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SooperKanoon Citation : sooperkanoon.com/344780

Court : Mumbai

Decided On : Dec-19-1979

Reported in : (1980)82BOMLR607; [1983]139ITR880(Bom)

Judge : Gadgil and ;Waikar, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 143 and 289

Appeal No. : Special Civil Application No. 963 of 1977

Appellant : Sunil Kumar

Respondent : Commissioner of Income-tax, Vidarbha and Marathwada and ors.

Advocate for Def. : R.G. Deshpande, Adv.

Advocate for Pet/Ap. : V.R. Manohar, Adv.

Judgement :

Gadgil, J.

1. In this writ petition, the petitioner has challenged the validity of the notice (annex. A) issued under s. 226(3) of the I.T. Act, 1961 (hereinafter referred to as 'the Act'), addressed to respondent No. 3 firm, directing that any amount due and

payable by that firm to the petitioner should be paid to the ITO in satisfaction of the alleged tax liability of the petitioner. The validity of the notice was taken up in revision before the Commissioner and the said revision had been dismissed on March 27, 1978, vide annex. E to the petition.

2. The main contention of the petitioner is that he is not under any liability to pay the income-tax dues as claimed by the Department and as such the recovery proceedings are bad. To understand his grievance, it will be necessary to refer to certain facts which are not in dispute.

3. Prior to 1958, respondent No. 5 firm, viz., M/s. Ramkrishana Ramnath, Kamptee (hereinafter referred to as respondent No. 5) was constituted. Radhakishanji, Ramakant and Banwarilal were the partners of this firm. In 1959, another firm by name M/s. Ramkrishana Ramnath Sons, kamptee (hereinafter referred to as respondent No. 4) was constituted. The wives of each of the partners of respondent No. 5 firm were the partners of this respondent No. 4 firm. The names of these wives are Smt. Krishnabai, Smt. Sudha Devi and Smt. Usha Devi. The petitioner who is the son of Banwarilal and Usha Devi was admitted to the benefits of the partnership of respondent No. 4 firm. In 1970, one more partnership came into existence, viz., M/s. Shri Jagadamba Trading Corporation (hereinafter referred to as respondent No. 3) S. P. Baid and M. S. Baid were the two partners of respondent No. 3 firm. The minors including the petitioner were admitted to the benefits of this partnership. It may be noted that the petitioner was born on August 11, 1958, and that till 1976, he was a minor.

4. The I.T. authorities, while assessing the income of the two firms, viz., respondents Nos. 4 and 5, came to the conclusion that respondent No. 4 was actually a benamidar for the other firm, respondent No. 5 and therefore, the incomes of these two firms were clubbed together and treated as the income of the firm, respondent No. 5. At the same time, protective assessments were made against the benamidar firm, viz., respondent No. 4. The contention of the petitioner is that the assessments of respondent No. 5 (so as to include the income of respondent No. 4 firm) has become final and that, therefore, the protective assessments that were made against respondent No. 4 have ceased to be valid

and enforceable. The petitioner, therefore, contends that his admission to the benefits of the partnership which was a benamidar of respondent No. 5 firm has no relevancy inasmuch as that firm itself was not really a firm but was a benamidar of respondent No. 4 firm. In addition, he has alleged that on April 21, 1977, he has given a notice under s. 30(5) of the partnership Act, 1932, electing not to become a partner in the firm. That sub-section says that a notice is required to be given within six months of his attaining majority or six months from his obtaining knowledge that he was so admitted to the benefits of the partnership. There is some controversy as to whether the notice has been given in good time. However, that is not much relevant.

5. The I.T. authorities intended to make a recovery of the tax assessed on respondent No. 5 firm. It is in connection with this tax recovery that the impugned notice (annexure-A) was issued to respondent No. 3 firm (of which the petitioner is a partner) calling upon that firm to pay the money of the petitioner, which is in the hands of that firm. Such payment was demanded towards the satisfaction of the tax liability of respondent No. 5. It is this demand that is being challenged before us on various grounds.

6. The first contention is that the petitioner was never a partner of respondent No. 5 firm and that the protective assessments of respondent No. 4 firm (to the benefits of which the petitioner was admitted during his minority), stood automatically cancelled and nullified when the assessments of respondent No. 5, were made so as to include all the income of respondent No. 4 firm (on the basis that this firm was a benamidar), have become final. It was also contended that the amounts covered by the protective assessments have been written off by the Commissioner on September 27, 1977, and, therefore, no liability could exist on the basis of such protective assessment. The third contention is that the assessments against respondent No. 4 (even if they are assumed to be genuine or correct assessment), were assessments on the unregistered firm and that tax cannot be recovered from the partners. The petitioner has also alleged that the recovery proceedings were bad as no tax recovery certificate was issued under s. 222 of the Act. However, at the time of arguments, this contention was not pressed when Mr. Deshpande, for the Department, made a statement that the tax recovery

certificates have been issued against respondent No. 4 firm.

7. Respondents Nos. 1 and 2 (viz., the Commissioner and the ITO) have opposed the petition by filing their return. In para. 6, it was admitted that the petitioner was not the partner of respondent No. 5. In para. 7, it is admitted that the I.T. Department held respondent No. 4 as benamidar of respondent No. 5 firm and that the protective assessments were made against respondent No. 4. The respondents also admitted that no proceedings were pending in respect of the registration of respondent No. 4 and that no proceedings were pending with regard to holding the said firm to be the benamidar of respondent No. 5. In para. 14, there is a statement that income covered by the protective assessments was included in the income of respondent No. 5 firm. The contesting respondents, however, contended that all this would not nullify the protective assessments made against respondent No. 4 firm. It was alleged in para. 7, that these protective assessments are also the regular assessments. At the same time there is a statement in that paragraph that these assessments are protective assessments in the sense that the Department has held that the income pertains to respondent No. 5. In para. 19, the respondents alleged that the petitioner, who was admitted to the benamidar firm, respondent, No. 4, was connected with respondent No. 5 firm and that, therefore, the recovery proceedings are good. It was then contended that a writing-off of the tax under the protective assessments would not enable the petitioner to avoid the recovery. The Department also contended that under s. 289(d) of the Act the tax can be recovered from the partner of the firm.

8. The main and important question that arises in this petition is as to what would be the effect of the protective assessments, particularly, when the income covered by those assessments has been finally included in the assessments of respondent No. 5. Mr. Deshpande, however, contended that such income had not yet been finally included in the assessments of respondent No. 5. We are, however, not able to accept this contention inasmuch as in para. 7 of the petition, the petitioner has made the following averments :

'The petitioner further submits that only protective assessments were made against the firm, M/s. Ramkrishna Ramnath Sons, Kamptee, the income of which

protective assessments have been added duly every year to the income of M/s. Ramkrishna Ramnath, Kamptee, against whom regular assessments in respect of very same income have been made, completed and already finalised'.

9. This particular averments has not been denied by the Department in their return. Similarly, the petitioner has made the following allegations in para. 17(b) :

'The petitioner has already pointed out that the alleged amount of taxes sought to be recovered from the petitioner as the dues of the fourth respondent firm, M/s. Ramkrishna Ramnath Sons, could not be recovered for the reason that the very same income has already been the subject matter of a regular assessment in the case of the fifth respondent firm, M/s. Ramkrishna Ramnath, which according to the Department was the real firm of which the fourth respondent firm was merely a benamidar. The petitioner has also pointed out that the assessments against respondent No. 5 have already been finalised and no proceedings challenging the said assessment are pending at any stage.'

10. This averment is also not specifically denied. In view of this position, it will be very difficult for the respondents to contend that the assessment proceedings against respondent No. 5 are not finalised or that the income of respondent No. 4 has not been included in the assessment of respondent No. 5 on the basis that the said respondent No. 4 is a benamidar for respondent No. 5.

11. It is true that the I.T. Act has not made any specific provision about the protective assessments or precautionary assessments. But this aspect has been considered by the Supreme Court in the case of Lalji Haridas v. ITO. : [1961]43ITR387(SC) . In that case, the two brothers, Lalji and Chhotalal, had submitted the return of their respective incomes. The Department felt that the income, shown to be that of Chhotalal, was actually the income of Lalji, the proceedings went on before the I.T. authorities and, ultimately, the matter reached the Supreme Court. The question arose as to what should be done in such a contingency and the Supreme Court has held as follows (p.392) :

'In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has

received that income and prima facie it appears that the income may have been received either by A or B by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No. 1. in pursuance of the impugned notice issued by him against the appellant...

We would, however, like to add one direction in fairness to the appellants. The proceedings taken against both the appellants should continue and should be dealt with expeditiously having regard to the fact that the matter is fairly old. In the proceedings taken against Lalji, the Income-tax Officer should make an exhaustive enquiry and determine the question as to whether Lalji is liable to pay the tax on the income in question. All objections which Lalji may have to raise against his alleged liability would undoubtedly have to be considered in the said proceedings. Proceedings against Chhotalal may also be taken by the Income-tax Officer and continued and concluded, but until the proceeding against Lalji are finally determined no assessment order should be passed in the proceedings taken against Chhotalal. If in the proceedings taken against Lalji it is finally decided that it is Lalji who is responsible to pay tax for the income in question it may not become necessary to make any order against Chhotalal.'

12. Thus in a taxation proceeding a question would arise as to whether an income said to have been earned by B is really earned by him or it is an income of A. The I.T. Department has to make an assessment within the prescribed period of limitation and, hence, it would not delay long the making of an assessment on B. Simply because the enquiry as to whether the income of B should be treated to be that of A is pending, there could not be an assessment of the said income on both A and B. The very purpose of such an enquiry would be to assess the income of B separately or to include it in the income of A. But if the proceeding is held only against A, it may still be possible that after necessary enquiry the concerned authority may come to a conclusion that the income of B should not be clubbed with the income of A and by the time this finding is given, the limitation for making the assessment against B would already be over. In such a contingency the

income shown to have been earned by B will go untaxed. To avoid such a contingency a protective assessment as it be made even against B. But the recovery on the basis of such protective assessment would depend upon the ultimate decision as to whether the income shown to have been earned by B belonged to A. If the finding is in the affirmative, the protective assessment will cease to be operative as the income covered by that assessment would be included in the income of A.

13. It was contended on behalf of the respondents that the fact that only protective assessments were issued against respondent No. 4, would not come in the way of the Department to make a recovery of the tax on the basis of such assessment. In our opinion, such recovery would be permissible only if ultimately the income of respondent No. 4, is found to be its own separate income and not the income as a benamidar of respondent No. 5. We have already observed that the assessment proceedings against respondent No. 5 have been completed and in those proceedings the income of respondent No. 4, has been included as the income of respondent No. 5. Thus, that income has already been taxed as the income of respondent No. 5. We are not able to accept the contention of the Department that in spite of this position the protective assessments that were made against respondent No. 4 would still remain operative, so as to enable the Department to proceed to recover the tax levied by those assessments.

14. In view of the above position, it is clear that the petitioner who was admitted to the benefits of respondent No. 4 firm would not be liable to pay any tax on the basis of the protective assessments made against that firm. In fact, those assessments have become a nullity on account of the final finding that the said respondent No. 4 firm was a benamidar of respondent No. 5 firm. Not only that, but the income of that benamidar firm has been included in the income of respondent No. 5 while assessing this latter firm. Under these circumstances, we are of the opinion that the recovery proceedings on the basis of the protective assessments are not tenable.

15. Certain other contentions have been raised by Mr. Manohar, for example, he has argued that the Commissioner's order dated September 27, 1977, writing off

the assessment would make the recovery bad. It was also submitted that the protective assessments (even if they are held to be enforceable), were against the unregistered firm and that, therefore, under the I.T. the liability of such assessments cannot be enforced against the partners of the firm. Mr. Deshpande contended that the amount of tax can be recovered from the partners, even though the assessments are against the firm. All these aspects, however, need not be considered, particularly when we have come to a conclusion that, in the present case, the tax under the protective assessments cannot be recovered. The result, therefore, is that the petition succeeds : rule is made absolute. The impugned notice dated March 25, 1977 (annex. A to the petition) and the revisional order dated May 27, 1977 (annex. D to the petition) are quashed and as such no recovery of the tax on the basis of these documents should be effected. There would, however, be no orders as to costs.