

(1961) 12 CAL CK 0007

In the Calcutta High Court

Case No : Appeal from Original Order No. 151 of 1960

BRINDABAN CHANDRA BASAK

APPELLANT

Vs

Income Tax OFFICER.

RESPONDENT

Date of Decision : 05-12-1961

Acts Referred:

Income Tax (Amendment) Act, 1959 — Section 34(4)
Income Tax Act, 1922 — Section 34

Citation : (1962) 46 ITR 14

Hon'ble Judges : Bose, C.J.; Debabrata Mookerjee, J

Bench : Full Bench

Judgement

BOSE C.J. - This appeal is against the order of Sinha J. dismissing a writ application under article 226 of the Constitution for quashing of certain Income Tax proceedings initiated u/s 34 of the Indian Income Tax Act.

The appellant was assessed u/s 34 of the Indian Income Tax Act in respect of a sum of Rs. 34,323 as income received by him within the assessment year 1943-44 on the ground that the appellant had purchased a plot of land at 95/96, Indra Biswas Road for a consideration of Rs. 24,323 which was paid on certain dates between 17th December, 1941, and 16th February, 1942, but which had not been disclosed by the appellant. The appellant appealed against this order of assessment to the Appellate Assistant Commissioner on the ground that the said sum was not an income and even if it was held to be an income, such income would be income relevant for the assessment year 1942-43 and not 1943-44. The Appellate Assistant Commissioner by his order dated 25th February, 1959, held that it was income, but such income accrued in course of the assessment year 1942-43 and not 1943-44 as held by the Income Tax Officer. The Appellate Assistant Commissioner in making his order gave the following direction :

"I therefore delete the addition for the assessment year under appeal and direct that Income Tax Officer should take necessary action to assess the same amount for 1942-43 assessment year."

Thereafter, by a notice dated 19th January, 1960, issued u/s 34 of the Indian Income Tax Act which was served on the appellant on the 21st January, 1960, the Income Tax Officer called upon the appellant to file a return of the income for the assessment year 1942-43. The relevant portion of the notice may be set out hereunder :

"To Sri Brindaban Chandra Basak,

20/10, Brindaban Basak Street 19.1.60

Calcutta.

Whereas, I have reason to believe that your income assessable to Income Tax for the assessment year 1942-43 has (a) escaped assessment. (b) been under-assessed..... I hereby require you to deliver to me within 35 days of the receipt of this notice a return in the attached form of your total income and total world income assessable for the said year ending 31st March, 19..... This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, Calcutta.

Sd. Illegible

income tax Officer,

District I(II),

D-Ward."

On 8th February, 1960, the appellant filed a petition before the Income Tax Officer objecting to the validity of the said notice on, inter alia, the ground that the issue of the said notice was barred by limitation. But as the Income Tax officer by his letter dated the 12th February, 1960, intimated that he was unable to entertain the objection of the appellant, the latter moved this court under article 226 of the Constitution and obtained a rule nisi on 24th February, 1960. When the matter came up before Sinha J. for final hearing, the contention put forward on behalf of the department before the learned judge was that by reason of the second proviso in sub-section (3) of section 34 of the Indian Income Tax Act as amended by Act 25 of 1953, which came into force from 1st April, 1952, the notice issued on 19th January, 1960, was saved from the bar of limitation. The relevant portion of the proviso which was relied upon may be set out hereunder :

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made shall apply to a re-assessment made u/s 27 or to an assessment or re-assessment 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, section 66 or section 66A."

The other contention put forward on behalf of the respondent was that in any event sub-section (4) of section 34 of the Indian Income Tax Act which had been

introduced by an amendment made in 1959 also saved the notice from the bar of limitation. The said sub-section may set out hereunder :

"A notice under clause (a) of sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that sub-section before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates."

In dealing with the first contention, the learned judge has referred to the fact that there is a divergence of view between the Madras High Court and the Allahabad High Court on the point whether an Appellate Assistant Commissioner has any jurisdiction at all to direct the Income Tax Officer to take steps for assessment of a particular income accruing in an assessment year which is other than one, which is the subject-matter of appeal before him, but has held that apart from that, the second proviso of section 34(3) as amended in 1953 and which came in to operation from 1st April, 1952, cannot apply to the facts of the present case and so the point had become irrelevant. With regard to the second contention the learned judge has found in favour of the Income Tax department and has held that sub-section (4) of section 34 as introduced by the amendment made in 1959 takes the matter outside the bar of limitation.

The correctness of these findings has been challenged before us. On behalf of the respondent it has been argued that the proviso to sub-section (3) of section 34 as amended in 1953 applies to the facts of the case and saves the notice from the attack on its validity on the ground of limitation. Now it is well established that retrospective operation should not be given to a statute or an amendment of a statute so as to impair or affect existing rights or obligations in the absence of express enactment or necessary intendment of the same though an exception is no doubt made in cases of provisions dealing with matters of procedure. So the amendment of 1953 which made sub-section (3) of section 34 applicable to the whole of section 34 and which came into operation from 1st April, 1952, cannot be held to affect a right which had accrued to the appellant by lapse of a period of eight years under the provisions of sub-section (1) of section 34 of the Act before the amendment of 1953 came into force. In respect of the assessment year which was the subject matter of the Income Tax proceeding the period of eight years expired in 1951 and the right to re-open an assessment u/s 34(1) having become barred at that time, the subsequent amendment of sub-section (3) of section 34 could not be called in aid for getting over the bar of limitation. Reference may be made in this connection to a bench decision of the Madras High Court reported as *United Nilgiris Services Ltd. v. Commissioner of Income Tax*. The proviso in question as it existed before the amendment and which could be said to apply to the assessment in question being limited in its operation by its very terms to sub-section (3) of section 34 itself could have no application as indicated already to a notice issued under sub-section (1) of section 34 of the Act. So this is the first difficulty in the way of the respondents contention being

accepted by us. Apart from that the further question that arises is whether it was open to the Appellate Assistant Commissioner in dealing with the appeal which was before him to give a direction to the Income Tax Officer to take necessary action to assess the sum of Rs. 24,323 as income accruing in the assessment year 1942-43 instead of 1943-44. In the case of *Kamlapat Motilal v. Income Tax Officer*, where in an appeal with respect to the assessment year 1942-43 the Appellate Tribunal directed that certain expenditure "should be adjusted as an expenditure due and allowable for the earlier year of assessment, i.e., 1941-42" and the Commissioner notified the assessee that he was unable to make the adjustment and the assessee made an application under article 226 of the Constitution for a writ of mandamus to enforce the order of the Tribunal, it was held that no writ could be issued inasmuch as the order passed by the Tribunal or the direction given by the Tribunal was without jurisdiction. The division bench of the Allahabad High Court presided over by Mootham C.J. and Bhargava J. held that the powers of the Appellate Tribunal u/s 33(4) of the Income Tax Act are limited to the passing of such order as it thinks fit to make in the proceeding which is then before it on appeal. It has no power under that sub-section to pass an order or give directions with reference to the proceedings of an earlier year which are concluded.

In the case of *Pt. Hazarilal v. Income Tax Officer, Kanpur*, which is another decision of a division bench of the Allahabad High Court where the question in appeal before the Appellate Assistant Commissioner of Income Tax was whether a certain sum of money was or was not income relevant to the assessment year 1947-48, it was held that for the purpose of applying the proviso to section 34(3) the Income Tax Officer was entitled only to take into account the finding recorded by the Appellate Assistant Commissioner of Income Tax that the sum in question was not an income of the petitioner for the assessment year 1947-48 and the Income Tax Officer could not treat as a finding the remark made or the view expressed by the Appellate Assistant Commissioner that this sum was the income of the assessee for the assessment year 1946-47. That was a point which the Appellate Assistant Commissioner was not called upon to decide and was not a point on which he could competently record his finding. The remote connection between the notice issued u/s 34 and the finding recorded by the Appellate Assistant Commissioner did exist but such a remote connection by itself could not satisfy the requirement that the action taken must be in consequence of the finding.

The view of the Madras High Court as I have pointed out already is however different (*Simrathmull v. Additional Income Tax Officer, Ootacamund*). In this case an assessee was assessed on a total income of Rs. 5,143 on December 18, 1946. Subsequently, on March 31, 1956, the Income Tax Officer reassessed him on a total income of Rs. 39,568 in which was included a sum of Rs. 31,000 which the assessee alleged he had taken on loan from a firm in Rajasthan, but which the Income Tax Officer held was income from undisclosed sources. The assessee appealed to the Appellate Assistant Commissioner, Coimbatore. One of the

contentions raised by the assessee before the Appellate Assistant Commissioner was that in any event the entire sum of Rs. 31,000 would not come in for assessment for the assessment year 1946-47. The Appellate Assistant Commissioner found that a sum of Rs. 20,000 out of Rs. 31,000 came in as credits on January 25, 1945, and March 8, 1945, and therefore this amount could not be assessed in the assessment year 1946-47. He, therefore, ordered that this sum of Rs. 20,000 should be deleted from the income for that year but he added a direction to the following effect :

"The Income Tax Officer will be at liberty to reopen the assessment of 1945-46 for including this amount in that assessment. Now the assessment for 1945-46 had been completed by the Income Tax Officer on December 31, 1945, but acting on what the Appellate Assistant Commissioner had said the Income Tax Officer issued a notice dated the 6th February, 1957 u/s 34 of the Act calling upon the petitioner to submit a return for the assessment year 1945-46. The question of limitation having been raised by the assessee the Income Tax department relied on the second proviso to section 34(3) of the Act. It was held that the finding or direction of the Appellate Assistant Commissioner fell within the second proviso to section 34(3) of the Act and therefore when action was taken by the Income Tax Officer he could take action at any time. It was pointed out in this case that the effect of this proviso was to abrogate or do away with the period of limitation prescribed in the section, in those cases where the Income Tax Officer takes action in consequence of a finding or direction given in an order made under the various sections specified in sub-section (3) of section 34, but subject to the general rule that he cannot take proceeding where before the proviso became law the remedy of the Income Tax department had already become barred.

It appears to me that there is good deal to be said in favour of the view taken by the Allahabad High Court. The expression "finding or direction" occurring in the proviso to section 34(3) appears to have reference to a finding or direction which arises directly out of the issues which fall for determination in the particular proceeding initiated u/s 34 of the Act. A positive finding that the escaped income or any part thereof does not relate to the assessment year which is the subject-matter of the proceeding but to another assessment year is a finding which is outside the scope of the proceeding which is before the appellate authority. Moreover, as is well known, a notice u/s 34 of the Act can be validly issued only if the Income Tax Officer is satisfied on certain matters specified in the section. So the action taken by the Income Tax Officer cannot be said to be one taken in consequence of or to give effect to the finding recorded by the appellate authority. Before the Income Tax Officer could issue a fresh notice u/s 34 he has to make up his mind independently upon investigation of new materials whether there was any justification for issuing a fresh notice. These are some of the reasons which can be urged in favour of the Allahabad view but I do not propose to express in this case any definite opinion on this point as it is not necessary to do so for the purpose of disposal of this appeal.

The contention based on sub-section (4) of section 34 of the Indian Income Tax Act may now be considered. As pointed out already this sub-section was introduced in section 34 by an amendment made on 12th March, 1959. Under proviso (ii) of section 34(1) it is provided that where the income which has escaped assessment wholly or in part is less than one lakh of rupees the Income Tax Officer has to take action within eight years; but where the income has escaped assessment wholly or in part and the amount involved is one lakh of rupees or more there is no period of limitation and the Income Tax Officer may take action at any time. The argument on behalf of the appellant is that the effect of sub-section (4) of section 34 is not to abrogate the provisions with regard to period of limitation as contained in the provisos in sub-section (1) of section 34 of the Act, but it has to be read as subject to those provisions and it is submitted that where the amount involved is less than rupees one lakh but the period of eight years has already elapsed before the issue of the notice then such a notice will be an invalid notice and a notice issued without jurisdiction by reason of the provisions of sub-clause (ii) of the proviso to sub-section (1) of section 34 of the Act, because that sub-clause expressly enjoins that the amount which is made the subject of assessment or reassessment is rupees one lakh or is likely to be rupees one lakh or more no notice can be issued by the Income Tax Officer if a period of eight years as prescribed has elapsed. But if sub-section (4) of section 34 is construed to mean that notwithstanding what is provided in sub-clause (ii) of the proviso to sub-section (1) of section 34, the Income Tax Officer can at any time re-open an assessment u/s 34 in respect of an income the amount of which is below rupees one lakh then an inconsistency and conflict will be created between sub-section (4) and sub-clause (ii) of the proviso to sub-section (1) of section 34 which could not certainly be the intention of the Legislature which framed those two provisions and intended them to exist side by side in the same section, i.e., section 34.

In my view this contention of the appellant cannot be accepted as sound. The proviso (ii) and various other provisions were introduced into sub-section (1) of section 34 by section 18 of the Finance Act, 1956 (18 of 1956), which came into force on 27th April, 1956 and it was by clause (a) of the same section 18 of the Finance Act, 1956, that the words "within eight years" were omitted from sub-section (1) of section 34 as it existed prior to such amendment. Later on sub-section (4) was introduced in section 34 by the Indian Income Tax Amendment Act, 1959 (1 of 1959). This new sub-section provided that a notice u/s 34(1)(a) could be issued at any time in respect of a year although a period of eight years after that year had already expired. In other words this sub-section (4) brought within its ambit those years in respect of which the right to issue the notice had become already barred before the amendment of 1956. The matter may be further clarified in the following manner : The amendment of 1956 though omitting the words "within eight years" from the main body of sub-section (1) of section 34, introduced the period of eight years in clause (ii) of the amended proviso in sub-section (1) and laid down that since the amendment of 1956 came

into force, no notice could thereafter be issued by the Income Tax Officer for any year after the lapse of a period of eight years unless the income escaping assessment was rupees one lakh or more. But, if before the amendment of 1956 came into force on 27th April, 1956, the right to issue notice in respect of any particular year had become barred by lapse of eight years then by virtue of sub-section (4) of section 34 the right was conferred on the Income Tax Officer to issue notice even in respect of such barred year. To put it in a different language, clause (ii) of the proviso in sub-section (1) of section 34 was intended to have prospective operation only with effect from 27th April, 1956, and sub-section (4) of section 34 was intended to have retrospective operation and to cover cases where the right to issue notice in respect of any particular year had become barred by lapse of a period of eight years before the amendment of 1956 came into force. It will thus be seen that there is no real inconsistency or conflict between proviso (ii) in sub-section (1) of section 34 and sub-section (4) of section 34. Consequently, although in the present case the right to issue notice in respect of the assessment year 1942-43 would otherwise have become barred in 1951, still by reason of and under sub-section (4), the Income Tax Officer had the right to issue notice in respect of this (otherwise barred) year. This appears to me to be the right interpretation of this sub-section (4) of section 34 of the Act and accordingly the notice issued on 19th January, 1960, was not barred by limitation but was a good and valid notice.

In the result the appeal must fail and it is accordingly dismissed with costs.

DEBABRATA MOOKERJEE J. - I agree.

Appeal dismissed