

(1961) 03 BOM CK 0007

In the Bombay High Court

Case No : Appeal No. 72 of 1960 (Miscellaneous Application No. 330 of 1960)

General Construction and Supply Co.

APPELLANT

Vs

Income Tax Officer (8th) C-ward, Section III, Bombay and
Another

RESPONDENT

Date of Decision : 05-03-1961

Acts Referred:

Income Tax Act, 1922 — Section 34(3)

Citation : (1962) 44 ITR 16

Hon'ble Judges : H.K. Chainani, C.J;N.A. Mody, J

Bench : Division Bench

Advocate : V. Rajagopal, for the Appellant; G.N. Joshi, for the Respondent

Judgement

Chainani, C.J.—The appellants are a partnership firm doing business in Bombay. The Income Tax Officer had assessed the appellants u/s 23 (3) read with section 34 (I) (a) of the Indian Income Tax Act for the assessment year 1947-48. He included in the assessable income a sum of Rs. 85,000 as the income of the appellants from some undisclosed sources. The amount was found to have been received by the appellants by encashing high denomination notes of the value of Rs. 85,000 on January 25, 1946. The appellants appealed against the order made by the Income Tax Officer to the Appellate Assistant Commissioner. In their appeal they raised three contentions. The first was that the fact of encashment of the high denomination notes was known to the Income Tax Officer at the time of the original assessment and that consequently he had no authority to proceed u/s 34 of the Act. The second contention was that the amount in question did not represent the income of the appellants, but formed part of the business cash balance and the sale proceeds of some lorries. The third contention, with which we are concerned in this appeal, was in the following terms :

"That when the amount in question has been held as the income of the appellants from some undisclosed source, the same falls to be assessed for the assessment year 1946-47 and not for 1947-48 as has been done by the Income

Tax Officer."

2. The appellate authority accepted the finding of the Income Tax Officer that the amount of Rs. 85,000 had been realised by encashing high denomination notes on January 25, 1946. He then dealt with the last contention of the appellants that this income could not be assessed in the year 1947-48. This contention was accepted. The question has been dealt with by the appellate authority in paragraph 4 of the judgment, which is in the following terms :

"That being so, the next question to be decided is whether the sum of Rs. 85,000 would be assessed for the assessment under appeal. It is now well settled that for income from undisclosed source the accounting year would be the financial year. Since the high denominating year would be the financial year. Since the high denomination notes in question were encashed on January 25, 1946, the accounting year would clearly be 1945-46. Accordingly, the impugned amount falls to be assessed in the assessment for 1946-47. The appellants' third contention is, therefore, accepted and the sum of Rs. 85,000 is deleted from the computation. It would, however, remain open for the Income Tax Office to take necessary action to assess this sum of Rs. 85,000 in the assessment for 1946-47."

3. According to this judgment, the sum of Rs. 85,000 should have been assessed in the year 1946-47 and not 1947-48. The Income Tax Officer subsequently issued a notice u/s 34 of the Act calling upon the appellants to submit a return of their income for the year ending March 31, 1947, as he had reason to believe that the income assessable to Income Tax for that year had escaped assessment or was under-assessed. The appellants then filed a petition in the High Court in which they challenged the validity of this notice and prayed for a writ or order restraining the Income Tax Officer from taking any further proceeding in pursuance of the said notice. The petition came up for hearing before Mr. Justice K. K. Desai. Only two points were urged before him. One was that the notice was invalid as it had been issued without obtaining the prior sanction of the Commissioner of Income Tax. The second contention was that the Appellate Assistant Commissioner had no jurisdiction to refer to the liability of the appellants to be re-assessed for 1946-47, that he could only record findings in respect of the assessment year, which was the subject matter of the appeal, that is, for the year 1947-48, and that consequently the notice was not saved under the second proviso to sub-section (3) of section 34. Both these contentions were negatived by Mr. Justice Desai, who dismissed the petition with costs.

4. Mr. Rajagopal, who appears on behalf of the appellants, has raised two points before us. In the affidavit, which the respondents have filed before Mr. Justice Desai, it had been stated that the notice, the validity of which was challenged, had been issued under clause (b) in sub-section (1) of section 34 and not under clause (a) of this sub-section. This statement was accepted by Mr. Justice Desai. Under sub-section (3) of section 34, as it stood before it was amended in 1953, a notice under clause (b) could not be issued after the expire of four years from

the end of the year in which the income, profits or gains were first assessable. The income, which is now sought to be assessed, was received by the appellants in 1946-47. Consequently, a notice under clause (b) in sub-section (1) of section 34 could not have not been issued in respect of this income after 31st March, 1951, under sub-section (3), as it stood before its amendment in 1953. Under the second proviso to sub-section (3), as it stands at present, there is no time limit for issuing a notice under clause (b), if the reassessment is made in consequence of or to give effect to any finding or direction contained in the order u/s 31. Mr. Rajagopal has urged that as the power to issue a notice under clause (b) in respect of the income realised in 1946-47 could not be used after 31st March, 1951, the remedy available to the Income Tax department to assess the income, which had escaped assessment, had become time barred before the section was amended and that consequently, no action can now be taken in order to assess such income. He has relied on the decision of this court in *Prashar v. Vasantsen Dwarkadas* in which it was held that where the remedy available to the Income Tax Officer had become barred u/s 34 before its amendment in 1953, the vested right of the assessee could not be affected except by clear and express terms used by the legislature, and that the legislature did not intend to give any retrospective operation further back than April I, 1952. This question has, however, not been raised by the appellants either in their petition, which has been filed, the point has been raised in a round about manner in the following terms :

"The learned judge ought to have held that if the said notice was not issued u/s 34 (I) (a) but u/s 34 (I) (b) of the Income Tax Act, the said notice was obviously time barred being issued beyond the period of four years prescribed for a notice u/s 34 (I) (b) and as such the said notice was without jurisdiction, illegal and void."

5. Mr. Joshi, who appears on behalf of the respondents, has rightly pointed out that the learned judge could not have held that the notice was time barred on this ground, when the question was not even argued before him. As, therefore, the point had not been raised either in the original petition or even at the time of its hearing, we have not permitted him to urge it before the Income Tax Officer.

6. Under clause (b) in sub-section (I) of section 34, a notice under this clause can be issued within four years of the end of the year, the income arising in which has escaped assessment. Under the second proviso to sub-section (3) this time limit shall not apply in cases in which the reassessment is made in consequence of or to give effect to any finding or direction contained in an order made u/s 31. The Income Tax Officer relies on this provision in support of his argument that the notice is in time. According to him the notice has been issued in order to give effect to the finding recorded by the appellate authority that the income of Rs. 85,000 should be assessed in the assessment year 1946-47 and not 1947-48. Mr. Rajagopal has urged that the appellate authority was dealing with the assessment for the year 1947-48, that u/s 31 he could only have

recorded findings, passed orders and given directions in regard to the income for that he had no power or authority to record any finding in regard to the income, which was assessable in any previous year. He has argued that the finding of the appellate authority should only be held to be that this income could not be assessed in 1947-48 as it was not within the competence of the appellate authority to say that this income could be assessed in 1946-47.

7. Mr. Rajagopal has relied on the decision of this court in *Indurkar v. Pravinchandra Hemchand*. In that case the Appellate Assistant Commissioner had found that the two amounts in dispute did not form part of the income for the assessment year 1945-46. He went on to add : "They could be assessed, if at all, for the tax year 1944-45, for which the Income Tax Officer may take necessary steps, if so advised." The Income Tax Officer subsequently issued a notice u/s 34 and it was held that the notice could not be said to have been issued in consequence of or to give effect to any finding or direction given by the Appellate Assistant Commissioner. It may, however, be noted that, as is pointed out in the judgment itself, the Appellate Assistant Commissioner had not recorded any finding that the income had arisen in 1944-45, for, as stated in the judgment, "if he had found to that effect, he would not have used the words "if at all"". It is true that there is an observation in the judgment that the Appellate Assistant Commissioner could not have found whether the income related to 1944-45. This observation must, however, be read in the context and would not justify an inference that the appellate authority can in no case record a finding on such a question. The other case, on which Mr. Rajagopal has relied, is the decision of the Allahabad High Court in *Pt. Hazari Lal v. Income Tax Officer*. In that case the appellate authority had found that the income in question, which had arisen in the financial year 1945-46, should have been included in the income of the assessment year for 1946-47 and not for 1947-48. The appeal before the authority was against the order assessing the income for 1947-48. It was held that the question whether the income accrued or was earned in 1946-47 was not before the appellate authority, nor was it a point on which it was essential for him to record a finding before deciding the appeal before him. It appears from the judgment that the learned judges were also of the view that if it is necessary for the appellate authority to record a finding for the purpose of making an order u/s 31, it would be a finding with jurisdiction.

8. The Madras High Court has taken a different view in *Simrathmull v. Additional Income Tax Officer*. In that case it was urged before the Appellate Assistant Commissioner that the amount conceded the point and deleted the amount of Rs. 20,000 from the assessment, but he directed the Income Tax Officer to reopen the assessment of 1945-46 for including this amount in that assessment. It was held that there was a clear finding by the Appellate Assistant Commissioner, which fell within the second proviso to section 34 (3), that the finding was given after the point was raised on behalf of the assessee, that it could not be said to be gratuitous or uncalled for, and the consequently the notice could be said to have been issued in consequence of the finding given in

the order u/s 31 and was therefore valid. With respect, we are inclined to agree with the view taken by the Madras High Court.

9. So far as the present case is concerned, the proceedings before the Appellate Assistant Commissioner, to which I have referred above, show that the assessing officer had included the amount of Rs. 85,000 should have been included in the income for 1946-47 and not for 1947-48. This was a finding, which it was necessary for him to record, in order to decide the question, which has been raised by the appellants themselves. The finding recorded by him cannot, therefore, be said to be a finding without jurisdiction. The notice can, therefore, be said to have been issued in consequence of or to give effect to a finding contained in an order made u/s 31 and would consequently be in time under the second proviso to sub-section (3) of section 34, if this section as amended in 1953 applies in this case.

10. The appeal, therefore, fails and is dismissed with costs.

11. Appeal dismissed.