

(1962) 02 GAU CK 0005
In the Gauhati High Court

Case No : Income-tax Ref. No. 4 of 1961 and Civil Rule No. 16 of 1961

Chouthmal Agarwalla

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-02-1962

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 2, 22, 23(3), 34, 34(1)

Citation : (1962) 46 ITR 262

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J

Bench : Division Bench

Advocate : S.K. Ghose, S. Tibrewal and N. Sarma, for the Appellant; P. Choudhury, for the Respondent

Judgement

G. Mehrotra, C.J.—By an order of this Court dated the 14th February Civil Rule No. 4 (M) of 1960, the Income Tax Appellate Tribunal was asked to refer the following two questions of law for decision:

(1) Whether on the facts and in the circumstances of the case any Income" has escaped due to the failure of the Assessee to disclose fully and truly all material facts and the proceedings started. u/s 34 (1) of the Income Tax Act were! justified and valid in law?

2. Whether there was any material evidences or basis on record to support that the sum of Rs. 1,18,000/- was secretly invested in the business during the years 1942 to 1946 and the estimate of profits at Rs. 60,000/- was justified and if so whether the entire sum of Rs. 60,000/- can be taxed during the year under consideration?

2. The facts as disclosed in the statement of the case are that the Hindu undivided family styled] Bhimraj Chouthmal whose karta is Chouthmal Agarwalla was assessed for the year 1946-47, the corresponding accounting year being 2002 Rule N. as Hindu undivided family, for Rs. 29,761/-. Notice u/s 34 was

subsequently issued on the ground that by reason of non-disclosure of certain material facts the income for the year has escape assessment. Thereafter, the Hindu undivided family was reassessed u/s 23(3) of the Income Tax Act. An appeal was filed against the aforesaid assessment, but the order was ultimately upheld by the Appellate Tribunal. The case of the Department was that the Department came to know subsequently that a sum of Rs. 1,18,000"/-, for which a draft was purchased in the name of Chouthmal Agarwalla, was deposited in the Hindu undivided family Bank account on the 19th March 1946 in the Imperial Bank of India at Dibrugarh This fact was not disclosed to the Income Tax authorities when the Hindu undivided family was assessed for the assessment year 1946-47. The Department has now come to the conclusion that the source of this amount of Rs. 1,18,000/, with which the Bank draft was purchased, had not been disclosed by the Assessee and thus the Assessee was assessed to Income Tax for the sum of Rs. 60,000/-as the estimated profit.

3. It will appear from a perusal of the order of the, Income Tax Officer that his view was that the sum of Rs. 1,18,000/- which was brought to Dibrugarh from Jaipur under a Bank draft, must have been brought earlier than 1946 and this amount must have been invested by the Hindu undivided family and that the profit made from the investment of Rs, 1,18,000/- could not be less than Rs. 60,000/-, and, thus the Income Tax Officer assessed the Assessee on this amount of Rs. 60,000/. The Appellate Assistant Commissioner whose order was affirmed by the Appellate Tribunal has come to the conclusion that the Assessee has failed to prove the source of Rs. 1,18,000/- with which the Assessee purchased the Bank draft at Jaipur and brought it to Di-brugarh. As the Assessee has failed to prove the source of this amount, the Appellate Assistant Commissioner has estimated the profit to be Rs. 1000/-. The Appellate Tribunal has affirm-ed the order of the Appellate Assistant Commissioner.

4. The contention rose by the Assessee Counsel before us is that there were no facts on the record; to" show that the Income Tax Officer had reasons to believe that the income had escaped assessment due (to the failure of the Assessee to disclose fully and truly all material facts. The condition for issue of notice of re-assessment u/s 34 of the Income Tax Act is that the Income Tax Officer has reason to believe that by reason of the omission of failure on the part of an Assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary .for his assessment for that year, income, profits or gains chargeable to Income Tax have escaped Assessment for the year. The contention is that there is no evidence to show that there was any non-disclosure or failure of the Assessee to disclose fully and truly all material facts necessary for assessment for that year. It is further said that the Income Tax Officer had no materials from which ho could reasonably believe that by reason of the said omission the -income for that year escaped assessment. The contention of the Counsel for the Department is that as this fact was not disclosed that the Bank draft was deposited in the Bank ac-count" of the Hindu undivided family, there was failure to disclose material facts and if the Income

Tax Officer came to the conclusion that this failure to disclose the material fact resulted in any under-assessment of the Hindu undivided family, it cannot be said that there were no circumstances before the Income Tax officer to issue notice u/s 34 (1) (a) of the Income Tax Act. The account books of the Hindu undivided family were before the Income Tax officer when the first assessment was made. In the account books of the joint family firm the sum of Rs. 1,18,600/- was credited as follows:

1. Rs. 50,000/- in the account of Chonthmal.
2. Rs. 35,000/- in the account of mother of Loknath.
3. Rs. 50,000/- in the account of Mabadevi Agarwallini.

The case of the Assessee was that a sum of Rs. 1,33,000/- was taken by Chouthmal to his home town in Rajasthan as there was fear of Japanese invasion in the year 1942. This sum was kept there and Rs. 15,000/- out of the said amount was spent and when the situation eased Rs. 1,18,000/- was brought back to Dibrugarh and credited in the account of the Hindu undivided family, to the credit of Chouthmal, mother of Loknath and Maha-devi Agarwallini. That this amount was brought to Dibrugarh and was credited in the name of various persons in the account books of the Hindu undivided family is apparent from the entries in the account book itself. That these credit items form part of the sum of Rs. 1,18,000/- brought from Jaipur to Dibrugarh is also evident from the copy of the ledger account of Chouthmal Agarwalla as also in the books of Bhimraj Chouthmal of Dibrugarh. It cannot, therefore, be said that the primary facts were not disclosed at the earlier stage and that it is a case of failure on the part of the Assessee to disclose the material facts. There is no material to show that the Income Tax Officer could reasonably believe that the failure to disclose the fact that the sum of Rs. 1,18,000/- was deposited in the Bank account of the Hindu undivided family resulted in under-assessment. In the absence of any such material, the condition precedent to issue any notice u/s 34 of the Income Tax Act did not exist and the entire proceedings consequent upon the issue of such notice are invalid in law. In our opinion therefore, the Income Tax Officer was not justified on the facts and in the circumstances of the case to issue notice u/s 34 (1)(a) of the Income Tax Act and thus the question No. I referred to us must be answered in the negative.

5. As regards the second question, the main contention of the Assessee is that there is no material on the record from which it can be inferred that the sum of Rs. 1,18,000/- was secretly invested in business during the years 1942 to 1946 and that the estimate of profits at Rs. 60,000/- was justified. In our opinion, this contention must be accepted. There is no evidence to show that this amount of Rs. 1,18,000/- was secretly invested; nor is there any material to show that the profit from the investment of Rs. 1,18,000/- could be Rs. 60,000/- in the accounting year. In fact as we have already pointed out, there is difference in the approach to this question both by the Appellate Assistant Commissioner and the

Income Tax Officer The Income Tax Officer has taxed the sum of Rs. 60,000/- on the footing that this sum would be the profit which the Assessee must have derived by investing the sum of Rs. 1,18,000/- for about four years. The Appellate Assistant Commissioner on the other hand has upheld the order of the Income Tax Officer on the ground that the Assessee has failed to prove the source of Rs. 1,18,000/-. In fact, the Counsel for the Department said that the Department may have been justified in taxing the entire sum of Rs. 1,18,000/- as undisclosed income of the Assessee. This finding of the Department would be based entirely on, surmises and conjectures. The assessment, was made u/s 23(3) of the Income Tax Act.." It is true that a certain amount of guess on -the part of the Department is likely to be there in each case of best judgment assessment when the account books have been rejected and the Income Tax Officer has to make an estimate, but the assessment cannot be uphold if it is based on mere suspicion and conjecture. It is an assessment which can be called to be capricious. Reference in this connection be, made to the- following cases: Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal, and Raghubar Mandal Harihar Mandal Vs. The State of Bihar, In the present case, beyond the mere suspicion that the sum of Rs. 1,18,000/- could not have remained uninvested for such a long time and must have yielded a profit of Rs. 60,000/- there is no material justifying such an inference.

6. It is then urged by the Counsel for the Department that the point that Rs. 60,000/- could not have been the profit from the investment of Rs. 1,18,000/- during that year was never raised before the Tribunal and thus it is not a point which arises out of the order of the Tribunal. The point, as will appear from the points argued before the Appellate Assistant Commissioner way raised. Apart from it, the whole question which the Tribunal was considering was whether the profit of Rs. 60,000/- was justified or not. One of the reasons given for it not being justified was that the Assessee could not have earned this profit of Rs. 60,000/- during that year, and, it cannot, therefore, be said" that the point was not raised. Reference has been made in this connection to the case of Commr. of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., : Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., In this case the law hits been summarized at p. 611 (of ITR) : (at p. 1645 of AIR) in the following terms:

- (1) When a question is raised before the Tribunal and is dealt with by it, it, is clearly one arising out of its order.
- (2) When a question of law is raised be-fore the Tribunal but the Tribunal fails to deal with it must be deemed to have been dealt with by it, and is therefore, one arising out of its order.
- (3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.
- (4) When a question of law is neither raised before the Tribunal nor considered

by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

The contention is that the present case is covered by the fourth head. We do not think that the present case comes under the fourth head. If the facts of that case are examined it will appear that the only point which was raised before the Tribunal was that the Assessee had not made a profit of Rs. 9,26,532/- during the assessment year. Before the High Court the point which was referred was that even if such an income was made by the assessee, he was entitled to an exemption under the fourth proviso of Section to (2)(vii) of the Income Tax Act. That was entirely a new point which was raised before the High Court. In the present case, the point all along raised by the Assessee was that the assessment of Rs. 60,000/- was not justified. A further point was also raised all along that there was no material to show that the Assessee could have made a profit of Rs. 60,000/- out of the investment of Rs. 1,18,000/- during that year. If the profit was not made during the accounting year, it could not have been liable to assessment. It is also significant to note that the amount was deposited in the Bank account of the Hindu undivided family towards the end of the accounting year and if the money was invested after it was brought to Dibrugarh it could not have yielded profit to the extent of Rs. 60,000/- during that year. It appears that the Income Tax Officer was of the opinion that this sum of Rs. 1,18,000/- was invested for four years. That necessarily means that the money must have been invested prior to the accounting year and any profit made by the Assessee during the period prior to the accounting year could not be taxed during the assessment year of 1946-47. In our opinion, therefore, there was no material evidence or basis on record to support that the sum of Rs. 1,18,000/- was secretly invested in the business during the years 1942 to 1946 and thus the estimate of profit at Rs. 60,000/- was not justified. This question is answered as indicated above.

7. The Assessee will be entitled to costs which we assess at Rs. 200/- (Civil Rule No. 16 of 1961).

8. A petition has also been filed under Article 226 of the Constitution of India. The main ground taken in this petition is that the notice u/s 34 of the Income Tax Act was not properly served and, as such the foundation for the issue of the notice was not properly laid and the entire proceedings arising out of the notice u/s 34 are invalid and must be quashed.

9. As we have already decided in the reference before us that the proceedings were not properly initiated, it is not necessary to deal with this petition at all. This petition was filed as the Petitioner thought that the question of proper service of notice on the Assessee could not be argued in the reference. As we have already answered the reference in favour of the assessee it is not necessary to deal with the points raised in this petition and it is accordingly rejected, but with no orders as to costs.

S.K. Dutta, J.

10. I agree.