
(1957) 07 MP CK 0002

In the Madhya Pradesh High Court

Case No : Miscellaneous C.C. No. 101 of 1955

Commissioner Income Tax

APPELLANT

Vs

Sheolal

RESPONDENT

Date of Decision : 18-07-1957

Acts Referred:

Income Tax Act, 1961 — Section 66(1)

Citation : (1957) JLJ 1052

Hon'ble Judges : Hidayatullah, C.J;Chaudhari, J

Bench : Division Bench

Advocate : M. Adhikari, for the Appellant; J.M. Thakkar with A.G. Halve, for the Respondent

Judgement

1. This is a reference under Sec. 66 (1) of the income tax Act by the income tax Appellate Tribunal, Bombay, for the determination of the following questions:?

(1) Whether the Appellate Tribunal was competent to pass a supplement (sic) order ?

(2) What is the "previous year" for including in the total Income of the assessee the sum of Rs. 26,000 being the value of 26 notes of Rs. 1,000 each, the source of which the assessee has failed to explain ?

2. The facts out of which this reference arises are as follows. The assessee was being assessed on his income in the accounting year 1946-47. He was found to have encashed high denomination notes of the value of Rs. 66,000. He encashed notes of the value of Rs. 40,000 on 24th January 1946 and the remaining, viz. Rs. 26,000 on 25th January 1946. The Income tax Officer in dealing with these notes held them to be income from an undisclosed source. In giving his finding he observed as follows:-

Rs. 26,000/- income concealed from the sales of High Denomination notes as explained.....

We are not concerned with Rs. 40,000, and we need not refer to them any further. In deciding the case, the income tax Officer found that the story that these notes were in the household chest was false, and he made the following observation In the order:-

It will thus be seen that the story appears to be a got up one. Thus it is amply clear that the entry of Rs. 26,000/- was a bogus one and it is nothing else but the profits on purchase and sale of notes.

The income was, therefore, taken for assessment in the assessment year 1947-48. During the course of appeal before the Appellate Tribunal, Bombay, a specific ground was taken in relation to those notes. It was stated in that ground:-

That the said authorities have further failed to prove that the amount of Rs. 66,000/- added to the income as alleged Income from some undisclosed sources represents income of the account year and could, therefore, be brought to tax in the account year.

3. It will thus appear that before the Appellate Tribunal, Bombay, the question was specifically raised under Sec. 2(11) of the income tax Act as to whether this income from the undisclosed source could be taken in the previous year or in the accounting year for which the assessment was made. The Appellate Tribunal, apparently, overlooked this ground, and though it dealt with the question of Rs. 40,000 it did not express its opinion on this point and dismissed the appeal. On this being brought to the notice of the assessee he made an application purporting to be under Sec. 35 of the income tax Act asking that ground No. 3 which had been overlooked should be retried and a decision should be given. In the prayer it is quite clearly stated by the assessee that the mistake was sought to be rectified under Sec. 35 of the income tax Act and/or otherwise a reference should be made under Sec. 66(1) of the income tax Act to the High Court for the determination of the legal question whether this income could be taken in the accounting year 1946-47.

4. When the matter came before the Appellate Tribunal it gave its decision by an order made on 20th October 1953. The interim application for rectification of the so-called mistake was allowed, and in the penultimate paragraph of its order the Appellate Tribunal stated as follows:-

We accept this contention of Mr. Bharuka and hold that the sum of Rs. 26,000 is an income of the assessee from some undisclosed source for the assessment year 1946-47 and not for the assessment year 1947-48.

The Appellate Tribunal, therefore, directed the income tax Officer to assess this amount in the hands of the assessee for the assessment year 1946-47 "if he is so advised". We gather from Shri Thakkar that the income tax Officer has in fact assessed the tax on the income of Rs. 26,000 for the assessment year 1946-47 as an escaped income under Sec. 34 of the income tax Act.

5. The present reference was made at the instance of the Department, which contended inter alia that the order made by the Appellate Tribunal correcting the assessment year for Rs. 26,000 was incompetent in view of the fact that the previous order on the appeal became final under sub-section (6) of Sec. 33 of the income tax Act and that this was not a matter within sub-section (2) read with sub-sec. (1) of Sec. 35. In making the reference the Appellate Tribunal stated that it did not purport to act under Sec. 35 of the income tax Act at all. The Appellate Tribunal observed that having found that the entire appeal had not been disposed of inasmuch as ground No. 3 had not been decided, it had passed a supplementary order and completed the appeal in so far as it had been made before the Tribunal. The question now mooted before us, therefore, concerns this observation and the powers of the Appellate Tribunal to rectify mistakes" if any, in the order which had been previously passed in the appeal.

6. The two questions clearly disclose that the first is a question of competence of the Appellate Tribunal and the second relates to the facts of the case, that is to say, whether the assessment year In respect of Rs. 26,000 was the correct year or not, we have been taken through the provisions of Secs. 33 and 35 of the income tax Act. It was admitted before us that the income tax Appellate Tribunal does not possess any power of review. Shri Thakkar, who appeared for the assessee, contended, however, that no review was involved inasmuch as at best it was a rectification of an obvious error on the previous occasion in taking the accounting year as 1946-47 when it was the year previous to that. He contended, therefore, that even if the Appellate Tribunal did not purport to act under Sec. 35 of the income tax Act, the action of the Appellate Tribunal in rectifying the mistake must be referred to the jurisdiction possessed by the power which the Appellate Tribunal says it had. Shri Thakkar also contends that even under sub-sec. (4) of Sec. 33 the power was exercisable inasmuch as that section confers upon the Appellate Tribunal the power to pass orders-the word used being in the plural-which envisages interlocutory and final orders.

7. Shri Adhikari appearing for the Department contends that the word "orders" in the above sub-section refers to the different kinds of directions which the Appellate Tribunal can give to the Department after the appeal is disposed of and does not refer to a piecemeal decision of the appeal by the Tribunal. We do not think it necessary to pronounce too largely upon this matter, because in our view the matter is comprised within a very narrow compass.

8. It will be seen from the quotations we have given from the order of assessment that this was treated as an income not from the business which the man was carrying on but from the business of "buying and selling notes", for which no accounts were maintained. The Appellate Tribunal had also stated as follows in its order made on the previous occasion:

For want of proof, therefore, the amount has been rightly added as the assessee's income from undisclosed sources." Emphasis is laid upon "undisclosed" and it shows that it is not the regular business of the assessee

which was the case in the two Patna cases cited before us by Shri Thakkar Commissioner of income tax is Meghu Sao Jhandhu Sao XXVII ITR 371 and Commissioner of income tax, Bihar and Orissa vs. P. Darolia & Sons. XXVII ITR 515, In our opinion, this was a matter which was governed by Sec. 2(11) of the income tax Act, and in the absence of an option exercisable by the assessee the income could naturally be taken only in the previous year of accounting and not in the year within which the Appellate Tribunal by Its first order supposed it to fall. This position is perfectly clear, because the date of sale is 25th January 1946. Under Sec. 2(11), in the absence of an exercise of option the income will be taken to be an income from an undisclosed source in the previous year, and thus the assessment year would be 1946-47. The appellate Tribunal, therefore, in passing the so called supplementary order did no more than right something which was a mistake and which was an error apparent on the face of the record. The question, therefore, is whether it had to pass a supplementary order or could rectify it under Sec. 35 of the income tax Act.

9. No doubt, the Appellate Tribunal does say that it did not purport to act under Sec. 35 of the income tax Act. But the action of the Appellate Tribunal may be referred to a jurisdiction possessed by it, even though at the time it may not have been aware of it. This is laid down in the leading case of the Bombay High Court followed on numerous occasions in India as well as in this Court Pitambar Vijirshet vs. Dhondu Navalps ILR 12 Bom 486 at p. 489.

10. Rectification within the meaning of Sec. 35 means the correction of an error which is apparent on the face of the record. That error must be demonstrable without the taking out of any additional evidence and without any detailed arguments pro and con. In the present case we are of opinion that the facts speak for themselves and the finding is also equally clear. The finding about an undisclosed source shows that a source other than the normal business of the assessee is in view. Therefore, the conclusion of the Appellate Tribunal in the second order that the income must be taken in the previous accounting year was quite correct and was quite clear. There was thus an error in putting it in the accounting year 1946-47, which we think the Appellate Tribunal was authorised under Sec. 35 of the income tax Act to rectify. We rely upon the decision of the Bombay High Court in Sidhramappa Andannappa Manvi Vs. Commissioner of Income Tax, Bombay, where the powers of rectification were considered by Chagla, C.J. and Tendolkar, J. We respectfully agree with the observations of the Chief Justice that the section should be interpreted to cover cases of this character.

11. No doubt, the assessee was himself at fault in not drawing the attention of the Tribunal to the omission in the first order of one of the grounds of appeal, but he did his best by bringing it to the notice of the Appellate Tribunal at the earliest opportunity and made a composite application both for rectification and for reference. The Appellate Tribunal has rectified the mistake, though by passing a supplementary order and not under Sec. 35 as it should have, and has rejected

the prayer for the reference of the case to the High Court. There is manifest injustice involved in this case, because the attitude of the Department would deprive the assessee of his right to bring his case under Sec. 66 to the High Court for its adjudication. But we do not base our decision upon the hardship involved in this case. We think that in spite of the opinion of the Appellate Tribunal that the action was not taken under Sec. 35 it cannot but be attributed to the power possessed by the Appellate Tribunal to rectify mistakes of this and similar character.

12. Fortunately, the question which has been framed for our opinion does not refer to Sec. 35, but it only moots the question whether the Appellate Tribunal was competent to pass a supplementary order. Our answer is that if the supplementary order is treated as one under Sec. 35 it was a perfectly competent order, and we say that it was. In view of this our answer to the first question is in the affirmative. That being so, the order of the Tribunal passed on the second occasion would stand, and there would be no need to answer the second question, which as will be seen from what we have stated above, must be answered as the Appellate Tribunal itself has decided in the second order. We answer the reference, therefore, in the following words:-

Question (1).-Yes (but u/s 35 of the income tax Act).

Question (2).-There is no need to give a decision on this point.

13. We think that there should be no award of costs because the mistake was an inadvertent one, which was corrected by the Tribunal, and the reference was made because the Tribunal was probably not aware of its own powers or was at any rate in doubt about them.