



2024:KER:64462

W.P. (C) No. 19826/2011

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 21ST DAY OF AUGUST 2024 / 30TH SRAVANA, 1946

WP (C) NO. 19826 OF 2011

PETITIONER:

M.A. IBRAHIM, MANAPURATH HOUSE,
NAYARAMBALAM, ERNAKULAM DISTRICT-682009.

BY ADVS.
SRI.T.R.RAJAN
SRI.B.KRISHNA MANI

RESPONDENT/S:

- 1 THE COMMISSIONER OF INCOME TAX-II
C.R. BUILDING, I.S.PRESS ROAD, KOCHI-682018.
- 2 THE INCOME TAX OFFICER WARD-I
MATTANCHERY, ERNAKULAM DISTRICT-682005.

BY ADV SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
21.08.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**‘C.R’****JUDGMENT**

The petitioner is an assessee under the Income Tax Act, 1961 (hereinafter referred to as ‘the 1961 Act’). For the assessment year 2007-08, the petitioner filed his return of income on 18.5.2007. The petitioner was served with Ext.P1 notice under Section 143(2)(ii) of the 1961 Act, on 22.8.2008. Thereafter, the assessing authority proceeded to issue Ext.P3 order of assessment under sub-section (3) of Section 143, on 30.12.2009, assessing the total income of the petitioner to be Rs.15,28,500/- (Fifteen lakhs twenty-eight thousand five hundred only) and proceeded to demand an amount of Rs.6,09,632/- (Six lakhs nine thousand six hundred thirty-two only) with surcharge, education cess and interest under Section 234 up to the date of the order. Being aggrieved by Ext.P3 order, the petitioner approached the Commissioner by filing Ext.P4 revision petition under Section 264 of the 1961 Act, taking up a contention that the notice issued to the petitioner under Section 143(2)(ii) of the 1961 Act was beyond the time prescribed in the first *proviso* to Section 143(2)(ii) which provided that no notice as contemplated by that provision shall be served on the assessee after the expiry of 12 months from the end of the month in which the return is furnished. However, by



Ext.P7 order, the revision petition filed by the petitioner was dismissed by the Commissioner. The contention of the petitioner that notice under Section 143(2)(ii) was beyond the time prescribed to the first *proviso* of that provision was rejected by the Commissioner on the basis of the amendment to the *proviso* by the Finance Act, 2008 with effect from 1.4.2008. The petitioner is thus before this Court contending that the proceedings culminating in Ext.P3 order of the assessing authority and Ext.P7 order of the revisional authority for the assessment year 2007-08 are illegal and unsustainable in law on the ground that notice under Section 143(2)(ii) of the 1961 Act was issued beyond the time prescribed in the first *proviso* to Section 143(2)(ii) of the 1961 Act as it stood prior to its amendment with effect from 1.4.2008 by the Finance Act, 2008.

2. Sri. T.R. Rajan, the learned counsel appearing for the petitioner would submit that it is settled law that the assessment for a particular assessment year has to be completed with reference to the law as it stood on the 1st of April of the relevant assessment year. It is submitted that the *proviso* to Section 143(2)(ii) of the 1961 Act as it stood on 1.4.2007 contemplated that no notice under Section 143(2)(ii) could be issued after the expiry of 12 months from the end of the month in which the return is furnished. It is submitted that in the facts and circumstances of this case, the



return for the assessment year 2007-08 was furnished by the petitioner on 18.5.2007 and the last date for issuing a notice under Section 143(2)(ii) would therefore be 17.5.2008. It is pointed out that Ext.P1 notice was issued only on 8.8.2008 and therefore, the entire proceedings following Ext.P1 notice are clearly without jurisdiction. The learned counsel placed reliance on the judgment of the Supreme Court in ***Karimtharuvi Tea Estate Ltd. v. State of Kerala; (1966) 60 ITR 262 (SC)*** to contend that the law applicable to the assessment year 2007-08 would be the law as on 1.4.2007 and the amendment to the *proviso* to Section 143(2) (ii) of the 1961 Act by the Finance Act, 2008 with effect from 1.4.2008 cannot apply. The learned counsel appearing for the petitioner also relies on the judgment of the Allahabad High Court in ***Tulsi Food Products v. Deputy Commissioner of Income-Tax and another; (2016) 380 ITR 192 (All)*** where an identical question was considered by a Division Bench of the Allahabad High Court and it was held that for the assessment year 2007-08 the amendment to the *proviso* to Section 143(2)(ii) with effect from 1.4.2008 would not apply.

3. Sri. Jose Joseph, the learned Standing Counsel appearing for the respondent Department would submit that the *proviso* to Section 143(2)(ii) of the 1961 Act would clearly apply as admittedly on the date of



coming into force of the amended *proviso*, the time for issuance of notice under the unamended *proviso* had not yet expired. It is further contended on the strength of the decision of a Division Bench of this Court in ***Income Tax Officer v. Nilofer Hameed & Ors; (2003) 262 ITR 281 (Ker)*** that the time limit prescribed by the *proviso* for issuance of notice is a procedural provision and it would therefore apply notwithstanding the fact that the *proviso* had been amended only with effect from 1.4.2008. It is also pointed out that a reading of Ext.P3 order will show that the Assessing Officer had also proceeded on the basis that the petitioner had filed his original return of income for the assessment year 2007-08 on 18.5.2007 and he had filed a revised return of income for the same year on 11.8.2008. It is submitted that on the filing of the revised return on 11.8.2008, the original return became invalid and even if the period prescribed by the unamended provisions of the *proviso* to Section 143(2)(ii) are applied, the Department could have issued a notice under Section 143(2)(ii) till the end of August 2009. It is submitted that even according to the petitioner, Ext.P1 notice was issued on 8.8.2008. The Learned Counsel also placed reliance on the judgment of the Supreme Court in ***Thirumalai Chemicals Ltd. v. Union of India and Ors; (2011) 6 SCC 739*** in support of his contentions.

4. Having heard the learned counsel for the petitioner and the learned



standing counsel appearing for the Income Tax Department, I am of the view that the petitioner is not entitled to the reliefs sought in the writ petition.

5. The *proviso* to Section 143(2)(ii) of the 1961 Act prior to its amendment with effect from 1.4.2008 reads as follows:-

“Provided that no notice under clause (ii) shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.”

If the time limit applicable in this case is as per the provisions of the unamended *proviso* to Section 143(2)(ii) referred to above, the time limit for issuance of notice would have expired by 31.5.2008 (12 months from the end of the month in which the return was filed) taking into consideration the date of filing of the original return. By the Finance Act, 2008 with effect from 1.4.2008, the *proviso* to Section 143(2)(ii) was amended as follows:-

“Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.”

Though, at first blush, the contention of the Learned Counsel for the petitioner appeared to be attractive, on the authority of the Supreme Court in ***Karimtharuvi Tea Estate Ltd (supra)*** and on the basis of the judgment of the Allahabad High Court in ***Tulsi Food Products (supra)***, I am of the



view that, on closer scrutiny, the contention must fail. This is for the reason that going by the unamended provision, the time for issuance of notice was available till 31.5.2008. When the *proviso* was amended with effect from 1.4.2008 by the provisions of the Finance Act, 2008, by virtue of statutory amendment the time limit for issuance of notice under Section 143(2)(ii) became six months from 31.3.2008 instead of 12 months from the end of the month in which the return was furnished. As already noticed above, the time limit for issuance of notice under the unamended provision was still 31.5.2008. When the law was amended with effect from 1.4.2008, it was only the amended provision that would apply and not the unamended provision. In other words, within the time available for issuance of notice under the unamended provision the amended provision was introduced and therefore, the time limit would be that prescribed in the amended provision.

6. The time limit for issuance of a notice is clearly a matter of procedure and does not affect substantive rights. This Court in ***Nilofer Hameed (supra)*** held as follows:-

“10. The next question is whether the second notice is barred by time. The learned single judge took the view that there is no bar, if notice is issued within eight years from the end of the assessment year. The learned single judge found that so far as



the year 1986-87 is concerned, it is more than eight years. But so far as the year 1988-89 is concerned, the bar is not over and hence, notices for the year 1988-89 were valid. The only question is whether the learned judge was correct in holding that the notices for the year 1986-87 were invalid. Learned counsel submitted that the learned judge made an error in applying the law at the time of assessment. At the time of assessment, the law was that the reassessment proceedings should be completed within eight years from the end of the assessment year. But at the time when the reassessment proceedings were initiated, the statute was amended to bring it as ten years. If ten years is taken into consideration, then both the notices will be valid. Learned counsel submitted to the effect that so far as section 148 of the Act is concerned, it is only a procedural provision. An amendment to the procedure has to be applied for all proceedings, which are pending. We agree with learned counsel that it is the period at the time of reassessment that will be looked into, if by the time of reassessment the entire assessment is not barred as per the provisions. Here, we find that at the time the second notice was issued, it was not barred by the earlier law and before the assessment, the ten year period has come. We are of the view that there is no time bar.”

In ***Thirumalai Chemicals (supra)*** it was held:-

“Substantive and procedural law

23. Substantive law refers to a body of rules that creates, defines



and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.

24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in Garikapati Veeraya v. N. Subbiah Choudhry [AIR 1957 SC 540], New India Insurance Co. Ltd. v. Shanti Misra [(1975) 2 SCC 840], Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087], Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar [(1999) 8 SCC 16] and Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24], has elaborately discussed the scope and



ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.

Law of limitation

29. Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time-barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are thus retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that they



neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have the effect of extinguishing a right of action subsisting on that date. Bennion on Statutory Interpretation, 5th Edn. (2008), p. 321 while dealing with retrospective operation of procedural provisions has stated that provisions laying down limitation periods fall into a special category and opined that although prima facie procedural, they are capable of effectively depriving persons of accrued rights and therefore they need be approached with caution.

30. The learned author in order to establish the above proposition referred to the decision of the Court of Appeal in Ydun case [1899 P 236 (CA)] where the Court held that the amending legislation dealt with procedure only and therefore applied to all actions whether commenced before or after the passing of the Act and even in respect of previously accrued rights. The principle laid down in Ydun [1899 P 236 (CA)] was applied in R. v. Chandra Dharma [(1905) 2 KB 335 : (1904-07) All ER Rep 570] and it was held that if a statute shortening the time within which proceedings can be taken is retrospective then it is impossible to give good reason, why a statute extending the time within which proceedings be taken, should not be held to be retrospective.”

In **Karimtharuvi Tea Estate Ltd (supra)** the issue considered was the sustainability of imposition of surcharge at the rate of 5 per cent on the



agricultural income tax and super tax levied and collected from the appellant under the provisions of the Kerala Surcharge on Taxes Act, 1957. The contention taken was that the law applicable to assessment for 1957-58 under the provisions of the Agricultural Income Tax Act was the law in force on 1.4.1957 and as the Surcharge Act came into force only on 1.9.1957 the surcharge could not be levied for that year. It was held that the law applicable for the assessment year 1957-58 would be the law in force on the 1st of April of that year. This decision obviously does not come to the aid of the petitioner as the case concerns the imposition of a surcharge and that is obviously a substantive provision as opposed to a procedural matter. In the light of the law laid down in *Thirumalai Chemicals (supra)*, I am of the view that the judgment of the Division Bench of the Allahabad High Court in *Tulsi Food Products (supra)* does not lay down the correct law. Thus, I hold that since the issuance of notice under Section 143(2)(ii) is only a procedural matter, the law that came into force on 1.4.2008 would apply to the petitioner's case, especially since the time for issuance of notice even under the unamended provision had not expired on 1.4.2008.

7. There is yet another aspect of the matter. Ext.P3 assessment order proceeds on the basis that after filing the original return of income on 18.5.2007, the petitioner filed a revised return of income on



11.8.2008. Therefore, the time limit for issuance of notice under the unamended provision of the *proviso* to Section 143(2)(ii) would be 12 months from 31.8.2008 and admittedly, Ext.P1 notice was issued on 8.8.2008. Though a reading of Ext.P7 order would indicate that there were some disputes as to whether the return filed on 11.8.2008 was in respect of assessment year 2007-08 or the assessment year 2008-09 there is no material thereafter produced to suggest that the return filed on 11.8.2008 pertains to the year 2008-09 and not to the year 2007-08.

For all these reasons, the writ petition fails and it is accordingly dismissed.

Sd/-

GOPINATH P.
JUDGE

acd



APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF THE NOTICE DATED 8.8.2008 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

EXT.P2: TRUE COPY OF THE INCOME TAX RETURNS DATED 11.8.2008 SUBMITTED BY THE PETITIONER BEFORE THE 2ND RSEPONDENT FOR THE ASSESSMENT YEAR 2008-2009.

EXT.P3; TRUE COPY OF THE ASSESSMENT ORDER DATED 30.12.2009 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

EXT.P4: TRUE COPY OF THE REVISION PETITION DATED 2.2.2010 SUBMITTED BY THE PETITIONER BFORE THE 1ST RESPONDENT.

EXT.P5: TRUE COPY OF THE ARGUMENT NOTES DATED 7.3.2011 SUBMITTED BY THE PETITIONER BEFOR THE 1ST RESPONDENT.

EXT.P6: TRUE COPY OF THE ADDITIONAL ARGUMENT NOTES DATED 7.3,2011 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.



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**EXT.P7: TRUE COPY OF THE ORDER DATED 31.3.2011 PASSED BY THE
1ST RESPONDENT.**

True copy

PS to Judge.