

(1969) 08 CAL CK 0018
In the Calcutta High Court
Case No : Matter No. 699 of 1967

Indra Co. Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 26-08-1969

Acts Referred:

Income Tax Act, 1922 — Section 35

Income Tax Act, 1961 — Section 154, 154(1), 297(2)

Citation : (1971) 1 ILR (Cal) 345 : (1971) 80 ITR 400

Hon'ble Judges : K.L. Roy, J

Bench : Single Bench

Advocate : D. Pal, for the Appellant; D.K. Sen, for the Respondent

Judgement

1. This is an application under Article 226 of the Constitution for the issue of appropriate writs for, inter alia, quashing a notice dated the 19th April, 1967, purported to be u/s 154 of the Income Tax Act, 1961, proposing to rectify the petitioner's assessment for 1959-60 and all proceedings in respect thereof and for prohibiting the respondents from taking any steps or giving any effect to the said notice and for other incidental reliefs.

2. The petitioner is an Indian company. In its return for the assessment year 1959-60, it claimed a loss of Rs. 2,41,472 in respect of its share-dealing business. The shares on the sale of which the loss was claimed included 1,393 bonus shares of Hastings Mills Ltd. which the assessee had valued in its books at the face value of Rs. 100 each. In the assessment order for the said year the Income Tax Officer, being the respondent No. 1 herein held that the alleged sale of shares was the result of a concerted action between the sellers and the purchasers, both belonging to concerns controlled by the Bangur group and that the loss claimed did not arise in the normal course of the assessee's business and disallowed the claim for loss. It does not appear from the said order that the Income Tax Officer considered the claim for loss in respect of each particular transaction in shares.

3. On appeal by the petitioner against the assessment order, the Appellate Assistant Commissioner, by his order dated the 11th December 1964, allowed the entire claim for loss of Rs. 2,41,472 on the ground that the petitioner was a dealer in shares and that the Income Tax Officer had failed to establish that the loss did not arise in the normal course of its business.

4. By his letter No. CCI/1967-68/105 dated the 19th April, 1967, the respondent No. 1, inter alia, purported to give notice to the petitioner u/s 154 of the Income Tax Act, 1961, for rectifying the assessment for 1959-60 as the profit on the sale of the said bonus shares to the extent of the face value thereof, viz., Rs. 1,39,300 had been under-assessed and the present rule was obtained on the 16th November, 1967.

5. The reason for the attempt at rectification is that until the decision of the Supreme Court in Commissioner of Income Tax, Bihar Vs. Dalmia Investment Co. Ltd., in 1964, there was considerable divergence of opinion as to how bonus shares were to be valued. In fact, this court had taken the view that such shares were to be accounted for at their face value. In the above case the Supreme Court laid down the principle for valuation of such shares as the aggregate cost of the shares acquired for value and the bonus shares.

6. Dr. D. Pal, for the petitioner, raised two main contentions against the validity of the impugned notice, viz., (i) that the assessment order having been merged in the order of the Appellate Assistant Commissioner, it was the latter officer who could have taken any proceedings for rectification of such order, and (ii) that the assessment for the year 1959-60 having been completed under the provisions of the Income Tax Act, 1922, the provisions of the 1961 Act were not applicable to it. For the first proposition Dr. Pal relied on several decisions of the Supreme Court of which mention may be made of (i) Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., where the court observed that after an appeal from an order of assessment is decided by the Appellate Assistant Commissioner, the Income Tax Officers's order under appeal merges in the appellate order and (ii) Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd., . where it was held that after the appellate authority had disposed of the appeal, the operative order was the order of the appellate authority whether it had reversed the original order or modified it or confirmed it.

7. To appreciate the second contention of Dr. Pal certain provisions of the repealed Income Tax Act, 1922, and the corresponding provisions in the Income Tax Act, 1961, would have to be considered. The right to rectify its own order by the appropriate authority was granted under the provisions of Section 35(1) of the earlier Act and was to the following effect:

"The Commissioner or the Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision u/s 33A and the Income Tax Officer may, at any time within four years from the date of any assessment order or refund

order passed by him, on his own motion rectify any mistake apparent from the record of the appeal revision assessment or refund, as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee:

8. Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the Appellate Assistant Commissioner, or the Income Tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard ."

9. Similar provisions were originally enacted in Section 154 of the 1961 Act. But by the Direct Taxes (Amendment) Act, 1954, Sub-clause (bb) was introduced in Sub-section (1) and a new Sub-section (1A) was enacted. Subsection (1)(bb) gave a similar power of rectification to the Inspecting Assistant Commissioner while Sub-section (1A) provided as follows :

"Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in subsection (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that Sub-section in relation to any matter other than the matter which has been so considered and decided ."

10. The 1922 Act was repealed by Section 297(1) of the 1961 Act, which by Section 297(2) enacted certain saving provisions, Clause, (a) of which provides that, notwithstanding the repeal, where a return of income has been filed before the commencement of the Act (1st April, 1962) by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if the repealing Act had not been passed.

11. Dr. Pal submitted that the said Sub-section (1A) was introduced to set at rest the controversy as to whether a lower court or a lower appellate court could rectify its order after an order by a superior appellate authority in respect thereof. He argued that, even assuming that Section 154(1A) of the 1961 Act was applicable to this case, the question of the valuation of the bonus shares must have been taken into consideration by the Income Tax Officer when he rejected the claim for loss on sale of shares and by the Appellate Assistant Commissioner when he allowed the loss as a business loss. The question of computation of the loss was before both the Income Tax Officer and the Appellate Assistant Commissioner. So, as this matter had been considered by the Appellate Assistant Commissioner in deciding the appeal, the Income Tax Officer was not entitled to amend or rectify the assessment order u/s 154(1A).

12. The learned counsel's next contention was that, as the original assessment was made under the provisions of the 1922 Act, the Income Tax Officer could only rectify the order u/s 35 of that Act and not under the provisions of the 1961 Act. He referred to the provisions of Section 297(2)(a) of the new Act mentioned above and relied on the authority of the following two decisions of the Supreme

Court. In *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, after citing with approval a passage from its earlier decision in *Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*, that the word "assessment" in Section 297(2)(a) of the 1961 Act has been used in a comprehensive sense of the whole procedure for ascertaining and imposing liability on the taxpayer, the court observed :

"It is clear that, when proceedings are taken for rectification of assessment to tax either u/s 35(1) or Section 35(5) of the Act of 1922, those proceedings must be held to be proceedings for assessment. In proceedings under those Sections what the Income Tax Officer does is to correct errors in, or rectify orders of assessment made by him, and orders making such corrections, or rectifications are, therefore, clearly part of. the proceedings for assessment ."

13. The learned counsel also drew my attention to the relevant passage in *Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*, and submitted that, as rectification proceedings are part of the assessment proceedings, respondent No. 1 could proceed, if at all, u/s 35 of the 1922 Act, and the present notice must be held to be illegal being in excess of his jurisdiction.

14. The next contention of Dr. Pal against the the validity of the proceedings initiated by the impugned notice is that the issue and service of a valid notice u/s 35 of the 1922 Act is the foundation of the jurisdiction of the Income Tax Officer to proceed thereunder and, as in this case the notice purported to be u/s 154 of the new Act, it is not a valid notice and the proceedings initiated thereby are not valid proceedings. The learned counsel relied on a stray observation of the Supreme Court in *Income Tax Officer, North Satara Vs. Arvind N. Mafatlal and Others*, to the following effect:

"It has further to be mentioned that it is not possible to correct the initial error in these proceedings because the notice u/s 35 which is the foundation of the jurisdiction of the officer to effect the rectification, sought in reality not the correction of the error but the perpetuation of it though in altered and less objectionable form from the point of view of the revenue."

15. I do not think that the above observation supports the learned counsel's contention that the issue and service of a valid notice u/s 35 is the foundation of the Income Tax Officer's jurisdiction to rectify the assessment order. What their Lordships were saying was that it was not possible to rectify an earlier order under a notice issued for rectification of a subsequent order made by the Income Tax Officer as the notice itself mentions the order required to be rectified. Further, in Section 35 of the 1922 Act, there is no provision for a notice except in the case where the assessment is likely to be enhanced in which event a notice giving the assessee a reasonable opportunity of being heard must be given. However, I need not elaborate this point any further as the question is covered by a very recent decision of our appeal court which I shall advert to later.

16. Mr. D. K. Sen, the learned counsel for the revenue, did not contest the proposition that once an appellate authority has decided the appeal the effective order is that of the appeal court. He, however, submitted that, since the introduction of Section 154(1A) in the Income Tax Act of 1961, the Income Tax Officer must be held to be authorised to rectify any order passed by him even after appeal in respect of any matter not considered or decided by the Appellate Assistant Commissioner. As the respondent No. 1 purported to give the impugned notice u/s 154(1A), which is the only provision under which he could try to rectify the assessment order, the cases relied on by Dr. Pal on this branch of his argument had no application. Neither the assessment order nor the order of the Appellate Assistant Commissioner show that the question of the cost of the bonus shares to the assessee was ever considered by either of these authorities, The Income Tax Officer rejected the claim as not being a genuine business loss while the Appellate Assistant Commissioner allowed the loss as a trading loss. I am inclined to agree with this part of Mr. Sen's argument. If Section 154(1A) of the 1961 Act is applicable to the impugned notice in this case, the Income Tax Officer must be held to be entitled to act in accordance with that notice.

17. The other submission of Mr. Sen that, in any event, the assessee has an alternative remedy by way of appeal to the Appellate Assistant Commissioner against the order of rectification when passed as provided for under the 1961 Act must be rejected forthwith. There is no provision in the 1922 Act for such an appeal and if that Act is held applicable to this case, the petitioner would have no remedy whatsoever against the order of rectification. Further, it is now well established that the mere existence of an alternative remedy is not a bar to an application under Article 226,

18. Mr. Sen referred me to a very recent decision of our appeal court (A. N. Ray and S. K. Mukherjee JJ.) in *Giridharilal Jhajharia Vs. Commissioner of Income Tax*, . In that case the assessee's assessment for 1956-57 and 1957-58 were made in March, 1961, and March, 1962, respectively, under the 1922 Act. On the 27th January, 1964, two notices u/s 154 of the 1961 Act for rectification of certain errors in those assessment orders were received by the assessee and on the 6th April, 1964, orders of rectification were passed u/s 35 of the 1922 Act. On appeal from the dismissal of the assessee's application under Article 226 for quashing the aforesaid orders of rectification, the court held that the orders made u/s 35 of the 1922 Act were valid in law. In that case also the assessee contended that the notices u/s 154 were bad. It would be necessary to set out below some of the relevant passages from the said judgment :

"Counsel for the appellant contended that notice u/s 35 of the Act of 1922 was the foundation of jurisdiction. I am unable to accept that contention for two reasons. First, it appears as the Supreme Court has held in the aforementioned decisions in *Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*, and *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, that the jurisdiction with regard to the assessment was

under the Income Tax Act of 1922, and the assessment proceedings are saved by the provisions contained in Section 297 of the Act of 1961 and rectification being a part of the assessment proceedings, the jurisdiction to rectify flows from the intrinsic provisions contained in the. Sections. In the case of Section 34 of the Income Tax Act of 1922, however, it will appear that the notice is the foundation of jurisdiction. In other Words, a notice u/s 34 of the Act of 1922 is jurisdictional fact. Notice under Sections 33B and 35 of the Act of 1922 is spoken of in order to give the assessee an opportunity of knowing what the revenue is going to do. Secondly, in cases falling u/s 35 of the Act of 1922 there is the possibility of enhancing the assessment or the reduction of the refund because of a mistake apparent from the record and the assessee is to be informed of the intention of the revenue to do so. The jurisdiction to rectify flows from the provisions contained in the statute in case of mistake apparent from the record. The provisions in Section 35 of the 1922 Act speak of notice of intention to rectify and an opportunity to the assessee to meet that case. Section 34 of the 1922 Act speaks of notice under that Section as a part of the revenue jurisdiction. As long as an opportunity is given to the assessee to meet the case contemplated in Section 35 of the 1922 Act the provisions are complied with.

Counsel for the appellant relied upon the decision of the Supreme Court in *M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another*, in support of the proposition that only a notice u/s 35 of the 1922 Act would invest the revenue with jurisdiction and a notice u/s 154 of the Act of 1961 would not have a similar effect. The Supreme Court in *Chockalingam's* case said that a notice had to be sent to the assessee and he was to be given a reasonable opportunity of being heard as the statute itself enacted. The Supreme Court said that, if that opportunity was not given and if a fair hearing was not given, the proceedings would be bad. The Supreme Court decision in *Chockalingam's* case, does not lay down that a notice must be expressly u/s 35 of the Act of 1922 to clothe the revenue with jurisdiction.

In that view of the matter it has now to be considered as to whether the issue of a notice u/s 154 of the Act of 1961 will have the effect of nullifying the proceedings. The decision in *S. Sankappa and Others Vs. The Income Tax Officer, Central Circle II, Bangalore*, also indicates that a notice issued under, Section 154 of the 1961 Act will not render invalid rectification of the assessment under the 1922 Act. The notice need not be construed so rigidly.... Counsel for the appellant also relied on the decision in *Income Tax Officer, North Satara Vs. Arvind N. Mafatlal and Others*, but that decision also does not establish that a notice is to be issued expressly u/s 35 of the 1922 Act to invest the revenue with jurisdiction.....

It, therefore, follows that failure to give a notice u/s 35 of the 1922 Act, which the appellant impeached as inherent in the lack of initial jurisdiction of revenue authorities is unsound from two points of view. First, the jurisdiction flows from the provisions under the 1922 Act and does not flow from a notice, and,

secondly, the exercise of a power is referable to a jurisdiction which confers authority upon it and not to a jurisdiction which will make it nugatory. The reference to Section 154 of 1961 Act in the notice is a mere irregularity at the worst for the reason that an assessee is given notice of possibility of enhancement and is given reasonable opportunity of being heard."

19. As this decision is binding on me it is no longer necessary to consider Dr. Pal's contention that, as under Sections 297(2)(a) of the 1961 Act the rectification proceedings must be under the 1922 Act, the impugned notice u/s 154 of the 1961 Act is invalid.

20. Even if the notice u/s 154 of the 1961 Act for the rectification of the assessment order in this case is held to be valid, the authorities including the aforesaid authority of the appeal court lay down that rectification proceedings must be taken u/s 35 of the 1922 Act. Mr. Sen had to concede that, unless he could bring the department's case within Section 154(1A) of the 1961 Act as introduced in 1964, the Income Tax Officer could not rectify the order. Action u/s 35 of the old Act would be barred because the assessment order has merged in the order of the Appellate Assistant Commissioner. According to the saving provisions in Section 217(2)(a) of the 1961 Act or even u/s 6 of the General Clauses Act (if applicable), all proceedings in respect of the assessment for this year must be taken under the provisions of the 1922 Act. Section 35 of that Act does not authorise the respondent No. 1 to rectify an order which is in effect an order of the Appellate Assistant Commissioner. So, whether "any matter" referred to in Section 154(1A) include every item of claim made by the assessee before the Income Tax Officer or the Appellate Assistant Commissioner as contended for by Dr. Pal be correct or not, the fact remains that the respondent Income Tax Officer cannot proceed to rectify the assessment order in these proceedings. There would, therefore, be an order quashing all proceedings pending under the impugned notice and directing the respondents to forbear from taking any further steps in pursuance thereof. The rule is made absolute to the extent mentioned above. Each party is to pay and bear its own costs.