

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 29TH JANUARY 2008 / 9TH MAGHA 1929

ITA.No. 327 of 2002()

AGAINST ORDER IN ITA.230/COCH/2002 DATED 24.7.2002
OF I.T.A.TRIBUNAL,COCHIN BENCH.
.....

APPELLANT:

M/S. MUBARAK TRADING COMPANY,
P.T.ROAD, BADAGARA, REPRESENTED BY PARTNER,
K.ABDUL AZEEZ, KALHATH HOUSE.

BY ADV. SRI.T.M.SREEDHARAN
SRI.A.V.MURALEEDHARAN
SMT.JAYASREE MANOJ
SRI.TONY CHACKO
SMT.PREMLA O.T.

RESPONDENTS:

THE COMMISSIONER OF INCOME TAX,
CALICUT.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT FOR R
SRI.GEORGE K. GEORGE, SC FOR IT FOR R

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD
ON 29/01/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C .N. RAMACHANDRAN NAIR &
T.R. RAMACHANDRAN NAIR, JJ.

I.T.A. No. 327 OF 2002

Dated this the 29th day of January, 2008

C.R.

JUDGMENT

C.N. Ramachandran Nair,J.

The appellant, a partnership firm, has filed this appeal under Section 260A of the Income Tax Act challenging the order of the Income Tax Appellate Tribunal confirming denial of status to them as a "firm" in proceedings completed by the Commissioner of Income Tax under Section 263 of the Act. Appellant did not file income tax return for the assessment year 1994-95 within the stipulated period, but filed a belated return on 19.11.1996. Even though the assessing officer issued proceedings under Section 143(1)(a) of the Act, he simultaneously issued notice under Section 148 of the Act proposing to make income escaping assessment under Section 147 of the Act. On receipt of notice the appellant requested the assessing officer to treat the belated return already filed as one filed against notice issued under Section 148 of the Act. The assessing officer thereafter completed the assessment under Section 147 read with Section 143(3), but assigned the status of firm to

the appellant. The Commissioner of Income tax in suo motu revision proceedings initiated under Section 263 of the Act, declared that appellant is not entitled to be assessed in the status of a "firm" and should be assessed as "Association of persons" on account of appellant's failure to file return within the time which is a failure under Section 144(1) of the Act referred to in Section 184(5) of the Act. The appeal filed by the appellant before the Tribunal against order under Section 263 was unsuccessful and hence this appeal is filed by the assessee.

2. Even though appellant has raised four questions of law for decision by this Court, we find only one substantial question of law arising from the order of the Tribunal for our decision and the said question redrafted by us is given hereunder:

Whether, on the facts and in the circumstances of the case, and particularly in view of admitted failure of the appellant to file return under sub-section (1), or (4) or (5) of Section 139, the appellant is entitled to be assessed in the status of a "firm" or has to be assessed in the status of "association of persons" under Section 184(5) of the Income Tax Act?

3. We have heard counsel appearing for the appellant and senior

counsel appearing for the respondent-Department. Counsel appearing for the appellant relied on the unreported decision of the Karnataka High Court in I.T.A.No. 4 of 2004 dated 20.2.2004 and also paragraph 66 of the Explanatory Note to the Finance Act, 2003, by which Section 184(5) was amended with effect from 1.4.2004 and contended that in order to deny the status of a "firm" best judgment assessment has to be made under Section 144 of the Act. Counsel specifically referred to mandatory provision of Section 144 which states that the assessing officer on being satisfied by the failure of any of the three conditions referred to therein shall after giving the assessee an opportunity of being heard make an assessment to the best of his judgment. Referring to this provision, counsel contended that in the absence of best judgment assessment under Section 144(1), Section 184(5) of the Act has no application. In this case, since assessment is specifically made under Section 147 read with Section 143(3), appellant was entitled to assessment in the status of a "firm" is the contention raised by counsel for the appellant. On the other hand, senior counsel appearing for the respondents contended that all what Section 184(5) says prior to the amendment is that when there is a failure on the part of the assessee of

any of the conditions referred to in Section 144(1), such failure would lead to disentitlement of status as Firm and assessment in the status as AOP. In order to appreciate the rival contentions, we extract hereunder Section 184(5) prior to the amendment by Finance Act, 2003 which is relevant for decision in this case:

184(5) Notwithstanding anything contained in the foregoing provisions of this section, where, in respect of any assessment year, there is on the part of a firm any such failure as is mentioned in Section 144, the firm shall not be assessed as such for the said assessment year and, thereupon the firm shall be assessed in the same manner as an association of persons, and all the provisions of this Act shall apply accordingly.

From the above it is clear that section is attracted if there is on the part of the assessee any such failure as is mentioned in Section 144 of the Act and failures referred to in Section 144 are the failures to make return required under clauses (a) to (c) which are extracted hereunder for easy reference:

Best judgment assessment.

144(1) If any person --

(a) fails to make the return required under sub-section (1) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment:

Provided"

Admittedly the return filed by the appellant was beyond the period provided under sub-section (1) or subsection (4) of Section 139 and therefore such return cannot be treated as a return referred to in clause (a) of Section 144(1). So much so, there is failure on the part of the appellant as contemplated under Section 144 and therefore Section 184 (5) is attracted.

4. However, the question to be considered is whether in order to deny the status as Firm and to assess the assessee as AOP under Section 184(5) consequent upon the failure under Section 144(1), the assessment has to be best judgment assessment or not. Counsel for the ;appellant has relied on the Notes on Clauses of Finance Bill 2003 by which Section 184(5) was amended and contended that status of Firm cannot be disallowed except when assessment is made under Section 144 of the Act. We do not know how appellant can rely on an amendment of 2003 for the assessment for 1994-95. In any case, we do not think the observation in the Notes on Clauses can supersede main provision which is very clear. In fact what is stated in the Notes on Clauses is that the amendment itself is to rationalise the provision, which pre-supposes that the provision that existed prior to the amendment was irrational. The provision existed prior to amendment disentitles a firm from retaining registration, if there was failure in regard to filing of return or complying with the notice issued by the Officer. However, major violation of evasion of tax leading to income escaping assessment still entitles a firm for retaining registration, if there was technical compliance in filing returns or complying with

notices. Probably it is to get over this irrational and discriminatory consequence that Section 184(5) and Section 185 are amended specifying the disability of firms for failures referred to in Section 144 of the Act. So far as unreported judgment of the Karnataka High Court is concerned, we do not find any application to the facts of this case because the case decided by the Karnataka High Court is the one where the assessee was disabled from filing the return in time on account of seizure and detention of books of accounts by the Department. The Karnataka High Court held that failure to file return can arise only when it was possible for the assessee to file return in time. Therefore the case decided by the Karnataka High Court applies to the facts of that case only and has no application here.

5. Another contention raised by the appellant is that unless there is Section 144 assessment, the assessee cannot be said to have committed a failure referred to in clauses (a) to (c) of the said Section. We are unable to accept this position because failure of any of the conditions mentioned in clauses (a) to (c) need not always lead to best judgment assessment under Section 144. For example, if an assessee fails to file return in time, but he produces entire books of of accounts

against the notice issued by the assessing officer, still assessment can be completed based on the book results and such assessment is certainly not a best judgment assessment under Section 144 of the Act. A best judgment assessment, in our view, arises only when the assessing officer determines income based on materials gathered by him and not when assessment is made based on books of accounts submitted by the assessee. A best judgment assessment can arise even in income escaping assessment under Section 147 because Section 148 makes it clear that a return filed against notice issued under Section 148 should be proceeded with as if it is a return under Section 139. This means that in a proceeding initiated under Section 147 the assessing officer can make a best judgment assessment if the books of accounts produced by the assessee are unacceptable. Therefore it is our view that even though the word "or" is used in clauses (a) to (c) of Section 144, a best judgment assessment is called for only when there is cumulative failure of all the conditions including failure to furnish details of income and prove the same through his accounts and documents. Even though there is failure on the part of the appellant to file return in time, which is a failure referred to in Section 144, still

best judgment assessment was not made by the assessing officer , in as much as assessment completed is one under Section 147 read with Section 143(3) of the Act. However, since there is failure on the part of the appellant in filing the return referred to clause (a) of Section 144, Section 184(5) is attracted, and appellant is rightly declined the status of a "firm" and assessment was ordered to be revised by the Commissioner under Section 263 in the status of "association of persons". We therefore agree with the view of the Tribunal in confirming the Commissioner's order. Accordingly, appeal is dismissed.

(C.N.RAMACHANDRAN NAIR)
Judge.

(T.R.RAMACHANDRAN NAIR)
Judge.

kk

