

S. Mageshwari Vs. Assistant Commissioner of Income-tax and Another

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Court : Karnataka

Decided On : Nov-04-1992

Reported in : (1993)109CTR(Kar)301; [1993]201ITR472(KAR); [1993]201ITR472(Karn); 1993(37)KarLJ137; [1993]67TAXMAN497(Kar)

Judge : K.A. Swami, A.J. and ;N.D.V. Bhat, J.

Acts : [Income Tax Act, 1961](#) - Sections 139, 139(8), 147, 246 and 264; [Constitution of India](#) - Articles 226 and 227

Appeal No. : Writ Appeals Nos. 1977 and 1978 of 1992

Appellant : S. Mageshwari

Respondent : Assistant Commissioner of Income-tax and Another

Advocate for Def. : H. Raghavendra Rao and ;M.V. Seshcahala, Adv.

Advocate for Pet/Ap. : G. Chandra Kumar, Adv.

Judgement :

K.A. Swami, Actg. J.

1. As the appeals lie in a very narrow compass, they are admitted and heard for final disposal. These two appeals are preferred against the order dated September 15, 1992, passed by the learned single judge in Writ Petitions Nos. 27470 and 27471 of 1992. The learned single judge has rejected both the petitions on the

ground that the properties which are brought for sale for recovery of the amount due under the assessment orders produced as annexures 'A' and 'A-1' in the writ petition do not belong to the assessee and further the petitioner assesses has filed the objections to the same, and as such, the authorities are required to consider the objections and take appropriate action in accordance with law. But the grievance made by Sri G. Chander Kumar, learned counsel for the appellant, is that, in the writ petitions, the petitioner has made two prayers : (1) to quash to orders of attachment of the properties and bringing them for sale as per annexures 'L' and 'O' dated April 16, 1992, and August 19, 1992, respectively, produced in the writ petitions; and (2) to quash that portion of the order of assessment dated November 30, 1990, made for the assessment year 1984-85 relating to levy of penal interest under sections 139(8) and 217 of the Income-tax Act, 1961 (hereinafter referred to as the 'Act'), produced at annexure 'A' in the writ petition. It is submitted that, whether the properties attached should be sold or not would depend upon the validity or otherwise of the aforesaid order of assessment relating to levy of penal interest, because the tax assessed has been paid. It is also contended that the order of assessment made for the assessment year 1984-85, in so far as it levies penal interest, is not applicable, as the assessee is not aggrieved by the quantum of assessment. In other words, it is submitted that when the quantum of assessment is not challenged, the appeal challenging the validity of levy of penal interest alone cannot be maintained, having regard to the provisions contained in section 246 of the Act, therefore, the appellant-petitioner is entitled to invoke the jurisdiction of this court under articles 226 and 227 of the Constitution.

2. Regarding the validity of the penal interest levied under the assessment order dated November 30, 1990, made for the assessment year 1984-85, it is submitted that the assessment order is passed in a reassessment proceeding and as such, in a reassessment proceeding, penal interest cannot at all be levied, as held by this court in Charles D'Souza v. CIT : [1984]147ITR694(KAR) , and affirmed by the Supreme Court in S. L. P. (Civil) No. 8215 of 1985 in CIT v. Charles D'souza [1990] 186 ITR 28.

3. On the contrary, it is contended by Sri Raghavendra Rao, learned standing counsel for the Department, that no doubt it is not open to the petitioner-appellant to prefer an appeal only against the order levying penal interest; nevertheless, she has a right to approach the authority under section 264 of the Act by way of revision and seek revision of the assessment order in so far as it levies penal interest; that the assessment order was passed as long back as on November 30, 1990, whereas, the petitioner-appellant has approached this court only in the year 1992 after a lapse of about a little less than two years; therefore, she is guilty of laches and has also not availed of the remedy of revision. It is, therefore, submitted that the appellant is not entitled to invoke the jurisdiction of this court under articles 226 and 227 of the Constitution; that it is not a case in which this court can exercise its jurisdiction in favour of the appellant-petitioner having regard to the unexplained delay of more than two years; that the appellant did not at all co-operate with the Department in the reassessment proceeding and the efforts made by the Department to serve notice on the appellant failed; therefore, the notice was required to be affixed on the premises of the petitioner-appellant; as such, the conduct of the appellant-petitioner should also be taken into consideration while exercising its jurisdiction under articles 226 and 227 of the Constitution.

4. As far as the merits of the claim of the petition-appellant are concerned, it is fairly submitted by learned standing counsel for the Department that the matter is covered against the Department by a decision of a Division Bench of this court in *Charles D'Souza v. CIT* : [1984]147ITR694(KAR) , which is also affirmed by the Supreme Court.

5. It may also be noticed at this stage that the petitioner-appellant has produced the assessment order for the year 1986-87, 1987-88 and 1988-89 as annexures A1, A2 and A3 under which also penal interest is levied, but the levy of penal interest under the above assessment orders has not been challenged and the prayer is confined to the order of assessment pertaining to 1984-85 assessment year, having regard to the fact that the Act has been amended by the Taxation Laws (Amendment) Act, 1984. Under this amendment, the old Explanation 2 to sub-section (8) of section 139 has been substituted by the new Explanation 2. The

substituted Explanation 2 provides that where, in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purpose of this sub-section. Section 147 of the Act relates to income escaping assessment. The present case is concerned with the assessment made for the assessment year 1984-85 covering the financial year ending with March 31, 1984. Whereas the amendment effected by the Taxation Laws (Amendment) Act is with effect from April 1, 1985; therefore, it does not cover the assessment pertaining to the assessment year 1984-85. Hence, Explanation 2 as substituted by the Taxation Laws (Amendment) Act, 1984, cannot be taken advantage of by the Department in so far as the assessment order pertains to the assessment year 1984-85.

6. The next question for consideration is when, in law, the assessing authority is not competent or has no authority to levy penal interest in the reassessment proceeding and the assessee has no right of appeal against that portion of the order of assessment which pertains to levy of penal interest and has not availed of the remedy of revision under section 264 of the Act and has approached this court after a lapse of a little less than two years whether there would be a ground to deny relief to the assessee under articles 226 and 227 of the Constitution.

7. It is a settled position of law that revision is not a right and it cannot at all be equated to the right of appeal therefore, failure to invoke revisional jurisdiction or avail of the remedy of revision, by itself, would not disentitle a party aggrieved to invoke the jurisdiction of this court under articles 226 and 227 of the Constitution; nor is such failure a bar to exercise of jurisdiction under articles 226 and 227 of the Constitution. The delay in approaching this court, in a matter where there is no authority vested in the assessing authority to levy penal interest, by itself, is not a ground to deny relief under articles 226 and 227. No doubt, the assessee has approached this court after a lapse of about two years, but the delay of two years in the facts and circumstances of the case, when the authority has no jurisdiction at all to levy penal interest to the tune of Rs. 3,88,509, would not be a ground to deny relief. Similarly, the conduct of the assessee in not co-operating with the Department in the matter of reassessment also cannot be made a ground to deny the relief, because the unacceptable or unreasonable conduct of the assessee will

not in any way confer jurisdiction upon the authority to pass an order levying penal interest. Therefore, we are of the view that the contention urged on behalf of the Department that the assessee is guilty of laches and has not availed of the remedy of revision and her conduct has not been worthy of acceptance during the period of reassessment proceedings as she failed to co-operate with the Department would not be sufficient to deny the relief to the assessee, as the assessing authority has exercise jurisdiction, not vested in it, in imposing the penal interest.

8. For the reason stated above, these appeals are allowed. The order dated November 30, 1990, passed by the Assistant Commissioner of Income-tax (Investigation), Circle IV (1), Bangalore, for the assessment year 1984-85 produced as annexure 'A' in the writ petition, in so far it imposes the penal interest amounting to Rs. 3,88,509, is quashed. In other respects, the said order is not disturbed.

9. The submission made by Sri Raghavendra Rao, learned counsel for the Department, that unless the application filed as per rule 11 of Schedule II of the Act is decided, the authorities will not proceed with the auction is placed on record. In view of this, it is not necessary to quash the sale proclamation notification because the validity of the same will have to be considered under rule 11 of Schedule II of the Act. We also further make it clear that the attachment effected by the authority is not, in any way, disturbed.