(1989) 03 KL CK 0056

High Court Of Kerala

Case No: Income-tax Reference No. 98 of 1983

Joseph Kuruvila		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: March 16, 1989

Acts Referred:

- Income Tax Act, 1961 - Section 144B, 144B(1)

Citation: (1989) 77 CTR 192 : (1989) 179 ITR 139

Hon'ble Judges: K.S. Paripoornan, J; K.A. Nayar, J

Bench: Division Bench

Advocate: P. Radhakrishnan, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

K.S. Paripoornan, J.
At the instance of the assessee, the Income Tax Appellate Tribunal (for short "the Tribunal") has referred the following two questions of law for the decision of this court:

"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in confirming the order of the Commissioner of Income Tax (Appeals) setting aside the assessment and directing the Income Tax Officer to make a fresh assessment ?

(2) Whether the Tribunal having found that the Income Tax Officer did not comply with the procedure prescribed u/s 144B was right in merely setting aside the assessment and in not annulling the same ?"

2. The applicant is an assessee to Income Tax, We are concerned with the assessment year 1975-76. He filed the return on November 6, 1975, showing nil income. The Income Tax Officer completed the assessment on March 18, 1980, on a total income of Rs. 1,83,450. The income comprised entirely of capital gains. In the appeal before the Commissioner of Income Tax (Appeals), the assessee took up the plea that the variation in the returned income (which was nil) and the assessed income, Rs. 1,83,450, was more

than Rs. 1,00,000, and, therefore, the Income Tax Officer was obliged to follow the procedure laid down by Section 144B of the Income Tax Act. He should have issued a draft assessment order to the assessee and after receiving the objections of the assessee, if any, he should have referred the matter to the Inspecting Assistant Commissioner for getting direction for completion of the assessment. This plea was accepted by the Commissioner of Income Tax (Appeals). He held that Section 144B(1) applies to the instant case. It was found that the said provision was not complied with. He, therefore, set aside the assessment and directed the Income Tax Officer to complete the assessment along the lines indicated by him in his order.

3. The assessee filed a second appeal before the Income Tax Appellate Tribunal. It was contended that the Commissioner of Income Tax was in error in setting aside the assessment order and ordering a remit. It was argued that the assessment made, ignoring Section 144B(1) of the Income Tax Act, 1961, was void and so the assessment order should have been nullified and a remit should not have been ordered. The Appellate Tribunal held that Section 144B of the Act is only a procedural provision and the Commissioner of Income Tax was justified in setting aside the assessment order for the irregularity noticed by him and in ordering a remit. Aggrieved by the said order passed by the Appellate Tribunal, dated November 6, 1982, the petitioner filed an application u/s 256(1) of the Income Tax Act to refer the questions of law, formulated hereinabove, for the decision of this court. Accordingly, the Tribunal has referred the above questions for our decision.

4. We heard counsel for the applicant-assessee, as also counsel for the Revenue. It was argued that Section 144B is a substantive provision and failure to effect an assessment in accordance therewith renders the assessment order a nullity. The Commissioner of Income Tax should have held so and nullified the assessment order. The remit ordered by the appellate authorities was unjustified and unauthorised. We see no force in this plea. We are of the view that Section 144B of the Income Tax Act is only a procedural provision and an order of assessment effected in breach thereof will not render the assessment void or a nullity. The irregularity committed by the Income Tax Officer in not conforming to Section 144B of the Act can certainly be a ground for the appellate authority to set aside the assessment and to order the remit. The Commissioner of Income Tax and also the Appellate Tribunal were justified in doing so. We are not inclined to accept the plea of the assessee that the failure to conform to Section 144B of the Income Tax Act is a fundamental infirmity or a juris-dictional infirmity, rendering the assessment order void or a nullity. Failure to conform to Section 144B is only an irregularity. It is only a procedural provision. When the irregularity was noticed, the appellate authority was justified in setting aside the assessment and directing the ITO to effect a fresh assessment in accordance with law. We see no error in the order of remit ordered by the Commissioner of Income Tax and upheld by the Appellate Tribunal. We are fortified in this view by the following decisions : H.H. Maharaja Raja Pawer Dewas Vs. Commissioner of Income Tax, , Kimtee Vs. Commissioner of Income Tax, , G.R. Steel

and Alloys Pvt. Ltd. Vs. Commissioner of Income Tax, and K. Ashok Kumar and Others Vs. Commissioner of Income Tax,

5. In the light of the above, our answer to question No. (1) referred to us is in the affirmative, against the assessee and in favour of the Revenue. Our answer to question No. (2) is also in the affirmative, against the assessee and in favour of the Revenue.

6. A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.