
Sushil Thomas Abraham Vs Assistant Commissioner of Income Tax and Another

Writ Petition No. 28277 of 2004

Court: High Court Of Kerala

Date of Decision: July 23, 2008

Acts Referred:

Constitution of India, 1950 – Article 227#Income Tax Act, 1961 – Section 140A, 143(1), 143(3), 234A, 234B

Citation: (2009) 221 CTR 182 : (2008) 4 ILR (Ker) 233 : (2009) 308 ITR 346

Hon'ble Judges: C.N. Ramachandran Nair, J

Bench: Single Bench

Advocate: Dale P. Kurien, for the Appellant; George K. George, for the Respondent

Judgement

C.N. Ramachandran Nair, J.

The petitioner, an assessee under the IT Act filed Ext. P3 return for the asst. yr. 1996-97. Even though

petitioner declared a business profit of Rs. 6,08,680 and tax liability of Rs. 1,57,969, the petitioner did not remit the admitted tax before filing of

the IT return as required u/s 140A of the IT Act, 1961. On processing Ext. P3 return, the AO noticed that the calculation of tax on the returned

income is incorrect and petitioner was liable to pay interest under Sections 234A, 234B and 234C of the Act. He accordingly sent intimation u/s

143(1)(a) of the Act vide Ext. P1 demanding payment of Rs. 2,81,473. After sending intimation vide Ext. P1 dt. 24th March, 1997, the AO took

up assessment u/s 143(3) which led to an additional demand of Rs. 10,61,252 vide Ext. P2 besides the demand under Ext. P1, When petitioner

filed appeal against regular assessment completed u/s 143(3) before the CIT(A), the CIT(A) noticed that appeal was not maintainable without

payment of admitted tax as required u/s 249(4)(a) of the Act. Since the assessee did not pay admitted tax, the CIT(A) rejected the appeal vide

Ext. P4. Against this order, petitioner filed second appeal before the Tribunal, which vide Ext. P5 remanded the case back to the AO for redoing

regular assessment u/s 143(3) of the Act.

2. However, the AO insisted on payment of admitted tax before revision of assessment in terms of Tribunal's order. In between, the TRO initiated

recovery proceedings vide Ext. P6. The petitioner's case is that Ext. P1 intimation u/s 143(1)(a) and the AO's refusal to revise the assessment

pursuant to order issued by the Tribunal are illegal and arbitrary and liable to be interfered by this Court. When the writ petition came up for

admission before this Court, this Court felt that Ext. P5 order of the Tribunal is without jurisdiction because once the first appeal was rejected as

one not maintainable on account of non-payment of admitted tax in terms of Section 249(4)(a) of the Act, appeal against such order of the CIT(A)

is not maintainable before the Tribunal and appeal provided against CIT(A)'s order is only against order on merits passed u/s 250 of the Act. This

Court through an interim order dt. 28th Sept., 2004 directed the assessee to show cause why Tribunal's order vide Ext. P5 should not be vacated

by this Court in exercise of powers conferred under Article 227 of the Constitution of India.

3. The petitioner has filed an affidavit supporting maintainability of the "Tribunal's order. I have gone through the writ petition, documents annexed

thereto and the affidavit filed by the petitioner pursuant to interim order dt. 28th Sept., 2004 and heard standing Counsel appearing for the

respondents.

4. Challenge against Ext. P1 is not maintainable because it is only an intimation issued u/s 143(1)(a) of the Act determining tax liability and interest

payable based on income returned by the petitioner vide Ext. P3 return furnished by him. It is clear from Ext. P3 that the tax calculated by the

petitioner on the income returned was incorrect. Moreover, petitioner has admitted that he has not paid any self-assessed tax before filing the

return which is the requirement of Section 140A of the Act.

5. In fact the credit of tax claimed by the petitioner in the return filed is TDS amounting to Rs. 6,688. The petitioner himself has computed interest

liability under Sections 234A, 234B and 234C at Rs. 35,607. However, even after conceding a tax liability of Rs. 1,57,969 and interest liability of

Rs. 35,607, petitioner has not paid any amount before or at the time of filing of the return. The AO has only determined the tax payable on the

Income declared by the petitioner in Ext. P1 intimation sent u/s 143(1)(a) of the IT Act. Even though regular assessment u/s 143(3) was later taken

up and completed vide Ext. P2, petitioner's case that Ext. P1 merges with Ext. P2 is not legally or factually true. In the first place, the additional

tax demanded under Ext. P2 is over and above the tax due under Ext. P1 which is seen set off in the final demand shown in Ext. P2. Both

intimation u/s 143(1)(a) and regular assessment u/s 143(3) are different proceedings, even though challenge against regular assessment may lead to

redressal of grievance against intimation issued u/s 143(1)(a) also. The petitioner has no case that the AO has committed any mistake in Ext. P1

and if so, he would have filed at least an application for rectification of such mistake. The petitioner also did not file objection against Ext. P1

probably because there is nothing adverse against him in Ext. P1 as there is no adjustment towards disallowance besides demanding of tax and

interest on the actual income returned by the petitioner. Therefore, I reject the challenge against Ext. P1 proceedings issued u/s 143(1)(a) of the

Act.

6. The next question to be considered is whether Ext. P5 order of the Tribunal interfering with Ext. P4 order of the CIT(A) rejecting the appeal as

one not maintainable for non-payment of admitted tax u/s 249(4)(a) of the Act is maintainable or not. Section 249(4) of the Act is as follows:

No appeal under this chapter shall be admitted unless at the time of filing of the appeal,

(a) where a return has been filed by the assessee, the assessee has paid the tax due on the income returned by him; or

(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by

him.

7. It is clear from the above that in a case where assessee has filed return, appeal against assessment is maintainable only if assessee has paid the

tax due on the income returned at least at the time of filing the appeal. In fact return itself has to be filed after remittance of tax due on the income

returned in terms of Section 140A of the Act. Assessee gets another chance to remit the admitted tax, if the assessee is desirous of filing an appeal

against assessment. However, the appellate authority has no authority to entertain appeal unless at least at the time of filing the appeal, the assessee

has paid tax due on the income returned by him. The proceeding u/s 249(4)(a) is in the nature of a scrutiny of appeal and if on such scrutiny the

appellate authority finds that tax due on the income admitted in the return is not paid at the time of filing the appeal, he has no jurisdiction to

entertain the appeal and such appeal has to be rejected in limine as one not maintainable. The CIT(A) is authorised to dispose of the appeal on

merits u/s 250 of the Act only if it is one found maintainable among other things, in regard to satisfaction of Section 249(4)(a) of the Act i.e.

payment of tax on admitted income. In this case it is clear from Ext. P4 that appeal was not entertained and the same was dismissed by the CIT(A)

on the ground that it is not maintainable for non-payment of tax on income admitted in the return.

8. The next question to be considered is whether Tribunal was justified in entertaining appeal u/s 253 against Ext. P4 order of the CIT(A). The

orders against which appeals are maintainable before the Tribunal u/s 253 include an order passed u/s 250 of the Act which is an order in appeal

passed by the CIT(A) on merits after entertaining the appeal. However, no appeal is provided against order of the CIT(A) declining to entertain

appeal as defective or one not maintainable on account of nonpayment of tax admitted in the return filed by the assessee.

9. In fact, it is seen that the Tribunal has considered the objection raised by the CIT(A), but without even finding that the petitioner has paid the

admitted tax, the Tribunal has chosen to interfere with the order of the CIT(A). I am of the view that appeal itself was not maintainable against Ext.

P4 order of the CIT(A) rejecting the appeal against assessment as one not maintainable for non-payment of admitted tax. Even if appeal is to be

entertained by the Tribunal, the scope of appeal is limited to the question whether the assessee has paid the admitted tax and if the Tribunal is

satisfied that the tax due on the income admitted in the return is paid by the assessee in compliance with Section 249(4)(a) of the Act, the Tribunal

can probably interfere with the order and direct the CIT(A) to entertain the appeal and decide the matter on merits.

10. However, the Tribunal has no authority to consider the merits of assessment in an appeal filed against order of the CIT(A) declining to entertain

appeal filed against assessment. I am unable to accept the contentions raised by the assessee in the affidavit filed in support of the Tribunal's order.

I, therefore, hold that Ext. P5 order is beyond the jurisdiction of the Tribunal and the same is vacated in exercise of powers conferred on this Court

under Article 227 of the Constitution of India. However, I give opportunity to the petitioner to pay the admitted tax and interest thereon within six

weeks from now and if payment is made, there will be direction to the CIT(A) to entertain the appeal and decide the case on merits. If assessee

does not comply with the above direction, it will be open to the Department to proceed for recovery treating Exts. P1 and P4 orders have become

final.

11. The writ petition is disposed of as above.