

(1974) 03 CAL CK 0015
In the Calcutta High Court
Case No : Appeal No. 224 of 1971

Chhogmal Agarwalla

APPELLANT

Vs

Income Tax Officer, "A" Ward and Others

RESPONDENT

Date of Decision : 21-03-1974

Acts Referred:

Income Tax Act, 1922 — Section 35(5)
Income Tax Act, 1961 — Section 297(2)

Citation : (1975) 100 ITR 29

Hon'ble Judges : Sabyasachi Mukharji, J; R.N. Pyne, J

Bench : Division Bench

Advocate : R.N. Bajoria and R.K. Murarka, for the Appellant; Ajit Sen Gupta and Prabir Majumdar, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this appeal we are concerned with the assessment year 1961-62. On the 14th March, 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, against the petitioner for the aforesaid year. On 31st of March, 1966, an order of assessment was passed against the firm, Jaswantrai & Bros. This was a registered firm of which the petitioner was a partner. The said assessment was also for the aforesaid assessment year 1961-62. Thereafter, 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. 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. It has to be borne in mind that the Income Tax Act, 1961, came into effect from 1st of April, 1962. On the 12th May, 1966, respondent No. 1, that is to say, the Income Tax Officer concerned passed an order against the petitioner u/s 154 of the new Act for the assessment year 1961-62, rectifying the assessment on the basis of the completed assessment of the partnership firm. On the 23rd May, 1966, the petitioner was served with a notice of demand u/s 156 of the new Act for the assessment year 1961-62. On the 4th July, 1966, 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. Thereafter, on 30th December, 1967, the petitioner was served with a notice of demand by 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. All the aforesaid steps beginning from the notice u/s 154 of the Income Tax Act, 1961, and subsequent thereto mentioned hereinbefore were the subject-matter of challenge in the application under article 226 of the Constitution in this court. The application came up for hearing before Sankar Prasad Mitra J. (as the Chief Justice then was). By a judgment and order passed on 14th May, 1970, Chhaganmal Agarwalla Vs. Income Tax Officer, "A" Ward and Others, , the learned judge has discharged the rule nisi and dismissed the application. This appeal arises out of the aforesaid judgment and order.

2. In so far as it was contended that the notice u/s 154 was bad in view of the provisions of Section 297(2)(a) of the Income Tax Act, 1961, and in view of the fact that the return of the income of the petitioner in his individual capacity had been filed prior to 1st of April, 1962, and the assessment was made before 1st of April, 1962, the learned judge came to the conclusion that the notice was not properly issued u/s 154 of the Income Tax Act, 1961. The learned judge relied on the decision of the Supreme Court in the case of S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore, . We are in agreement with the aforesaid conclusion of the learned judge. Indeed, not much argument was advanced before us in respect of this and no cross-objection has been filed by the respondent challenging the aforesaid finding of the learned judge.

3. The learned judge, however, held that though the notice had been issued u/s 154 of the Income Tax Act, 1961, it should be regarded as a valid notice u/s 35 of the Indian Income Tax Act, 1922, relying on the several decisions of the Supreme Court referred to in the judgment of the learned judge including the decision in the case of L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., . We are also in agreement with the aforesaid conclusion of the learned judge on this point. The appellant did not concede this point but could not advance any substantial reason before us to take a different view from this conclusion.

4. The third contention that was urged before the learned judge, however, was that inasmuch as the rectification was u/s 35(5) of the Indian Income Tax Act, 1922, this order of rectification could not have been passed in the facts and circumstances of the case because the assessment of the firm was made after the coming into operation of the Income Tax Act, 1961, and indeed the return was filed after the coming into operation of the Income Tax Act, 1961. It was contended that rectification that was contemplated u/s 35(5) on the assessment of the firm was the rectification made or done under the provisions of the Indian

Income Tax Act, 1922, and could not be a rectification under the Income Tax Act, 1961. In order to appreciate this contention it would be necessary to set out the relevant portions of Sub-section (5) of Section 35 of the Indian Income Tax Act, 1922, which 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 the mistake apparent from the record within the meaning of the section, and the provisions of Sub-section (1) shall apply thereto accordingly..."

5. The learned judge was unable to accept this contention. The learned judge was of the opinion that in fact and in substance the assessment of the firm was an assessment under the old Act but had to be completed under the new Act in view of Section 297(2)(b) of the Income Tax Act, 1961. It is the propriety of this conclusion of the learned judge which is being challenged in this appeal before us. We have already referred to the terms of Sub-section (5) of Section 35. It provides a power of reopening and rectifying a completed assessment of a partner on the assessment of the firm. It deals primarily with the rectification and the proceedings of assessment of the partner but that power is dependent upon the assessment or reassessment of the firm. How that assessment and reassessment of the firm has to be done is not the subject-matter of Sub-section (5) of Section 35 or Section 35 of the Act. It appears to us that when a power is given to rectify the assessment of a partner "on the assessment and reassessment of a firm", it is only on a proper assessment and reassessment of the firm in accordance with law and that assessment, if in a particular case has to be under the old Act, that is, Indian Income Tax Act, 1922, has to be under the old Act. But that assessment, in view of the fact that the firm filed the return subsequent to the coming into operation of the new Act, has to be under the new Act; then that power of rectification must also be utilised on the proper assessment or reassessment of the firm in accordance with the provisions of the new Act. It is undisputed that u/s 297(2)(b) of the Income Tax Act, 1961, the assessment of the firm has to be under the new Act and if that is the legal position when the power is given u/s 35(5) to rectify the assessment and reassessment of the firm, that power in this case will have to be exercised on the assessment and reassessment of the firm under the new Act. Any contrary view would lead to an anomaly. Counsel for the appellant, however, contended that in order to remove the anomalies that might arise power had been given u/s 298 of the Act to issue orders for removal of difficulties and indeed such order has been issued. But this situation has not been covered. That is, however, unfortunate ; but that does not, in our opinion, detract from the construction that we have made of Sub-section (5) of Section 35 of the Act.

6. In the aforesaid view of the matter this appeal fails and is accordingly dismissed.

7. In the facts and circumstances of the case, there will be no order as to costs.

R.N. Pyne, J.

8. I agree.