Income Tax held as follows :

"Our answer, therefore, to the question is that the Tribunal was not right in taking the view that the Appellate Assistant Commissioner in this case had the competence to alter the findings of the Income Tax Officer to the effect that the cash credits were part of the business income into a finding that they were undisclosed items of income from undisclosed source and consequently to travel beyond the record of the appeals before him and alter in one appeal the assessment on the basis of facts and materials restricted to another appeal."

6. The facts of the case in Commissioner of Income Tax v. Shapoorji Pallonji Mistry are briefly these : the assessee who was the respondent in the said case had received on July 20, 1946, a sum of Rs. 40,000. In the proceedings for assessment for the assessment year 1946-47, this fact came to the notice of the Income Tax Officer. Since the receipt fell within the accounting year relative to the assessment year 1947-48, the Income Tax Officer made a "note", that the question would, however, be considered again at the time of 1947-48, the Income Tax Officer overlooked the note made by him in the assessment order of the earlier year with the result that the said amount escaped assessment. The

assessee preferred an appeal to the Appellate Assistant Commissioner against his assessment for the year 1947-48. In that appeal, on the basis of a reference made by the Income Tax Officer, the Appellate Assistant Commissioner after issuing notice to the assessee assessed the sum of Rs. 40,000 and included it in the original assessment. The matter ultimately reached the Supreme Court. The question before the Supreme Court was whether it was open to the Appellate Assistant Commissioner to find a new source of income not considered by the Income Tax Officer and assess it under his powers u/s 31 of the 1922 Act. The Supreme Court negatived the said contention. While doing so it quoted with approval the decision of the Patna High Court in *Jagarnath Therani v. Commissioner of Income Tax* and a decision of the Madras High Court in *Sri Gajalakshmi Ginning Factory v. Commissioner of Income Tax*. In the Patna case the assessee had three businesses at Purnea, Jalpaiguri and Calcutta. His income from Purnea only was assessed by the Income Tax Officer. On appeal by the assessee, the Appellate Assistant Commissioner assessed him with regard to the income from the other two businesses. The head of income was the same within section 6 of 1922 Act, but the source of income was different. The Patna High Court observed :

"Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power of travel beyond the subject-matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income."

7. The High Court of Madras in its in its decision observed :

"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income Tax Officer."

8. The Supreme Court rejected the contention urged on behalf of the Commissioner of Income Tax that the word "assessment" meant the ultimate amount which an assessee must pay regard being had to the charging section and his total income and that the words "enhance the assessment" were not confined to the assessment reached through a particular process, but should be extended to the amount which ought to have been computed if the true total income had been found. Even though the Supreme Court was of the opinion that such a view was also possible, it observed that it must be overlooked when there were other provisions like sections 34 and 33B which allowed escaped income from new sources to be taxed after following a certain procedure. It was also of the view that, if the power to assess fresh sources of income was read into the provisions of section 21, the assessee would be deprived of a finding by two tribunals and one right of appeal. Ultimately, it was of the view that there was no

good reason to reject the view which had held the field for nearly 37 years. In P. Vasudeva Setty's case the above view of the Supreme Court was followed.

Sri S. R. Rajasekhara Murthy, learned counsel for the revenue, however drew my attention to the following observations made by this court in P. Vasudeva Setty's case at page 178 :

"It is argued that the only question asked is whether the appellate power of the Appellate Assistant Commissioner does not include the power of relating a given item to a source different from the source to which it had been related by the Income Tax Officer. The argument, though prima facie attractive, is in our opinion wholly inapplicable to the facts and circumstances of this case. So long as a certain item of income had been considered and examined by an Income Tax Officer from the point of view its assessability and so long as the Appellate Assistant Commissioner does not travel beyond the record of the year, there has never been any doubt as to his powers of redoing the categorisation and bringing the assessment within the true description of the law."

9. Relying on the above observation, Sri Rajasekhara Murthy contended that, since in this case the sums of Rs. 83,600 and Rs. 1,82,887 had been dealt with by the Income Tax Officer, it was permissible for the Appellate Assistant Commissioner to trace them to a source different from the source to which they had been traced by the Income Tax Officer. On going through the judgment of this court carefully, I find that the observations made by this court which are extracted above, are slightly inconsistent with the conclusion reached by the court in that decision and also the principle enunciated by the Supreme Court in Commissioner of Income Tax v. Shapoorji Pallonji Mistry, because in the concluding paragraph (quoted earlier) this court has held that the Appellate assistant Commissioner had no competence to alter the findings of the Income Tax Officer to the effect that the cash credits in question were part of the business income into a finding that they were undisclosed income from an undisclosed source.

10. It is also not possible to hold that the Supreme Court took a view different from the one expressed in Commissioner of Income Tax v. Shapoorji Pallonji Mistry in Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria. After referring to the earlier decisions of the Supreme Court including Commissioner of Income Tax v. Shapoorji Pallonji Mistry. the Supreme Court held in Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria.

"The principle that emerges as a result of the authorities of this court is that the Appellate Assistant Commissioner has no jurisdiction, u/s 31(3) of the Act, to assess a source of income which has not been processed by the Income Tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and, therefore, the Appellate Assistant Commissioner cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement u/s 31(3) of the Act is restricted to the subject-matter of

assessment or the source of income which have been considered expressly or by clear implication by the Income Tax Officer from the point of view of the taxability of the assessee."

11. Later on it is observed by the Supreme Court :

"As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income Tax Officer with a view to find out new sources of income and the power of enhancement u/s 3(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income Tax Officer from the point of view of taxability"

12. It is, therefore, clear that the Supreme Court was of the view that the subject-matter of assessment was the source of income but not the amount as such. In these cases it is seen that neither expressly nor by clear implication the Income Tax Officer had dealt with the undisclosed sources referred to by the Appellate Assistant Commissioner.

13. It was lastly argued by Sri Rajasekhara Murthy that the expressions "income" and "source of income" are inter-changeable and if a certain income has been dealt with by the Income Tax Officer, it would be open to the Appellate Assistant Commissioner to pass an order in respect of the said income also whether or not it was traceable to a source dealt with by the Income Tax Officer. It is not possible to agree with the above submission in view of the decision in Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria.

14. In view of the decision of the Supreme Court in Commissioner of Income Tax v. Shapoorji Pallonji Mistry. I do not think that the revenue can derive any sustenance from the decision in Parameswara Oil Mill v. Commissioner of Income Tax, which is rendered without noticing the above decision of the Supreme Court. It has, however, to be observed that the Andhra Pradesh High Court proceeded on the basis that in Commissioner of Income Tax v. McMillan & Co., the Supreme Court had approved the decision in Narrondas Manordass v. Commissioner of Income Tax, rendered by the Bombay High Court. But in Commissioner of Income Tax v. Shapoorji Pallonji Mistry the Supreme Court has observed at page 895 that the Supreme Court had not expressed its final opinion on the question in Commissioner of Income Tax v. McMillan & Co. It is apparent that the later decision of the Supreme Court was not brought to the notice of the Andhra Pradesh High Court. It is also to be noticed that in Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria, the Supreme Court by implication has observed that Commissioner of Income Tax v. McMillan & Co., did not depart from the view expressed in Commissioner of Income Tax v. Rai Bahadur Hardutroy Motilal Chamaria.

15. Although the discussion so far made relates to the construction of section 31 of the 1922 Act, it has to be held that the position in law has not altered under the 1961 Act as the language of the relevant provisions in both the Acts is almost

the same.

16. In the result, these petitions succeed. The Commissioner of Income Tax is directed to modify the orders passed by him by deleting the sum of Rs. 83,600 from the order of assessment relating to the year 1960-61 and a sum of Rs. 1,82,887 from the order in respect of the assessment year 1961-62.

17. These petitions are accordingly allowed.

18. No costs.