(1972) 09 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No. 2507 of 1968

Thangam Textiles APPELLANT

Vs

First Income Tax Officer RESPONDENT

Date of Decision : 06-09-1972

Acts Referred:

Income Tax Act, 1922 — Section 34
Income Tax Act, 1961 — Section 147, 148, 187, 189(1), 189(3)

Citation : (1973) 90 ITR 412

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; V. Balasubrahmanyan and J. Jayaraman, for the Respondent

Judgement

Ramaswami, J.—This is a petition for the issue of a writ of prohibition prohibiting the respondent from pursuing the reassessment

proceedings in pursuance of the notice dated July 6, 1967, issued u/s 148 of the Income Tax Act, 1961 (hereinafter called "" the Act""), in respect

of the assessment year 1963-64. The petitioner, a firm of partnership, originally consisted of five partners. On April 24, 1963, one K. Ramaswami,

a partner of the firm, retired and on December 26, 1963, M/s. Krishnaswami and Thiagarajan, two other partners of the firm, also retired. The

partnership firm was continued by Perumalsarni and Uthamraj, the two remaining partners, up to January 3, 1965, on which date the firm was

dissolved.

2. For the assessment year 1963-64, the petitioner filed a return of income and this return was accompanied by a statement of the auditor,

containing the above facts relating to the partnership firm and also a statement that the deed of partnership was executed on December 27, 1963,

between the two partners to continue the firm and the application for registration for 1964-65 was also filed on February 15, 1964. The petitioner

was doing business in purchase, manufacture and export of cotton and art silk cloth to Ceylon and there were also some local sales. In the

statement accompanying the return of income the petitioner admitted that the licences for import of art silk and dyes were disposed of but the

profits were not brought into account. The petitioner however stated that for the reasons stated in the statement accompanying the return the

income returned was only an estimate.

3. The Income Tax Officer estimated the petitioner''s profit on the sale of the licences at 125 per cent, on the face value of import licences relating

to art silk yarn and at 50 per cent, on the face value of the licences concerning dyes, besides estimating the petitioner''s profit on local sales, and

completed the assessment on February 28, 1966. The Income Tax Officer reopened the assessment u/s 147(b) of the Act and a notice u/s 148

dated July 6, 1967, was served on July 17, 1967, on Krishnaswami, who retired from the firm on December 26, 1963. This notice was issued, as

it now appears from the records and the counter-affidavit, subsequent to the assessment on information conveyed by the Inspecting Assistant

Commissioner to the Income Tax Officer on the basis of authentic market reports that the premiums on the sale of import licences during the

relevant time were 205 per cent, on art silk import licences and anything between 150 ""to 170 per cent, on licences for dyes. On this information

the Income Tax Officer was said to have entertained the belief that the assessee''s income had been under-assessed in the original assessment.

4. The petitioner filed an objection on April 20, 1968, to the notice issued u/s 148 of the Act. It may be stated that one of the objections taken by

the petitioner was that the notice served on Krishnaswami was not legal and valid and there was no proper notice served on the petitioner.

Thereafter the petitioner has filed this writ petition.

5. Though the petitioner had. raised a number of grounds in the affidavit filed in support of the writ petition, Thiru K. Srinivasan, the learned

counsel for the petitioner, had confined himself to only two of the grounds in the arguments. The first contention was that a valid notice was a condition precedent for initiation of the proceedings u/s 147(b) and that the notice served on Krishnaswami, who had retired from the firm, is

invalid and, therefore, the proceedings taken in pursuance of that notice is illegal and void. The second contention was that the information

furnished by the Inspecting Assistant Commissioner based on the authentic market reports relating to the premiums on the sale of import licences,

would not itself clothe the jurisdiction on the Income Tax Officer to initiate reassessment proceedings u/s 147(b) in the absence of an allegation that

the information furnished showed that the petitioner had sold the licences at those rates especially when the petitioners reported that they had sold

the licences and the profit on sales had already been estimated by the Income Tax Officer.

6. We are of opinion that the learned counsel for the petitioner is well-founded in his submission that the notice served on Krishnaswami was not

valid. Section 283(2) of the Act requires that where a firm is dissolved, notices Under the Act in respect of the income of the firm may be served

on any person who was a partner immediately before its dissolution. The dissolution of the firm was on January 3, 1965, and immediately before

that the firm consisted of only two partners and Krishnaswami was not then a partner, he having already retired on December 26, 1963,

Therefore, on a plain reading of the section, it is clear that there was no valid notice in this case. But, what the learned counsel for the revenue

would contend is that the phrase "" immediately before "" occurring in Section 283(2) should not be given its ordinary and plain meaning but should

be understood and given a meaning with reference to the year of assessment and that the notice issued is in respect of underassessment of the

income of the firm for the assessment year 1963-64 and that, therefore, the notice could be issued to any of the persons who were partners during

the accounting year relevant to the assessment year. We are unable to accept this argument of the learned counsel for the revenue. u/s 187, where

at the time of making an assessment u/s 143 or Section 144, it was found that a change had occurred in the constitution of a firm, the assessment

should be made on the firm as constituted at the time of making the assessment. Section 189(1) provides that where a firm is dissolved the Income

Tax Officer shall make an assessment of the total income of the firm as if no dissolution had taken place and all the provisions of the Act shall apply so far as may be to such assessment and u/s 189(3) every person who was a partner at the time of dissolution of the firm and the legal

representative of any such person who is deceased shall be jointly and severally liable for the amount of tax and all the provisions of the Act, so far

as may be, shall apply to any such assessment. These provisions, in our opinion, make it clear that the persons who are liable to bear the tax are

the partners at the time of dissolution. Therefore, the notice u/s 283(2) has to be issued only to such of those persons who were partners

immediately before the dissolution of the firm. In the context, we are of the view, that the phrase "" immediately before "" means "" preceding the date

of dissolution "". Hence, the notice issued on Krishnaswami was not a valid notice on the petitioner-firm.

7. In Y. Narayana Chetty and Another Vs. The Income Tax Officer, Nellore and Others, . the Supreme Court held that the service of requisite

notice on the assessee is a condition precedent to the validity of any reassessment made u/s 34 of the Income Tax Act, 1922 (which corresponds

to Section 147 of the Income Tax Act, 1961), and if a valid notice was not issued as required, the proceeding taken by the Income Tax Officer in

pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative. The learned counsel for the

revenue submitted that this decision of the Supreme Court rested on the language of Section 34 and that the provisions of sections 147 and 148

had not made service of notice the foundation for the initiation of the reassessment proceedings. Section 34 of the Indian Income Tax Act, 1922,

required the Income Tax Officer to ""serve on the assessee .... a notice .... and may proceed to assess or reassess . . ..."" Because this section

requires that notice to be served and then proceed to assess, the notice was considered to be the foundation for initiation of proceedings u/s 34.

But, u/s 147 of the Act the existence of the reasons or the grounds as stated therein are not foundations for the initiation of the proceedings and the

issue of the notice u/s 148 is a mere formality to be observed before a reassessment, so ran the argument for the revenue.

8. We are unable to find any such distinction between Section 34 of the old Act and sections 147 and 148 of the new Act, except that the

provision requiring the notice is put as a separate provision. In our opinion, there is no difference between the provisions of the old Act and the new Act in this regard. Section 148 requires that, before making the assessment or reassessment u/s 147, the Income Tax Officer shall serve on

the assessee a notice. In our view, the notice u/s 148 is the foundation for the initiation of reassessment proceedings and a condition precedent for

the validity of any reassessment. We are supported in this view by a decision of the Mysore High Court in C.N. Nataraj Vs. Fifth Income Tax

Officer, City Circle II, Bangalore, . Though no argument appears to have been placed distinguishing Section 34 of the old Act and sections 147

and 148 of the new Act, on a construction of sections 147 and 148, the learned judges came to the conclusion that a notice prescribed u/s 148 of

the Act for initiating reassessment proceedings is not a mere procedural requirement and that the service of the prescribed notice on the assessee is

a condition precedent to the validity of any reassessment u/s 147.

9. It is next contended by the learned counsel for the revenue that the notice issued and served on Krishnaswami, a retired partner, found its way

to the petitioner and in fact the petitioner filed an objection to the notice and that, therefore, there was a valid initiation of the reassessment

proceedings. We are unable to accept this contention of the learned counsel for revenue. Section 282 of the Act provides for the mode of service

and Section 283(2) is a special provision relating to the mode of service in cases of dissolved firms. Unless the notice is served in the prescribed

manner, the service is insufficient. In Nataraj v. Fifth Income Tax Officer, also the assessee appeared and submitted returns in pursuance of an

invalid notice and the counsel for the revenue relied on that fact, in support of the validity of the reassessment proceedings. The Mysore High

Court, however, held that the service should be in accordance with the provisions of the Act and unless the provisions relating to the mode of

service are strictly complied with the reassessment proceeding was without jurisdiction. In support of this view, the learned judges relied on two

earlier decisions in Commissioner of Income Tax v. Dey Brothers, [1935] 3 ITR 213. and (1934) 2 ITR 438 . We are in entire agreement with

this view. It, therefore, follows that there was no valid notice for initiation of the proceedings for reassessment and that the respondent had no

jurisdiction to proceed with the reassessment proceedings in pursuance of that notice. In view of this finding, it is not necessary for us consider the second point raised by the learned counsel for the petitioner.

10. The writ petition is, therefore, allowed and the rule nisi is made absolute with costs. Counsel''s fee Rs. 150.

