
(2004) 11 KL CK 0076
In the High Court Of Kerala
Case No : W.A. No. 1668 of 2002

Varkey Jacob

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-11-2004

Acts Referred:

Constitution of India, 1950 — Article 265
Finance Act, 1956 — Section 18, 43
Income Tax Act, 1961 — Section 139, 139(8), 142(1), 143, 143(3)
Land Acquisition Act, 1894 — Section 18

Citation : (2005) 196 CTR 391 : (2005) 2 ILR (Ker) 195 : (2005) 275 ITR 146 : (2005) 2 KLT 140

Hon'ble Judges : K.P. Balachandran, J; J.B. Koshy, J

Bench : Division Bench

Advocate : V. Ramachandran and M.P. Abraham, for the Appellant; P.K. Raveendranatha Menon, Sr.Adv. and George K. George, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—Whether proceedings for imposing tax or reopening assessment for assessment years which have attained finality under existing law due to bar of limitation can be revived by the amendment of law which has no express provision of retrospective effect is the question to be considered in this case. Senior advocate Sri. V. Ramachandran appeared for the appellant and Sri. P.K. Ravindranatha Menon, senior Standing Counsel for the Income Tax Department appeared for the respondents. Appellant/petitioner is an unregistered firm and was a lessee of a rubber estate called "Velanikkara Estate" which was acquired by the Government for establishing Agricultural University. The Government took possession of the estate in 1973 and determined the compensation in March, 1974. Being a lessee of the land, petitioner's share was assessed as Rs. 9,58,192/-. Not being satisfied, the matter was taken for reference u/s 18 of the Land Acquisition Act and finally this Court by judgment in L.A.A. No. 247/1980 dated 28.1.1987 awarded compensation including solatium of Rs. 17,59,342/- as

the petitioner's share with interest as provided under the Land Acquisition Act. On receipt of the amount, the petitioner was advised that they would be liable to pay tax on the interest granted on the compensation. Hence, it filed returns on 3.1.1990 showing the interest awarded as its income. Dispute in this case pertains to assessment years 1979-80 to 1984-85 for which also he filed returns on 3.1.1990. In these years, the petitioner had no other income than the interest from this amount.

2. In *M. Jairam Vs. Commissioner of Income Tax*, , a Division Bench of this Court held that the entire amount of interest has to be assessed in the year in which it was received. But, the above view was overruled by a Full Bench of this Court in *Peter John Vs. Commissioner of Income Tax*, . The Supreme Court in *Rama Bai and Others Vs. Commissioner of Income Tax, Andhra Pradesh Hyderabad and Others*, , finally held that interest on enhanced compensation for land compulsorily acquired under the Land Acquisition Act should be counted as having accrued year after year and such interest cannot be assessed to income tax in one lump sum in the year in which the order is made. Therefore, when the assessee filed returns, he spread over the interest for the years 1979-80 onwards. Returns were filed on 3.1.1990 after receipt of the amount. The department accepted the returns for the period from 1985-86 onwards, but did not accept the returns for the years 1979-80 to 1984-85 as filed out of time and issued notice u/s 148 of the Income Tax Act for reopening the assessment. Thereafter, assessments were completed u/s 143(3) accepting the statements filed by the assessee. In doing so, interest under Sections 139(8) and 217 of the Income Tax Act was also charged. The contention of the assessee was that notice issued u/s 147(a) read with Section 148 by the Income Tax authorities is illegal as assessee has disclosed the income and on that basis only assessments were made. Therefore, assessments can be made only u/s 147(b) of the Income Tax Act and in view of Section 149 the assessments beyond four years of the notice are time barred. The Commissioner in Ext.P13 order found that notices u/s 148 were issued only after amendment of the Income Tax Act with effect from 1.4.1989 and therefore amended Section 147 will apply. Section 147(a) was wrongly quoted and as the notices were issued after 1.4.1989 only the amended section will apply and demand can be made within a period of 10 years.

3. It is well settled law that no tax in terms of Article 265 of the Constitution of India can be imposed, levied or collected except by the authority of law. When the wordings are clear, one has to go by the language used by the Legislature. In *Cape Brandy Syndicate v. I.R.C. (1921) 1 KB 64* , it is stated as follows:

"..... In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

In *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , the above principle was accepted by the Hon'ble Apex Court of India. As held in *Wm.Cory &*

Son Ltd. v. I.R.C. (1965) 1 All ER 917, a taxing or a fiscal statute demands strict construction. It must never be stretched against a taxpayer. So long the natural meaning for the charging section is adhered to and when the law is certain, then the strange meaning thereto should not be given. The above principle is accepted in India also as can be seen from Commissioner of Central Excise, Pondicherry Vs. ACER India Ltd., (see para 32), Therefore, before going into the disputed question, we shall go through the relevant provisions before and after the amendment in 1989. Section 147 before amendment was 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 to 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 Section 148 to 153 referred to as the relevant assessment year).

xxx xxx xxx."

After the amendment with effect from 1.4.1989, in view of Direct Tax Laws (Amend.) Act, 1987, Section 147 was substituted by the following Section 147:

"147. Income escaping assessment.-- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year. Unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts

necessary for his assessment for that assessment year.

xxx xxx xxx."

Section 149 before amendment reads as follows:

"149. Time limit for notice.-- (1) No notice u/s 148 shall be issued.--

(a) in 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.

(2).....xxx xxx xxx."

Section 149 was also substituted with effect from 1.4.1989. Under the new Section, in case there is no original assessment, time limit mentioned in issuing notice is 10 years where the demand is more than Rs. 50,000/-.

4. First we may consider the question whether Section 147(a) or Section 147(b) will apply if the notice was issued before amendment in 1989. In the revisional order (Ext.P13), it can be seen from paragraph 3 that the assessee specifically contended that even though notice was issued u/s 147(a), it can be made only u/s 147(b). That was dealt with by the Commissioner in paragraph 4. The relevant portion is quoted below:

".....Since the assessee itself filed the returns for the assessment years 1980-81 to 1984-85 admitting the incomes, the Assessing Officer was fully justified in invoking the provisions of Section 147 for these years. In this connection it may be mentioned that since no assessment were earlier completed u/s 143(3) for these assessment years, the proviso to Section 147 will not be attracted to the assessee's case. No doubt in the assessment the section has been wrongly quoted as 147(a). This error will not invalidate the assessments in any way especially in view of the provisions of Section 292B".

In view of the specific finding that proviso to new Section 147 will not apply, it is clear that even department has no case that there is suppression of any materials by the assessee. So, in view of the findings that Section 147(a) will not apply and that proviso to the present Section 147 also will not apply, under the old Act proceedings can only be started u/s 147(b) as there is no suppression of materials by the assessee and only on the basis of the materials supplied by the assessee the assessments were made. Therefore, if Section 147(b) is the applicable provision under the old Act at the time of the issuance of the notice,

the notice was time barred in view of Section 149(1)(b) i.e., after the expiry of four years from the end of the relevant assessment year. But, the contention of the revenue is that since Sections 147, 148 and 149 were substituted, the limitation that is applicable is as per the present provisions, after the amendment. The above provisions are only machinery provisions or procedural provisions and as per the newly substituted provisions of Sections 147 to 149, the demands are not time barred. Contention of the assessee is that at the time when the amendment came, assessment prior to four years of the amendment is a finalised issue as no notice was issued before the amendment and in view of the clear provisions of Section 147(b) read with Section 149, no further amendments can be made on the assessee. In such circumstances, the amended provision has no application. It is also submitted that if it was not time barred on the date when the amendment came, then the department would have been justified in using the amended provisions of Section 147 in reopening the assessment within the time prescribed under the new section. Various decisions were pointed out to substantiate this argument.

5. We note that a similar contention was considered by a three member bench of the Apex Court as early as in 1964 in *S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company*, . After considering the case law the Supreme Court held as follows:

"In considering whether the amended statute applies, the question is one of interpretation, i.e., to ascertain whether it was the intention of the Legislature to deprive a taxpayer of the plea that action for assessment or reassessment could not be commenced, on the ground that before the amending Act became effective, it was barred. Therefore, the view that even when the right to assess or reassess has lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the Income Tax Officer can exercise his powers to assess or reassess under the amending statute which gives, an extended period of limitation, was not accepted in *Calcutta Discount Company's* case.

As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income Tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party u/s 43 within two years from the date of the year of assessment. But authority of the Income Tax Officer under the Act before it was amended by the Finance Act of 1956, having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act".

The same view was expressed by the Supreme Court in various cases like *Controller of Estate Duty, Gujarat I, Ahmedabad Vs. M.A. Merchant, Accountable Person of Late Shri A.G. Merchant, Majirajwadi Road, Bhavnagar and Others*, ,

State of Tamil Nadu v. Star Tobacco Co. (1973) 31 STC 319, etc. A Division Bench of this Court in Commissioner of Agricultural Income Tax v. Panampunna Estates 1997 (2) KLT 206, followed the above decisions and held that when assessment has already become barred by limitation under the existing law subsequent amendment of law enhancing the period of limitation cannot be availed of by the Revenue.

6. Senior Standing Counsel pointed out a decision of this Court in Income Tax Officer Vs. Smt. Nilofer Hameed and Another, . In that case, even though notice of assessment u/s 148 was issued, that was not pursued. Thereafter, a second notice was issued. The Court held that before the second assessment a second notice was issued in time and it was not barred by the earlier law at that time. In such circumstances, when the second notice was issued, it was not barred by the earlier law and by the time the new amended provision came, the amended provisions can be applied in the matter of assessment except for the rate of tax. The contention of the assessee is also the same. It is the assessee's contention that if the notice was issued within the time prescribed under the old law or the time for assessment has not expired at the time when amendment came into force, the new provisions would apply. But, here admittedly, when the amendment came, the time for assessment or reassessment as provided u/s 147 read with Section 149 was over and liability for assessment was completely extinguished. The amendment was not made retrospectively and as held by the Supreme Court in the case of S.S. Gadgil (supra), we are of the opinion that the amended provisions will not come to the rescue of the department. Liability that was extinguished due to time bar cannot be resurrected or revalidated by the perspective amendment. In this connection, learned counsel for the appellant also cited a Division Bench decision of this Court in C.I.T. v. Vaikundom Rubber Co. Ltd. (Ken) 2001 (1) KLT 134 : (2001) 249 ITR 19. We are of the view that the matter is beyond controversy in view of the Supreme Court decision in this matter explaining the effect of very same amendment of Sections 149 and 150 in K.M. Sharma Vs. Income Tax Officer, Ward 13(7), New Delhi, , Dicta of the above decision have to be followed here. There, the Supreme Court relied on S.S. Gadgil's case and held as follows:

"13. Fiscal statute, more particularly a provision such as the present one regulating period of limitation must receive strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to litigant for indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The amendment to Sub-section (1) of Section 150 which intends to lift embargo of period of limitation u/s 149 to enable authorities to reopen assessments not only on the basis of orders passed in proceedings under the Act but also on order of a Court in any proceedings under any law has to be applied prospectively on or

after 1.4.1989 when the said amendment was introduced to Sub-section (1). The provision in Sub-section (1), therefore, can have only prospective operation to assessments, which have not become final due to expiry of period of limitation prescribed for assessment u/s 149.

14. To hold that the amendment to Sub-section (1) would enable the authorities to reopen assessments, which had already attained finality due to bar of limitation prescribed u/s 149 as applicable prior to 1.4.1989, would amount to give Sub-section (1) a retrospective operation which is neither expressly nor impliedly intended by the amended sub-section.

In fact, after the decision of the Supreme Court a review petition was filed before the learned Single Judge on the ground that when the matter was considered earlier, judgment reported in K.M. Sharma Vs. Income Tax Officer, Ward 13(7), New Delhi, was not available. But, review petition was also dismissed. We are of the opinion that the matter is covered by the above decision and we respectfully follow the same even though review petition was dismissed. At the time of issuance of the impugned notices and at the time of amendment, the right to initiate proceedings u/s 147 was extinguished for certain assessment years as per the old provisions. When the new Act came into force, there was no cause of action of issuing a further notice to revive old matters which have attained finality under the then existing law due to limitation and therefore the new Act cannot be applied. Provision for limitation is not a mere procedure and unless it is made retrospectively, it cannot be acted upon retrospectively for reviving any barred and extinguished assessments on the date when the Act came into force.

In the above circumstances, we allow the appeal and the impugned judgment is set aside. The assessment orders issued for the periods where liability was extinguished cannot be reopened invoking the extended limitation period in the amended provision. We make it clear that notices issued for assessment years for which liability to pay tax were not extinguished or time barred as per the old law when the amended section came into force are valid.