

(1959) 03 KL CK 0040
In the High Court Of Kerala
Case No : O.P. No. 536 of 1958

Velu Gopalan

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 23-03-1959

Acts Referred:

Income Tax Act, 1922 — Section 44

Citation : AIR 1959 Ker 370 : (1960) 38 ITR 141

Hon'ble Judges : M.S. Menon, J; Kumara Pillai, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer, for the Appellant; G. Rama Iyer, for the Respondent

Final Decision : Allowed

Judgement

M.S. Menon, J.—The petitioner and one Krishnan entered into a partnership on the 15th April, 1949. The firm was registered u/s 26A of the Indian Income Tax Act, 1922.

2. Ext. P.3 dated 5-6-1952 is the assessment order in respect of the assessment year 1951-52. In that order the Income Tax Officer stated as follows :

"As the firm is registered there is no tax payable by it. The share income of each partner will be considered in his individual assessment. No demand for 1951-52".

3. The statement conformed to Section 23 (5) (a) of the Indian Income Tax Act, 1922, which on the material date -- omitting the provisos thereto --was in the following terms :

"Notwithstanding anything contained in the foregoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under Sub-section (1), Sub-section (3) or Sub-section (4), as the case may be.

(a) in the case of a registered firm the sum payable by the firm itself shall not be determined but the total income of each partner of the firm including therein his

share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined."

4. Ext. P3 assessed the petitioner's taxable income from the firm at Rs. 18790/- and that of Krishnan at Rs. 19316/-. Individual assessments followed and the petitioner paid the tax due from him. Krishnan, however, did not do so and on 23-11-1957 the Income Tax Officer wrote to the petitioner as follows :

"A sum of Rs. 2439-5-0 is still in arrears in respect of the above assessee against the tax demand for the assessment years 1951-52. In spite of the best efforts of the Department the tax arrears could not be collected from the assessee.

Since the tax payable by the firm is the tax due from each of the partners on the share income, the arrears due from the partner is part of the tax-due from the firm and since the two partners are jointly and severally responsible for the amount of tax determined on the income of the firm you are also responsible for the tax arrears in the case of the other partner.

As the other partner Shri K. Krishnan has failed to pay the tax I would request you to pay the tax arrears immediately. Demand notice and chalan are enclosed".

5. The petitioner appealed to the Appellate Assistant Commissioner of Income Tax, Kozhikode, but without success. According to the petitioner he is not liable to pay the amount and his prayer is that Ext. P,2 and Ext. P.1, the notice of demand mentioned in Ext. P.2 should be quashed by an appropriate writ or direction from this court.

6. It is common ground that the partnership was dissolved on 21-6-1952 and that its business was discontinued as from that date. The contention of the Department is that this fact will sustain the demand made on the petitioner in view of the provisions of Section 44 of the Indian Income Tax Act, 1922, That section, at the material time, was in the following terms :

"Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall in respect of the income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment."

This provision apparently postulates an assessment after the discontinuance or dissolution and a liability for the amount of tax found due on such an assessment. There has been no assessment subsequent to the discontinuance of the business and if this interpretation is correct Exts. P1 and P2. are unsustainable and cannot be supported,

7. Section 44 as extracted above was the result of a substitution effected by the

Indian Income Tax (Amendment) Act, 1939. The original section as embodied in the Indian Income Tax Act, 1922, read as follows :

"Where any business, profession or vocation carried on by A firm has been discontinued, every person who was at the time of such discontinuance a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income profits and gains of the firm".

The expression "tax payable" occurring in the above provision came up for consideration in The Commissioner of Income Tax Vs. P.T. Chengalvaroya Chettiar and Another, The special Bench said:

"It seems "to us that "tax payable" means "tax that is due to be paid"; "tax which the firm or partnership would be liable to pay if it had not been discontinued"; "tax either found to be due already or that will be found to be due in the future" ".

8. Even on the assumption that the words "tax payable" occurring in the provision with which we are concerned comprehends also a tax determined to be due prior to the discontinuance of the business, the Department cannot succeed as there, was as a matter of fact no such determination in the case before us. As already pointed out the. Income Tax Officer has specifically stated in Ext. P3 that there was no tax payable by the firm.

9. In the absence of an assessment of the firm prior to the discontinuance of its business or of the partners subsequent to the discontinuance, the liability of Krishnan cannot possibly be saddled on the petitioner. It follows that the petition has, to be allowed and we do so with costs, advocate"s" fee Rs. 100/-.

10. An entirely new section with three sub sections have been substituted for Section 44 by the Finance Act of 1958 with effect from 1-4-1958. We are not concerned with that provision in this case and it is hence not discussed in this judgment.