

(1962) 02 KL CK 0005

In the High Court Of Kerala

Case No : Income-tax Referred Case No. 18 of 1960

M. O. THOMAS

APPELLANT

Vs

COMMISSIONER OF Income Tax, KERALA.

RESPONDENT

Date of Decision : 26-02-1962

Acts Referred:

Income Tax Act, 1961 — Section 34

Citation : (1963) 47 ITR 775 : (1962) 1 KLJ 961

Hon'ble Judges : Govindan Nair, J

Bench : Division Bench

Judgement

GOVINDAN NAIR J. - The Income Tax Appellate Tribunal as required by this court, has stated a case and has referred the following nine questions for our opinion :

- "1. Whether, consequent on the transfer of the assessee's file from Kozhikode to Trichur, the Kozhikode officer had jurisdiction to initiate and complete the proceedings in question ?
2. Whether notice u/s 34 has been served on the assessee as required by law and whether the assessment is proper and legal, in the absence of a proper service of notice on the applicant ?
3. Whether, on the facts and in the circumstances of the case, the provisions of section 34 were properly applied, especially after the identical amount had been the subject of examination by the Income Tax Officer before accepting the disclosure made by the applicant ?
4. Whether, on the facts and in the circumstances of the case, there is any material to sustain the finding of the Tribunal that any income has escaped assessment ?
5. Whether, in the facts and circumstances of the case the finding that the amount is income from other sources is sustainable ?

6. Assuming the credit as assessable, whether it is assessable for the year 1945-46 ?
7. Whether the reassessment u/s 34 is competent when the original assessment itself was on estimate made by the Officer ?
8. Whether, in the facts and circumstances of the case, the amount in question remitted from Cochin could be treated as income from other sources or assessed at all in Kozhikode ?
9. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the explanation of the assessee is unbelievable is based on any material and legally sustainable ?"

The matter arises from reassessment proceedings started against the assessee pursuant to a purported notice dated March 27, 1954, issued to the assessee u/s 34 of the Indian Income Tax Act and question No. 2 above relates to the legality of the service of the above notice on the assessee and the propriety and legality of the assessment in the absence of proper service of notice. We feel that this case can be disposed of by answering question No. 2 alone and are therefore referring only to such facts as are relevant for answering the above question.

The assessment related to the year 1945-46, the corresponding accounting period ending about the middle of August, 1944 (year 1119 Malabar Era), according to the assessee, and the period ending March 31, 1945, according to the department. This difference between the department and the assessee is not material for answering question No. 2. The assessee was carrying on business in grocery articles as a wholesale trader and as a commission agent with head-office at Trichur and a branch at Kozhikode. Up to and inclusive of the assessment year 1949-50, he was assessed to tax under the Indian Income Tax Act as well as the Cochin Income Tax Act. For the year 1945-46, the assessment under the Indian Income Tax Act was finally completed after appeals and remand on December 31, 1949.

The Indian Income Tax Act was extended to the Part B States and on and from the assessment year 1950-51, the assessment has to be made only under that Act. The assessment records of the assessee were therefore transferred by the Income Tax Officer, Kozhikode, to the Income Tax Officer, Trichur, in whose jurisdiction the assessee's main place of business was situated. There were certain voluntary disclosure proceedings and the assessee made a disclosure on October 22, 1951, before the Trichur Income Tax Officer. During the course of those proceedings, the Income Tax Officer, Trichur, wrote to the assessee that he found from the trial balance of the Kozhikode business that a loan of Rs. 25,000 was taken from a lady, N. K. Kunhanam, in 1120. He further said that he presumed that the lady in question is the wife of the assessee and that the loan represented the undisclosed income of the assessee. The assessee, admitting that the lady is his wife, explained that the money belonged to his wife being part of the proceeds of dowry got by her from her father. Apparently

unsatisfied, the Income Tax Officer, Trichur, called for further details from the assessee and, by letter dated September 24, 1953, requested the Income Tax Officer, Kozhikode, to take necessary action since the credit was in the books in the Kozhikode branch. The latter officer issued a notice dated March 27, 1954, u/s 34 of the Indian Income Tax Act for the assessment year 1945-46. This notice was affixed at the assessee's place of business at Kozhikode as well as at his residence at Trichur on March 29, 1954.

The point for consideration is whether there has been proper service of notice as required by the mandatory provisions of section 34 in order to confer jurisdiction on the Income Tax Officer to proceed to reassess the assessee u/s 34 of the Act. Annexure "N" to the statement of the case gives copies of the reports of the notice server and extracts from the order-sheet. From the report of the notice server dated March 29, 1954, it is seen that notice has been served by affixture at Trichur "since the person was not available" and the report relating to the service at Kozhikode is to the effect that "since the person noted in the notice, Sri M. O. Thomas, is permanently residing at Trichur, the notice has been served by affixture at Shop No. 9/351 (business premises of the assessee) in the presence of C. L. Antony, Manager..."

Emphasis has not been laid by the authorities on the service of notice at Kozhikode as complying with the mandatory provisions of section 34, we think rightly. Section 63 of the Indian Income Tax Act is clear that a notice under the Indian Income Tax Act may be served on the person either by post or as if it were a summons issued by a court under the Code of Civil Procedure, 1908 (V of 1908). Rules 12 and 13 of Order V are relevant. The former rule enjoins that, whenever it is practicable, service shall be made on the defendant in person and rule 13 provides that in a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service. It is seen from the report made by the notice server relating to the service at Kozhikode that the assessee was permanently residing at Trichur and that he served the notice by affixture. We do not think this is warranted.

The service at Trichur is no better. The report of the notice server regarding that service merely states that notice has been served by affixture since the person was not available. The relevant rule is rule 17 of Order V of the CPC and it shows that a service by affixture can be resorted to only where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf nor any other person on whom service can be made. It appears to us to be clear that the Income Tax Officer, Trichur, also felt that the service was not proper. There is no verification of the service under rule 17 of Order V by an affidavit by the serving officer as enjoined by rule 19 of Order V. The Income Tax Officer, noticing the

same, has ordered :

"Sworn statement of the notice server may be obtained."

This is seen from the following extract from the order-sheet of the Income Tax Officer, Trichur, which is contained in annexure "H" to the statement of the case :

"Notice served by affixture on March 29, 1954. Sworn statement of the notice server may be obtained.

I declare the notice to have been served on March 29, 1954.

Sd./- Income Tax Officer,

29-3-1954

1st Addl. Income Tax Officer,

Trichur Circle, Trichur."

Curiously enough, the Income Tax Officer has declared the notice to have been served on March 29, 1954, even without previously obtaining a sworn statement from the notice server. There is no indication whatever that any sworn statement has at any time been obtained from the serving officer. It is clear that rule 17 has been violated by the serving officer in that the serving officer has not used all due and reasonable diligence for finding out the assessee and for ascertaining whether there is any agent empowered to accept service on his behalf nor has he exercised due and reasonable diligence in finding out whether there is any other person on whom service could be effected. Rule 19 has been violated by the Income Tax Officer concerned in that he has given a declaration that the notice has been duly served without the return being verified by an affidavit and without examining the serving officer on oath. The service at Trichur is also not proper and is even illegal as opposed to the rules indicated above and cannot be treated as service at all. We are supported in this view by the decision of this court in Commissioner of Income Tax v. Thayaballi Mulla Jeevaji Kapasi, where in it has been held that a notice is invalid either because of its being incorrectly issued or because it is improperly served negating the argument that a procedural defect would not invalidate the notice. The Supreme Court in Y. Narayana Chetty v. Income Tax Officer, Nellore, observed at page 392 thus :

"The notice prescribed by section 34 cannot be regarded as a mere procedural requirement; it is only if the said notice is served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is known to be invalid then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void."

In the light of the above discussion, we hold that there has been no proper service of notice u/s 34 and, therefore, the Income Tax Officer is incompetent to take reassessment proceedings.

Before concluding, we must also refer to the argument advanced by the learned counsel for the department based on a letter dated 12th April, 1954, written by the assessee to the Income Tax Officer, Kozhikode. This letter is contained in annexure "I" to the statement of the case. The assessee, having referred to the notice u/s 34 in that letter, it is contended that it must be presumed that there has been proper service of notice. The year of assessment being 1945-46, it is not disputed that a notice should have been served on the assessee before March 31, 1954. The contention is not that the assessee must be taken to have received the notice u/s 34 on 12th April, 1954, the date of the above letter, and even so there is valid service as required by law; but the point urged is that, since the assessee refers to the notice u/s 34 in his letter, it must be presumed that the notice has been served before the relevant date, viz., March 31, 1954. We are unable to accept this contention. It is for the department to establish that there has been a service of notice on the assessee before then relevant date. Their attempt to prove such service on March 29, 1954, as we have held above, has failed. It is not possible to presume that in view of the letter of the assessee dated 12th April, 1954, he had received notice on or before March 31, 1954.

On the basis of the conclusions reached above, we answer both parts of question No. 2 referred to us in the negative and in favor of the assessee. The assessee will have his costs and we fix counsels fee at Rs. 150.

Questions No. 2 answered in the negative.