
(1973) 02 AHC CK 0033

In the Allahabad High Court

Case No : Income-tax Reference No. 718 of 1970 connected with Income Tax Reference No's. 719 and 720 of 1970

Hari Babu

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-02-1973

Acts Referred:

Income Tax Act, 1922 — Section 23B, 23B(2), 34(1)

Citation : (1974) 96 ITR 118

Hon'ble Judges : R.L. Gulati, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : Gopal Behari, for the Appellant; R.R. Misra, for the Respondent

Final Decision : Dismissed

Judgement

Gulati, J.—The Income Tax Appellate Tribunal, Delhi Bench " B ", has submitted this statement of the case in this and the connected cases on certain questions of law, which are common to all the three cases.

2. The assessees, in all the three cases, are the minor sons of one Hari Babu. The assessment year involved is 1952-53. Hari Babu was a partner in a firm styled Jagdish Prasad Satya Prakash and his three minor sons, who are the assessees in these references, were admitted to the benefits of that partnership. Originally the firm was assessed as an unregistered firm but on appeal to the Income Tax Appellate Tribunal registration was granted to the firm. Subsequently, Hari Babu was assessed and in his assessment, share income of the minors was also included. He appealed and the Income Tax Appellate Tribunal held that the income of the minor sons could not be included in the income of Hari Babu and the minors should have been assessed separately. In the meantime, the Income Tax Officer, Aligarh, initiated proceedings u/s 34(1)(a) of the Income Tax Act against the assessees as they had failed to file their returns for the assessment year in question. It appears that the case of the partnership firm of Jagdish Prasad Satya Prakash fell within the jurisdiction of the Income Tax

Officer, Delhi. The firm had filed its return for the assessment year 1952-53, and the Income Tax Officer, Delhi, made a provisional assessment u/s 23B against the firm as well as against the minors on the basis of the return. In response to the notices u/s 34(1)(a) of the Act, issued by the Income Tax Officer, Aligarh, the minors filed their returns under protest and the Income Tax Officer, Aligarh, completed the assessment on February 28, 1963. The assessee's appeal to the Appellate Assistant Commissioner of Income Tax did not succeed. They went up in second appeal before the Income Tax Appellate Tribunal and challenged the assessment on the following four grounds :

- (1) That the action u/s 34 was not tenable in law as the Income Tax Officer had ample information with him about the liability that could be settled on the minors;
- (2) That the notices u/s 34 were not properly served and the procedure adopted was wrong in law ;
- (3) That the issue of notices to the minors was not at all justified in law; and
- (4) That the Income Tax Officer, Aligarh, had no jurisdiction over the minors after the Income Tax Officer, Delhi, had framed Section 23B assessments on the basis of the firm's return.

3. The Income Tax Appellate Tribunal rejected all the contentions and dismissed their appeals. The Tribunal, however, has referred for the opinion of this court the following questions :

"(1) Whether, on the facts and in the circumstances of the case, notice u/s 34(1)(a) was validly issued ?

(2) If the answer to question No. 1 above is in the affirmative :

(i) whether the notice u/s 34(1)(a) was not barred by limitation; and

(ii) whether it was validly served ?

(3) Whether, on the facts and in the circumstances of the case, the assessment made in the name of the minor through his guardian by the Income Tax Officer, Aligarh, on the basis of the notice u/s 34(1)(a) issued by the Income Tax Officer, Delhi, was validly made ? "

4. The learned counsel for the assessee states that if question No. 1 is answered in favour of the assessee, the remaining two questions need not be answered. We accordingly proceed to examine the first question.

5. Now Section 34 contains a machinery for assessment of income which has escaped assessment. It has two clauses. Under Clause (a), before its amendment in 1956, a notice could be issued within 8 years of the end of the assessment year if income had escaped assessment as a result of the failure of the assessee to file a return or to disclose fully and truly all material facts. Under Clause (b), a notice could be issued within 4 years if there was no failure or omission on the part of the assessee as mentioned in Clause (a), if the Income

Tax Officer, in consequence of information in his possession, came to believe that income had escaped assessment. It is clear that Section 34 becomes applicable only if some income has escaped assessment either wholly or in part. The question arises as to whether it can be said that any income had escaped assessment in the instant case. It is true that the assessee had not filed their returns but they had been assessed to tax u/s 23B(2). Sub-section (1) of Section 23B provides for a provisional assessment in advance of a regular assessment on the basis of the return filed by an assessee. Sub-section (2) of Section 23B lays down that a partner of a firm may be provisionally assessed under Sub-section (1) in respect of his share in the firm's income, profits and gains, if its return has been received, although the return of the partner- himself may not have been received. It is true that a provisional assessment is to be followed by a regular assessment but so long as it is not replaced by a regular assessment, it is, a good assessment and it cannot be said that a person who has been provisionally assessed u/s 23B has not been assessed. A similar view has been taken by another Division Bench of this court in Jagannath Rameshwar Prasad Vs. Income Tax Officer and Another, (Special Appeal No 850 of 1967, decided on 25th January, 1973).

6. Now, in the instant case, proceedings u/s 34(1)(a) of the Act were initiated with a view to levying tax on the income of the assessee derived by way of their share in the firm, Jagdish Prasad Satya Prakash. That income had already been assessed u/s 23B(2). From the assessment order it is clear that the assessee had no other source of income nor is it the case of the department that the income provisionally assessed is less than the income actually earned by the assessee. In these circumstances, it cannot be said that any part of the assessee's income had escaped assessment. The mere fact the assessee had not filed their returns did not bring into play Section 34(1)(a) of the Act. It must be shown that some income of the assessee had escaped assessment. That clearly is not the case of the department.

7. For the reasons stated above, we answer question No. 1 in the negative in favour of the assessee and against the department and return no answer to the remaining questions.

8. The assessee is entitled to the costs, which we assess at Rs. 200 in each case.