

Madras High Court

Smt.S.Nachiar vs The Income Tax Officer on 12 March, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 12.03.2010

CORAM

THE HONOURABLE MR.JUSTICE K.N.BASHA

WP.No.29278/2008 & MP No.1/2008

Smt.S.Nachiar

.. Petitioner

Vs

1.The Income Tax Officer
Ward 1[3], Tambaram,
Chennai 600 045.

2.The Commissioner of Income Tax-VII
121, Nungambakkam High Road, Chennai.

3.The Tax Recovery Officer
4th Floor, 130-B, Mudichur Road,
Tambaram, Chennai-45.

.. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for a writ of

For Petitioner : Mr.R.Sivaraman

For Respondents : Mr.T.Ravikumar, Standing Counsel
for Income Tax

ORDER

By mutual consent of both the learned counsel for the petitioner and the learned Standing Counsel appearing [Income Tax] for the respondents, the main writ petition is taken up for final disposal.

2.The petitioner has come forward with the petition seeking for the relief of quashing the order of the 2nd respondent dated 23.02.2005 and to direct the 1st respondent to issue valid notice u/s.148 in accordance with law.

3.The learned counsel for the petitioner submitted that the petitioner has not been served with the notice as contemplated u/s.148 of the Income Tax Act, 1961 [hereinafter referred to as "the Act"]. It is contended that without serving such notice u/s.148 of the Act, the 1st respondent proceeded to issue a letter dated 16.10.2000 calling for the return of Income for the assessment year 1994-1995 from the petitioner herein. The learned counsel would submit that only after serving the notice u/s.148, the other procedures should be followed by the respondents as per section 143[2] of the Act. It is further contended that the notice prescribed u/s.148 cannot be regarded as a mere procedural requirement and once, if the notice is not served on the assessee, the entire proceedings initiated for the assessment, on the basis of the invalid notice, would be illegal and void. It is also contended that the issue of notice u/s.142[1] calling for the assessee to submit his return, would not amount to a notice u/s. 148 of the Act. Therefore, it is submitted that the impugned order dated 23.02.2005 passed by the 2nd respondent is liable to be set aside.

4.The learned counsel for the petitioner would also contend that the provision of alternative remedy of filing an appeal can always be waived by the assessee as per section 264 of the Act and the assessee can file a revision before the Commissioner seeking for the relief of setting aside the exparte order of assessment and as the said revision was dismissed through the impugned order, the petitioner has challenged the same before this court by way of filing the above writ petition.

5.The learned counsel for the petitioner, in support of his contention, placed reliance on the following decisions:-

[a]Y.NARAYANA CHETTY & ANR. Vs. INCOME TAX OFFICER & OTHERS [1959 [35] ITR 388 [SC]]; and [b]THANGAM TEXTILES Vs. INCOME TAX OFFICER [1973 [90] ITR 421 [MAD]]

6.Per contra, the learned Standing counsel appearing for the respondents would submit that the notice contemplated u/s.148 of the Act was issued against the petitioner on 17.09.1999 and duly dispatched on 22.09.1999 as per the Despatch Register. It is contended that thereafter, a reminder letter dated 16.10.2000 was also issued to the petitioner for the return of income for the assessment year 1994-1995 in response to notice u/s.148 and the said notice was also served on 20.10.2000 and the acknowledgment was also available on record. Learned Standing Counsel would further contend that even the notice u/s.142[1] of the Act was also issued against the petitioner on 11.03.2002 and the same was duly served on 13.02.2002. Therefore, it is contended that there is no illegality or infirmity in the impugned order dated 23.02.2005 warranting interference of this court.

7.I have carefully considered the rival submissions made on either side and also perused the materials available on record including the impugned order.

8.The undisputed fact remains that the petitioner has suffered an exparte order of assessment and as against the same, the petitioner has preferred a revision u/s.264 of the Act and the said revision was dismissed through the impugned order dated 23.02.2005. However, it is stated in the counter affidavit to the effect that the petitioner was served with the notice of the 3rd respondent dated 26.04.2006 u/s.221 of the Act asking the petitioner to pay the arrears of tax for the assessment year 1994-1995 and the same is available on record and in spite of the same, the petitioner has not

appeared, resulting in passing an exparte assessment order. It is also stated in the counter that it is not the fault of the respondents for necessitating the authority to pass an exparte order.

9.The crux of the question involved in this matter is to the effect that whether the assessment order could be passed without serving the notice u/s.148 of the Act.

10.In respect of such question, it is categorically stated by the petitioner in the affidavit and also contended by the learned counsel for the petitioner that the notice contemplated u/s.148 of the Act was not served on the petitioner. On the other hand, it is stated in the counter filed by the respondents and also contended by the learned Standing Counsel that the notice contemplated u/s.148 was issued on 17.09.1999 and duly despatched on 22.09.1999 as per the Despatch Register. It is also further stated in the counter that subsequently on 16.10.2000, a reminder letter was issued calling for the return of income for the assessment year 1994-1995 in response to notice u/s.148. The above said statement made in counter makes it crystal clear that though notice said to have been issued u/s.148 of the Act, the fact remains that the said notice was not served on the petitioner. Therefore, this court has no hesitation to hold that the respondents have not complied with the requirements contemplated u/s.148 by serving a notice on the assessee, viz., the petitioner herein. It is also pertinent to point out that though it is claimed by the respondents that subsequently a reminder letter dated 16.10.2000 was issued to the petitioner and the same was also duly served on the petitioner on 20.10.2000, the said reminder letter is only for calling the petitioner to submit the return of income and by no stretch of imagination the said letter could be construed to be a notice u/s.148 of the Act.

11.The Hon'ble Apex court has held in paragraph 4 of the Judgment in Y.NARAYANA CHETTY & ANR. Vs. INCOME TAX OFFICER & OTHERS reported in [1959] 35 ITR 388 [SC] that:-

"4..... The notice prescribed by s.34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the ITO would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the ITO without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in CIT Vs. Ramsukh Motilal [1955] 27 ITR 54 [Bom] and R.K.Das & Co. Vs.CIT [1956] 30 ITR 439 [Cal] and we think that that view is right."

12.The above said decision was also subsequently followed by a Division Bench of this court in THANGAM TEXTILES Vs. INCOME TAX OFFICER reported in [1973] 90 ITR 412 [Mad] wherein the Division Bench has held in paragraph 7 which reads here under:-

"7.In Narayanan Chetty Vs. ITO [1959] 35 ITR 388 [SC], the Supreme Court held that the service of requisite notice on the assessee, is a condition precedent to the validity of any reassessment made under s.34 of the IT Act, 1922 [which corresponds to s.147 of the IT Act, 1961], and if a valid notice and consequent orders of reassessment passed by him would be void and inoperative".

13. Section 34 of the Old Act referred in the decision cited supra, is equivalent to section 148 of the Act, 1961. The principles laid down by the Hon'ble Apex court as well as this court, are squarely applicable to the facts of the instant case as in this case also, the notice contemplated u/s.148 of the Act was not served on the petitioner. As a result, the entire proceedings culminating into the present impugned order dated 23.02.2005 passed by the 1st respondent is vitiated.

14. The learned standing counsel for the respondents has also put forward the contention to the effect that the petitioner is having the alternative remedy of filing an appeal as per section 246 of the Act to the Commissioner [Appeals], Income Tax, against the order of assessment and without exhausting such alternative remedy, the petitioner is not entitled to maintain a writ petition before this court. I am not able to countenance the said contention of the learned standing counsel for the respondents for the simple reason that the assessee, viz., the petitioner can very well waive the right to file an appeal as per the provision u/s.264 by preferring a revision. It is seen that accordingly, the petitioner waived his right to file an appeal and filed a revision as per section 264 and the said revision was dismissed through the impugned order dated 23.02.2005 passed by the 2nd respondent.

15. For the aforesaid reasons, this court is constrained to set aside the impugned order dated 23.02.2005 passed by the 2nd respondent in his proceedings C.No.7032[1]/264/CIT-VII/2003-04 and remand the matter to the first respondent to proceed with the assessment for the period 1994-1995 by issuing notice u/s.148 of the Act. Accordingly, the writ K.N.BASHA, J.

ap petition is allowed. No costs. It is made clear that the consumption of time taken during the pendency of this proceedings by granting the relief of the stay, would not stand in the way of limitation. Consequently connected miscellaneous petition is closed.

12.03.2010 Index : Yes Internet : yes ap To

1. The Income Tax Officer Ward 1[3], Tambaram, Chennai 600 045.

2. The Commissioner of Income Tax-VII 121, Nungambakkam High Road, Chennai.

3. The Tax Recovery Officer 4th Floor, 130-B, Mudichur Road, Tambaram, Chennai-45.

WP.No.29278/2008