

(1970) 05 CAL CK 0016
In the Calcutta High Court
Case No : Matter No. 517 of 1968

Chhaganmal Agarwalla

APPELLANT

Vs

Income Tax Officer, "A" Ward and Others

RESPONDENT

Date of Decision : 14-05-1970

Acts Referred:

Income Tax Act, 1922 — Section 35

Income Tax Act, 1961 — Section 154, 155, 297(2)

Citation : (1972) 86 ITR 248

Hon'ble Judges : Sankar Prasad Mitra, J

Bench : Single Bench

Advocate : D. Pal, for the Appellant; D. Sen and A. Sengupta, for the Respondent

Judgement

Sankar Prasad Mitra, J.—On March 14, 1962, the Income Tax Officer, "E" Ward, Dist. IV(3), made an order of assessment u/s 23(3) of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act"), for the assessment year 1961-62 against the petitioner. On March 31, 1966, an order of assessment was passed against the petitioner's partnership firm, Jaswantraai & Bros., for the assessment year 1961-62. The respondent No. 1, namely, the Income Tax Officer, "A." Ward, Dist. III(3), Calcutta, gave to the petitioner on the 6th May, 1966, a notice u/s 154/155 of the Income Tax Act, 1961 (hereinafter referred to as "the new Act"), for the assessment year 1961-62. The purpose of this notice was to rectify the petitioner's assessment made on the 14th March, 1962, upon the assessment of the petitioner's firm on the 31st March, 1966. Needless to say that, by this rectification, the petitioner's tax liability was sought to be increased. On the 12th May, 1966, the respondent No. 1 passed an order against the petitioner u/s 154 of the new Act for the assessment year 1961-62. On January 9, 1966, the petitioner was served with a notice of demand u/s 156 of the new Act for the assessment year 1961-62 pursuant to the aforesaid notice u/s 154. On the 4th July, 1966, the respondent No. 1 gave notice to the petitioner u/s 222(1) of the new Act requiring the petitioner to show cause why a penalty should not be imposed for non-payment of tax. Eventually, on December 30,

1967, the petitioner was served with a notice of demand from the Tax Recovery Officer, Calcutta, with respect to the certificate for Rs. 74,348.85 forwarded by the Income Tax Officer. The Tax Recovery Officer on the same day, namely, the 30th December, 1967, made an order prohibiting and restraining the petitioner from making any transfer of his shares in the Transport Corporation of India (P.) Ltd.

2. In the present application the notice u/s 154 read with section 155 of the new Act dated 12th May, 1966, the notice u/s 156 of the new Act dated 23rd May, 1966, the notice u/s 222(1) of new Act dated the 4th July, 1966, the notice of demand of the Tax Recovery Officer dated the 30th December, 1967, and the prohibitory order of the Tax Recovery Officer made on the 30th December, 1967, have all been challenged.

3. Mr. Bajoria, learned counsel for the petitioner, drew my attention to Section 297(2)(a) of the new Act, which runs thus :

Notwithstanding the repeal of the Indian Income Tax Act, 1922 (XI of 1922) (hereinafter referred to as "the repealed Act"),--

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment, of that person for that year may be taken and continued as if this Act had not been passed."

4. Learned counsel has urged that the petitioner's return of income for the assessment year 1961-62 was filed before the commencement of the new Act. In these premises, all proceedings for the petitioner's assessment for the year 1961-62 have to be taken or continued if at all not under the new Act but under the old Act. Reliance is placed on the Supreme Court's judgment in *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, .. In this case the Supreme Court has held that proceedings taken for rectification of assessment to tax either u/s 35(1) or u/s 35(5) of the old Act were proceedings for assessment. Learned counsel submits that if proceedings for rectification are proceedings for assessment then in the instant case the notice for rectification should have been served not u/s 154 or 155 of the new Act but u/s 35(5) of the old Act. And since the initial notice for rectification was bad, all proceedings taken thereunder were also illegal and should be set aside. Mr. Bajoria invites my attention to paragraph 6 of the affidavit-in-opposition of Umapada Choudhury affirmed on the 18th July, 1969. In this paragraph it is, inter alia, stated :

"I say that in the instant case the assessment of the said firm was made after 1st April, 1962, and as such, the assessment of the petitioner could be rectified u/s 155(1)(a) of the Income Tax Act, 1961."

5. Mr. Bajoria contends that since "rectification" is a part of "assessment", the point aforesaid raised in the affidavit-in-opposition is not sustainable by reason of the provisions of Section 297(2)(a) of the new Act. It is apparent, submits Mr.

Bajoria, learned counsel for the petitioner, from Section 3 and Section 23(5) of the old Act that the firm and its individual partners are distinct and separate entities for purposes of assessment, And simply because the firm has been assessed under the new Act the individual partner's assessment cannot be rectified under the new Act.

6. On behalf of the respondents it has been urged before me that Sections 154 and 155 of the new Act contain two distinct types of provisions. Section 154 deals with rectification of mistake made in an order of assessment and Section 155 with "other amendments" in an order of assessment. According to counsel for the respondents Section 155 does not deal with rectification as such and is independent of Section 297(2)(a) of the new Act. In other words, the provisions in Section 297(2)(a) do not in any way control the provisions of Section 155. It is true that in Sankappa's case the Supreme Court has said that assessment includes rectification but Section 155 does not deal, according to counsel for the respondent, with the type of rectification envisaged in that case. Moreover, it would appear from *S. Sankappa v. Income Tax Officer, Central Circle II, Bangalore*, at page 763, that it was conceded before the High Court on behalf of the Income Tax Officer "that proceedings for rectification of the assessment of the appellants could not be taken u/s 155 of the Act of 1961, because, admittedly, the rectifications related to assessments of tax for the assessment years when the Act of 1922 was applicable, so that proceedings could only be taken u/s 35(5) of the Act of 1922 in view of the provisions of Section 297(2)(a) of the Act of 1961". In the instant case counsel for the respondents was not prepared to make any such concession.

7. I do not agree with these contentions of the learned counsel for the respondents. Section 154 of the new Act deals with rectification of mistakes, but it is not concerned with rectification of a partner's assessment upon assessment or reassessment of his firm which was the subject-matter of Section 35(5) of the old Act. On the contrary, so far as this aspect of the matter is concerned, the language of Section 155 of the new Act appears to be identical with that of Section 35(5) of the old Act. In these circumstances, it cannot, in my opinion, be urged that a proceeding u/s 155 of the new Act can be initiated in spite of the provisions of Section 297(2)(a). These contentions of the respondents' counsel are, therefore, overruled.

8. The next argument on behalf of the respondents is that Section 297(2)(a) provides that proceedings "may be taken and continued as if this Act had not been passed". It shows, according to learned counsel, that proceedings u/s 297(2)(a) are permissible only and the tax authorities are free to adopt other methods available to them for achieving the same results. To my mind, this contention is also without substance. If Section 297(2)(a) had not been enacted, Section 6 of the General Clauses Act would have brought into operation the provisions of the old Act.

9. It seems to me, however, that the proceedings taken by the tax authorities in

the instant case should be examined from an entirely different point of view. In *Giridharilal Jhajharia v. Commissioner of Income Tax I.T.R., 1970 (Cal.) 133* the assessee was assessed on 30th March, 1961, and 20th March, 1962, for the assessment years 1956-57 and 1957-58. Subsequently, on January 27, 1964, the assessee received two notices under Sections 154 and 155 of the new Act for rectifying the assessment on the ground of a mistake apparent from the record. The error was said to be a difference between the amounts of certain commission paid by another company to the assessee as disclosed by that company and the amounts shown in the returns filed by the assessee. On 6th April, 1964, orders were passed u/s 35 of the old Act rectifying the assessment. The assessee applied under Article 226 to quash the orders by the issue of a writ of certiorari. A Division Bench of this court has held that the orders of rectification made u/s 35 of the old Act are valid in law : the word "assessment" is used in the Income Tax Act, in a number of provisions, in a comprehensive sense and included all proceedings starting with the filing of the return or issue of notice and ending with determination of the tax payable by the assessee ; the proceeding for rectification of assessment of tax u/s 35 of the old Act are proceedings of assessment: and it, therefore, follows that the jurisdiction of the revenue authorities to rectify flows from the old Act and, secondly, from the provisions contained in Section 297(2)(a) of the new Act. The jurisdiction u/s 35 of the old Act does not flow, according to this court, from the issue of the notice and any notice issued under the new Act in respect of assessment proceedings under the old Act would not rob the revenue of the jurisdiction to rectify u/s 35 of the old Act.

10. This judgment is binding on me. It lays down that notice may be given under the new Act but if the order of assessment is passed under the old Act the assessment is valid. In the present case the notice was given under the new Act and the order rectifying the assessment of the petitioner has also been made under the new Act Obviously, the Division Bench judgment cited above cannot be invoked in support of such an order. But, there is a judgment of the Gujarat High Court in *P.M. Bharucha and Co. Vs. G.S. Venkatesan Income Tax Officer, Circle I Ward A, Bhavnagar, ..* In this case, the Income Tax Officer issued on December 23, 1965, to the petitioner, an unregistered firm of three partners, a notice proposing to rectify u/s 154 of the Income Tax Act,, 1961, an assessment order made on the petitioner as unregistered firm u/s 23(3) read with Section 34(1)(a) of the old Act on March 22, 1962. The notice was in respect of an amount of Rs. 3,72,553 as capital gains in the assessment year 1949-50, on the ground that there was a mistake apparent from the record, that the officer who made the assessment had failed to make the assessment u/s 23(5)(b) of the old Act treating the petitioner as a registered firm which, if it had been done, would have gained more tax, for the reason that capital gains in the hands of the petitioner-firm would be business income in the hands of the partners. The petitioner filed a writ petition attacking the notice for rectification and also the subsequent order of rectification on the ground, inter alia, that, as the rectification related to

assessment of tax for the assessment year 1949-50, the officer had no jurisdiction to make an order of rectification u/s 154 of the new Act and the order of rectification was null and void. The Gujarat High Court has held, *inter alia*, that, though the order of rectification could not be made by the officer u/s 154 of the new Act, it cannot be said that he had no power to make it as he had power to make an order of rectification u/s 35 of the old Act, and the order of rectification would not, therefore, be regarded as having been made without jurisdiction. According to the Gujarat High Court, a wrong reference to the power under which an order is made does not per se vitiate the order, if there is some other power under which the order could lawfully be made. ITR 520 Bhagawati C.J. of the Gujarat High Court observes : "The validity of the order has to be tested by reference to the question whether the Income tax Officer had any power at all to make the order. If the power is otherwise established, the fact that the source of the power has been incorrectly described would not make the order invalid : the order cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within the power of the Income Tax Officer under some other provision of law. Now, though the order of rectification could not be made by the respondent u/s 154 of the new Act, it cannot be said that the respondent had no power at all to make it. The respondent had power to make an order of rectification u/s 35 of the old Act and the order of rectification could not therefore be regarded as an order made by the respondent without jurisdiction. It is no doubt true that the notice which preceded the order of rectification mentioned Section 154 of the new Act as the provision under which the assessment order was sought to be rectified, but there was no prejudice to the petitioner-firm by reason of the wrong description of the source of the power, since there is no difference in the nature and content of the power, whether it is exercised u/s 35 of the old Act or u/s 154 of the new Act, and the conditions for the exercise of the power under both the provisions are also identical. The order of rectification cannot therefore be assailed as an order made in exercise of a power which did not exist. It was an order made in exercise of the power u/s 35 of the old Act."

11. In reaching these conclusions the Gujarat High Court has relied on the Supreme Court decision in *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, .. In this case, the Commissioner of Income Tax purporting to act under Sections 5(5) and 5(7A) of the old Act, made an order on November 4, 1953, that the assessment of the assessee-firm could be done by the Income Tax Officer, Special Circle, Ambala, and not by the Income Tax Officer, Patiala, who was the competent authority u/s 64 of the Act to assess the firm. In 1955 the Income Tax Officer, Special Circle, Ambala, issued a notice u/s 34 of the Patiala Income Tax Act, 2001, to reopen the firm's assessment in the accounting year 1945-46. The firm contended that the officer at Ambala had no jurisdiction as the order of the Commissioner was *ultra vires*, since it was not issued under the Patiala Act which applied to the assessment year 1946-47 by virtue of the Finance Act, 1950. This contention was negated by the Supreme

Court. Hidayatullah J., as he then was, observed :

"The Patiala Income Tax Act contained provisions almost similar to Sections 5(5) and 5(7A) of the Indian Income Tax Act. Sub-section (5) differed in this that the Commissioner of Income Tax was required to consult the Minister-in-charge before taking action under that sub-section. The only substantial difference in the latter sub-section was that the Explanation which was added to Section 5(7A) of the Income Tax Act as a result of the decision of this court in *Bidi Supply Co. Vs. The Union of India (UOI) and Others*, . did not find place in the Patiala Act. The Commissioner, when he transferred this case, referred not to the Patiala Income Tax Act but to the Indian Income Tax Act, and it is contended that if the Patiala Income Tax Act was in force for purposes of reassessment, action should have been taken under that Act and not under the Indian Income Tax Act, This argument, however, loses point, because the exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle is well settled. See *Pitamber Vajirshet v. Dhondu Navlapa* ILR 1888 Bom. 486"

12. I am inclined to apply the principles laid down in these decisions to the facts of this case. Here, the notice for rectification was issued under the new Act, The order rectifying the assessment has also been made under the new Act. But, the order of rectification must be held to be referable to the jurisdiction of the Income Tax Officer u/s 35 of the old Act which confers validity upon it and not to his jurisdiction under the new Act under which it will be nugatory.

13. Mr. Bajoria, learned counsel for the petitioner, faced with the judgments of the Supreme Court and the Gujarat High Court referred to above, has contended before me that the principles discussed in these judgments are inapplicable to Section 35(5) of the old Act so far as the facts in this petition are concerned. The relevant portions of Sub-section (5) of Section 35 are as follows;

"Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm u/s 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of the section, and the provisions of Sub-section (1): shall apply thereto accordingly"

14. Mr. Bajoria's point is that, unless the partner's assessment is complete under the old Act and the assessment or reassessment of his firm also takes place under the old Act, Section 35(5) cannot be invoked in the instant case, the partner's assessment was made under the old Act but the firm's assessment was made under the new Act. And, in this view of the matter, according to learned counsel for the petitioner, the judgments of the Gujarat High Court and

of the Supreme Court cited above would not save the notices and orders under challenge.

15. To deal with this point of Mr. Bajoria it would be necessary to recapitulate and compare the provisions of Clauses (a) and (b) of Subsection (2) of Section 297 of the new Act. These are as follows :

"Section 297(2).--Notwithstanding the repeal of the Indian Income Tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act),--

(a) Where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed.

(b) where a return of income is filed after the commencement of this Act otherwise than in pursuance of a notice u/s 34 of the repealed Act by any person for the assessment year ending on the 31st day of March, 1962, or any earlier year, the assessment of that person for that year shall be made in accordance with the procedure specified in this Act."

16. In the present case the original assessment of the petitioner was made under the old Act; a proceeding for rectification is a part of assessment; it is, therefore, obvious by reason of Section 297(2)(a) that the rectification proceedings must be taken and continued as if the new Act had not been passed at all. With respect to the firm the position is that the assessment related to an assessment year to which the old Act applied. The firm filed its return after the commencement of the new Act. That is why the firm has been assessed u/s 297(2)(b) in accordance with the procedure specified in the new Act. But in fact and in substance it is an assessment under the old Act. On this view of the matter I do not see any difficulty in institution of proceedings for rectification against the petitioner u/s 35(5) of the old Act. In any event, Section 35(5) does not expressly specify that the assessment or reassessment of the firm must be under the old Act. Now that the new Act has come into operation it would be unreasonable to hold that, unless the firm is assessed or reassessed, particularly according to the procedure laid down in the old Act, Section 35(5) would not apply. On these grounds I am unable to agree with the argument advanced on behalf of the petitioner on the difficulties in applying Section 35(5) of the old Act to the facts herein.

17. The result is that this application is dismissed. The rule is discharged. All interim orders are vacated. There will be no order as to costs. The operation of this order is stayed for four weeks on the application of counsel for the petitioner.