

**(1959) 05 P&H CK 0004**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Letters Patent Appeal No. 157 of 1957

KUNDAN LAL

APPELLANT

Vs

Income Tax OFFICER, B WARD, AMRITSAR.

RESPONDENT

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**Date of Decision :** 08-05-1959

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (1959) 37 ITR 337

**Hon'ble Judges :** Mehar Singh, J;Falshaw, J

**Bench :** Full Bench

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## Judgement

MEHAR SINGH J. - The father of the appellant Kundan Lal was a partner in the firm Kanshi Ram Kundan Lal, having a share of 12/16th in the business of the same. After the death of his father that share in the business of the firm is represented by the appellant.

The firm having been assessed in regard to its taxable income for the year 1946-47, the share of its profits, that became available for inclusion in the taxable income of the appellants father, came to Rs. 24,957.

Subsequently, on a re-assessment according to section 34 of the Indian Income Tax Act, 1922, the Income Tax Officer found the taxable income of the firm to be Rs. 77,179, and the appellants share of the profits of the firm, that thus became available for inclusion in his taxable income, came to Rs. 57,884. The re-assessment of the firm was made on March 28, 1956. After that on August 23, 1956, the Income Tax Officer took steps to recover the additional amount of Income Tax due from the appellant. The appellant then came in with a petition under article 226 to this court questioning the legality of the additional demand from him. The ground taken was that the Income Tax Officer, having re-assessed the taxable income of the firm, purported to move under sub-section (5) of section 35 of the Indian Income Tax Act, 1922, in rectifying mistake in his assessment, which assessment was completed some time in 1946. Sub-section (5) of section 35 of this Act was included in section 35 by the Income Tax

(Amendment) Act, 1953, which has been given retrospective effect to be operative from April 1, 1952. It was the case of the appellant in the petition that his assessment having become final long before that date, there could be no rectification of any mistake in it under the provisions of the amending Act, which was not retrospective further back than April 1, 1952. The respondent, the Income Tax Officer, did not accept this position in the return. The learned single Judge having already held in *Ram Parshad Nand Lal v. Central Board of Revenue*, that sub-section (5) of section 35 of the Indian Income Tax Act, 1922, has nothing to do with any particular assessment year and can be invoked only to rectify a mistake whenever it be made provided the necessary rectification is made within four years and finding that in the present case the rectification of the mistake was made within four years from the date of the re-assessment of the taxable income of the firm dismissed the petition of the appellant with costs on May 17, 1957. This is an appeal by the appellant under clause 10 of the Letters Patent.

The only question that has been canvassed in this appeal is the same as was the ground in the petition and as was, after argument, negatived by the learned single Judge. It is not denied by the learned Advocate-General appearing on behalf of the said Act, a mistake of the type as is involved in the present case could not have been rectified in the assessment of the appellant under sub-section (1) of section 35 even though on re-assessment it was found that the taxable income of a registered firm was more than it had been originally assessed. The appellants firm is a registered firm. But the learned Advocate-General has contended that after the enactment of that sub-section the re-assessment of the taxable income of a registered firm enables the Income Tax authorities to rectify a mistake in the assessment of a partner as arising in consequence of the re-assessment of the taxable income of such a firm. He contends that there is no case of retrospective operation of the amending Act but that that is the consequence of the newly added sub-section (5) to section 35 of the Indian Income Tax Act, 1922. In support of his position the learned Advocate-General relies upon the same case upon which the learned single Judge has done in his order under appeal. On the side of the appellant the learned counsel takes the position that the assessment of the appellant having been finalised some time in 1946, it cannot be re-opened in consequence of the provisions of the Income Tax (Amendment) Act, 1953, except from and after April 1, 1952, the date to which retrospective effect has been given to that amending Act. He says that the assessment of the appellant was finalised long before that date and rectification of any mistake in it is not within the scope of the amending Act unless that Act is to be given retrospective operation further back than April 1, 1952. In this respect he relies upon *Lakshminarayana Chetty v. First Additional Income Tax Officer*, in which the learned Judges held that the provisions of sub-section (5) of section 35 of the Indian Income Tax Act, 1922, which were inserted in that Act by the Income Tax (Amendment) Act, 1953, are not merely declaratory of a pre-existing law but clearly affect vested rights which have

accrued to the assessee; the sub-section, therefore, must be deemed to have come into force on April 1, 1952, and no retrospective operation can be given to it. This position is unexceptional for the Indian Income Tax (Amendment) Act, 1953, having been given retrospective effect to a definite particular date, it cannot have a greater retrospective effect so as to be operative from a date further back than that date. So far the position is clear. But it appears to me that this case is not helpful to the appellant in the present case because the assessment of the registered firm, by reason of which the share of the profits of the assessee in that case was found to be much more than previously, was completed on July 31, 1951. It was because of that assessment of the registered firm that rectification of the mistake was sought in the assessment of the partner under sub-section (5) of section 35 as added by the amending Act which was operative from April 1, 1952. Obviously to a case like that that sub-section could not possibly apply by any stretch of argument. The assessment of the registered firm was completed some time before the introduction of sub-section (5) to section 35 by the amending Act and under that sub-section in the mistake in the assessment of the partner could not be rectified as if it was a mistake under sub-section (1) of section 35 of the Indian Income Tax Act, 1922. So that on facts this authority has no application to the present case.

The newly added sub-section (5) of section 35 of the Indian Income Tax Act, 1922, reads :

"(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm u/s 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

Once on assessment or re-assessment of a firm it is found that the share of its partner in the profits and loss of the firm has not been included in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, is by statutory fiction deemed to be a rectification of a mistake apparent from the record within the meaning of section 35 and under sub-section (1) of this section limitation provided for such rectification is four years from the date of the final order passed in the case of the firm. Under sub-section (1) of section 35 the period of limitation in the case of an order of the Income Tax Officer is four years from the date of the assessment or the refund order passed by him and in the case of an appeal or a revision also the starting point for the period of four years under this

sub-section is from the date of the order of the appellate or the revisional authority. It means that under sub-section (1) of section 35 four years are to be computed from the date of the order of the particular authority dealing with the assessment or the refund order made in regard to the assessment of a particular assessee, but under sub-section (5) of this section the period of four years is to commence not from such date, and such commencement is to have no relation to such date, but it is to commence from the date of the final order passed on the assessment or re-assessment of the firm. So the effect of the newly added sub-section (5) is to maintain the period of limitation as before but to give a different starting point for limitation as compared to that given under sub-section (1) of this section. Once an assessment or re-assessment of the firm is made, as has been the re-assessment of the firm in the present case, and a question of rectification of a mistake apparent from the record within the scope of sub-section (5) of section 35 arises, then from the date of the order of assessment or re-assessment of the firm by virtue of the express provisions of sub-section (5) of this section power and authority is given to the proper authority under the Indian Income Tax Act, 1922, to rectify the mistake in the assessment of the partner of such a firm and it is further expressly provided that that can be done within four years from the date of the final order passed in the case of such a firm. So that express provision has been made in sub-section (5) of section 35 for rectification of a mistake in the assessment of a partner once that mistake is found on assessment or re-assessment of the firm of which he is a partner and such rectification can be made within four years from the final order passed in the case of such a firm. This, in my opinion, is not giving retrospective operation to this sub-section beyond what has been provided in the amending Act itself as this sub-section in terms provides for the rectification of a mistake in the assessment of a partner in consequence of the assessment or re-assessment of the firm leading to a reduction or enhancement in the income of the firm. Once such assessment or re-assessment of a firm takes place after April 1, 1952, then under sub-section (5) of this section by express provision rectification of a mistake in the assessment of the partner can be made and it can be made within four years from the final order passed in the case of the firm. Thus the present case is within the scope of sub-section (5) of section 35 as the re-assessment of the firm was made after April 1, 1952, though the rectification of the mistake in the assessment, which was completed some time in 1946, takes place after that date. This might appear to show some inconsistency because it has been clearly provided that this amendment is to have no more retrospective effect than further back to April 1, 1952. To my mind there is no inconsistency in this approach because this date is for the purpose of the assessment or re-assessment of a firm and is to be confined to that alone. Once the assessment or re-assessment of the firm takes place as referred to in sub-section (5), the subsequent effect of it is expressly provided in the sub-section and the consequence must follow as provided in it. It has not been denied that the re-assessment of the firm in this case u/s 34 of the Indian Income Tax Act, 1922, has been properly and validly done and that has not been a matter of argument

at any stage in the present case. That re-assessment was done after April 1, 1952. It is a re-assessment of the firm as referred to in sub-section (5) of section 35. In consequence of this re-assessment and increase in the taxable income of the firm having been found, that means corresponding increase in the taxable income of the appellant when his share of the increase in the taxable income of the firm is added to his taxable income. Such inclusion in his taxable income is by statutory fiction deemed to be a rectification of a mistake apparent from the record within the meaning of section 35, and that being so under sub-section (5) of that section such rectification can be made within four years from the date of the final order passed in regard to the re-assessment of the firm. Such rectification has in the present case taken place within that statutory period. So this argument on behalf of the appellant was on sound considerations repealed by the learned single Judge.

No other question has arisen in this appeal and none other has been argued by the learned counsel for the parties.

In consequence the appeal fails and is dismissed with costs; counsels fee being Rs. 100.

FALSHAW, J. - I agree.

Appeal dismissed.