
(1961) 03 MAD CK 0037

In the Madras High Court

Case No : Writ Petitions No. 225 of 1958

A. S. Khader Ismail

APPELLANT

Vs

Income Tax Officer, Salem

RESPONDENT

Date of Decision : 28-03-1961

Acts Referred:

Income Tax Act, 1922 — Section 23, 27, 31, 31(3), 33

Citation : (1963) 47 ITR 16

Hon'ble Judges : Ramachandra Iyer, J

Bench : Single Bench

Judgement

Ramachandra Iyer, J.—These petitions are filed for the issue of writs of prohibition restraining the Income Tax Officer, Salem, from continuing the proceedings initiated u/s 34 of the Indian Income Tax Act, 1922. In W. P. No. 225 of 1958 the petitioner, Khader Ismail, was assessed to Income Tax for the year 1945-46 (the relevant year of account being April 1, 1944, to March 31, 1945), u/s 23 of the Indian Income Tax act on January 31, 1946, by the Income Tax Officer, Salem. That assessment was re-opened by the Income Tax Officer u/s 34 of the Act on the ground that certain cash credits amounting to Rs. 56,234 in the assessee's books were not genuine ones but on the contrary represented income from undisclosed sources. The assessment that followed was the subject-matter of an appeal to the Appellate Assistant Commissioner. That authority, while sustaining the view of the Income Tax Officer that the alleged borrowings represented by the cash credits were income from undisclosed sources, held that such income must have been received during the year previous to the year of account. The Appellate Assistant Commissioner stated :

The credits appear partly on November 23, 1943, and the rest on December 21, 1943. The amounts having manifested themselves in the financial year 1943-44 can be included only in the assessment year 1944-45 and not the assessment year 1945-46. The appellants preliminary objection is well founded and the sum of Rs. 56,234 cannot be included in the assessment year 1945-46.

The Income Tax Officer is directed to consider the credits for the assessment year 1944-45 after initiating appropriate proceedings.

Thereupon, the Income Tax Officer, Salem, initiated proceedings against the petitioner u/s 34(1)(a) of the Act in respect of the assessment for the year 1944-45 and issued a notice on January 28, 1958, calling upon the petitioner to submit a return of income for the year ending March 31, 1944.

2. The facts in W. P. No. 1007 of 1958 are almost similar. The assessment of the petitioners father, Parisa Mudaliar, for the year 1946-47 was revised on the ground that a sum of Rs. 33,250 which was income from undisclosed sources was concealed from the Income Tax Officer. The consequent order of revised assessment was the subject-matter of an appeal to the Appellate Assistant Commissioner who set aside the same on the ground that the impugned credits must have represented income received prior to the year of account. The appellate authority stated :

As all the credits are prior to 31st March, 1945, the amounts, if at all assessable, can be included in the assessment for 1945-46.

3. The Income Tax Officer thereupon issued a notice to the petitioner, his father having died since the date of the original assessment, u/s 34 of the Act for revising the assessment for the year 1945-46. The notice is dated March 21, 1958.

4. The validity of the initiation of proceedings u/s 34 in both the cases has been challenged on behalf of the respective assesseees on several grounds. Mr. Sharfuddin, appearing for the assesseees, first contended that the cases would be governed by the provisions of section 34(1)(b) of the Indian Income Tax Act and not by section 34(1)(a) and that four years after the respective years of assessment, it would be barred by limitation. Section 34(1)(b) relates to a case where there has been no omission or failure on the part of the assessee to disclose fully and truly all material facts, but yet the income has escaped assessment. Under the Act, as it stood at the time when the assessment was made, the proceedings could be initiated only within a period of four years of the end of the relative assessment year. The second proviso to section 34(3) as it stood before its amendment by Act 25 of 1953, which came into effect on April 1, 1952, was as follows :

Provided further that nothing contained in this sub-section shall apply to a reassessment made u/s 27 or in pursuance of an order u/s 31, section 33, section 33A, section 33B, section 66 or section 66A.

5. The proviso was repealed and re-enacted by Act 25 of 1953, in its present form, thus :

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a reassessment made u/s 27 or to an assessment or

reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 31, section 33, section 33A, section 33B, or section 66 or section 66A.

6. The contention urged on behalf of the assesseees is that the terms of the proviso, as re-enacted above, have the effect of placing no time-limit to re-open assessments coming under the terms of that proviso and would not apply to the present cases, which would be governed only by the terms of the proviso which was in force till April 1, 1952. It is their further case that under the terms of the previous proviso what can be reopened was only in pursuance of an order u/s 31, that is, what would relate to the particular year of assessment with which the appellate authority was concerned. It is urged that as the period of four years prescribed u/s 34(1)(b) had expired before the Act 25 of 1953 came into force, the right to revive u/s 34(1)(b) should be held to be barred. On the other hand, it is contended by the learned counsel appearing for the department, that even if the terms of the old proviso were held to apply to the present case, the words "in pursuance of" in that provision are wide enough to comprehend a case where the reassessment proceedings are started for another year as a result of any finding given in the appeal. It is, however, unnecessary to consider this contention as we are of opinion that the present case cannot come within the terms of section 34(1)(b) of the Act. There is nothing to show in the present case that the assesseees disclosed the cash credits to the Income Tax Officer during the assessment for the previous year. Even if it were assumed that the impugned cash credits were found in the account books for the previous year, they can only be concealed income, not amounting to a disclosure by the assessee, which is necessary for the application of section 34(1)(b). We are, therefore, of opinion that the provisions of section 34(1)(a) alone would apply to the present case.

7. Under the latter provision, the proceedings for reassessment could be initiated within a period of eight years. In W. P. No. 225 of 1958, it is contended that the re-enacted proviso under Act 25 of 1953 would not apply as the period of eight years should be held to have expired on March 31, 1952. The argument was that the period of eight years should be reckoned from the last day of the year of account and not the year of assessment. If that argument were to be accepted, the Income Tax Officer would have jurisdiction to initiate proceedings only till March 31, 1952. As the re-enacted proviso to section 34(3) came into force only from April 1, 1952, it is contended that that provision govern. We cannot, however, agree that for the purpose of the application of section 34(1) the period mentioned therein should be reckoned from the last day of the year of account. It is clear from the section itself that such period is to be calculated from the last day of the year of assessment. In C. W. Spencer v. Income Tax Officer, Madras, it was held that the period of limitation, whether it be the eight year period (period for cases falling u/s 34(1)(a)) or the four year period (for cases falling u/s 34(1)(b)), had to be computed from the end of that year and that though the expression "year" had not been further defined by the section, it was clear from the contest that the "year" referred to was the assessment year and had no

reference to the according year, which has been referred to in the Act as the previous year. We respectfully agree with that view. It follows that the jurisdiction of the Income Tax Officer to initiate proceedings u/s 34(1)(a) in respect of the assessment year 1944-45 would extend up to March 31, 1953. The Act 25 of 1953 came into force as and from April 1, 1952. It is one of the settled rules of construction of statutes that no person has a vested right in procedure. Rules of limitation being rules of procedure, proceedings initiated at a particular time would be governed in the manner prescribed for the time being. Therefore, it is the re-enacted proviso that would apply to the instant case.

Reliance is placed on the decision of a Bench of this court, to which one of us was a party, in *United Nilgiris Services Ltd. v. Commissioner of Income Tax*, wherein it was held that the initiation of proceedings for re-opening the assessment after the expiry of the period limited by section 34 would be without jurisdiction. That was a case u/s 34(1)(b). The period of four years limited by that section expired before Act 25 of 1953 came into force, under which the proviso to section 34(3) was re-enacted. It was held that as the right to re-open u/s 34(1)(b) was barred before April 1, 1952, when that Act came into force, it would not be open to the Income Tax Officer to rely upon the provisions thereof for justifying initiation of proceedings as a result of a finding given by the appellate authority. We cannot see how the principle of that decision could be invoked in this case in which we have found that, before the expiry of the period of eight years mentioned in section 34, Act 25 of 1953 had come into force. The provisions of the re-enacted second proviso to section 34(3) have been validly invoked by the Income Tax Officer.

8. The question then is, whether the proceedings now started by the Income Tax Officer are those made in consequences of or to give effect to any finding or direction contained in the order of the Appellate Assistant Commissioner u/s 31 of the Act. Mr. Sharfuddin first contended that the order of the Appellate Assistant Commissioner, in consequence of which the proceedings initiated are the subject-matter of W. P. No. 1007 of 1958, could not be said to amount to a finding which can be given effect to by the Income Tax Officer. That order, which we have extracted above, states that the credits were prior to March 31, 1945, and the amount, if at all assessable, can be included in the assessment for 1945-46. This, according to learned counsel, would not amount to the recording of a finding or giving of a direction, as it has not been found definitely that the income was received in any particular year. We are, however, unable to read the order in the way in which the learned counsel wants us to do. There is no doubt from the other portions of the order that the conclusion of the Appellate Assistant Commissioner was that the cash credits related to receipts in the year previous to the one with which he was concerned. The phrase "if at all assessable" only relates to the question whether the income was assessed or not and not to the period during which it was received. But we shall, however, deal with the contention of the learned counsel on the footing that the finding given by the Appellate Assistant Commissioner was so to say only a negative finding, that is,

that the income was not received during the year with which the appeal was concerned, there being no positive decision as to the year in which it was received. Learned counsel relies on the decision in *Indurkar v. Pravinchandra Hemchand*. The Appellate Assistant Commissioner in that case stated that "the assessee could be assessed, if at all, for the tax year 1944-45" for which the Income Tax Officer might take necessary steps, if so advised. The learned judges of the Bombay High Court held that the decision of the Appellate Assistant Commissioner only amounted to this, namely, that the amounts did not form part of the income for the assessment year 1945-46 with which he was concerned and not that they were income for the earlier year; and that the suggestion contained in the order that the assessee could be assessed, if at all, for the year 1944-45, was neither a finding nor a direction which would support a notice u/s 34 of the Act. With great respect to the learned judges we are unable to agree with that conclusion. The proviso to section 34(3) enables the initiation of proceedings u/s 34 at any time, where such proceedings are in consequence of or to give effect to a finding of the various authorities mentioned in the section. The word "consequence" has been defined in the Concise Oxford Dictionary as (i) result, (ii) logical inference. In a case coming before the appellate authorities mentioned in the proviso, the question would always concern the particular year of assessment to which the appeal or other proceeding relates. Where in such proceedings it is found that a particular income was not received in the year with which the appeal or other proceeding was concerned, the finding relative thereto can ordinarily take one of two forms depending to a large extent on the evidence available. It may, for example, be a positive finding showing that the income though not received in the year with which the appellate authority was concerned, was received during any particular earlier year or it may merely amount to this, namely, that it was not received in that year with which the appeal or other proceeding was concerned. The latter finding can be called a negative finding. In either case, if proceedings are initiated by the appropriate Income Tax Officer u/s 34 for bringing to charge the escaped assessment, such proceedings would be the result or, at any rate, the basis of a logical inference from the previous finding. Therefore, whether the finding in a particular case is positive or negative in character, the provisions of section 34(3), proviso, would apply.

9. Mr. Sharfuddin contended that it is not competent for the Appellate Assistant Commissioner to travel beyond the scope of the appeal which was before him and find that the income was received in any particular earlier year. He relied in this connection on the decision of the Allahabad High Court in *Pt. Hazari Ltd. v. Income Tax Officer, Kanpur*, where it was held that the power of the Appellate Assistant Commissioner u/s 31 was only to record a finding in matters which he was called upon to decide when passing an order in appeal in conformity with what laid down in section 31(3) and that an order which was passed by him, beyond what was required or covered by that section would be one without jurisdiction and should not form the proper basis for the initiation of proceedings

u/s 34. Section 31(3) confers a power on the Appellate Assistant Commissioner to confirm, enhance or annul the assessment or set aside the assessment and direct the Income Tax Officer to make a fresh assessment after making such further enquiry as may be necessary. This provision relied on as indicating the scope of the powers of the appellate authority and it is contended that as section 31(3) only refers to the assessment for particular year, which was the subject-matter of the appeal, the appellate authority would have no jurisdiction to give a finding in regard to late authority would have no jurisdiction to give a finding in regard to a receipt during any other year. The view taken by our court is, however, to the opposite effect. In *Simrathmull v. Additional Income Tax Officer, Ootacamund* Balakrishna Ayyar J., delivering the judgment of the Bench, observed :

Mr. Subbaraya Aiyar then argued that even if it be right to say that the Assistant Commissioner has given a finding in respect of this sum of Rs. 20,000 that finding can be used only in respect of the assessment year in which he gave his decision. To support this argument no authority was cited and it appears to us to be completely untenable. When an assessment is made and either the department or the assessee appeals, the whole matter would be before the Assistant Commissioner, and no express provision would be necessary to enable him to give directions in respect of a matter already before him. This would apply also to the Commissioner and the Income Tax Appellate Tribunal. It is only to enable the Income Tax Officer to take action in pursuance of a finding recorded or directions given in respect of an assessment different from that covered by the appeal or revision as the case may be that special provision would be necessary. To construe the proviso in the manner in which Mr. Subbaraya Aiyar invited us to do would be to make that proviso otiose.

10. We are in respectful agreement with the foregoing observations. The object of section 34 is to bring to charge an escaped assessment. The various provisions contained in that section are enacted with the object of discovering the evasion of tax. The proviso to section 34(3) is designed to give power to an Income Tax Officer to re-open the assessment whenever the concealment of income in any particular year is discovered as a result of the judicial enquiry. The provisions contained in the proviso are couched in very general terms and, having regard to the object which the legislature had in view, its operation cannot be restricted only to a finding relative to the assessment which was the subject-matter of the appeal. The learned judges of the Allahabad High Court make a distinction between a finding and a statement of fact and hold that the term "finding" would only cover the case of a judicial adjudication with regard to the period in dispute. We are, however, unable to share that view. Let us take, for example, the finding of an appellate authority in regard to a particular year of assessment that the disputed sum was not assessable in that year. That finding may take one of several forms. The appellate authority can hold that whether that income was received or not, it was not received during the particular year of account with which that authority was immediately concerned or it may be that

the authority finds that the income, though not received during the period with which it was concerned, was received at an earlier period. In the last two of the cases stated above, the finding is necessary or incidental to the actual matter entrusted to the decision of the appellate authority, namely, that the income was not received during the year in which it formed the subject-matter of the appeal. The term "finding" in the proviso to section 34(3) must have a wider significance having regard to its purpose; the finding may be one which is necessary for the disposal of the appeal or one which is incidental to it. Therefore, the proviso would apply to cases where the appellate or revisional authority finds that the income was received in any particular year. As we held earlier, it will also apply to a case where it is held that the income was not received during the year with which the authority was concerned. In such a case it would be for the Income Tax Officer to investigate afresh as to in which year the income was received. In either case, the action taken by the Income Tax Officer u/s 34 would be the result of or the logical consequence of the finding arrived at for the purpose of the disposal of the appeal by the appellate authority. We are, therefore, of opinion that the Income Tax Officer acted within his jurisdiction in initiating proceedings u/s 34 in the instant cases. The writ petitions fail and are dismissed. The rule nisi is discharged. The petitioner will pay the costs of the department. Counsels fee in each case Rs. 125.