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Court : Karnataka

Decided On : Jan-08-2004

Reported in : [2004]266ITR305(KAR); [2004]266ITR305(Karn)

Judge : R. Gururajan, J.

Acts : [Finance \(no. 2\) Act, 1988](#) - Sections 87; Income Tax Act

Appeal No. : Writ Petitions Nos. 10603-604 of 1999

Appellant : S. Jaganathan and anr.

Respondent : Assistant Commissioner of Income-tax and anr.

Advocate for Def. : M.V. Seshachala, Adv.

Advocate for Pet/Ap. : S. Parthasarathi, Adv.

Disposition : Petition rejected

Judgement :

R. Gukurajan, J.

1. The first petitioner is the legal representative of the late Sri A. S. Sengoda Gounder. Sri A. S. Sengoda Gounder died on October 16, 1997. He was the managing director of M/s. Sri Sampurna Laxmi Spinning Mills Ltd., at Erode. He was an assessee in Bangalore. He submitted income-tax returns year after year

and was regular in the matter of payment. In the accounting year relevant to the assessment year 1995-96, he received certain foreign exchange from certain persons who are non-resident Indians. He did not submit any information about the foreign exchange in his returns. A survey was conducted in the office and residential premises in the year 1996. According to the petitioner, nothing transpired from out of the survey. He, while filing returns, indicated about the receipt of foreign exchange. Exemption was claimed in respect of NRI gifts. A search was carried out on February 20, 1997, at the office-cum-residential premises. Certain affidavits were seized in addition to certain xerox copies of the documents which has already been filed along with the income-tax return for the assessment year 1995-96. On October 16, 1997, Sri A. S. Sengoda Gounder died. The return filed by him was processed by the Department. A notice under Section 158BC was issued. Since Sri Gounder died before the notice was served, a return for the block assessment period was filed in pursuance of the notice and assessment was completed. Copy of the regular assessment order is filed at annexure 'B'. The petitioner, Sri Jagannathan, aggrieved by the order filed an appeal before the Commissioner. During the pendency of the appeal, he made a declaration under Section 88 of the Finance (No. 2) Act, 1998, under the Kar Vivad Samadhan Scheme, 1998. Annexure 'C' is the declaration. His declaration was rejected by the respondent on the ground that the assessment made for the assessment year was a protective assessment. Accordingly, declarations which had been filed in relation to regular assessment were not liable to be considered. Declaration was rejected in terms of annexure 'E'. Aggrieved by the same, the petitioner filed an appeal. Thereafter, the Commissioner of Income-tax (Appeals) passed an order against the appeal filed for the assessment year 1995-96. The petitioner filed an appeal before the Tribunal and the same is pending. The first petitioner-company aggrieved by the rejection of the Kar Vivad Samadhan Scheme application, has filed this writ petition.

2. The second petitioner Sri Shanmugasundaram is the son-in-law of the late Sri A. S. Sengoda Gounder. The office premises of the second petitioner and the first petitioner was the subject matter of survey on October 8, 1996. A return was filed by the second petitioner. A survey under Section 132 was conducted and substantially the same steps have been taken as in the case of Sri A. S. Sengoda

Gounder. The rest of the proceedings both on the basis of regular return, regular assessment for the assessment year 1995-96 and the block assessment have gone on in the same manner as in the case of petitioner No. 1. The block assessment pursuant to the notice under Section 158BC was issued to the second petitioner. Declaration was rejected. The petitioner, aggrieved by the declaration is challenging the rejection of the Kar Vivad Samadhan Scheme application.

3. The respondents have entered appearance. Parties are heard at great length. Sri Parthasarathi, learned counsel appearing for the petitioner, argues that when he made an application, a protective assessment and protective demand was available and that therefore, his application ought to have been considered in the matter. He says that the scheme provides consideration of such cases. He took me through various provisions to contend that he is entitled for consideration.

4. Per contra, Sri Seshachala, learned standing counsel says that a careful reading of the definition in terms of Section 87(m) and Section 88 shows that there should be a factual tax payable in terms of the Act for the purpose of consideration.

5. After hearing learned counsel, I have carefully perused the material on record. It is unnecessary for me to refer to various facts. Admitted facts reveal that the petitioner made an application in terms of the Kar Vivad Samadhan Scheme and the same has been rejected. While rejecting, the authority has noticed that the protective demand is not subject to recovery under the Act until it is finally upheld by the Department. He further ruled that once the declaration in a substantial case or year is accepted, the tax arrears in protective case here would no longer be valid and will be rectified by suitable orders. He noted that the addition made by the petitioner for NRI gifts is made on protective basis. The sum and substance of the order is that there are no tax arrears pending on the date of application. The same was the reasoning in annexures 'E' and 'J'.

6. In the light of the argument of learned counsel, I have carefully perused the scheme. The scheme provides for definitions. We are concerned with a few definitions, namely, disputed tax and tax arrears. A combined reading of these two definitions would show that there should be a factual tax arrears which could be

demanded legally in terms of the Act for the purpose of the scheme. There should be a legal determination in terms of the Act. Only in such cases, the scheme is available to a party for the purpose of settlement.

7. Sri Parthasarathi, learned counsel argues that protective assessment and protective demand is well accepted and is tenable in law. At the outset, this argument is attractive and if stripped naked, this argument is of no assistance to the petitioner. Protective assessment and protective demand are factually not found in the Act. Any demand in terms of protective demand cannot be legally enforceable like a regular assessment demand. In the case on hand, regular assessment also has been done. In these circumstances, the authorities are right in holding against the petitioner by way of rejection of the petition.

8. Learned counsel for the petitioners relies on the judgment of the Andhra Pradesh High Court reported in CIT v. Khalid Mehdi : [1987]165ITR685(AP) . The facts of the case are clearly distinguishable. The court was considering only with regard to protective assessment and a final determination in that case. It was not a case in which the court was considering those assessments in terms of the definitions as available in the present case.

9. The judgment in Khandubhai Vasanji Desai v. Deputy CIT : [1999]236ITR73(Guj) is also distinguishable on facts. That was not a case where the court was considering tax arrears as in the present case.

10. I must also notice the answer given to question No. 18 for the purpose of understanding of the scheme. The question and answer reads as under :

'Question No. 18 : Section 90(1) of the Scheme refers to the sum payable that may be determined by the designated authority. How is the sum payable to be worked out ?

Answer : The sum payable is to be determined with reference to disputed income as defined in Section 87(e) to mean the whole or so much of the total income as is relatable to the disputed tax. The term 'disputed income' as used in the scheme does not refer to the income in dispute by way of appeal, etc., but it refers to the

income which is relatable to the disputed tax. The term 'disputed tax' has been defined to mean the tax determined and payable but remaining unpaid on the date of declaration. The designated authority will work out the disputed income relatable to disputed tax by applying the marginal rate applicable for the relevant assessment year for that assessee and thereafter determine the sum payable in accordance with Section 88 of the Scheme.'

11. Learned counsel for the respondent relies on the judgment of the Supreme Court reported in Lalji Haridas v. ITO : [1961]43ITR387(SC) . The court in that case notices that the protective assessment is in the nature of precautionary assessment and is not recognised in law. The court further notices that though protective or precautionary assessment is justified by the provisions of the Act, the court ruled that still the authorities can determine by appropriate proceedings for the purpose of tax liability. In the light of the definitions in terms of the scheme and in the light of the answer to question No. 18 read with the judgment of the Supreme Court, I am of the view that no case is made out by the petitioner.

12. The petitions are rejected. No costs.