

Vijay Mallya Vs. Assistant Commissioner of Income Tax

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Court : Kolkata

Decided On : Jul-03-2003

Reported _____ **in** _____ **:**
(2003)1CALLT530(HC),(2004)186CTR(Cal)697,[2004]266ITR329(Cal)

Judge : D.K. Seth and ;R.N. Sinha, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 6(1), 142, 142(1), 142(3), 143, 144, 154 and 246

Appeal No. : GA No. 819 of 2003 an APOT No. 148 of 2003 in Writ Petition No. 94 of 1996

Appellant : Vijay Mallya

Respondent : Assistant Commissioner of Income Tax

Advocate for Def. : P.K. Ghosh and ;Sudipta Bose, Adv.

Advocate for Pet/Ap. : Pranab Kumar Pal and ;Subrata Das, Adv.

Judgement :

D.K. Seth, J.

1. Mr. Pal appearing for the appellant in this case has taken two grounds. One is in relation to notice under Section 154 of the IT Act, 1961, being Annex. 'M' at p. 142.

Admittedly, the petitioner was in India for 172 days during the asst. yr. 1989-90 and he was assessed as non-resident in the year of assessment. This notice was issued on 8th of January, 1996, long after expiry of four years from the end of the assessment year. The notice under Section 154 was issued on the ground that the petitioner could not be assessed as non-resident for the ,asst. yr. 1989-90 by reason of the Expln. (b) under Section 6(1)(c) of the IT Act. Identical question arose in APOT No. 735 of 2002 (Vijay Mallya v. Asstt. CIT) disposed of by us on 12th May, 2003. In the said decision, we held that Section 154 could not be attracted in view of the uncertain situation as to which of the interpretation would be correct. It is not in dispute that facts are identical in both these cases. Having regard to the ratio decided and following the principle laid down in Vijaya Mallya (APOT. No. 735 of 2002) (supra), in this case, we hold that the impugned notice under Section 154 does not conform to the ingredients of Section 154 and, therefore, the same is illegal, invalid, bad in law and without jurisdiction.

2. The other ground taken by Mr. Pal is related to two more notices issued by the authorities under Section 142(1), one of which is dt. 30th Nov., 1995, at p. 133 of the paper book. This notice is accompanied by the letter dt. 30th Nov., 1995, at p. 134 of the paper book in respect of asst. yrs. 1992-93 and 1993-94. In the said letter, authority had held that 'you are treated as ordinary resident and your claim of residential status as resident but not ordinarily resident is hereby rejected'. When a notice is being given in course of assessment for production of document to prove the non-residential status, there is no scope of determining the question finally without giving any opportunity and then call upon the assessee to prove that he is a non-resident. This is preposterous.

In any event such a decision can be arrived at only in the assessment proceedings after giving opportunity to the assessee. The said observation in the notices amounted to prejudging the issue. Therefore, now we are required to examine whether the notice containing the decision arrived at about the status of the assessee can be sustained. Whether pursuant to the said notice, the assessee could be permitted to produce adequate proof to support its claim of non-residential status and seek reversal, of or a fresh decision in the assessment proceedings itself.

3. Another notice was issued on 8th Jan., 1996, in respect of the same asst. yrs. 1992-93 and 1993-94 accompanied by a letter of even date. The notice and the letter are at pp. 145 and 146 of the paper book. In the said notice, it was stated that the proceedings of each year are separate and independent and, therefore, the assessment for 1989-90 assessing the assessee non-resident would not preclude the AO to assess the assessee as resident. The authority had jurisdiction to assess the assessee as resident for the asst. yrs. 1992-93 and 1993-94.

4. There is no doubt about the fact that the assessing authority has jurisdiction to decide the question. The decision of non-residential status in a particular year does not preclude the AO to assess the assessee as resident in subsequent year or years. Each assessment is independent and has to conform to the provisions of law applicable to that year. Whether in law the assessee was to be assessed as resident or non-resident is a question to be determined in the assessment proceedings. There cannot be any question of making up of mind or issuing threats to the assessee. The assessing authority cannot prejudge the issue and that too without opportunity and unilaterally. The notice seems to be an example of putting the cart before the horse. This can be done in the process of the assessment after giving opportunity to the assessee in accordance with law. That apart, the letter dt. 8th Jan., 1996, at p. 146 cannot preclude the assessee from substantiating his claim in the assessment proceeding about the nonresident status and the assessing authority from determining the same in accordance with law without being influenced by the observation made in the said letter dt. 8th Jan., 1996, at p. 146.

5. Mr. Pal, learned counsel for the appellant, contends that there cannot be any piecemeal assessment. He relied on CIT v. Dhampui Sugar Mills Ltd. : [1988]170ITR449(All) , M.M.A.K. Mohideen Thumbay & Co. v. CIT : [1955]28ITR252(AP) and Debi Prasad Malviya v. CIT : [1952]22ITR539(All) in support of his contention. The decision in Dhampui Sugar Mills Ltd.'s case (supra) does not help Mr. Pal in the present context. Inasmuch as in the said decision, it was held that the Act does not provide for multiplicity of assessment orders for a given year against the same assessee and assessment once made can be modified and interfered with only in accordance with law and in the manner

provided under the Act. But it was so held in the context of the facts on which the said decision was rendered. In the said case, a reference was pending before the High Court in respect of an assessment. Pursuant to the direction given by the appellate authority against which the reference was pending before the High Court, a fresh assessment was made. This fresh assessment was held to be incompetent since order passed by the CIT was subject-matter of a decision by the Tribunal, setting aside the order of the CIT against which the reference was pending before the Tribunal. The decision in M.M.A.K. Mohideen Thumbby & Co. 's case (supra) also does not help us in the present context, though it was held that the Act does not contemplate piecemeal assessment and ordinarily it is expected from an ITO to complete. The assessment for a particular year once and for all. He cannot resort to method of piecemeal and compartmental assessment. In this case during the course of assessment and on scrutiny of accounts, the AO has discovered certain transactions, but ignored the same and completed the assessment on 17th of March, 1941. But, however, he requested ITO of another region to collect information with regard to the amount shown in the account. After obtaining information he came to the conclusion that income has escaped assessment and, therefore, initiated a proceeding under Section 34 of the. 1922 Act. In such a context, it was held that this information was within the knowledge of the AO, therefore, it could not be said that this information was not with him at the time of assessment. Therefore, he was proceeding to reassess under Section 34 on the basis of an information received by him during the course of assessment and not after the assessment since the information received after 17th March, 1941, was not a discovery within the meaning of Section 34 of the 1922 Act. In this context, the reassessment was held to be an assessment in piecemeal or compartmentalized assessment. The decision in Debi Prasad Malviya's case (supra) also does not help us. In the said decision, it was held that Section 23 of the 1922 Act contemplated making of a complete assessment on the basis of the total income of the assessee, it was not to make assessment in piecemeal. It was not open to the AO to assess one part of the income and to assess the rest of the income on a later date even relying upon Section 34 of the 1922 Act for re-opening of the assessment.

6. The facts of the present case are completely different. In this case, it was not assessment in piecemeal. In this case, a notice under Section 142(1) was issued before assessment requiring furnishing of information. The AO had resorted to an enquiry, which he is entitled to do before the assessment. Therefore, it is not an assessment of a part of the income. In that way it is not an assessment in piecemeal or a compartmentalized assessment. On the other hand, it is an enquiry before assessment. It is an enquiry as to on which basis the computation of income is to be made. It is the basic foundation for making the assessment.

7. In order to examine this question in the light of the contention raised by Mr. Pal, we may examine the assessment process provided in the 1961 Act as applicable to the relevant assessment year. Chapter XIV of the 1961 Act deals with the procedure of assessment. Section 139 requires filing of return of income. After such return of income is filed, the same is to be dealt with in the Act provided in Section 139 in its various sub-sections. We may not go into the details thereof. Section 142 empowers the AO to make enquiry before assessment and to require the assessee to furnish informations on such points or matters as the AO may require. After such enquiry before assessment, assessment is made under Section 143.

8. Therefore, there is no infirmity in the notice requiring the assessee to furnish the information called upon through the said notice. Such requirement of information, is essential for the purpose of the assessment. In this case, it was in order to establish the status of the assessee, the information was so required. The information of the status is a basis on which the income is to be computed for the purpose of assessment. But the determination of the status in the notice itself simultaneously requiring information cannot go together. The determination of the status can be made only after the informations are furnished and the same are considered after giving opportunity to the assessee. Once these informations are furnished, the same are to be considered. It is incumbent on the AO to give opportunity to the assessee before determining the question of status on the basis of the information gathered or furnished. In this case, there was a determination in the notice itself while requiring the information. Therefore, before the assessee could furnish the information, a determination was arrived at. Thus, the

determination cannot be said to have been made on the basis of the information yet to be furnished pursuant to the said notice. It must have been determined on the basis of information that might have been gathered before the notice under Section 142(1) was issued. Thus the situation seems to hit the provision of Section 142(3). Therefore, in substance, this ought to be a notice under Section 142(2). Section 142(3) requires giving of an opportunity before determining any question on the basis of the information gathered, since this was not an assessment under Section 144. Therefore, the finding with regard to the status along with the issuance of the notice is in conflict with Section 142(3). Section 142(3) gives statutory recognition to a well-established principle of natural justice, which was being observed during the currency of the 1922 Act, even though that Act did not contain any express provision in that behalf. This principle was so recognized and formed the foundation for the decision by the Supreme Court in *Dhakeswari Cotton Mills Ltd. v. CIT* (1954) 26 ITR 775 and that of the Kerala High Court in *Swamy Bros. v. CIT* : [1958]34ITR123(Ker) . In *Joseph Thomas & Bros. v. CIT* : [1968]68ITR796(Ker) and *Poliseti Subbaraidu & Co. v. CIT* : [1968]69ITR738(AP) , it was held that absence of opportunity provided under Section 142(3) on the basis of the information furnished by an assessee vitiates the order. Same view was taken by Gauhati High Court in *Assam Forest Products (P) Ltd. v. CIT*, and Rajasthan High Court in *Vimal Chandra Golecha v. ITO and Ors.*, and Kerala High Court in *Malayil Bankers v. Asstt. CIT & Am.*, (1999) 104 Taxman 161 (Ker). Sections 143(2) and (3) also envisage some enquiry or scrutiny.

9. The word 'assessment' takes the colour from the context. It has to be understood in each section with reference to the context in which it has been used--*A.N. Lakshman Shenoy v. ITO* : [1958]34ITR275(SC) . The nomenclature does not prevent from being an assessment provision in a proper context, in the context of a penalty imposed as a part of the machinery of assessment of tax liability--*C.A. Abraham v. ITO and Anr.* : [1961]41ITR425(SC) . The correct connotation of the expression 'assessment' in a given provision must be determined on an examination of the said provision and the fact that the expression has been elsewhere used in a wider connotation will not mean that it is so used in a particular provision under examination. The expression 'assessment' has been interpreted to be capable of having reference to a liability to tax and

includes a reference also to the liability to pay penalty--C.A. Abraham's case (supra) and CIT v. Bhikaji Dadabhai & Co. : [1961]42ITR123(SC) . Sometimes the word 'assessment' is used in a number of provisions in a comprehensive sense and it can comprehend the whole procedure of ascertaining and imposing liability upon the taxpayer and the machinery for enforcement thereof--C.A. Abraham's case (supra); Bhikaji Dababhai & Co.'s case (supra); Kalawati Devi Harlalka v. CIT and Ors. : [1967]66ITR680(SC) , S. Sankappa v. ITO : [1968]68ITR760(SC) and STO v. Sudarsanam Iyengar & Sons : [1970]1SCR859 . Therefore, the requirement of information was a necessity in course of assessment in which the assessee is entitled to an opportunity.

10. But such opportunity given must be reasonable. It is implicit in terms of Section 143(2) that the assessee should be given reasonable time and opportunity to produce the information and to provide evidence in support of his return. Denial of such opportunity would vitiate the order--Munnalal Murlidhar v. CIT : [1971]79ITR540(All) and Addl. CIT v. Radhey Shyam Jagdish Prasad : [1979]117ITR186(All) . Section 154 does not imply only the requirement of a notice for compliance by the assessee or merely to calculate and produce information, but also to support and supplement the claim of the assessee--Sadaram Puranchand, In re (1931) 5 ITC 459 (Cal) .

11. Thus, the AO is free to determine the question of status in course of the assessment, but he could not do so in the manner he had purported to do. Only after giving an opportunity of hearing to the assessee, he can determine the same in accordance with law. Instead of deciding the same question differently, he can do it in the order of assessment itself and ordinarily this determination with regard to the status should form part of the order of assessment. Such determination is definitely a part of assessment and 'as such in this case, it would also be a determination, though not one part of the income, but determination of a part of the assessment. Inasmuch as Section 246 provides for appeal in respect of an assessment made under Section 143. Therefore, a decision, which is part of the assessment unless complete with the assessment under Section 143(3) would not be appealable and if decided separately that will give rise to a cause of action, which the assessee may not be waiting to challenge till the assessment is made.

When an order under Section 143 is appealable, a part of the order that forms basis of the assessment for computing the income is an integral part of the assessment in respect of which an assessee would be entitled to prefer an appeal. If this determination is part of the order under Section 143 in a completed assessment order, then this decision is definitely appealable along with the order of computation of income for assessment. This determination cannot be segregated from the process of assessment and be determined separately in a compartmentalized process, leaving the assessee without any remedy, entitling him to seek relief through writ proceedings. Therefore, it is desirable that such determination should be included in the order of assessment and be made along with the assessment without making it separately and such determination should form part of order of assessment itself so that the same can be examined and scrutinized in the appeal provided under Section 246 of the 1961 Act. Therefore, though not directly supported by the decisions cited by Mr. Pal, yet the principle can be borrowed even for the purpose of a case in the present context.

12. In the circumstances, the second ground taken by Mr. Pal is accepted with the modification that the said notice will not prevent the assessee from supporting his claim of non-residential status in the assessment itself and at the same time, the AO shall be free to decide the said question in accordance with law after giving opportunity to the assessee in the assessment proceedings and conclude the said question in the assessment itself. The determination of status contained in the impugned notices dt. 30th Nov., 1995 (p. 133 paper book) and 8th Jan., 1996 (p. 145 paper book) cannot, therefore, be sustained. Accordingly, only those parts of the two notices aforesaid hereby stand quashed. The rest of the notices be proceeded with. The order dt. 26th Sept., 2002, passed in Writ Petition No. 94 of 1996 shall stand modified in respect of the second ground relating to asst. yrs. 1992-93 and 1993-94 taken by Mr. Pal to the extent indicated above.

13. In the result, the appeal in respect of the asst. yr. 1989-90 succeeds and the order dt. 26th Sept., 2002, passed in Writ Petition No. 94 of 1996 in relation thereto is hereby set aside and the impugned notice dt. 8th Jan., 1996, contained in Annex. 'M' at p. 142 of the paper book is hereby quashed. Let a writ of certiorari do issue accordingly. The appeal in respect of asst. yrs. 1992-93 and 1993-94

succeeds in part as indicated in para 12 above subject to paras 14 and 15 hereafter. Let a writ of certiorari do issue accordingly.

14. This order will not prevent the AO from proceeding pursuant to the notice and the information furnished or may be furnished and deciding the question of status of the assessee in respect of the assessment years involved in accordance with law after giving opportunity to the assessee in course of the assessment and make the said finding a part of the assessment order.

15. Question was raised by the respondent as to the maintainability of one writ petition and one appeal with regard to the cause of action for different assessment years. Mr. Pal submits that he had put in the requisite Court fees for the writ petition as well as the appeal treating the cause of action separately for each assessment year. The Registrar, Original Side, shall examine the said question and if it is found that there is any deficit, the same may be notified and demanded from the appellant within a fortnight hereof and the appellant shall put in the same before obtaining certified copy of the order but not later than a fortnight after being notified. In case court fee amount is paid, in that event, certified copy of the order may be given. In default of payment of deficit court fee, if any, within 4 (four) weeks from date, this order shall stand recalled and the writ petition and the appeal shall stand dismissed in respect of the asst. yrs. 1992-93 and 1993-94.

16. This appeal is, thus, disposed of.