

(2002) 11 MAD CK 0149

Madras High Court

Case No: Writ Petition No 13436 of 1999 and Writ Miscellaneous Petition No. 19277 of 1999 26 November 2002

M. Kaliannan

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: Nov. 26, 2002

Citation: (2003) 127 TAXMAN 258

Hon'ble Judges: E. Padmanabhan, J

Bench: Division Bench

Advocate: R. Janakiraman, for the Assessee Naresh Kumar, for the Revenue, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

The petitioner prays for the issue of a writ of certiorarified mandamus calling for the records of the respondent in C. No. 536/KVSS/98-99/IT/CBE dated 12-5-1999 modifying the certificate in Form No. 2A dated 22-2-1999, quash the same and further direct the respondent to pass fresh orders after giving opportunity to the petitioner considering the letter dated 18-3-1998.

2. Heard Mr. R. Janakiraman, learned counsel appearing for the petitioner and Mr. Naresh Kumar, learned Standing counsel appearing for the respondent. With the consent of counsel for either side the writ petition itself is taken up for final disposal.

3. The petitioner is an assessee on the file of the Income Tax Officer, Ward I(10), Salem-7. For the assessment year 1992-93 the assessment was completed u/s 143(3) read with section 147 on 26-3-1998 on a total income Rs. 2,41,170 as against the returned income of Rs. 47,270. The assessing authority added Rs. 1,93,000 under four heads namely (1) Rs. 68,900 being the difference in cost of construction of the residential building; (ii) Rs. 50,000 being the repayment of loan to HUF not accounted; (iii) Rs. 60,000 being the loan to HUF not shown in the balance sheet; and (iv) Rs. 15,000 being the additions towards low drawings.

4. Being aggrieved by the assessment proceedings the petitioner preferred an appeal before the Commissioner (Appeals). The appellate authority by proceedings dated 13-11-1998 allowed the appeal in part by setting aside the order in respect of items (ii) and (iii) and remitted the matter back to the assessing authority for de novo consideration, The appellate authority also sustained the plea advanced in respect of item No. (iv).

5. The assessing authority while giving effect to the order of the appellate authority reduced the income only to the extent of amount which is shown as item No. (iv) and did not consider the other items namely (ii) and (iii). Once again the petitioner preferred an appeal before the Commissioner (Appeals) and it is said to be pending. Such assessment order came to be passed after the material date.

6. For the assessment years 1993-94 and 1994-95 the Income Tax Officer by proceedings dated 26-3-1998 determined the total income at Rs. 88,580 and Rs. 1,20,020 respectively as against the returned income of Rs. 60,680 and Rs. 77,750 respectively. Being aggrieved, the petitioner preferred an appeal before the Commissioner (Appeals), Coimbatore.

7. During the pendency of the appeal, Kar Vivad Samadhan Scheme (KVSS) was announced. For the three assessment years 1992-93, 1993-94 and 1994-95, the petitioner filed a declaration in Form No. 1A on 31-12-1998 under the KVSS before the respondent herein.

8. The respondent who is the designated authority on 22-2-1999 issued a certificate in Form No. 2A under rule 4(a) under KVSS Rules and demanded tax of Rs. 62,844 for 1992-93 and Rs. 14,103 for 1993-94 and Rs. 31,987 for 1994-95. It is contended that the respondent has acted arbitrarily in fixing the tax arrears. The respondent should have taken into consideration only the tax arrears mentioned in Form No. 1A and without assigning any reason or opportunity the respondent fixed the arrears of tax at Rs. 1, 14,223, Rs. 18,032 and Rs. 33,609 respectively for the said three assessment years.

9. The petitioner addressed the respondent on 18-3-1999 while submitting a detailed working sheet and requested the respondent to rectify the demand raised in Form No. 2A, besides requested the respondent to furnish a working sheet of the amounts demanded in Form No. 2A. The respondent revised the demand by proceedings dated 12-5-1999 at Rs. 53,845 for 1992-93, Rs. 7,926 for 1993-94 and Rs. 13,909 for 1994-95. On 4-6-1999 the petitioner paid tax for the said three assessment years as per the declaration in Form No. 1. The petitioner contended that he is not liable to pay the additional demand for which no details have been disclosed to by the respondent. Despite the said representation, the respondent by communication dated 27-7-1999 directed payment of Rs. 75,680 while threatening to forfeit the benefit under KVSS. Challenging the said demand, the present writ petition has been filed.

10. The respondent has not filed a counter, but produced the file and the standing counsel made his submissions. In fact no counter is required as there is no factual dispute about the proceedings and the contention advanced being legal contentions.

11. It is contended by Mr. R. Janakiraman, learned counsel appearing for the petitioner that the respondent should have afforded an opportunity to the petitioner and such opportunity should be an effective opportunity of hearing and without affording the opportunity orders have been passed fixing the liability of the petitioner, without reference to the declaration made and such an action is arbitrary. It is further contended that when the appeal is allowed in respect of two of the items and remitted back to the original authority in respect of the said items, there cannot be a demand by the respondent, nor the petitioner could be compelled to pay since in respect of the said two items in dispute the matter has been remanded back to the original authority or passing fresh orders, and therefore the said two items ought not to have been taken into consideration while issuing a certificate in Form No. 2A. It is further contended that the action of the respondent is arbitrary and vitiated by error apparent on the face of the record as well as contrary to the very provisions of KVSS.

12. Per contra, Mr. Naresh Kumar learned standing counsel appearing for the respondents contended that no interference is called for since under the KVSS the respondent is well justified in fixing the tax payable by the petitioner and issuing the demand or certificate under Form No. 1A dated 22-2-1999. Under the Scheme, it is not necessary to afford an opportunity of hearing the petitioner or his representation.

13. The points that arise for consideration in this writ petition are :

(A) Whether the order passed by the respondent is vitiated by non-application of mind, arbitrariness and violative of KVSS provisions ?

(B) Whether the order is vitiated for failure to follow the principles of natural justice ?

(C) Whether the action of the respondent in including the tax liability for the disputed items which were originally included in the assessment by original authority, but set aside by the appellate authority and remanded back for de novo consideration as a disputed liability and make a demand under the KVSS ?

All the points could be considered together conveniently .

14. Concedingly, either before passing the original order or before issuing the Form No. 2A calling upon the petitioner to pay the tax/sum due under the Scheme no opportunity of hearing has been accepted. The orders have been passed without affording an opportunity to the petitioner and liability has been fastened on the petitioner. It is riot as if the declaration submitted by the petitioner has been accepted which may not require an opportunity of hearing. It is fundamental and

well settled that when a burden to pay additional tax liability is sought to be fastened an opportunity should have been afforded and materials for such fastening should have been disclosed. Further the principles of natural justice should be read into the provisions of the KVS Scheme.

15. The proceedings of the Commissioner dated 12-5-1999 proceeds on the premise that the Commissioner (Appeals) has given only a direction to re-examine the issue involving Rs. 1,10,000 and that no specific order has been passed while allowing the assessee's contentions advanced in respect of two of the disputed items.

16. In this respect attention of the court was drawn to the orders passed in the appeal by the Commissioner (Appeals) in his proceedings in Appeal No. 469-C/98-99 dated 13-11-1998. The said appellate authority considered four issues raised in the appeal. On the first issue, confirmed the addition made by the assessing authority. On the second and third issue the appellate authority set aside the additions made by the assessing officer and directed the assessing officer to re-examine the point by analysing the balance sheets of the two parties and obtain the explanation of the appellant and decide the issue afresh as per law. On the 4th issue the appellate authority has sustained the contention advanced by holding that the addition is not justified. In respect of the first and fourth issues, we are not concerned here. It is represented that an appeal is pending after issue of fresh demand.

17. In respect of the second and third issue the proceedings of the appellate authority proceeds thus :

"3.3. I have carefully considered the rival submissions in the matter and the materials on record. As per the submissions made by the appellant, it appears that Rs. 60,000 was received by it as advance rent from three tenants and this was duly recorded in the statement recorded from the appellant on 8-12-1997, and that the said amount was advanced to the Hindu undivided family Further in the assessment order the assessing officer has noted that the balance sheet of the appellant as at 31-3-1992 indicated that the Hindu undivided family continued to be a creditor to the extent of Rs. 50,000. The above will clearly bring out the fact that the points involved have not been properly taken care of in the assessment order. Thus, to bring the matter on the right track, I am of the view that it needs to be re-examined. Therefore, in the interest of fair play and justice, I set aside this issue. The assessing officer while re-examining the point will analyse the balance sheets of the two parties and obtain the explanation of the appellant and decide the issue afresh as per law."

18. The above portion would indicate that in respect of the disputed items (ii) and (iii) the additions made by the assessing officer has been set aside and the matter has been remanded back to the original authority or de novo proceedings. This would mean that the proceedings of the assessing officer in respect of the said two items have been set aside and as on the date of filing of declaration the petitioner

could not have invoked the scheme as there is no assessment, nor it could be stated that the petitioner is liable to pay tax as additions made by the assessing officer has been set aside and the matter has been remitted back to the original authority for fresh proceedings.

19. Till fresh proceedings are passed by the assessing officer in respect of the said items (ii) and (iii) it cannot be stated that it is a disputed tax and in respect of which KVSS could be invoked. In the present case, the respondent has proceeded as if those items also are to be included as items of disputed tax. This is a misconception of the scheme itself.

20. In terms of KVSS, 1998 though there is no dispute that the scheme applies in respect of tax arrears or disputed tax, in respect of which appeals are pending. When the additions have been ordered to be deleted and the matter has been remitted, till the assessing officer decides one way or the other in respect of the remanded portion, it cannot be stated that there is a dispute which could be the subject matter of settlement under the scheme. Clause 87(f) defines the expression "disputed tax". The definition reads thus :

"disputed tax" means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration u/s 88.

21. Clause (m) defines tax arrears as the amount of tax, penalty or interest determined on or before the 31-3-1998 under the respective enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration.

22. In respect of the two disputed items namely (ii) and (iii), the assessment, namely additions made by the Income Tax Officer has been set aside and there is no determination or assessment available on the crucial date in that respect. In other words, determination made by the Income Tax Officer has been set aside in respect of the particular assessment years and till it is determined by the Income Tax Officer consequent to the remand, it cannot be stated that the tax has been determined in terms of section 87(m) of the Scheme .Clause 95 of the scheme among other things provides that the scheme shall not apply in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or no application for revision is pending before the Commissioner on the date of filing declaration. The condition precedent to invoke KVSS, 1998 is existence of an assessment and appeal or other proceedings thereof pending on the crucial date. In this case at the material point of time appeal has been partly allowed and assessment proceedings has been partly set aside. Therefore, it follows that on the date when a declaration is made in respect of the said two items, the petitioner as such could not have invoked the scheme. Without reference to the said provisions the impugned proceedings has

been passed which is not in accordance with the scheme.

23. On the ground that there is violation of principles of natural justice, on the view that the interpretation placed by the respondent in respect of the order passed by the Commissioner (Appeals), and proceedings being not in conformity with the KVSS, the proceedings impugned is set aside and the matter is remitted back to the respondent for de novo consideration. It is needless to add that the respondent shall afford necessary opportunity and also take into consideration of the developments if any which has taken place before the crucial date which is relevant under the KVSS, 1998 and thereafter pass orders according to law. The points (A), (B) and (C), are answered as above.

24. Writ petition is allowed in the above terms. Consequently, connected WMP is closed. The parties shall bear their respective costs.