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Court : Chennai

Decided On : May-03-1957

Reported in : [1957]32ITR411(Mad)

Appeal No. : Writ Petitions Nos. 943 to 945 of 1955

Appellant : S.

Respondent : Veerappan Chettiar and Another V. Commissioner of Income-tax, Madras, and Another.

Judgement :

RAJAGOPALAN, J. - The petitioners, Veerappan Chettiar and Angidi Chettiar, along with two others, Ramaswami and Sundaram, constituted a firm with the vilasam Messrs. S. V. Veerappa Chettiar and Co. The firm was registered under section 26A of the Income-tax Act for the assessment years 1947-48, 1948-49 and 1949-50. The partnership was dissolved with effect from 13th April, 1951, and notice of the impending dissolution was given to the Income-tax Officer on 10th April, 1951.

For the three assessment years mentioned above the assessee was the registered firm. The assessment for 1947-48 was completed on 22nd March, 1950, that for 1948-49 on 28th September, 1950, and that for 1949-50 on 17th

November, 1951. In the course of each of these assessment proceedings and before the assessment was completed, the Income-tax Officer issued notices to the assessee as required by section 28(3) of the Act, that it was proposed to take action to levy a penalty under section 28(1)(c). Those notices were dated 20th March, 1950, 27th September, 1950, and 15th November, 1951, respectively. The notices that related to 1947-48 and 1948-49 were thus issued before the dissolution of the firm, while that for 1949-50 was issued only after the partnership had been dissolved. Eventually, on 20th May, 1954, penalties were levied under section 28(1)(c) of the Act for each of the three assessment years. By that time the firm ceased to be in existence. Further Sundaram, who had been one of the partners, died on 5th March, 1953.

In the course of the proceedings under section 28 of the Act before the Income-tax Officer none of the quondam partners raised the issue whether the Income-tax officer had any jurisdiction to levy a penalty on the firm or on the partners of that firm after its dissolution. But that point was specifically taken by Veerappan Chettiar when he moved the Commissioner of Income-tax Under section 33A of the Act to set aside the orders of the Income-tax Officer. The Commissioner applied under article 226 of the Constitution for the issue of a writ of certiorari, with reference to each of the three assessment years, to set aside the orders of the Income-tax Officer confirmed in effect by the Commissioner of Income-tax. Since the questions which arise for consideration are identical in these three petitions, we shall dispose of them by a common judgment.

During the pendency of these petitions in this Court the first petitioner, Veerappan Chettiar, died. The second petitioner continued the proceedings.

The only ground on which the validity of the proceedings taken by the Income-tax Officer under section 28 of the Act was attacked was that after the dissolution of the firm, which was the assessee assessed to income-tax in the relevant assessment years, there was no statutory provisions for the levy of any penalty, either on the firm or on any of the persons that had been partners of the dissolved firm. It was urged that the orders of the Income-tax Officer dated 20th May, 1954, were beyond his jurisdiction to issue.

The relevant portion of section 28(1) run :

'If the Income-tax Officer,....., in the course of any proceedings under this Act, is satisfied that any person -.....

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income;

he..... may direct that such person shall pay by way of penalty,..... in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax..... which would have been avoided if the income as returned by such person had been accepted as the correct income.'

The 'person' who was liable to be penalised under section 28(1)(c) of the Act, and was in fact penalised by the Income-tax Officer in these cases, was the assessee who was charged with 'concealment of particulars of his income or deliberately furnishing inaccurate particulars of his income,' in the relevant assessment years. That assessee was the firm which had been registered under section 26A of the Act. That assessee ceased to have any existence in the eye of law when the partnership was dissolved on 13th April, 1951. That person, the assessee, was not in existence on 20th May, 1954, the date on which penalties were levied under section 28(1) of the Act. As we pointed out, it was on the assessee, the firm, that the Income-tax Officer levied the penalties.

The basic principle that was explained in Commissioner of Income-tax v. Sanichar Sah Bhim Sah by the Patna High Court and by this be levied under section 28(1) of the Act only on a person in existence on the date the penalty is imposed by the competent authority. In both these cases the assessee had been a Hindu undivided family, which however ceased to be in existence as a juristic entity on the date the penalties were levied under section 28(1) of the Act. In Raju Chettiar v. Collector of Madras, which was decided by us, we recorded at page 24 :

'Thus both the requirements have to be satisfied on the date proceedings are initiated under section 28 of the Act; the person, and if that person is a Hindu

undivided family that family must be in existence; that family must be also in existence on the date the order imposing the penalty on that family as a person is passed.'

The learned counsel for the Department relied on *Mareddi Krishna Reddi v. Income-tax Officer*, in support of his contention, that in cases where a firm - we are dealing with a firm registered under section 26A of the Act - had been the assessee, section 44 of the Act authorised the Income-tax Officer to levy a penalty under section 28(1)(c) even after the dissolution of that firm. That is the real question for determination. We are not concerned in this case with the question, whether after the dissolution of the registered firm, proceedings could be taken under section 28(1) against the individuals who had been partners of that firm. As we pointed out earlier, in this case it was the registered firm, the assessee in the relevant years, on which the Income-tax Officer purported to levy penalties. Did section 44 of the Act clothe the Income-tax Officer with jurisdiction to levy those penalties, is the question. To put it in a different form, does section 44 save these penalties from the operation of the basic principle we explained above, that section 28(1) authorised the levy of a penalty only on a person in existence. Section 44 run :

'Liability in case of a discontinued firm or association. - 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 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.'

Mareddi Krishna Reddi v. Income-tax Officer is directly in point. But with all respect to the learned Judges of the Andhra Pradesh High Court, we are unable to accept that decision as embodying the correct exposition of the scope of section 44 of the Act.

At page 681 of the report the learned Chief Justice pointed out that the scope of section 25A of the Act was different from that of section 44 of the Act and observe :

'Section 44 in an abbreviated form provides for the joint and several liability of the partners of a discontinued firm and for the assessment and payment of the tax. But this section adds the following words, which are not present in section 25A, all the provisions of Chapter IV shall, so far as may be, apply to any such assessment. Is section 28 a provision relating to any such assessment Section 28 is one of the sections in Chapter IV. It imposes a penalty for the concealment of income or the improper distribution of profits. The defaults made in furnishing a return of the total income, in complying with a notice under sub-section (4) of section 22 or sub-section (2) of section 23 and in concealing the particulars of income or deliberately furnishing inadequate particulars of such income are penalised, under that section. The defaults enumerated therein relate to the process of assessment. Section 28, therefore, is a provision enacted for facilitating the proper assessment of taxable income and can properly be said to apply to an assessment made under Chapter IV. We cannot say that there is a lacuna in section 44 such as that found in section 25A of the Act.'

If we may say so with respect to the learned Chief Justice, the levy of penalty under section 28(1) cannot be equated to assessment under Chapter IV within the meaning of section 44 of the Act. Nor is the penalty levied under section 28(1) a tax, for the payment of which section 44 imposes a joint and several liability on the erstwhile partners of the dissolved firm.

It is true that action under section 28(1) has to be initiated in the course of 'any proceedings under the Act.' The notices issued under section 28(3) in these cases were in the course of proceedings to assess the assessee, the registered firm, to income-tax for those years. That however did not make the proceedings under section 28 part of the proceedings to assess the assessee to income-tax under Chapter IV. The learned Chief Justice observed at page 68 :

'Section 28 therefore is a provision enacted for facilitating the proper assessment of the taxable income.'

With all respect to him we would venture to point out that the assessment to tax remained unaffected by the levy of penalty under section 28(1) of the Act. In our opinion it may not be correct to look upon section 28(1) as a provision for facilitating the assessment of the taxable income. Concealment of income may be discovered in the course of proceedings to assess a person to tax. If that is established, then proceedings are taken under section 28(1) of the Act. In *Sivagaminatha Moopnar and Sons v. Income-tax Officer*, we had occasion to point out :

'The penalty proceedings should be in the course of any proceedings under the Act. In the context, therefore, the proceedings referred to in section 28(1) are proceedings other than penalty proceedings, that is, assessment, re-assessment or refund proceedings.'

The proceedings under section 28(1) to penalise a person are, in our opinion, quite distinct from the proceedings to assess that person to tax. At pages 613-14 of the report in *Sivagaminatha Moopnar and sons v. Income-tax Officer* , we explained the desirability, which often almost amounts to a necessity, to defer the levy of penalty under section 28(1) till after the tax payable has been finally determined, even though section 28(1) of the Act requires initiation of the proceedings under that sub-section before the completion of the proceedings to assess the person to tax. But each set of proceedings is thereafter distinct from the other.

The distinction between the tax that is assessed and the penalty that could be imposed under section 28(1) of the Act is a well marked one, which is preserved by the several provisions of the Act. Section 29, which is an example, runs :

'Notice of demand. - When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable.'

In *Commissioner of Income-tax v. Sanichar Sah Bhim Sah* the learned Judge recorded at page 31 :

'It cannot be argued and it was not argued on behalf of the Income-tax Department that the expression tax in section 25A includes penalty also, for the legislature has made a sharp distinction between tax and penalty in enacting the various provisions of the Income-tax Act.'

In *Raju Chettiar v. Collector of Madras* , we stated at page 24 :

'Section 47 of the Act provides for recovery of the penalty imposed. But that postulates the existence of a valid order imposing the penalty. Section 28 is a complete code in itself, regulating the procedure for the imposition of the penalties prescribed. The provisions for the assessment and levy of the tax will not as such apply.'

What are the liabilities imposed by section 44 of the Act One is the liability to assessment under Chapter IV; the other is liability to pay the tax payable. 'Tax payable' obviously means tax lawfully payable under a lawful assessment. Whether the assessment and levy of the tax were before the dissolution of the firm or after the dissolution of the firm under the enabling provisions of section 44, the tax would be one lawfully payable; and the joint and several liability imposed by section 44 on the quondam partners of a dissolved partnership would come into play.

We have next to consider the scope of the statutory expression in section 44 'liable to assessment under Chapter IV'. In the context of section 44, where specific reference is also made to the tax payable as a result of the assessment, the assessment can, in our opinion, only mean assessment to income-tax for which Chapter IV provides. Neither in express terms nor by necessary intendment is section 44 made applicable to proceedings under section 28(1) which are obviously not proceedings to assess a person to tax. The levy of penalty is no doubt provided for under Chapter IV, but such levy is not assessment under Chapter IV within the meaning of section 44 of the Act. The provisions of Chapter IV are of course made applicable when the Income-tax Officer avails himself of the statutory provisions in section 44. But section 44 specifically provides that the provisions of Chapter IV will apply to 'such assessment'. 'Such assessment' in that context is obviously 'assessment under Chapter IV' referred to earlier in section

44, which when completed resulted as a 'tax payable'. That assessment is, therefore, obviously an assessment to tax. The expression 'such assessment' cannot include within it proceedings taken under section 28(1)(c) of the Act, initiated no doubt in the course of assessment proceedings but pursued and completed as proceedings otherwise independent of the assessment proceedings.

We are clearly of opinion, that section 44 did not authorise the Income-tax Officer to levy a penalty under section 28(1) on the assessee in this case, a 'person' who had ceased to be in existence on the relevant date, 20th May, 1954. There is as much a lacuna in section 44 as in section 25A of the Act. Neither provides for the imposition of any vicarious liability for penalty.

The rule nisi issued in each of these cases is made absolute. In each of these cases a writ of certiorari will issue to set aside the order of the Income-tax Officer dated 20th May, 1954, and the further order of the Commissioner thereon declining to revise the order of the Income-tax Officer. The second petitioner will be entitled to his costs in W.P. No. 943 of 1955. Counsels fee Rs. 250. There will be no order as to costs in W.P. Nos. 944 and 945 of 1955.

Rule made absolute.

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