

(1959) 02 AHC CK 0023

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 406 of 1956

HAKIM UDDIN KHAN

APPELLANT

Vs

Income Tax OFFICER, MIRZAPUR, AND ANOTHER.

RESPONDENT

Date of Decision : 20-02-1959

Acts Referred:

Income Tax Act, 1961 — Section 35

Citation : (1960) 40 ITR 402

Hon'ble Judges : Bhargava, J

Bench : Division Bench

Final Decision : Allowed

Judgement

BHARGAVA J. - The petitioner, Hakimuddin Khan, has prayed for the issue of writs of certiorari to quash an order of the Income Tax Officer dated 13th December, 1954, passed u/s 35 of the Income Tax Act and an order of the Commissioner of Income Tax dated 18th September, 1955, dismissing a revision against that order of the Income Tax Officer. In addition, there is a prayer for the issue of a writ of mandamus directing the Income Tax Officer, Mirzapur, to withdraw his notice of demand dated 13th December, 1954, issued to the petitioner in pursuance of his order of the same date u/s 35 of the Income Tax Act.

The assessee was assessed to Income Tax in respect of his income for the assessment year 1953-54 by the Income Tax Officer by his order dated 22nd September, 1953. In this assessment was included income from dividends received by the petitioner in respect of shares held by him in some companies including Messrs. Obeetee Limited. in the assessment year the Income Tax Officer; found that a net income of Rs. 17,056 had been received by the assessee as dividends. In respect of these dividends warrants had also been filed by the assessee. The Income Tax Officer then found that the grossed up income from dividends amounted To Rs. 22,967-6-0 and the Income Tax deducted at source was Rs. 5,629-15-0 and the surcharge was Rs. 281-10-0. On these

findings, the Income Tax Officer further proceeded to work out the total income of the assessee and to determine the tax payable by him. To this assessment order no objection was taken by the petitioner. Subsequently, on 8th October, 1954, the Income Tax Officer informed the petitioner that a mistake had occurred in calculating his income from dividends for the assessment year 1953-54 in so far as a sum of Rs. 16,100 received by him as dividend from Messrs. Obeetee Limited, Mirzapur, had been wrongly grossed up and credit to tax allowed to him. It was further stated that, since the mistake was apparent from the records and his income from dividends had been taken at a wrong figure, the Income Tax Officer proposed to rectify it u/s 35 of the Income Tax Act. The assessee filed objections against this notice. Thereafter the Income Tax Officer passed the order u/s 35 of the Income Tax Act on 13th December, 1954, which is now challenged in this writ petition. In this order, the Income Tax Officer took note of the fact that the dividend of Rs. 16,100 had been paid by Messrs. Obeetee Limited, Mirzapur, out of the reserve fund created on 31st December, 1949, from the profits of earlier years and, while computing the total income of the assessee, this dividend was wrongly grossed up and credit of tax deducted at source amounting to Rs. 5,629-15-0 was wrongly allowed to the assessee. He then proceeded further to hold that the mistake was committed on account of wrong calculation, so that he was entitled to make the correction. Thereafter the assessee went up in revision before the Commissioner of Income Tax who, by his order dated 18th September, 1955, dismissed the revision upholding the order of the Income Tax Officer.

These two orders were challenged by the petitioner on two main grounds : The first ground urged was that there was no mistake apparent from the records of the proceedings in which the assessment order was first passed by the Income Tax Officer on the 22nd of September, 1953, and, consequently, the Income Tax Officer had no jurisdiction to make any rectification u/s 35 of the Income Tax Act. The second point urged on behalf of the petitioner was that, even if section 35 of the Income Tax Act was applicable, the order, which was passed at the time of assessment by grossing up the income from dividends, was correct and the later order of rectification is based on an incorrect interpretation of the provisions of section 16(2) of the Income Tax Act under which the proceedings for grossing up are taken. We heard learned counsel for the parties at some length on both the points but we consider that, in this case, because of the view which we are taking on the first point, it is not necessary for us to express any opinion on the second point.

The first point raises the question whether the Income Tax Officer had any jurisdiction at all to rectify the assessment order u/s 35 of the Income Tax Act. Under that section, an Income Tax Officer is empowered to rectify any mistake apparent from the records of the assessment and the question that arises is whether, when the Income Tax Officer passed his order u/s 35 of the Income Tax Act, he did, in fact, rectify what he held was really a mistake apparent from the records of the assessment. In the notice for taking proceedings u/s 35 as well as

in the order passed under that provision of law, the Income Tax Officer has given his finding as to what the mistake was which he had found in that assessment order. The Income Tax Officer has held that the mistake was one committed on account of wrong calculations and it was on this view that he proceeded to exercise powers u/s 35 of the Act. If there had been, in fact, a mistake of calculation only, which was apparent from the records of the proceedings, the Income Tax Officer would, no doubt, have been justified in exercising his jurisdiction to rectify the mistake. The question, however, is whether it can be held that the rectification that he proceeded to make was a rectification of a mistake committed on account of wrong calculations. As we have mentioned earlier, the assessment order showed that the net income from dividends returned by the assessee was Rs. 17,056 the tax deducted at source was Rs. 5,629-15-0 and the surcharge was Rs. 281-10-0. The grossed up income was found to be Rs. 22,967-6-0. Neither in the order u/s 35 nor in the counter affidavit filed in this case there is any statement indicating that there was any mistake in the calculation of these figures. It was not urged even during the course of arguments that any of those figures or the calculation form which those figures were worked out was incorrect. In this petition, the attempt on behalf of the Department is to support the order passed u/s 35 of the Income Tax Act by the Income Tax Officer not on the ground that there was any wrong calculation in the matter of working out the figures but on the ground that the Income Tax Officer, when passing the assessment order, had committed the mistake of grossing up the income which he should not have done presumably as the second part of section 16(2) of the Income Tax Act was not applicable to the case of the assessee. It is to be noticed that, from the assessment order itself it appears that the Income Tax Officer was fully aware of the provisions of the Income Tax Act which he was applying. He knew that, u/s 16(2) of the Income Tax Act, income from dividends has to be included in the total income of an assessee. His mention of the facts that warrants had been filed showed that he was aware of the provisions of section 20 of the Act under which certificates issued on behalf of a company have to be filed by an assessee. It is these certificates which have been described as warrants in this order. Then the order proceeds to mention the amount of the grossed up income. Grossing up of income from dividends is made and can be made only under the second part of section 16(2) of the Income Tax Act. The order on the face of it shows that he actually applied the provisions of section 16(2) of the Act to the case of the assessee when assessing his income. Having applied the provisions of section 16(2) of the Act, he, naturally, further proceeded to grant to the assessee the relief u/s 18(5) of the Income Tax Act. When passing that order of assessment, therefore, the Income Tax Officer did not lose sight of any fact. He based his order on his view that the provisions of section 16(2) of the Act were fully applicable to the case of the assessee and the assessee was, consequently, entitled to the benefit of section 18(5) of the Income Tax Act. Subsequently, by his order u/s 35 of the Act, the Income Tax Officer proceeded to deny the benefit of section 18(5) of the Act to the assessee, working on the basis that the

provisions of the second part of section 16(2) relating to grossing up of income was not applicable to the case of the assessee. It is this process adopted by him in his order u/s 35 of the Income Tax Act that has been described by him as the correction of a mistake committed on account of wrong calculations. Clearly, there had been no mistake on account of any wrong calculations. The mistake, if any, was in applying the provisions of section 16(2) and 18(5) of the Income Tax Act to the case of the assessee. Even assuming that these provisions of law were not applicable, it is necessary that the Income Tax Officer should have realised that he had made a mistake in applying them to warrant any action u/s 35 of the Act. In the instant case, the Income Tax Officer does not say so at any stage. The mistake, which was apparent to him, was only a mistake in calculation. He said so in the notice to the assessee. Such a mistake had really never occurred and was non-existent. The Income Tax Officer thus exercised his powers after noting his satisfaction that there was a mistake apparent from the record when that mistake did not at all exist; whereas another mistake, which, it has been urged on behalf of the Department, did exist, was never found by the Income Tax Officer to be a mistake which was apparent to him from the record. In these circumstances, it is not permissible for us now to go into the question whether the view of the Income Tax Officer that the provisions of sections 16(2) and 18(5) of the Income Tax Act were applicable to the case of the assessee, as inferred from the assessment order of the 22nd of September, 1953, was a correct or an incorrect view. The jurisdiction of the Income Tax Officer would depend not on our opinion whether the application of those provisions of law in the assessment order was a mistake and the further opinion whether that mistake was apparent from the record. The Income Tax Officer could get jurisdiction only if he himself had found that such a mistake had occurred and that to him that mistake was apparent from the record. Consequently, at this stage, any finding by us that there was such a mistake apparent from the record cannot serve any purpose and cannot be a substitute for the opinion which the Income Tax Officer was required to form. The Income Tax Officer having exercised jurisdiction on the basis of a finding that there was a mistake on account of wrong calculations which finding, on the face of the record, is entirely incorrect, his order u/s 35 of the Income Tax Act was clearly passed without jurisdiction and must be quashed. It is because of this view that we consider it unnecessary to go into the second question whether the provisions of section 16(2) and 18(5) were or were not actually applicable to the case of the assessee. When quashing the order of the Income Tax Officer, we have also to quash the order of the Commissioner of Income Tax passed in revision by which that order was confirmed. The question of issuing a writ of mandamus to direct the Income Tax Officer; to withdraw the notice of demand issued by him on the basis of the order u/s 35 of the Income Tax Act does not arise because, once that order of rectification u/s 35 of the Act is quashed, the notice of demand automatically become ineffective.

For these reasons, we allow this petition and quash the order of the Income Tax

Officer dated 13th December, 1954, passed u/s 35 of the Income Tax Act and the order of the Commissioner of Income Tax dated 18th September, 1955, passed in revision confirming that order of the Income Tax Officer. The petitioner will be entitled to costs of this petition from the Department which we fix at Rs. 400. For purposes of taxation, the fee of learned counsel for the Department will be taken at the same amount.

Petition allowed.