

(1971) 12 AHC CK 0028
In the Allahabad High Court
Case No : Special Appeal No. 618 pf 1963

Fazlur Rahman

APPELLANT

Vs

Income Tax Officer, A Ward

RESPONDENT

Date of Decision : 15-12-1971

Acts Referred:

Income Tax Act, 1922 — Section 34(1), 34(4)

Citation : (1973) 90 ITR 479

Hon'ble Judges : G.C. Mathur, J;A.K. Kirty, J

Bench : Division Bench

Advocate : B.L. Gupta and Ashok Gupta, for the Appellant; Deokinandan, for the Respondent

Final Decision : Allowed

Judgement

G.C. Mathur, J.—This is a special appeal against the judgment of Manchanda J. dismissing the writ petition filed by the appellant, challenging a notice dated September 14, 1961, issued u/s 34(1)(a) of the Indian Income Tax Act, 1922.

2. The accounting year of the appellant for his business income was the calendar year. During the course of the examination of the appellant's account books in connection with the assessment for the assessment year 1947-48 (corresponding to the accounting year 1946), the Income Tax Officer noticed that 20 high denomination notes of Rs. 1,000 each were encashed by the appellant on January 19, 1946. The Income Tax Officer called upon the assessee by a notice u/s 23(3) to explain the nature and source of the income of Rs. 20,000. The explanation of the assessee was that the notes were out of the closing balance of Rs. 23,916 on the evening of January 11, 1946. This explanation was not accepted by the Income Tax Officer who held that the amount represented the secreted profit of the assessee and was liable to Income Tax. The amount was added to the income for that year as undisclosed income. Corresponding assessment was made for purposes of excess profits tax also.

3. The two assessments made by the Income Tax Officer were, on appeals by the assessee, confirmed by the Appellate Assistant Commissioner and by the Appellate Tribunal. At the instance of the assessee, certain questions of law were referred by the Appellate Tribunal to this court (income tax Reference No. 33 of 1957). In this reference, it was held by a Division Bench on December 14, 1960 :

(i) That the income of Rs. 20,000 was not from business but from an undisclosed source and, therefore, it could not be subjected to excess profits tax; and

(ii) that the income would fall to be assessed in the assessment year 1946-47 and not in 1947-48.

4. The Bench made it clear that it was not expressing any opinion whether this amount constituted assessable income for the assessment year 1946-47 or not. Thereafter, on September 14, 1961, the impugned notice u/s 34(1)(a) was issued and it was served on the appellant on September 16, 1961. On November 20, 1961, the assessee filed an objection, challenging the notice on two grounds, namely:

" (i) that it was issued after eight years as provided by Section 34(1)(a) and that the provisions of Section 34 do not apply to this case; and

(ii) that there was no material on the record on which the Income Tax Officer could say that he had reason to believe that the income, profits or gains chargeable to Income Tax for the year 1946-47 had escaped assessment."

5. By order dated November 24, 1961, the Income Tax Officer rejected the objection. On March 17, 1962, the assessee moved an application before the Central Board of Revenue, asserting that the notice issued u/s 34(1)(a) was time-barred and praying that the Income Tax Officer be directed to close the proceedings. By a letter dated May 10, 1962, the assessee was informed that the Central Board of Revenue did not consider it necessary to interfere in the matter. After this, the writ petition was filed on August 1, 1962, praying for a writ of prohibition restraining the Income Tax Officer from taking any further proceedings on the basis of the impugned notice.

6. In reply to the writ petition, the Income Tax Officer has filed a written statement by way of an annexure to a short affidavit opposing the stay application filed by the assessee. The writ petition came up for final hearing before Manchanda J. Before him, the following three points were canvassed :

(i) Whether the writ petition deserved to be dismissed on account of laches of the appellant;

(ii) Whether the bar of limitation in giving notice was saved by subsection (4) of Section 34; and

(iii) Whether the conditions precedent for the issue of the notice u/s 34(1)(a) were satisfied in this case.

7. On the first point, though Manchanda J. observed that the petition was, prima facie, belated, he did not dismiss it on that ground. On the second point, he held that Section 34(4) permitted the issue of the notice as the eight years from the order of assessment expired on March 31, 1955, before the coming into force of the Amending Act of 1956. On the third point, he held that the conditions precedent had been satisfied as there was a failure on the part of the assessee to disclose the primary facts in the return for the assessment year 1946-47. He, accordingly, dismissed the writ petition with costs. The assessee has now preferred this special appeal against the judgment of Manchanda J.

8. Sri Ashok Gupta, learned counsel for the appellant, has challenged the impugned notice before us also on the same two grounds on which it was assailed before Manchanda J. The decision of the question whether the notice is time-barred or is saved from limitation depends on a proper understanding of the various amendments made in Section 34(1)(a) of the Income Tax Act. We are, concerned, with amendments made in 1948, and thereafter. The relevant portion of this section, as it stood after the amendment of 1948, reads as follows :

" 34.--(1)(a) If 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 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 that year he may in cases falling under Clause (a) at any time within eight years and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee, or, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22"

9. The section was then amended by Act XXIII of 1956. After this amendment, this section read as follows:

" 34.--(1)(a) If 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 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 that year . . . , he may in cases falling under Clause (a) at any time and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22:

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

(i) for any year prior to the year ending on the 31st day of March, 1941;

(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.... amount to, or are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March, 1941..."

10. By the Indian Income Tax (Amendment) Act, 1959, Sub-section (4) was introduced in Section 34. Sub-section (4) is in these words :

" (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."

11. Section 4 of the Indian Income Tax (Amendment) Act of 1959 provided :

" 4. Saving of notices, assessments, etc., in certain cases.--No notice issued under Clause (a) of Sub-section (1) of Section 34 of the principal Act at any time before the commencement of this Act and no assessment, reassessment or settlement made or other proceedings taken in consequence of such notice shall be called in question in any court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or reassessment was made, the time within which such notice should have been issued or the assessment or reassessment should have been made under that section as in force before its amendment by Clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired."

12. The escaped income in this case is Rs. 20,000, i.e., less than Rs. 1 lakh. The question which arises for determination in this appeal is whether Sub-section (4) of Section 34 saves the impugned notice which has admittedly been issued more than eight years after the relevant year. It will be noticed that Sub-section (4) permits a notice to be issued after the Amendment Act of 1959 and saves such notice from the bar of limitation placed by Section 34(1)(a) as it stood after the amendment of 1948 but it does not save the notice from the bar of limitation imposed by Section 34(1)(a) as it stood after the amendment of 1956. The contention of Sri Gupta is that, by virtue of the main provision of Section 34(1)(a) as it stood after the amendment of 1956, the limitation placed by the section as it stood in 1948 was wiped out and, by the second proviso to the 1956 section, a fresh limitation of eight years was imposed. According to him, it is this fresh limitation of eight years imposed by Section 34(1)(a), as amended in 1956, which the assessee has pleaded and that this bar is not lifted by Sub-section (4) of Section 34 inserted in 1959. The contention of Sri Deokinandan, learned counsel for the department, on the other hand, is that the period of eight years, in the present case, expired on March 31, 1955, before the Amending Act of 1956 came into force and, therefore, the notice was barred by the rule of limitation prescribed by Section 34(1)(a) as it stood in 1948. His further contention is that the bar of limitation imposed by the section as it stood in 1948

has been clearly removed by Sub-section (4) of Section 34. There is no doubt that if the bar of limitation, which applies to the impugned notice, is the bar imposed by Section 34(1)(a) as it stood after the amendment of 1948, then the bar has been lifted by Section 34(4) but if the bar of limitation which applies is the one imposed by the section as it stood after the amendment of 1956, then Section 34(4) does not lift the bar. Therefore, the real question which arises for determination in this case is as to whether the limitation prescribed by Section 34(1)(a), as it stood in 1948, applied to the impugned notice or the bar of limitation imposed by this section as it stood after the amendment of 1956 applies.

13. We are relieved of the necessity of deciding this question ourselves as, in our opinion, the matter is covered by the decision of the Supreme Court in *Hussain Bhai and Others Vs. Commissioner of Income Tax, Madras*, . In this case, the question was whether the notice issued u/s 34(1)(a) was saved from the bar of limitation by Section 4 of the Amendment Act, 1959. In the case before us, the question is whether the impugned notice is saved from the bar of limitation by Sub-section (4) of Section 34. Both these provisions seek to save notices issued u/s 34(1)(a) from the same bar of limitation. Section 4 seeks to save a notice from this bar when the notice has been issued before the Amendment Act of 1959 came into force and Section 34(4) seeks to save the notice from the same bar when the notice is issued after the Amendment Act of 1959 has come into force. If a notice u/s 34(1)(a) in respect of a particular year issued before the Amendment Act of 1959 is not saved by Section 4 of the Amendment Act of 1959, then, if the notice in respect of the same assessment year is issued after the Amendment Act of 1959 it will not be saved by Section 34(4). Therefore, in order to determine as to which bar of limitation applies to a particular case, the fact whether the notice has been issued before or after the Amendment Act of 1959, is not of any consequence. The decision of the Supreme Court, though given in respect of Section 4 of the Amendment Act of 1959, is equally applicable to Section 34(4).

14. In the case before the Supreme Court, the notice u/s 34(1)(a) was in respect of the assessment year 1948-49 and was issued on July 9, 1958. The notice was thus issued beyond eight years. It was contended by the department that the bar of limitation was saved by Section 4 of the Amendment Act of 1959. The Supreme Court observed :

" It seems to us that Section 4 of the Amending Act of 1959 does not save the notice u/s 34(1)(a) issued on July 9, 1958. In this case, we are concerned with an income less than Rs. 1 lakh mentioned in Section 34 as amended by the Finance Act, 1956. It is no doubt true, as urged by the learned counsel for the revenue, that the first sentence of Section 4 includes all notices issued under Clause (a) of Sub-section (1) of Section 34 of the Act at any time before the commencement of the 1959 Act and the notice dated July 9, 1958, falls within this description. But, in our view, the section does not save such notices from

attack on all grounds whatsoever; the only ground which cannot be taken to attack the validity of the notice is that at the time the notice was issued the period prescribed u/s 34(1)(a), as in force before its amendment by Section 18 of the Finance Act, 1956, had expired. Is the assessee then raising this ground ?

It seems to us that he is not. What he is saying is that a notice u/s 34(1)(a), as amended by the Finance Act of 1956, could have been issued under that Act in respect of the assessment year 1948-49, till April 1, 1957, and when the Finance Act of 1956 came into force, he came to be governed by the 8 year period prescribed by the Act as amended by the 1956 Act and not the 8 year period prescribed by the Act as it existed before the amendments made in 1956. Accordingly, the assessee's ground of attack is that the 8 years prescribed by Section 34, as amended after 1956, have expired and not that 8 years prescribed by Section 34 before its amendment by the Finance Act, 1956, have expired. In our view, the stand taken by the assessee is correct."

15. These observations of the Supreme Court were sought to be distinguished by learned counsel for the respondent, on the ground that the eight year period expired after the 1956 amendment and, therefore, the new period of limitation became applicable, whilst, in the case before us, the period of limitation expired before the 1956 amendment and, therefore, the case was governed by the limitation as prescribed by the section as it stood in 1948. This contention cannot be accepted in view of the subsequent part of the judgment of the Supreme Court. In this subsequent part, the Supreme Court has approved of certain observations made by Sarkar J. (as he then was) in *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, The observations, which have been approved, are as follows :

" "So, though Section 4 of the 1959 Act freed a notice from the bar of limitation in respect of it imposed by the 1948 amendment, it did not altogether do away with all prescriptions of time. In spite of Section 4, a notice contemplated by it would be subject to the prescription of time as its issue under the 1939 Act and may be, u/s 34 as it stood before the 1939 amendment. If the notice was issued after the 1956 amendment, it would also be subject to the prescription as to time provided by that amendment.

Then it was said that if Section 4 applied to a notice issued more than eight years after the year in which the income escaped assessment but before the 1956 amendment came into force in a case where the escaped income of the year was less than Rs. 1,00,000, the position would be curious. A notice issued in a similar case after the 1956 amendment would be bad u/s 34 as it then stood and Section 4 could not save it for it saved notices only from the effect of the 1948 amendment. The position then would be that in a case involving the same amount of escaped income for the same year, a notice issued before the 1956 amendment and Invalid under the 1948 amendment would be validated and a more recent notice equally invalid under both the earlier and present laws would remain invalid. Assume that the position is somewhat curious or incongruous.

But that seems to me to be the result of the words used. For all we know, that might have been intended.. However strange, if at all, the result may be, I do not think the courts can alter the plain meaning of the language of the statute only on the ground of incongruity if there is nothing in the words which would justify the alteration. As I have said earlier, in this case there is nothing to justify the alteration of the plain meaning." "

16. From these observations, particularly the portions emphasised by the Supreme Court it is clear that, if the notice u/s 34(1)(a) was issued after the 1956 amendment, the limitation as to time provided by the 1956 amendment would apply. In Prashar's case, the assessment year was 1942-43, and the notice u/s 34(1)(a) has been issued on April 30, 1954. It was held that the case was governed by the prescription as to time laid down by the section as it stood after the amendment of 1948, and the notice was saved by Section 4 of the Amendment Act of 1959. It was in connection with this year of assessment that the eight years prescribed by the 1939 amendment had expired and Sarkar J. said that, if the notice had been issued after the 1956 amendment, the prescription as to time provided by that amendment would have applied. These observations apply fully to the case before us. Here also, though the period of eight years expired before the 1956 amendment, the notice was issued after that amendment and, therefore, the prescription as to time provided by the 1956 amendment and not that provided by the 1948 amendment would apply. That being so, limitation is not saved by Sub-section (4) of Section 34.

17. The case considered in the second part of the observations of Sarkar J. quoted above is similar to the one before us. In both cases, the escaped income was less than Rs. 1,00,000 and the notice was issued more than eight years after the year in which the income escaped assessment. Sarkar J. observed that, in such a case, if the notice was issued before the 1956 amendment, it would be saved by Section 4 of the Amendment Act of 1959 but, if it was issued after the 1956 amendment, then it would not be so saved. If the notice issued after the 1956 amendment but before the 1959 amendment was not saved by Section 4 of the Amendment Act of 1959, then a notice in such a case issued after the 1959 amendment would not be saved by Sub-section (4) of Section 34, for both the provisions save the notice from the same prescription as to time.

18. Following the decision of the Supreme Court in Hussain Bhai's case, and the observations of Sarkar J. in Prashar's case, which have been approved in Hussain Bhai's case, we have come to the conclusion that the impugned notice is barred by the rule of prescription of time laid down by the 1956 amendment and is not saved by Sub-section (4) of Section 34. The notice being time-barred, the Income Tax Officer had no jurisdiction to issue it or to take any proceedings for assessment on the basis of this notice..

19. Since the notice is time-barred and is illegal for that reason, it is not necessary to consider the second point whether the conditions precedent for issuing it were satisfied or not. Though the question of laches was not raised

before us, we would like to observe that the writ petition, out of which this appeal arises, is not liable to be dismissed on the ground of laches. There was considerable delay in issuing the impugned notice even after the discovery of the escaped income which was occasioned by the mistake of the Income Tax Officer in first trying to include it in the income for the year 1946 corresponding to the assessment year 1947-48. Compared to this delay, the delay by the assessee in filing the writ petition after the issue of the notice is insignificant. Since we have held that the Income Tax Officer had no jurisdiction to issue the notice or to proceed with the assessment on the basis of the notice, we cannot allow those proceedings to go on and refuse to interfere on the ground of laches.

20. We, accordingly, allow the appeal and set aside the judgment of Manchanda J. The writ petition is allowed. The impugned notice dated September 14, 1961, and all further proceedings taken in pursuance thereof are quashed. The appellant is entitled to his costs of this appeal and of the writ petition from the respondent.