

(1968) 03 RAJ CK 0003

In the Rajasthan High Court

Case No : Income-tax Civil Reference No. 31 of 1962

COMMISSIONER OF Income Tax

APPELLANT

Vs

CHAGANLAL DURGA PRASHAD, BEAWAR.

RESPONDENT

Date of Decision : 27-03-1968

Acts Referred:

Income Tax Act, 1922 — Section 23(5), 35(5)

Citation : (1968) 70 ITR 314 : (1968) RLW 477

Hon'ble Judges : Bhandari, Acting C.J.

Bench : Division Bench

Judgement

The judgment of the court was delivered by :

BHANDARI, ACTG. C.J. - The Income Tax Appellate Tribunal (Delhi Bench "C"), hereinafter called the Tribunal, has referred the following question u/s 66(1) of the Indian Income Tax Act, 1922 (Act No. XI of 1922) hereinafter called the Act :

Whether the assessments made for the years 1954-55 and 1955-56 on an association of persons were bad in law ?

As the statement of case shows, this question arose under the following circumstances:

Messrs. Chaganlal Durga Prashad, hereinafter called the assessee, filed the return of Income Tax for the assessment year 1954-55 u/s 22(1) of the Act claiming the status of a firm. This return was accompanied by an application for registration u/s 26A of the Act. Another return for the assessment year 1955-56 was filed on a notice u/s 22. This return was also accompanied by an application for renewal of registration. According to the assessee, the firm was a partnership firm consisting of 18 partners. These partners had filed their individual returns separately and assessments were made thereon separately. The Income Tax Officer held that there was no genuine partnership of 18 partners but it was an association of persons in which there were some dummy partners who represented the four dominant partners. He refused to register the firm and

made the assessment in the status of association of persons. The assessee filed appeals before the Appellate Assistant commissioner both against refusal to register the firm as well as against the quantum of income assessed, but met with no success except to a light extent in the matter of quantum of assessment. The assessee then filed appeals before the Tribunal which decided them by a consolidated order on 8th March, 1961. The Tribunal held that the assessee was a partnership firm and should be registered up to 24 February, 1955. The Tribunal annulled the assessment for both the years 1954-55 and 1955-56 on the grounds contained in the following concluding part of its judgment :

Coming to the assessments made u/s 23(3), we would refer to the two preliminary legal objections which pressed by Shri. A. R. Agarwal, the learned counsel for the assessee. The first of these objections is that the Income Tax Officer ought not to have made the assessments on the firms after making the assessments on the partners direct. The learned counsel for the assessee stated before us and furnished figures to show that each of the partners who had assessable income, was assessed in respect of his share of profits arising from the firm. Following the decision of the Allahabad High Court in the case of Joti Prasad Agarwal v. Income Tax Officer, B-Ward, Mathura, it was contended that the assessments made on the firm were bad in law as they had resulted in double assessment of the same income. We agree with the learned counsel for the assessee that this is indeed a valid objection and the assessments will have, therefore, to be annulled.

Incidentally, we may point out that as the assessments on each of the partners have already been made separately, the department will not be in a disadvantageous position if the present assessment are annulled inasmuch as the income arising had already been assessed and tax collected in respect of such income though in the hands of the partners direct.

Further, the assessments have also now to be held technically bad in law because theses have been made on an association of persons whereas we have held that the correct status is that of a firm.

The second legal objection propounded by the learned counsel for the assessee was the assessments were bad in law inasmuch as they had been made on a dissolved firm. The learned counsel for the assessee relied upon the decision of the Calcutta High Court in the case of Manindra Lal Goswami v. Income Tax Officer. The department relied upon an unreported case of C. A. Abraham v. Income Tax Officer, Kottayam, decided by the Supreme Court (Civil Appeal No. 517 of 1958 dated November, 29, 1960) in which the levy of penalty on a dissolved firm has been upheld. It was contended by the departmental representative that as the levy of a penalty on a dissolved firm has been upheld, a fortiori, the assessments made on a, dissolved firm are also valid. Although we have given our attention to the contentions of both sides, we find that it is not necessary for us to give our opinion on the issue as we have already held the assessments to be bad : vide paragraph 16.

As the assessments are being annulled, it is not necessary to give any finding as regards the additions made on different counts to the income shown.

In the result we summarise our decisions on the four appeals separately :

1. Registration

(a) The firm is found to be genuine and it is directed that registration for the assessment year 1954-55 should be allowed.

(b) For the assessment year 1955-56 the firm is found to have dissolved on the death of the partner, Shri Hira Lal, on 24-2-1955. The assessment should be made up to this period and registration allowed for this period only.

2. Quantum of assessments made u/s 23(3).

For both the years 1954-55 and 1955-56, the assessments are annulled.

In the result, the appeal u/s 26A for the assessment year 1954-55 is allowed, the appeal u/s 26A for the assessment year 1955-56 is allowed pro tanto, and the other two quantum appeals for the assessment years 1954-55 and 1955-56 are allowed.

Notice of this reference was given to the assessee and the first objection raised by learned counsel for the assessee is that the question formulated by the Tribunal is capable of only one answer that the assessments were bad in law as the assessments by the Income Tax Officer and the Appellate Assistant Commissioner were made on an association of persons while the Tribunal had decided as a matter of fact that the assessee was a firm, and the question formulated did not raise any question of law.

On behalf of the department it is contended that this is not the import of the question as will appear from paragraph 7 of the statement of case submitted by the Tribunal. Paragraph 7 runs as follows :

In the matter of assessments u/s 23(3), the learned counsel for the assessee raised two preliminary objections on the validity of the assessments, viz.,

(i) that the assessment on the firm was bad in law in view of the fact that the assessments had already been made on the partners individually;

(ii) that the assessment was bad because the partnership was dissolved prior to making of the assessment.

The Tribunal agreed with the assessee's contention that the assessment was invalid because the assessments were already made on the two partners direct. In coming to this decision, the Tribunal relied on the decision of the Allahabad High Court in the case of Joti Prasad Agarwal v. Income Tax Officer, B-Ward, Mathura. The Tribunal also observed that, as the assessee had filed the returns in the status of a firm and the Tribunal upheld that there was a genuine firm in existence, therefore, the Income Tax Officer could not make an assessment on

an association of persons which according to the Income Tax Officer, was composed of 4 partners. The Tribunal accordingly annulled the assessment made on the association of persons. The Tribunal had already held that the assessment was not valid in law and they did not express any opinion on the assessee's further contention that the assessment was bad because the firm was already dissolved."

The argument of learned counsel for the department is that the Tribunal having held that the assessee was a firm, was faced with the argument whether assessment of the firm could be made when the individual partners of the firm had been assessed in their individual capacity. The Tribunal relying on the authority of the Allahabad High Court in *Joti Prasad Agarwal v. Income Tax Officer, B-Ward, Mathura*, held that the assessments made on the firm were bad in law as they resulted in double assessment of the same income. In fact, the assessee was not till then assessed as a firm and what the Tribunal meant in its judgment was that the assessment of the firm would be bad in law as it would result in double assessment of the same income. Learned counsel for the department has urged that how far this view of the Tribunal was correct has been submitted by the Tribunal for determination to this court but the question formulated by the Tribunal is not happily worded.

Learned counsel for the assessee has argued that the question should be answered as it is worded and it is not permissible for this court to amend a question in any shape or form.

Learned counsel for the assessee has relied on a number of authorities starting from *Commissioner of Income Tax v. Kameshwar Singh*. In that case, their Lordships of the Privy Council observed that the duty of the High Court u/s 66(5) is to "decide the questions of law raised" by the case referred to them by the Commissioner and it was for the Commissioner to state formally the questions which arise. In that case, the High Court itself formulated a question for its decision and their Lordships deprecated this departure from regular procedure.

In *Commissioner of Income Tax v. Scindia Steam Navigation Co. Ltd.* after reviewing a large number of authorities, the Supreme Court observed that all the High Courts are agreed that section 66 creates a special jurisdiction and that the power of the Tribunal to make a reference and the right of the litigant to require it must be sought within the four corners of section 66(1) and that the jurisdiction of the High Court to hear reference is limited to questions which are properly referred to it u/s 66(1) and that such jurisdiction is purely advisory and extends only to deciding questions referred to it.

All this is true and we agree that it is not open to us to raise new questions for decision. But if the Tribunal intended to refer to the High Court a point of law on which it formulated a question which was not worded in a precise manner so as to bring in forefront the point which it intended to refer to the High Court, the High Court is competent to resettle or reframe the question so as to bring out

the real point which the Tribunal intended to refer.

In *Assam Bengal Cement Co. Ltd. v. Commissioner of Income Tax* Chakravartti C.J. observed with regard to the question submitted by the Appellate Tribunal that :

There can be little doubt as to what question the Tribunal intended to refer, but it must be said that the question, as drawn up, is neither correctly framed, nor accurately worded. The only question ever raised in the case was whether the payments were capital payments or revenue expenditure. It was never disputed that they had been made for the purpose of, that is to say, in the interest and for the furtherance of, the business or that they had been made solely for that purpose. Yet, the question, as framed would suggest that the latter is the only question in the case.

This case went to the Supreme Court and the decision of the Supreme Court is reported as *Assam Bengal Cement Co. Ltd. v. Commissioner of Income Tax* and no objection was taken to the re-casting of the question by the Calcutta High Court.

Yet in another case, *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax*, the Supreme Court itself framed a question which the assessee in that sought to raise and which was not referred to the High Court. The Supreme Court observed as follows :

The question of law raised in the third question being answered in favour of the assessee-firm the question of the applicability of section 10A of the Excess Profits Tax Act could not arise, for the assessee-firm having, during the relevant period, no business to which that Act applied, section 10A could not be invoked by the revenue and, therefore, the question whether there was evidence to support the finding of the Tribunal under that section could not arise. On the contrary, the further question of law which would really arise out of the order of the Appellate Tribunal consequent upon the aforesaid answer to question No. 3 would be whether under the facts and circumstances of the case, the application of section 10A with a view to amalgamating the income of the firm Uppal & Co., and Ram Singh & Co., with the income of the assessee-firm was correct and valid in law and, that was precisely the first question which the assessee-firm sought to raise by its application. In our view, the High Court should not only have answered question No. 3 in the negative but should also have raised, as a corollary to that answer to question No. 3, the further question of law on the lines indicated in question No. 1 of the assessee's petition. In other words, the High Court should have, after answering question No. 3 in the negative, reframed the referred question No. 1 by restoring question No. 1 as suggested by the assessee-firm in its petition and should have answered the question so restored, in the negative and in favour of the assessee.

These cases lay down the law that the language in which the question is framed is not sacrosanct if it not capable of expressing concisely and precisely what is

intended to be referred.

In this case we are constrained to observe that the question framed by the Tribunal is not very precise. This is further clear from the fact that the Tribunal had in the statement of case observed that so far as the registration was concerned this order had become final and no reference has been sought against it. The question referred by the Tribunal, if understood in the sense that the assessments made by the Income Tax Officer on association of persons were bad in law, could not have been referred without questioning the order of the Tribunal about the registration of the firm. In the sense in which the question is sought to be interpreted by learned counsel for the assessee, the answer is evidently in the affirmative if the registration is made. Then again in paragraph 7 of the statement of the case, the Tribunal has mentioned that in the matter of assessments, learned counsel for the assessee raised two preliminary objections on the validity of the assessments, one of which was that the assessment on the firm was bad in law, in view of the fact that the assessment has already been made on the partners individually. This was the point which was accepted by the Tribunal relying on the ruling of the Allahabad High Court in Joti Prasad Agarwals case. The crux of the matter, therefore, was whether the assessment of the firm would be bad in law, in view of the fact that the assessment had already been made on the partners individually. And this is the question which, in our opinion, the Tribunal intended to refer to this court and did refer. We, therefore, remodel the question referred by the Tribunal in the following form :

Whether, on the facts and circumstances of the case, the assessment of the firm Messrs. Chhaganlal Durga Prashad for the years 1954-55 and 1955-56 would be bad in law in view of the fact that assessments had already been made of its partners individually ?

Now we proceed to answer this question.

Section 3 of the Act is the main charging section and it runs as follows :

3. Charge of Income Tax. - Where any Central Act enacts that Income Tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually.

Section 23 of the Act deals with the assessment. Sub-section (5) of section 23 deals with the case of a registered firm and its relevant part as it stood before 1st April, 1956, runs as follows :

(5) in of under has or the firm (3) contained as and Notwithstanding anything foregoing sub-sections, when assessee is a total income been assessed (1) sub-section (4) case may be, (a) in the case of a registered firm,

- (i) the Income Tax payable by the firm itself shall be determined; and
- (ii) the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined...

Sub-section (6) laid down that :

Wherever the Income Tax Officer makes a determination in accordance with the provisions of sub-section (5) he shall notify to the firm by an order in writing the amount of the total income on which the determination has been based and the apportionment thereof between the several partners.

Now, the scheme u/s 23 so far as a registered firm is concerned was that the assessment of the total income of the firm is to be made under sub-sections (1), (3) or (4) as the case may be, and after that the total income of each partner of the firm including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined and then the Income Tax Officer is to notify to the firm the amount of total income on which the determination has been made and the apportionment thereof between the several partners. It is also that it was not necessary to determine the Income Tax payable by the firm itself.

In the instant case, the Tribunal was to proceed according to the provisions of section 23 of the Act in the matter assessment. For that purpose, it was first to assess the total income of the assessee, and then to assess the total income of the partners and also to determine the Income Tax payable by each partner on the basis of such assessment. If the Tribunal was itself not inclined to do so, it could have directed the Income Tax Officer to do so. The Tribunal could not have refused to determine the quantum of income of the firm unless there was a legal impediment in its way to do so. The Tribunal found a legal impediment as it accepted the argument advanced by learned counsel for the assessee that the partners of the firm had been taxed individually and, therefore, should be dropped; otherwise there would be double taxation.

Learned counsel for the assessee has supported this argument in this court by pointing out that section 3 of the Act, though not expressly, but impliedly prohibits the assessment of the firm if its partners had been assessed. In our opinion, such a broad proposition cannot be supported on the language of section 3 of the Act. Section 3 no doubt permits the assessment of the partners of the firm in their individual status and, if the Income Tax Officer assess the partners of the firm knowing that he has the option either to assess the firm or the partners of the firm, a question may arise whether it is open to him to assess the firm. In Joti Prasad Agarwals case, the view taken was that once such income has been charged to tax in the hands of one of the entities mentioned in section 3 of the Act, it cannot be charged in the hands of another of those entities subsequently. Bhargava J., who delivered the judgment on behalf of the court, observed as follows :

In the present case, the income, which was earned by the association was assessed and charged to tax in the hands of the members of the association individually under one of the alternatives provide u/s 3 of the Income Tax Act. This assertion of the petitioners is admitted by the opposite party, the Income Tax Officer, in the counter affidavit filed on his behalf. The income having once been charged to tax, it is urged that it could not be charged to tax again in the hands of the association. Learned counsel for the opposite party contended before us that there was no bar to tax being charged on the income in the hands of the association after it had already been charged to tax in the hands of the individual members of that association relying on the fact that in the Income Tax Act there is no specific provision barring such action of charging of tax by the Income Tax Officer. We do not think that any specific provision in this behalf was required. Section 3 of the Act, which is the main charging section, only talks of charging the income of certain persons and does not talk of Income Tax being charged on persons. This implies that the charge is to be levied on an income only once. Whether it is to be charged in the hands of one person or another can certainly be determined u/s 3 and other relevant provisions of the Income Tax Act. Section 3 is clear enough to indicate that the same income cannot be charged repeatedly in the hands of different persons or in the hands of the same person.

This view may be taken to be approved by their Lordships of the supreme Court in Commissioner of Income Tax v. Kanpur Coal Syndicate. The view taken in that case was that tax can be levied on either of the said two entities, that is, an association of persons or the individual members of an association, according to the provisions of the Act. Joti Prasads case 2 was also referred by the Supreme Court in Income Tax Officer v. Bachu Lal Kapoor, in which it was observed that;

The exercise of the option to do one or other of the two alternatives open to an officer assumes knowledge on his part of the existence of two alternatives.

And it was further observed that :

... the Act does not envisaged taxation of the same income twice over on one passage of money in the form of one sort of income.

The same view is taken in Commissioner of Income Tax v. M. J. & P. Ginning & Pressing Factory. Thus, we accept the position that section 3 of the Act impliedly prohibits double taxation. If one of the entities mentioned in section 3 has been taxed, it is not open to the taxation department to tax another entity for the same income.

In this case, the income of the firm has not yet been assessed and it may turn out that the total income of the firm assessed while taxing the various partners individually was the same as the total income of the firm which may be determined by the Tribunal. In that case, there will be no fresh taxation because the various partners of the firm had already been taxed on the profits which they received from the firm.

Learned counsel for the department has, however, argued that on the assessment of the income of the firm it may turn out that it was higher than the aggregate amount of the income on which the various partners had paid Income Tax treating it to be income derived from the firm and in that case the result will be that the total income of the firm has not been taxed but a portion of it has escaped taxation. In such a case, it is urged, it will be open to the Tribunal to act u/s 23(5) of the Act and thereafter for the department to take action u/s 33(5) of the Act.

This contention in our opinion, is sound. What can be read as an implied prohibition u/s 3 of the Act is that once the total income of an entity has been assessed and taxed in the hands of other entities referred to in that section, no tax can be collected from the first entity. To take a concrete example, suppose there is a firm consisting of four partners A, B, C and D, and the Income Tax Officer first assesses the income of the partners and imposed Income Tax on them, each partner showing his income from the firm at Rs. 25,000. After such assessment of the partners, the case for assessment of the firm comes before the Income Tax Officer it turns out on assessment of the income that the income of the firm was Rs. 2 lakhs. Is it not open to the Income Tax Officer to proceed on with the assessment of the firm simply on the ground that the four partners who constituted the firm had been assessed ? Evidently, the total income of the firm has not been assessed, and it cannot be contended with respect in the income of lakh on which no tax had till then been imposed that it could not be the subject-matter of assessment proceedings. If such firm is a registered firm, then u/s 23 (5) (a), the proper procedure will be to assess the income of the partners and make necessary rectifications u/s 35(5) of the Act. In fact, section 35(5) envisages a case when on the assessment of the firm it is found 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 Income Tax Officer may then amend the order of assessment of the partners with a view to include his share of the income which has not been assessed. It cannot be said that section 35(5) is in conflict with section 3 in any way. The reason, as we have already pointed out, is that there is no double imposition of Income Tax.

It is contended on behalf of the assessee that a registered firm and its partners are two different entities and once the partners have been assessed, it is not permissible to assess the registered firm. He has conceded that this will be the position only when the Income Tax Officer had the knowledge on his part of the existence of two alternatives, i.e. of assessing the firm or in the alternative of assessing its partners individually. But he has argued that in the circumstances of the case, such knowledge must be presumed. Granting that the Income Tax Officer had such knowledge, section 3 is not a bar to the assessment of the income of the firm because by merely assessing its income, there is no danger of double taxation.

It is argued that the Income Tax Officer has no jurisdiction to reopen the

assessment of a partner because a mistake is discovered by carrying on the assessment proceeding of a firm. But the enactment of section 35(5) has changed the position. In *Income Tax Officer v. S. K. Habibullah* it was held that under clause (5) of section 35, the power to rectify the assessment of a partner of a firm by including or correcting his share of the profit or loss of the firm can therefore be exercised only in the case of an assessment of a firm made on or after 1st April, 1952, and that the Income Tax Officer had no jurisdiction under clause (5) of section 35 of the Act to rectify the assessment of a partner consequent on the assessment of the firm disclosing an error made before 1st April, 1952.

In our case, it is not dispute that the assessment of the partners was made after 1st April, 1952, and the assessment of the firm has yet to be made. In the *Income Tax Officer, Tuticorin v. T. S. Devinatha Nadar* (Civil Appeals Nos. 2154 to 2158 of 1966 decided by the Supreme Court on 25th October 1967) it has been observed as follows :

Under sub-section (1) of section 35, the Income Tax authorities mentioned therein were empowered to rectify mistakes apparent from the record. Such power could, in the case of an Income Tax Officer, be exercised at any time within four years from the date of any assessment order passed by him on his own motion. The section however imposed a limitation in that the mistake must be in the record of the case itself. As a firm and the individuals composing it are separate entities for purposes of Income Tax Act, they are assessed separately. u/s 23(5) (a) of the Act, when the assessee is registered firm and its income has been assessed under sub-section (1) sub-section (3) or sub-section (4) of that section the Income Tax payable by the firm itself has to be determined and the total income of each partner of the firm including therein his share of the firms income, profits and gains of the previous year have to be assessed and the sum payable by him on the basis of such assessment has to be determined. Inasmuch however as a mistake discovered in the assessment of the firm was not a mistake apparent from the record of assessment of the individual partner, section 35(1) did not enable the Income Tax Officer to rectify the assessment of the individual partner because of the discovery of the mistake in the assessment of the firm. The judgment of the discovery of the mistake in the assessment of the firm. The judgment of the Andhra Pradesh High Court in *Kanumarlapudi Lakshminarayana Chetty v. First Additional Income Tax Officer, Nellore* wherein it was decided that when the mistake discovered in the assessment of the firm was not in the record of the individual partner section 35 (1) did not authorise the rectification of such mistakes, was upheld by this court in *Income Tax Officer Madras v. S. K. Habibullah*. Section 35(5) removes that difficulty.

It expressly provides that where it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm under the provisions of the specified sections 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 will be deemed to be a rectification of a mistake apparent from the record within in the meaning of section 35 so as to make sub-section (1) of section 35 applicable to the case of a completed assessment of a partner in a firm. Whereas u/s 35(1) rectification is only possible within four years from the date of any assessment order or refund order passed by the Income Tax Officer, the starting point of computation of the period of four years u/s 35 (5) is the date of the final order passed in the case of the firm.

Thus, the effect of sections 23(5) and 35(5) is that the assessment proceedings with regard to a registered firm may continue for the purposes of computation of the income and even for the purpose of determining the share of the partners in that income, both of which will be notified according to law. Then appropriate proceedings can be taken for rectification of the mistake, if any, in the assessment of the partners u/s 35(5) of the Act.

Learned counsel for the assessee has strongly relied on a judgment of the Bombay High Court in Commissioner of Income Tax v. Murlidar rJhawar and Purna Ginning and Pressing Factory which has been confirmed by the Supreme Court in Commissioner of Income Tax v. M. J. & P. Ginning and Pressing Factory. It was held that once the option is exercised for assessing the individual partner and including his share of profits in the firm in his assessment, it is not open to the department to assess the same income as income of the unregistered firm. Referring to sub-section (5) of section 35 the Bombay High Court in Commissioner of Income Tax v. Murlidhar Jhwar and Purna Ginning & Pressing Factory observed as follows.

It is true that this sub-section envisages a case where the assessment of the firm gets completed after assessment of its partners. But we are unable to read in the sub-section anything which confers a right on the department to bring to tax the income of the firm in the hands of the firm after its having brought to tax in the hands of its respective partners. All that is provided in the section is that in such a case if on the completion of the assessment of the firm it is found that any income of the firm has not been correctly included in the income of its partners, the necessary rectification in that matter be made in the partners assessment as if it was a mistake apparent from the record.

If we carefully examine the judgment of the Bombay High Court we find that the department had not finally accepted the income shown by the partners as the income of the firm when it proceeded to assess the persons in respect of the income of the firm and had reserved to themselves the right to ascertain the extent and the true income of the firm and made the necessary rectification in the assessment orders of the partners. The High Court held that all that was open to the department to do was to compute the income of the firm and make necessary adjustment in accordance with its conclusions to which the assessee had no objection. It appears that the department wanted to tax to the department than if the tax was collected from the partners assessed individually

and the High Court and the Supreme Court held that the department having once exercised the option to tax the partners individually, the firm could not be taxed for that income. Thus, what was held objectionable was collection of tax from the firm as an entity. But in the case of a registered firm, each partner's share in the firm's profits is to be added to his other income and the tax paid by each partner on the basis of his total income is to be determined and the levy has to be made on the partners individually. The only objection that could be taken was that once the partners had been finally assessed, their final assessment could not be disturbed but with the enactment of sub-section (5) of section 35 this difficulty is removed.

We are, therefore, of the opinion that the proper thing for the Tribunal to do was not to drop the proceedings relating to the assessment of the assessee but to proceed on to assess its income on the basis that it was a registered firm in accordance with section 23 (5) of the Act. In this case the assessee itself had prayed that it should be assessed as a firm, and there was no bar for the Tribunal to assess it as a firm if there is already material on the record. Otherwise, it may direct the Income Tax Officer to make a fresh assessment of the income of the assessee in the status of the firm. We may mention that the Tribunal is of course to decide the objection of the assessee that the firm was a dissolved firm and therefore it could not be assessed as a firm.

We, therefore, answer the question as reframed by us i.e. "Whether, on the facts and circumstances of the case, the assessment of the firm Messrs. Chaganlal Durgaprashad for the years 1954-55 and 1955-56 as a firm would be bad in law in view of the fact that assessments had already been made by its partners individually ?" in the negative. In our opinion, taking proceedings for assessment in accordance with section 23 (5) of the Act would not be bad in law. The assessee shall pay Rs. 250 as costs to the department.