
(1962) 03 KAR CK 0016
In the Karnataka High Court
Case No : Writ Petition No. 1079 of 1960

Ekambarappa

APPELLANT

Vs

Additional Income Tax Officer, Bellary

RESPONDENT

Date of Decision : 22-03-1962

Acts Referred:

Income Tax Act, 1922 — Section 35 (5), 66, 66 A

Citation : (1963) 49 ITR 692

Hon'ble Judges : K.S. Hegde, J;Iqbal Husain, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; D.M. Chandrasekhar, for the Respondent

Judgement

Hegde, J.—These petitions raise one common question of law and that is that the impugned notices were issued long after the period fixed u/s 35(5) of the Indian Income Tax Act, 1922 (to be referred to as the Act hereinafter), and, therefore, they are invalid. The petitioners are the partners of a firm known as "Guduthur Thimmappa & Brothers". On September 8, 1960, they were served with notices u/s 35(5). The petitioners challenge the validity of those notices.

2. The facts material for our present purpose are as follows : The petitioners in these three petitions were partners of a firm known as Guduthur Thimmappa & Brothers; that firm was dissolved on October 16, 1944. For the assessment year 1945-46, the firm in question was assessed to Income Tax on January 31, 1948. After the firm was assessed, the partners were also assessed to Income Tax in respect of their share of the income. Later on, it was found out that a portion of the firm's income had "escaped assessment". Therefore, a notice u/s 34 was issued to the firm on March 30, 1954. On March 29, 1955, the firm was again assessed in respect of its "escaped income". The firm filed an appeal against that order and that appeal was dismissed on November 21, 1958. Thereafter, on September 8, 1950 the Income Tax Officer issued to the partners notices u/s 35(5) as mentioned earlier. On these facts, the question for decision is whether

the aforesaid notices u/s 35(5) were issued after the period of limitation mentioned in that section. Section 35(5) says :

"35. (5) Where in respect of any completed assessment of a partner in 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 a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply there to accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm".

3. The controversy in this case is as to when exactly the "final order" referred to in section 35(5) was passed. Was it on March 29, 1955, when the "escaped assessment" of the firm was assessed by the Income Tax Officer or was it on November 21, 1958, when the appeal filed by the firm was dismissed ? If the relevant date is March 29, 1955, then, the period within which inclusions or corrections had to be made u/s 35(5) had been clearly barred. If, on the other hand, the "final order" is the order passed by the appellate authority, that order having been passed on November 21, 1958, it was open to the authorities to make the corrections in question.

4. In Commissioner of Income Tax v. Amritlal Bhogilal & Co., Gajendragadkar J., speaking on behalf of the Bench, observed thus :

"There can be no doubt that, if an appeal is provided against an order passed by a Tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the Tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement;....."

5. From this decision it is clear that the principle of merger of the order of the lower Tribunal in the order of Appellate Tribunals is a principle of general application, the cases under the Income Tax Act being no exceptions.

6. Sri Srinivasan contends that the words "final order" found in section 35(5) does not mean the order of the final Tribunal; that expression is used in contradiction to the expression "provisional assessment". In other words, his contention is that the period of four years mentioned in section 35(5) commences as soon as the first Tribunal takes action u/s 34 read with section 23(3) of the Act, and makes a final assessment; the period mentioned in section

35(5) has nothing to do either with the order of the Appellate Assistant Commissioner or of the Tribunal. At this stage it may be noticed that neither the orders of the Income Tax Officer nor the orders of the Appellate Assistance Commissioner are made "final" under the provisions of the Act. Whereas section 33(6) says :

"33. (6) Save as provided in section 66 an order passed by the Appellate Tribunal on appeal shall be final".

7. In other words, normally, it is only the orders of the Tribunal that are "final". Orders of the Income Tax Officer and the Appellate Assistant Commissioner have a precarious existence. They are always open to be modified or set aside by the superior Tribunals. It is only when no appeal is filed against their orders, those orders become conclusive. They are not "final" on their own force. It is in this sense the term "final order" is used in section 35(5). Again, as earlier noticed, the orders of the Income Tax Officers as well as that of the Appellate Assistant Commissioners, whenever appealed against, get merged in the orders of the Tribunal. In those cases the "final orders" are those passed by the Tribunal.

8. Section 35(5) is not happily worded. u/s 35(1), provision is made for rectifying mistakes apparent from the record. Section 35(5) contemplates consequential orders. The cause of action for a consequential order u/s 35(5) is a rectification made u/s 35(1), or an enhancement or reduction under the provisions of the Act, in the assessment of the firm. In truth, section 35(5) does not deal with any mistake apparent or otherwise. It only contemplates certain inclusions or corrections in the assessments of the partners as a consequence of changes made in the assessment of the firm of which they are or were the partners. Section 35(5) has two parts in it. The first part of that section says :

"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 a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly..."

9. The second part of that section reads :

"The period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm".

10. For reasons not very clear, the legislature introduced the fiction of "mistakes apparent from the record" into section 35(5). In truth, that section does not deal with any mistakes as such. That section, undoubtedly, could have been worded in clearer terms. All that the legislature need have said is that whenever any

change is made in the assessment of a firm necessary corrections can be made, within the period fixed, in the assessment of the partners.

11. The true scope section 35(1) and section 35(5) was considered by the Supreme Court in *Income Tax Officer, V-Circle, Madras v. S. K. Habibullah*. At page 811 of the report, Shah J. stated :

"Section 35(1) empowers the Income Tax authorities to rectify mistakes apparent from the record of certain orders passed by them. The clause (omitting parts not material) provides that the Income Tax Officer may at any time within four years from the date of any assessment order passed by him, on his own motion rectify any mistake apparent from the record of the assessment. The power or rectification may be exercised subject to two conditions : (1) that there is a mistake apparent from the record of the assessment, and (2) that the order of rectification is made within four years from the date of the assessment sought to be rectified. The mistake which may be rectified need not be in the order itself : it may be in any part of the record or proceeding if assessment of the assessee, But for the purpose of assessment an individual and a firm are distinct entities and even if an individual is a partner of the firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake apparent from the record of assessment of the individual partner. In *Kanumarlappudi Lakshminarayana Chetty v. First Additional Income Tax Officer, Nellore*, in dealing with the question whether the record of the assessment of the firm may be regarded as the record of the assessment of the individual partner, Subba Rao C.J., speaking for the court, observed and, in our judgment, correctly :

But it is said that section 35 of the Act even without the amendment would have enabled the Income Tax authorities to reopen the assessment on the ground that there was a mistake apparent from the record. But from the record of final assessment, it is impossible to say that there was a mistake apparent from the record, for the assessing authority accepted a certain figure as representing the share of the assessee in the firm and made a final assessment. The mistake is not in the record but by a subsequent assessment of the firm, it was discovered that the earlier assessment was wrong to the extent of the assessee's share in the firm. It is not a mistake apparent from the record but a mistake discovered from the disposal of another case."

Section 35(1) of the Income Tax Act could not therefore be resorted to by the Income Tax authorities for rectification of the assessments of the assessee, for there was no error apparent from the record apparent from the record of those assessments"

12. At page 812, the learned judge dealt with the scope of clause (5) of section 35. This is what his lordship says :

"Clause (5) was one of a group of clauses, added by Act 25 of 1953, dealing with rectification of assessments. Clause (5) dealt with inclusion of income or correction of the income of a partner in a firm consequent upon assessment or

reassessment of the firm of which he was a partner.... The legislature by a fiction in all these classes of cases regarded the inclusion, correction, computation or recomputation as rectification of a mistake apparent from the record and prescribed special termini for reckoning the period of four years within which the rectification must be made. Under clause (5) with which alone we are directly concerned in these appeals, the inclusion of the share in the assessment of the partners or the correction thereof is deemed to be a mistake apparent from the record within the meaning of the section, and sub-section (1) applies thereto accordingly - the period of four years being computed from the date of the final order passed in the case of the firm. The discrepancy disclosed as a result of assessment or reassessment of firm between the share of a partner included in the individual assessment of that partner and his share disclosed in the assessment of the firm was not an error apparent from the record within the meaning of section 35(1) and the legislature enacted a fiction making the inclusion of the share in the assessment or correction thereof such a mistake. If the inclusion of the share or the correction of the assessment were an error apparent from the record and falling under clause (1) of section 35, the enactment of clause (5) was plainly unnecessary. When the legislature has deliberately enacted a fiction was ex abundant cautela rectification of the nature contemplated by clause (5) could not have been effected under clause (1), and to remove the lacuna the legislature declared that what was not a mistake apparent from the record and provided a terminus for the computation of the period of four years."

13. We are unable to agree with Sri Srinivasan when he contends that the words "final orders" have been used in section 35(5) in contradiction to the term "provisional assessment". There is nothing like a "provisional order" under the Income Tax Act. There is only "provisional assessment". If the intention of the legislature was that a correction u/s 35(5) must be made within a period of four years from the date of the alteration in the assessment of the firm, then the word "final" would not have been used. It would have been sufficient to say "from the date of the order".

14. Even looking from the practical point of view there is no advantage in compelling the authorities to carry out the necessary changes in the assessment of the partners even before the assessment of the officers concerned to go on altering the assessments made on the partners of a firm as and when changes are made in the assessment of the firm by the hierarchy of Tribunals. Sri Srinivasan strenuously contended that the argument of convenience is not relevant in interpreting a statutory provision. It is true, if the language of the provision is plain, then the question of convenience or inconvenience would not arise for consideration. On the other hand. If the court is called upon to construe a provision then assistance from all canons of construction, the rule of convenience being one of them, has to be availed of. After all, in the final analysis, the courts are required to find out the intention of the legislature.

15. Viewed from any angle we do not think that Sri Srinivansn's contention that the period of four years prescribed in section 35(5) began to run on the date when the "escaped income" of the firm was subjected to assessment by the Income Tax Officer is sound.

16. In the result, these petitions fail and they are dismissed with costs. Advocate's fee Rs. 100. One set.

17. Petitions dismissed.