

N.M Vishwanath Vs. Cit

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Court : Karnataka

Decided On : Apr-19-2006

Reported in : (2006)204CTR(Kar)1; [2006]286ITR487(KAR);
[2006]286ITR487(Karn); [2006]155TAXMAN170(Kar)

Appeal No. : IT Refd. Case No. 838 of 1998 19 April 2006 A.Y. 1972-73

Appellant : N.M Vishwanath

Respondent : Cit

Advocate for Pet/Ap. : A. Ramamurthy, *for the Applicant*. M.V. Seshachala, *for the Respondent*

Judgement :

N. Kuwar, J.

This reference arises out of the order of the Tribunal, Bangalore Bench dated 13-6-1995 made in ITA No. 985/Bang/1989, under section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), at the instance of the assessee. The questions referred for our opinion are as under :

'1. On the facts and in the circumstances of the case, whether the Tribunal is right in holding that reassessment proceedings were rightly initiated for the assessment year 1972-73 and the income tax officer was not seized of the information relating

to acquisition of house property, although the same was reflected in wealth-tax records for the assessment year 1973-74 and when that records were available when original assessment under Income Tax Act was made ?

2. On the facts and in the circumstances of the case, whether the Tribunal was justified in restricting the interest levied under section 139(8) and under section 217(1A) of the Act to the figures in original assessment ?'

2. Brief facts leading to this reference are as under :

The assessee is manufacturing aluminium and steel vessels in his factory. He filed his return of income for the assessment year 1972-73 declaring the total income of Rs. 32,500 from business. The assessment was completed at the figure of Rs. 53,500 by adding sum of Rs. 21,000 towards donations, the source of which was not disclosed by the assessee. As the aforesaid donation was not disclosed, penal action, for concealment of income was ordered and a sum of Rs. 3,080 and Rs. 5,714 under section 139(8) and section 271(1A) (sic-217(1A)) of the Act was imposed as interest and the total tax payable by the assessee was Rs. 25,293.

3. Later in the course of search conducted in the premises of the assessee, certain documents were seized. It is seen that the assessee had purchased a site property bearing Nos. 4 and 32, situated at BVK Iyengar Road, Bangalore on 5-1-1971 for a sum of Rs. 80,000. The total cost of the site including registration came to Rs. 1,05,000. The said acquisition of property was not reflected in the balance sheet along with the wealth-tax report filed for the assessment year 1972-73, on the basis of which the wealth-tax assessment was completed. It was not declared in the income-tax assessment year 1972-73. Therefore, proceedings for reopening of the assessment was initiated under section 148 of the Act with the permission of the CBDT. Notice was duly served on the assessee on 28-6-1982. The assessee did not file the return of income to the said notice. Hence notice under sections 142(1) and 143(2) was issued on 9-9-1986, and the same was served on the assessee on 15-9-1986. There was no response from the assessee to the said notice. Again on 2-12-1986 as another notice was issued posting the case on 17-12-1986 and the same was served on the assessee on 11-12-1986 and even to this notice there was no response from the assessee. Under those circumstances,

the assessing officer added a sum of Rs. 1,05,000 as unexplained investment in the property to the income determined in the original assessment, and passed an order directing payment of tax in a sum of Rs. 1,64,366 which also included interest payable under sections 139(8) and 217(1A) of the Act by means of his order dated 5-1-1987.

4. The assessee challenged the said order in appeal before the Commissioner (Appeals). The appeal came to be dismissed affirming the order of the assessing officer. Aggrieved by the said order, the assessee preferred a second appeal to the Tribunal. The Tribunal though affirmed the finding of the two authorities, insofar as the addition is concerned, modified the order regarding the payment of interest and restricted the payment of interest to the original figures of Rs. 3,080 and Rs. 5,714 respectively levied for the delay caused in filing the return. It is thereafter, at the instance of the assessee, as noticed by us earlier, the aforesaid questions of law are referred for our opinion.

5. The learned counsel for the appellant Sri Ramamurthy, challenging the order of the Tribunal, made two submissions. Firstly, he submitted that when the assessee has enclosed the wealth tax returns to 'the income tax return, it cannot be said that the assessee had suppressed this acquisition of site, and therefore, the proceeding initiated under section 148 of the Act is without jurisdiction. Elaborating this submission he contended that since the assessee had given the information in the wealth tax return with regard to the acquisition of site, it cannot be said that there was non- declaration of property by the assessee and that the department discovered it at the time of search and seizure. It is his further submission that since the information was already available with the assessing officer, if at all the assessing officer intended to reopen the assessment, he should have done it within four years in terms of section 147(b) of the Act and he could not have invoked the power conferred on him under section 147(a) of the Act. In support of this submission, he relied upon the Division Bench decision of this court in the case of Venkatesh Power Works v. CIT : [2005]278ITR436(KAR) . Secondly, he submitted that no interest for the delay in filing the return would be levied and in support of the said contention, he relied upon the Division Bench decision of this court in the case of ITO & Anr. v. K.L. Srihari (HUF) : [1992]197ITR694(KAR) ,

which judgment according to him, is affirmed by the Supreme Court in the case of ITO &, Anr. v. K.L. Srihari (HUF) & Ors. (: [2001]250ITR193(SC) .

6. Per contra the learned counsel for the revenue Sri M.V. Seshachala, pointed out that the aforesaid judgments relied upon by the learned counsel for the appellant would apply to a case where the acquisition of property had been mentioned in the returns filed. Further, he submitted that the wealth-tax return was filed along with the income tax returns filed in the assessment year 1973-74 and not in the assessment year 1972-73. It is only during the search, when the department seized the sale deed of which the assessee had acquired the property, the authorities have promptly initiated the proceedings and the said proceedings have been initiated within ten years, which is valid. Insofar as the payment of interest is concerned, he submits that though the Division Bench of this court has taken the view that the assessment order would have the effect of totally effacing the earlier order and consequently no interest is payable, and the judgment, when it was challenged before the Supreme Court, the Supreme Court has kept that question open. He further submitted, the Supreme Court in the case of CIT v. Sun Engraving Works (P) (Ltd.) (1992) 798 ITR 297 held that in a reassessment proceedings it was not open to the assessee to seek review of concluded items unconnected with the escapement of income for the purpose of computation of the income escaping assessment; and therefore, he contends that when once an assessee admittedly filed the returns beyond time for which tax under section 139(8) was liable to pay interest, which he had paid after assessment that interest cannot be effaced by virtue of reassessment order. It is further submitted by him that liability of payment of interest is statutorily provided under section 139(8) of the Act and that liability is fixed because of the delay in filing of the returns on payment of tax. When that is the statutory liability and the claim of the Act, the observation made by this court that since the earlier order of the assessment stood effaced by virtue of the order of reassessment the liability to pay interest also gets effaced, is contrary to the mandate of the statute and therefore, it has to be declared as per inquirium or at any rate in view of the aforesaid judgment of the Supreme Court, the law is clear on the point.

7. In the light of the aforesaid submissions, the two points that arise for consideration are :

(i) Whether, in the facts and circumstances of the case it can be said that the assessee has suppressed the acquisition of site before the subject-matter of reopening of assessment ?

(ii) Whether the assessee is not liable to pay interest for delay in filing the returns originally as well as for not disclosing the income in the said return ?

8. Insofar as the duty of the assessee to disclose all the income is concerned, a Division Bench of this court in the case of Venkatesh Power Works v. CIT (supra) has held that, a duty is cast on the assessee to disclose primary facts necessary for assessment. If the assessee has disclosed primary facts, it is for the assessing officer to make the necessary enquiries and draw proper inferences as to whether the income returned is correct or not. Further it has been held that, it would be the plain duty of the assessing officer to make an enquiry and if he did not make an enquiry, it is a case of oversight and it could not be said that the income chargeable to tax had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts.

9. Relying on the aforesaid judgment it is contended before us that the assessee had enclosed wealth-tax returns along with the income-tax returns and, therefore, he had not suppressed the acquisition of site. The material on record discloses that the income tax returns filed by the assessee and the balance sheet filed along with the same do not disclose the acquisition of this site. It is for the subsequent year the return of wealth-tax was enclosed. It is in that context the authorities had no occasion to make an enquiry with reference to the acquisition of this property. It is not a case by oversight they did not look into this acquisition or there is any omission or failure on their part to enquire into this source of income for acquisition of the property. Therefore, only during search and seizure they recovered the registered sale deed under which the assessee had acquired this property and they have promptly initiated proceedings for reopening of the assessment. As the proceedings were initiated within the period stipulated from the date of seizure of the sale deed, the proceedings are well within time and the law laid down in the

aforesaid judgment is not applicable to the facts and circumstances of this case as it is not a case of assessee disclosing primary facts in the income tax returns and balance sheet, and the authorities not noticing the same, and failing to make an enquiry. Therefore, we do not find any substance in the first contention.

10. Insofar as the second contention is concerned, the admitted facts disclose that the assessee did not file the returns for the assessment year 1972-73 within the stipulated period. There was delay in filing the said return. Therefore, he was liable to pay interest under section 139(8) of the Income Tax Act. As the assessee had not disclosed the source of donations which were shown in the returns, the authorities treated it as concealment of income and directed payment of interest under section 271(1A) of the Act. The assessee paid the interest along with tax without any murmur. He did not challenge the said order. It is only after search and seizure authorities recovered the sale deed under which the assessee had acquired a site and a sum of Rs. 1,05,000 was held as the concealed income and proceedings were initiated for reopening of the assessment. After such reopening of the said assessment, all that the income tax officer has done is to add this income to the income which was already assessed. He has not set aside the original assessment done. It is in that context the question for consideration is, whether the interest levied for delay in filing the return and for suppressing the income is also liable to be set aside merely because no interest could be levied after reopening of the assessment.

11. The learned counsel for the parties relied on several judgments in this regard which needs to be noticed.

11.1 In the case of Charles D'Souza v. CIT : [1984]147ITR694(KAR) a Division Bench of this court dealing with the question whether the interest under sections 139(8) and 217 of the Act could be levied in a case where the assessment is done under section 147, held that, there can be levy of interest only in cases of regular assessment as defined by section 2(40) of the Act. The expression 'regular assessment' as defined by section 2(40) means assessment made under section 143 or section 144 in contradistinction to assessments/reassessment under section 147. When the expression 'regular assessment' is defined to mean only

assessments made under certain sections of the Act, it would be beyond the jurisdiction of any court to give it a wider and comprehensive meaning so as to include all assessments done under the Act, whether under section 143/144 or completed after issue of notice under section 148. Assessments under section 143/144 fall under a distinct category of assessments and the assessments made under section 147 are not covered by the expression 'regular assessment' as defined in section 2(40). Therefore, interest under sections 139(8) and 217 cannot be levied in the case of an assessment or reassessment made under section 147.

11.2 Yet another Division Bench of this court in the case of CIT v. Mysore Iron & Steel Ltd. : [1986]157ITR531(KAR) dealing with the question, whether after an assessment, an order of rectification has been made and subsequently there is a reassessment under section 147 of the Act, whether the time-limit provided under section 154 of the Act should be computed from the date of the earlier order from rectification or from the date of earlier of reassessment, held that, when a former assessment is reopened though it has become final, the assessing officer is required to assess the assessee on his total income or the turnover, as the case may be, and not merely on his escaped income. Once an assessment is reopened, the income tax officer has not only the jurisdiction, but it is also his duty to determine the total taxable liability of the assessee. For the said purpose, he must take into account not only the escaped income in respect of which a notice under section 147 has been issued, but also the entire income of that year. The resulting position is that the order of reassessment so made will have to take the place of the original order of assessment. There can be no dichotomy of thought in this matter. That being the necessary consequence of reassessment, the period of limitation, in the present case, should be reckoned from the reassessment order dated 15-3-1973, and not from the earlier rectification order or the original assessment order.

11.3 In coming to the aforesaid decision, the Division Bench was relying on the judgment of the Supreme Court in Dy. Commr. of Commercial Taxes v. H.R. Sri Ramulu : [1977]2SCR593 where justice Khanna speaking for the court observed that, the reason for that is that once an assessment is reopened, the initial order of assessment ceases to be operative. The effect of reopening the assessment is to

vacate or set aside the initial order of assessment and to substitute in its place the order made on reassessment. The initial order of reassessment cannot be said to survive, even partially, although the justification for reassessment arises because of turnover escaping assessment in a limited field or only with respect to a part of the matter covered by the initial assessment order. The result of reopening the assessment is that a fresh order of reassessment would have to be made including for those matters in respect of which there is no allegation of the turnover escaping assessment.

Therefore, the aforesaid judgment of the Supreme Court was in the context of the factual position that the assessment orders made under section 12A were comprehensive orders and were not confined merely to matters which had escaped assessment earlier. In those circumstances, it was held that only orders which could be the subject-matter of revision by the appellant were the orders made under section 12A of the Act and not the initial assessment orders.

11.4 Following the aforesaid judgment, yet another Division Bench of this court in the case of ITO & Anr. v. K.L. Srihari (HUF) (supra) held that, the effect of reopening an assessment is that the original assessment gets totally effaced. When there is a total effacement of the original assessment order, the interest levied thereunder would not survive.

11.5 The said judgment was challenged by the revenue before the Supreme Court. The Supreme Court in the aforesaid case : [2001]250ITR193(SC) has held in the facts of that case, they were satisfied that the assessment order made after reopening of the assessment under section 147 makes a fresh assessment of the entire income of the respondent-assessee. They affirmed the finding of the High Court to the effect that the earlier assessment order has been effaced by the subsequent order. But, they did not consider it necessary to go into the question whether interest is payable after fresh order of assessment of the entire income of assessee under section 147 as there was a difference in the views expressed by the Supreme Court on the said point. Therefore, it cannot be said that as a proposition of law the Supreme Court has affirmed the view expressed by the Division Bench of this court to the effect that on reopening of the assessment, the

original assessment gets totally effaced and interest cannot be levied under sections 139(8) and 217 of the Act.

12. In all the judgments relied on by the learned counsel for the applicant all that has been said is, the expression 'regular assessment' as defined by section 2(40) means assessment made under section 143 or section 144 in contradistinction to assessments under section 140A, a provisional assessment before its abolition in 1971 and an assessment/reassessment under section 147. The said regular assessment does not include the assessment done under the Act, whether under section 143/144 or completed after issue of notice under section 148. It is further held that, assessments under section 143/144 fall under a distinct category of assessments and the assessments made under section 147 are not covered by the expression 'regular assessment' as defined in section 2(40). Therefore, it was held, the interest under section 139(8) and section 217 cannot be levied in the case of an assessment or reassessment made under section 147. It is also held in the aforesaid judgments that, the effect of an assessment or reassessment under section 147 would be that the assessment made under section 143 or section 144 would stand effaced and for the purpose of limitation it is the order of assessment/reassessment under section 147 alone is to be taken into consideration.

13. However, in none of those judgments the question whether the interest levied or paid under sections 139(8) and 217 for non-disclosure of income was discussed. In the instant case, the Tribunal has rightly disallowed the interest levied under sections 139(8) and 217 insofar as the escaped income of Rs. 1,05,000 is concerned. It had rightly declined to set aside the interest levied under sections 139(8) and 217 insofar as regular assessment is concerned. Though for the purpose of limitation the order of assessment/reassessment made under section 147 would have the effect of effacing the order of regular assessment, in a given case if the original order of regular assessment is not set aside at all and in the course of assessment under section 147 only the additional income is added, it cannot be said that the interest levied under sections 139(8) and 217 which was accepted and paid by the assessee also stands effaced. In that view of the matter, we do not find any error committed by the Tribunal in passing the impugned order.

Therefore, both the questions referred for our consideration are answered in the affirmative in favour of the revenue and against the assessee.

14. In terms stated above, this reference is disposed of. However, no order as to costs is made.

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