Moidu Vs Income Tax Officer

Court: High Court Of Kerala

Date of Decision: Aug. 20, 1964

Acts Referred: Income Tax Act, 1961 â€" Section 139, 143(3), 147, 148, 148

Citation: (1965) KLJ 262

Hon'ble Judges: K.K. Mathew, J

Bench: Single Bench

Advocate: P.K. Kurien, K.A. Nair and K. Sukumaran, for the Appellant; C.T. Peter, for the Respondent

Final Decision: Allowed

Judgement

K.K. Mathew, J.
The question arising for consideration in this writ petition is whether the order passed by the income tax Officer,

Cannanore directing refund of an amount by the petitioner was passed without jurisdiction. For the assessment year 1956-57, the petitioner was

assessed under the income tax Act, 1922, by the income tax Officer, Cannanore, and as per the said order his total, income was determined at Rs.

4,619/-. This total income included the dividend income from the shares held by the petitioner. The said income was grossed up and added to the

total income and credit given for the tax on the dividend. Accordingly a refund of Rs. 837.37 was granted to the petitioner in the order of

assessment. Thereafter the respondent issued a notice u/s 148 of the income tax Act, 1961, calling upon the petitioner to deliver to him within 30

days of the receipt of the notice a return of the income of the petitioner. In that notice it was stated that the respondent had reason to believe that

there was an escapement of income chargeable to tax for the assessment year 1956-57. Pursuant to the notice the respondent passed an order

purporting to be one u/s 143(3) read with Section 147 of the income tax Act, 1961, stating that the income assessed in the hands of the petitioner

actually belong to A.K. Tarwad as the investments made in the name of the petitioner were out of the funds of the said tarwad. The respondent

therefore found that the income was not liable to be assessed in the petitioner"s hands, and excluded the dividend income and held that the

petitioner had no total income. Based on this finding he directed the petitioner to pay back the amount of Rs. 837.37 being the refund given in the

original order of assessment, within the time specified in the order. A copy of that order is Ext. P.2. The main submission made by counsel for the

petitioner was that u/s 147 of the income tax Act, 1961, the respondent can reopen a completed assessment only if he has reason to believe that

by reason of omission or failure on the part of the assessee to make a return for any assessment year or to disclose fully or truly all the material

facts necessary for his assessment for that year, the income chargeable to tax has escaped assessment for the year or notwithstanding that there has

been no omission or failure as mentioned above on the part of the assessee, he has in consequence of the information in his possession, reason to

believe that the income chargeable to tax has escaped assessment for any assessment year. The petitioner''s counsel submitted that none of the

ingredients which would confer jurisdiction on the respondent to invoke Section 147 was present in the case and therefore Ext. P.1 notice and Ext.

P.2 order were invalid. Counsel also submitted that there was no underassessment or an assessment at too low a rate or that the income

chargeable to tax has been made the subject of excessive relief in order to attract the provisions of Section 147. The only ground on which the

order was sought to be justified by counsel for the Department was that the income chargeable to tax has been subjected to excessive relief, and

therefore the income tax Officer was justified in issuing the notice and making the assessment. Section 147 is as follows:

Income escaping assessment:- if-

(a) the income tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for

any assessment year to the income tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income

chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the income tax Officer has in

consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he

may, subject to the provisions of sections 148 to 153 assess or reassess such income or recompute the loss or the depreciation allowance, as the

case may be, for the assessment year concerned (Hereinafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped

assessment, namely:--

(a) where income chargeable to tax has been under assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian income tax Act, 1922 (II of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--Production before the income tax Officer of account books or other evidence from which material evidence could with due

diligence have been discovered by the income tax Officer will not necessarily amount to disclosure within the meaning of this section.

Counsel for the Department attempted to argue that the present case would be taken in by the clause relating to excessive relief. In order that that

clause might apply it is necessary to prove that the income chargeable to tax has been made the subject of excessive relief. The finding of the

income tax Officer is that the petitioner had no income, and that the dividend income really belonged to A.K. Tarwad as the petitioner had no

interest in the shares from which the dividend income was derived. If that be so it cannot be said that any income had been subjected to excessive

relief. Petitioner''s counsel placed before me the ruling of the Supreme Court in P. S. Subramanyan v Simplex-Mills Ltd., (1963 48 ITR (S.C)

182) for the proposition that unless the income has been subjected to excessive relief there can be no question of reopening the assessment u/s 34

of the income tax Act, 1922, corresponding to Section 147 of the new Act. In that case in the original assessment of the assessee for the

assessment year 1952-53, a part of the tax paid by it in advance for that year was found refundable. The income tax Officer allowed interest u/s

18A(5) of the income tax Act, 1922, on the amount of the advance tax paid by the assessee in accordance with the law as it then stood. After the

amendment of section 18A(5) by the income tax (Amendment) Act, 1953, with retrospective effect, the income tax Officer found that the interest

allowed was excessive. He sought to recover by reassessment proceedings u/s 34(1) (b) the excess of the interest so allowed on the ground that

income for that year had been under-assessed or on the ground that it had been made the subject of excessive relief. It was held that the original

assessment could not be reopened u/s 34 because it could not be said either that there was under-assessment of the income or that excessive relief

was granted. In the course of the judgment, Sirkar J., observed:

It is a case where tax had been paid in advance and upon subsequent regular assessment for the period for which the tax had been paid it was

found that what had been paid was in excess of what was actually due. This is really a case of over assessment though only provisional and not of

under-assessment at all. The payment of interest was in no sense a relief granted in computing income; it has paid at the rate calculated according

to the law then in force. No doubt in view of the subsequent amendment of the law and in view of this amended provision being given retrospective

operation covering the date when the original assessment had been made, if the interest has to be computed according to the amended law then a

smaller sum might have been payable as interest. But when it was computed the new law was not in fact there, and, therefore, the computation had

been according to the law then in force. That computation cannot be reopened u/s 34 because it cannot be said that it is a case either if under-

assessment or of excessive relief having been granted. It is really a case where the statutory liability of the State to pay interest was reduced from a

higher figure to a lower one. Therefore, quite clearly it was not a cess within section 34.

2. I think the principle of this ruling must apply to the facts of this case. The argument that the petitioner has an alternative remedy is not entitled to

much weight, as on the facts admitted, the income tax Officer has no jurisdiction to proceed u/s 147. I therefore hold that Ext. P.2 order was

passed without jurisdiction I quash Exts. P.1 and P.2. The writ petition is allowed. No costs.