

**(1970) 04 AHC CK 0009**

**In the Allahabad High Court**

**Case No : Income-tax Reference No. 56 of 1964**

Dhiraj Mal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

**Date of Decision : 20-04-1970**

**Acts Referred:**

Income Tax Act, 1922 — Section 30(1), 34(3)

**Citation : (1971) 79 ITR 242**

**Hon'ble Judges : V.G. Oak, C.J.; S.N. Singh, J**

**Bench : Division Bench**

**Advocate : P.N. Pachauri, for the Appellant; Brij Lal Gupta and R.R. Misra, for the Respondent**

## **Judgement**

V.G. Oak, C.J.—The question for consideration in this Income Tax reference is whether a certain assessment is within limitation or not. Dhiraj Mal is the assessee. The assessment year is 1950-51,

2. Dhiraj Mal was the karta of a joint Hindu family called Messrs. Mithoolal Ram Nath, There was a business under the style of Messrs. Shri Ram General Engineering Works. Partners of the firm were Dhiraj Mal and Lalta Prasad. A sum of Rs. 21,079 was introduced as capital in the said firm between April 1, 1949, and February 28, 1950. When the Income Tax Officer took up assessment of the Hindu undivided family for the years 1950-51 and 1951-52, he thought that two sums of Rs. 14,167 and Rs. 6,912 represented income of the undivided Hindu family. The joint family was assessed accordingly. That decision was affirmed by the Appellate Assistant Commissioner. But the joint family succeeded in further appeal before the Appellate Tribunal. On October 7, 1959, the Appellate Tribunal upheld the contention of the Hindu undivided family that the two sums of Rs. 14,167 and Rs. 6,912 did not represent income of the undivided Hindu family.

3. Acting on the decision of the Appellate Tribunal, the Income Tax Officer issued a notice to Dhiraj Mal u/s 34(1)(a) of the Indian Income Tax Act, 1922 (hereafter referred to as " the Act "), with respect to the assessment year 1950-51. Dhiraj

Mal raised an objection that the notice issued u/s 34(1)(a) was barred by time. The objection was overruled by the Income Tax Officer. Dhiraj Mal was assessed for 1950-51 on the footing that the sum of Rs. 21,079 represented his undisclosed income. The assessee, however, succeeded in appeal before the Appellate Assistant Commissioner. He held that the reassessment proceedings were barred by time.

4. The department appealed against the decision of the Appellate Assistant Commissioner. The appeal filed by the department was allowed by the Appellate Tribunal on March 28, 1963. The Tribunal restored the decision of the Income Tax Officer, holding that the notice and the assessment proceedings were not barred by time.

5. The assessee applied u/s 66(1) of the Act requesting the Tribunal to refer a number of questions to this court. The Tribunal agreed to refer only one question to this court. The question runs thus:

" Whether, on the facts and in the circumstances of the case, notice dated March 2, 1960, is time-barred in view of (a) Section 34(4), or (b) second proviso to Section 34(3) of the Indian Income Tax Act, 1922 ? "

6. The sole point for consideration in this reference is with respect to limitation u/s 34 of the Act. It is, therefore, necessary to examine the relevant provisions contained in Section 34. Section 34 deals with income escaping assessment. Section 34 states :

" (1) If-

(a) the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income ... or to disclose fully and truly all material facts . . .

he may in cases falling under Clause (a) at any time . . . serve on the assessee ... a notice . . . and may proceed to assess or reassess such income . . .

Provided that the Income Tax Officer shall not issue a notice under Clause (a) of Sub-section (1) . . .

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to Income Tax which have escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under the Act. . . amount to or are likely to amount to, one lakh of rupees or more in the aggregate .. .

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made under .. . Section 31, Section 33 ...

(4) A notice under Clause (a) of Sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight

years specified in that sub-section before its amendment by Clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates."

7. In the present case the assessment year is 1950-51. March 31, 1951, was the last date of the assessment year. Eight years expired on March 31, 1959. Notice u/s 34(1)(a) was issued to the assessee on March 2, 1960. That was more than eight years after the expiry of the assessment year 1950-51. So, prima facie, the notice issued to the assessee was barred by time under the first proviso to Sub-section (1) of Section 34 of the Act. But the department urged that limitation has been saved in the instant case in view of certain provisions contained in Section 34. The language of the question framed by the Tribunal is not happy. The substantial question is whether limitation is saved either by Sub-section (4) of Section 34 of the Act or under the second proviso to Sub-section (3) of Section 34 of the Act. These two pleas raised on behalf of the department have to be discussed separately.

8. The first plea raised by the department rests on Sub-section (4) of Section 34 of the Act. In order to bring the present case under Sub-section (4) of Section 34, Mr. Brijlal Gupta appearing for the department relied upon a decision of the Supreme Court in *Prashar v. Vasantsen Dwarkadas* [1963] 49 ITR (S.C.) 1: [1964] 1 S.C.R. 29 (S.C.). In that case it was pointed out that Sub-section (4) was inserted in Section 34 of the Act by the Income Tax (Amendment) Act, 1959, and the amendment was prospective in operation. In the present case the notice was given to the assessee in the year 1960. So far as the date of notice, is concerned, the department can certainly rely upon the amendment which came into force in the year 1959. But that is not the end of the matter.

9. The true effect of Sub-section (4) of Section 34 was explained by the Supreme Court in *Prashar's* case. On page 27 of the judgment it was observed:

"Now the legislature has not said that the notices shall not be challenged on the ground that a period of eight years u/s 34(1)(a) as in force after the Amending Act of 1948 had elapsed. It has deliberately used the words as in force before its amendment by the Finance Act, 1956". These words indicate that the legislature intended to give full effect to the amendment made by the Finance Act of 1956 in Section 34(1)(a) removing the bar of the lapse of eight years" period in cases of certain incomes."

10. It was further observed at page 28 :

" Taking this principle into account it appears that the object of the amendment was to validate certain notices after the amendment and after the lapse of eight years from the end of the assessment year and also to nullify the effect of the Calcutta judgment above mentioned. "

11. These observations of the Supreme Court indicate that Sub-section (4) of Section 34 does not cure the defect of delay in all cases. Although it is mentioned

in Sub-section (4) that a notice may be issued at any time, the amendment did not delete the provision contained in the first proviso to Sub-section (1) of Section 34 of the Act. If the first proviso to Sub-section (1) is read with Sub-section (4), the position appears to be this. Ordinarily, notice u/s 34(1)(a) has to be issued within eight years. But the limitation of eight years may be got over in cases covered by the amendment made by the Finance Act, 1956. The main effect of the 1956 amendment was to remove the bar of limitation in cases of valuation of one lakh of rupees and upwards. The protection offered by Sub-section (4) must be limited to that class of cases. In the present case the valuation of the case was far below one lakh of rupees. Consequently, the case is not covered by Sub-section (4) of Section 34 of the Act.

12. Next we take up the question whether the department is entitled to the benefit of the second proviso to Sub-section (3) of Section 34. As regards this proviso, Mr. P.N. Pachauri appearing for the assessee raised two points. Firstly, he contended that the proviso is unconstitutional. Secondly, he urged that in the instant case there was neither a finding nor a direction as contemplated by the proviso.

13. On the first point, Mr. Pachauri relied upon *Prashar v. Vasantsen Dwarkadas* [1963] 49 ITR (S.C.) 1: [1964] 1 S.C.R. 29 (S.C.). In that case it was held by the Supreme Court by majority that the provisions of the second proviso to Section 34(3) of the Act of 1922, in so far as they authorised the assessment or reassessment of any person other than the assessee beyond the period of limitation specified in Section 34 in consequence of or to give effect to a finding or direction given in an appeal, revision or reference arising out of proceedings in relation to the assessee, violated the provisions of Article 14 of the Constitution, and were invalid to that extent.

14. *Praskar's* case [1963] 49 ITR (S.C.) 1 : [1964] 1 S.C.R. 29 (S.C.) was noticed by the Supreme Court in a later decision of the court in *Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri*, It was observed on page 346 :

"The expression " any person " in its widest connotation may take in any person, whether connected or not with the assessee, . . . but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, the person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. If so construed, we must turn to Section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of Section 30(i) and Section 31(3) of the Act indicates the cases where persons other than the appealing assessee might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a

partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be."

15. The decision of the Supreme Court in Murlidhar Bhagwan Das's case lends support to Mr. Brij Lal Gupta's contention that if assessment of a Hindu undivided family is set aside in appeal, the Tribunal may give a direction for taking proceedings against a member of the family. So, in the instant case, the assessment proceedings cannot be called in question on the short ground that Dhiraj Mal and the undivided Hindu family are different entities for tax purposes. Not only was Dhiraj Mal a member of the undivided family, but it has been found that he was the karta of the family.

16. The second point for consideration with reference to the second proviso is whether there was any finding or direction. Mr. Brij Lal Gupta conceded that there was no direction given by the Tribunal on October 7, 1959. But it was urged by him that that decision did contain a finding against Dhiraj Mal.

17. In support of this contention, Mr. Brij Lal Gupta relied upon certain recitals contained in the statement of the case and the subsequent decision of the Tribunal, dated March 28, 1963. Annexure "A" to the statement is a copy of the earlier decision of the Tribunal dated October 7, 1959. Annexure "D" to the statement is a copy of the subsequent decision of the Tribunal, dated March 28, 1963.

18. On page 6 of the statement of the case there is an observation : "It was found that this was an assessment in consequence of or to give effect to finding or the direction contained in an order u/s 33 of the Act. " That observation was made with reference to a decision of this court in Lakshman Prakash Vs. Commissioner of Income Tax, U.P., . In the judgment, annexure " D " there is the observation that the Hindu undivided family which was the appellant before the Tribunal and which acted through Dhiraj Mal as the karta put forward the position that the business belonged to Dhiraj Mal as partner in his individual capacity. It was this case that was accepted by the Tribunal.

19. If this were the only material on the record, there might be some force in Mr. Brij Lal Gupta's suggestion that the Tribunal did record a finding on October 7, 1959, against Dhiraj Mal. But a copy of the judgment dated October 7, 1959, is also on the record. The Tribunal made that copy as annexure "A" to the statement of the case. Annexure "A" thus forms part of the statement of the case. The court is entitled to pursue the judgment dated October 7, 1959, on the question whether that decision contains a finding against Dhiraj Mal or not. The judgment itself is the best evidence.

20. We carefully examined the Tribunal's judgment, annexure "A", dated October 7, 1959. The operative part of the judgment ran thus:

"In the circumstances, we are of the opinion that the amounts in question cannot be treated as the income of the Hindu undivided family and should be deleted."

21. We have not found any finding to the effect that the sum of Rs. 21,079 represented Dhiraj Mal's income. No doubt in paragraph 2 of annexure "A" there is an observation to the effect that a sum of Rs. 11,184 was debited to the account of Dhiraj Mal in the books of the Hindu undivided family. But that amount had nothing to do with the two amounts of Rs. 14,167 and Rs. 6,912 which are in dispute in the present assessment proceeding. Mr. Pachauri is right in his contention that annexure "A" does not contain any finding to the effect that the sum of Rs. 21,079 represented Dhiraj Mal's income. Since there was neither any finding nor direction as contemplated by the second proviso, the department can make no use of the second proviso to Sub-section (3) of Section 34 of the Act.

22. Dr. Misra appearing for the department also relied upon Section 4 of the Amendment Act, 1959. But that aspect is not covered by the question referred to the court by the Tribunal. This point does not appear to have been raised before the Income Tax authorities or before the Tribunal. We, therefore, did not permit Dr. Misra to raise the question of applicability of Section 4 of the Amendment Act, 1959.

23. The net result is this. Prima facie, the notice dated March 2, 1960, was barred by time. The case is not covered either by Sub-section (4) of Section 34 of the Act or by the second proviso to Sub-section (3) of Section 34 of the Act. The result is that the assessment proceeding is barred by time.

24. Our answer to the question referred to this court is as follows:--The notice dated March 2, 1960, is not saved from limitation either by subsection (4) of Section 34 or by the second proviso to Sub-section (3) of Section 34 of the Indian Income Tax Act, 1922. The notice dated March 2, 1960, was barred by time. The assessee shall receive Rs. 200 as costs of the reference from the Commissioner of Income Tax, U.P.