

(1955) 07 OHC CK 0012

In the Orissa High Court

Case No : Special Jurisdiction Case No. 1 of 1954

Mannalal Modi

APPELLANT

Vs

Commr. of Income Tax

RESPONDENT

Date of Decision : 15-07-1955

Acts Referred:

Income Tax Act, 1922 — Section 23(4), 34

Citation : AIR 1956 Ori 37 : (1955) 21 CLT 441 : (1956) 29 ITR 30

Hon'ble Judges : Mohapatra, J; Misra, J

Bench : Division Bench

Advocate : B. Misra, for the Appellant; G.C. Das, for the Respondent

Judgement

Misra, J.—This is a reference u/s 66 (1), Income Tax Act, by the Income Tax Appellate Tribunal, Madras Bench, "B" stating a question of law which arises out of the Tribunal's order in I. T. A. No. 5617 dated 16-10-1952.

2. The assessee Mannalal Modi was a member of the Joint Hindu family consisting of Rangalal Modi, Mannalal Modi and others. This Joint family was an assessee on the file of the Income Tax Officer, Special Circle, Cuttack. The assessment year with which we are concerned is 1944-45, and the accounting year is the Dewali year ending 29-10-1943. Mannalal filed a return of his income before the territorial Income Tax Officer, Cuttack, on 19-10-1944 as an individual showing an income of Rs. 14,273/- for the Deepavali year (accounting year) ending with 29-10-1943.

It appears on receipt of this return the territorial Income Tax Officer sent it to the Income Tax Officer, Special Circle, as the larger joint family of which Mannalal was a member was being assessed by the Income Tax Officer, Special Circle, and as by that time the partition between the members of the family had not been accepted by the department. Later on, as a result of certain proceedings which came to the High Court, the department accepted the case that there had been a partition between members of the joint family with effect from 9-11-1942.

Thereupon, the Income Tax Officer, Special Circle, by his letter dated 19-1-1949 informed the territorial Income Tax Officer that Mannalal Modi had become separate and was carrying on business as an individual from 9-11-1942, that is from the beginning of the year previous to the assessment year of 1944-45. On receipt of this letter the territorial Income Tax Officer, Cuttack, issued a notice u/s 34, Income Tax Act on 21-3-1949 on Mannalal Modi asking him to submit a return. The notice was served on the assessee on 28-3-1949. On 2-5-1949, Mannalal informed the Income Tax Officer that he had filed a return already on 19-10-1944.

He was, however, asked to file a fresh return in compliance with the notice u/s 34; but he did not file any such return. The territorial Income Tax Officer was of opinion that the assessee had failed to comply with the notice u/s 22 (4), and so he proceeded to make an assessment u/s 23(4) on 9-2-1950. The assessee thereupon moved a petition u/s 27 for reopening the assessment which was rejected by the Income Tax Officer on 29-4-1950.

3. On appeal, the Appellate Assistant Commissioner cancelled the order of the Income Tax Officer and directed him to make a fresh assessment as he was of the opinion that the assessee was under a bona fide mistake in regard to the compliance of the said notices, and the assessee was therefore prevented by sufficient cause from submitting a return. When the matter went back to the Income Tax Officer on remand, the assessee again filed on 11-7-1951 a petition urging that the proceedings were barred by time u/s 34(3) of the Act, as he had already filed a return on 19-10-1944 and the assessment should have been completed by 31-3-1949.

The Income Tax Officer issued a notice u/s 23(2) dated 14-7-1951, but the assessee again filed a petition on 17-7-1951 objecting to the assessment on the ground that the proceedings had been barred by time. The Income Tax Officer rejected the contention of the assessee and made an assessment u/s 23(3) on a total income of Rs. 15,363/-. The order of the Income Tax Officer was confirmed on appeal by the Appellate Assistant Commissioner by his order dated 6-11-1951.

Before the Appellate Tribunal a contention was raised that the proceedings u/s 34 were without Jurisdiction, as the conditions which are pre-requisites for the application of that section had not been fulfilled in that case, and that there was no escapement of income in view of the fact that the assessee had filed a return on 19-10-1944, and the mere fact that there had been no assessment was not sufficient to hold that there was escapement of the income from payment of tax and further that the assessment made after the end of the period laid down u/s 34 (3) was invalid.

There was difference of opinion between the two members who constituted the Bench of the Appellate Tribunal. Thereupon a reference was made to the third Member whose decision went against the assessee. He thereupon filed an

application before the Appellate Tribunal for reference of the case to the High Court on a question of law, and the Appellate Tribunal agreeing with him has referred the following question to this Court:

"Whether on the facts and in the circumstances of the case, the assessment u/s 34 is valid"?

4. Before the Income Tax authorities there was some dispute as to whether this case would be governed by the amending Act of 1939 or by the amending Act of 1948. Before us, however, learned counsel on both sides have agreed that the case would be governed by the amending Act of 1939.

5. From the above resume of facts, it is clear that the only question for consideration before us is whether the Income Tax Officer was justified in the circumstances of the case in invoking the aid of Section 34 of the Act as it stood after the amendment of 1939. The section after the amendment of 1939 runs as follows:

"34. If in consequence of definite information which has come into his possession the Income Tax Officer discovers that income, profits or gains chargeable to Income Tax have escaped assessment in any year, or have been under-assessed or have been assessed at too low a rate or have been the subject of excessive relief under this Act the Income Tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22, and may proceed to assess or re-assess such, income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be:

Provided further that when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income Tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person u/s 43, this sub-section shall have effect as if for the periods of eight years and for years a period of one year were substituted.

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The language of the section shows that the Jurisdiction to act u/s 34 arises only when the Income Tax Officer discovers that income, profits or gains chargeable

to Income Tax have escaped assessment in any year or have been under-assessed, or have been assessed at too low a rate or have been the subject of excessive relief under this Act. In the present case we are only concerned with the first clause viz., whether in the circumstances it can be said that the income chargeable to Income Tax has escaped assessment.

Mr. B. Misra the learned counsel for the appellant urges that when he had filed a return on 19-10-1944, in pursuance of a general notice u/s 22(1) of the Act and the proceedings had not been finally terminated, it cannot be said that the income had escaped assessment. He further contends that the fact that income has not been assessed to Income Tax is not equivalent to the fact that there has been an escapement of tax, and when the department accepted the position that there had been a partition between the members of the family before the accounting year, it was open to the department to proceed to assess him on the return which he had filed on 19-10-1944.

The fact that they did not do so would not give rise to the inference that the income had escaped assessment so as to confer jurisdiction on the Income Tax Officer to invoke the aid of Section 34. For this purpose, he relies on a number of decisions. The first one is -- *Sir Rajendra Nath Mukerjee v. Commr. of Income Tax*, (1934) 61 Ind App 10, AIR 1934 PC 30. This was a case which was finally decided by their Lordships of the Judicial Committee.

In this case Burn and Company filed a return in pursuance of a notice issued by the Income Tax Officer. There was another Company known as Martin and Company, and the Income Tax authorities thought that Martin & Company had purchased Burn and Company and so the Income Tax authorities made an assessment on Martin & Company in respect of the joint income of Burn and Company and Martin and Company. On a reference to the High Court at the instance of Martin and Company, the High Court held that the two companies should have been separately assessed.

In pursuance of the decision of the High Court, the assessment of Martin and Company was amended by eliminating the income of Burn and Company. Thereupon the department made an assessment on the income as originally returned by Burn and Company. On behalf of Burn and Company an objection was taken that the assessment was illegal without a notice u/s 34 as their income had escaped assessment and the failure to take proceedings u/s 34 was fatal to the fresh assessment. Their Lordships of the Judicial Committee after considering the arguments of both sides held as follows:

"The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only u/s 34 with its limitation. This involves reading the expression "has

escaped assessment" as equivalent to "has not been assessed".

Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped". That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to "the course of any assessment". To say that the Income of Burn and Company which in January, 1926, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin and Company has "escaped" assessment in 1927-28 seems to their Lordships an inadmissible reading.

"The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have "escaped" assessment within the statutory meaning." (Underlines are (here in " ") mine).

Mr. Misra also relies upon the decision in -- *Harakchand Makanji and Co. Vs. The Commissioner of Income Tax*, . In that case his Lordship Chagla, C. J. and Tendolkar, J. held that, notice u/s 34 is only necessary, if at the end of the assessment year no return has been made by the assessee and the authorities wish to proceed u/s 22(2), but, where the assessee himself chooses voluntarily to make a return, no question can arise u/s 34 of assessment escaping, and therefore, there is no necessity to serve any notice u/s 34.

It may be noted that this decision was approved by their Lordships of the Judicial Committee in the case to which I have already made reference, viz., -- "*Bajendranath Mukerjee v. Commr. of Income Tax, Bengal*", (A) Mr. Misra has also drawn our attention to a Special Bench decision of the Calcutta High Court in -- *In Re: Lachhiram Basantlal*, where their Lordships held that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income.

The next case relied upon by Mr. Misra is that of -- *Ranchhoddas Karsondas Vs. Commissioner of Income Tax, Bombay City*, . In that case a public notice u/s 22(1) was issued in respect of the assessment year 1945-49 on 1-5-1945 but no notice u/s 22(2) was issued to the assessee. The assessee made a return on 5-1-1950, in which he showed his income as Rs. 1,935/- and added a footnote to the effect that his wife had sold her ornaments and deposited a sum of Rs. 59,026/- in a firm of which he was a partner.

On 27-2-1950, the Income Tax Officer issued a notice upon the assessee u/s 34 and made an order on 26-2-1951 assessing the sum of Rs. 59,026/- also to tax. Chagla, C. J. sitting with Tendolkar J., held that the notice u/s 34 issued on 27-2-1950, after the assessee had filed a voluntary return, and the assessment made on 26-2-1951 were not valid in law.

His Lordship further held that it is open to the department to issue a notice u/s

22(2), and if no return is made within the time fixed by that notice they can proceed u/s 23(4) to a best judgment assessment, or if the time for making a return u/s 22(1) has expired and no return has been made, it is open to the department to proceed u/s 34 on the basis that no return has been made, and the assessee is liable to be taxed u/s 34.

But if the department takes no action at all, either the one or the other, allows time to pass and permits the assessee to make a voluntary return which he is entitled to do u/s 22(3) then it is not open to the department to proceed u/s 34. The return having been made, it must be disposed of and the income of the assessee must be assessed as laid down in Section 23. Their Lordships followed the decision of the Judicial Committee referred to above.

6. These authorities make it perfectly clear that once a return has been made, it is for the department to make an assessment u/s 23. When a return has been made but no assessment has been made, it cannot be said that the income has escaped assessment so as to confer jurisdiction on the Income Tax Officer to invoke the aid of Section 34.

In the present case when the territorial Income Tax Officer received information from the Special Circle that there has been a partition in the family of the assessee, he could have sent for the return which the assessee had filed and could have proceeded to make an assessment on the return in accordance with the provisions of Section 23. His action therefore in completely ignoring the return and starting proceedings u/s 34 is without jurisdiction.

7. Mr. G.C. Das, the learned counsel for the Income Tax Department, tries to distinguish the case of *Sir Rajendra Nath Mukerjee v. Commr. of Income Tax*, (1934) 61 Ind App 10, AIR 1934 PC 30 on the ground that it was a case before the amendment of 1939, and therefore, neither this case, for the subsequent cases which followed it would be a proper guide for the interpretation of the section as it stood after the amendment of 1939. Before the amendment of 1939, the Section 34 stood thus:

"34. If for any reason income, profits or gains chargeable to Income Tax has escaped assessment in any year, or has been assessed at too low a rate, the Income Tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of company on the principal order thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rates at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

Comparing the terminology of the section as it stood before the amendment of 1939 and after it, we find that so far as the words "income, profits or gains chargeable to Income Tax have escaped assessment in any year" are concerned, they remain the same both before and after the amendment. Therefore, the construction of the words "have escaped assessment" would be the same in either case.

The distinction sought to be made out by the learned counsel for the department is without any force. The only question is what is the meaning of the phrase "have escaped assessment" which is common to the terminology of the sections in both the Acts. Mr. Das very strongly relies upon the decision of the Supreme Court in -- *Chatturam Horilram Ltd. Vs. Commissioner of Income Tax, Bihar and Orissa*, .

That was an appeal from a decision of the Patna High Court. In that case the assessee who was carrying on business in Chota Nagpur was assessed to tax for the year 1939-40, but the assessment was set aside by the Income Tax Appellate Tribunal on 28-3-1942, on the ground that the Indian Finance Act, 1939, was not in force during the assessment year 1939-40 in Chota Nagpur which was a partially excluded area.

On a reference u/s 66, the High Court agreed with the view of the Appellate Tribunal by its judgment dated 30-9-1943. On 30-6-1942, Bihar Regulation 4 of 1942 was promulgated by which the Indian Finance Act of 1939 was brought into force in Chota Nagpur retrospectively as from 30-3-1939.

The Income Tax Officer passed an order on 8-2-1944 holding that he had definite information that the income of the assessee for the year 1939-40 had escaped assessment, and thereupon he issued to the assessee a notice u/s 34 of the Act.

The question was whether this notice was valid. Two questions were raised for decision by the Supreme Court. The first was whether in the circumstances of the case it could be said that the Income Tax Officer had received "definite information" within the meaning of Section 34 as it stood after the amendment of 1939 and the second question was whether the income for the year 1939-40 had escaped assessment.

The Patna High Court answered both these questions in favour of the department. The assessee went up to the Supreme Court in appeal, and the Supreme Court upheld the decision of the Patna High Court. It will be seen that in that case the Income for the assessment year 1939-40 had actually been assessed, but the proceedings had been quashed as a result of the order of the High Court holding that the assessment was void.

Their Lordships of the Supreme Court pointed out that the fact that the income of the appellant for the relevant year remained without any valid assessment emerged only on the High Court finally giving its decision that the assessment previously taken was invalid.

So far as the first question is concerned, their Lordships held that there could be no doubt that this fact can be reasonably said to have been discovered by the Income Tax Officer when he got definite information as to the passing of the Bihar Regulation 4 of 1942 applying the Finance Act of 1939 retrospectively for the relevant accounting period, and the judgment of the High Court pronouncing prior proceedings to be invalid.

Therefore, their Lordships held that the Income Tax Officer had definite information of a fact as contemplated by Section 34. With regard to the second question their Lordships held as follows:

"For the purpose of the present case it appears to us sufficient to say that where earlier assessment proceedings had in fact been taken but failed to result in a valid assessment owing to some lacuna "other than that attributable to the assessing authorities," notwithstanding the chargeability of income to the tax, it would be a case of chargeable income escaping assessment and not a case of mere non-assessment to Income Tax.

The proceeding for assessment in the present case have failed to result in a valid assessment by virtue of a legal lacuna, viz., the fact of the Indian Finance Act of 1939 not having been extended to the relevant area for the relevant assessment year".

Under these circumstances their Lordships held that it was a case where income chargeable to Income Tax had escaped assessment, and therefore, Section 34 had been rightly invoked. The Privy Council decision in *Sir Rajendra Nath Mukerjee v. Commr. of Income Tax*, (1934) 61 Ind App 10, AIR 1934 PC 30 ", and the cases which followed it were cited before their Lordships of the Supreme Court.

It was argued before their Lordships that In the Privy Council case assessment proceedings were pending and that was the distinguishing feature. Their Lordships of the Supreme Court said that -

"while no doubt the Privy Council case is thus distinguishable, the contention of the learned counsel for the appellant that the escapement from assessment is not to be equated to non-assessment simpliciter is not without force."

In my opinion the Patna case is clearly distinguishable. There the assessment had been set aside as invalid as a result of the final order of the High Court. Therefore, the assessment itself was invalid and no proceeding for assessment was pending.

Under those circumstances, the Court, if I may say so with respect, was justified in holding that the income chargeable to Income Tax had escaped assessment. It may be noted that their Lordships of the Supreme Court distinctly held as follows:

"Here again, it is unnecessary to lay down what exactly constitutes "escapement from assessment." "

Therefore, the decision of their Lordships was a decision on the facts of that case and did not lay down a general proposition as to the interpretation of the phrase, "escapement from assessment". Mr. Das also referred to the case of the -- The State of Bihar Vs. Sir Kameshwar Singh Bahadur, and the passage at p. 418 was cited. In that case Ramaswami J. held that:

"If an item of income is not charged because it is not included in the return it will be proper to say that the income has escaped assessment. Similarly income will be said to have escaped assessment if it has not been charged on account of a mistake or oversight on the part of the taxing authorities."

That was a case under the Agricultural Income Tax Act, but as the language of Section 26 of that Act is almost similar to Section 34, Income Tax Act, Mr. Das wanted to rely upon this passage. The facts of that case show that an item of income was not charged, because it was not included in the return, and therefore, the taxing authorities were justified in treating it as a case of escapement of tax and proceeding u/s 26 of that Act.

8. In the present case, as I have pointed out, the assessment proceedings had not come to an end. The return was still pending. Whether it was pending before the territorial Income Tax Officer or the Income Tax Officer, Special Circle, is immaterial so far as the assessee is concerned. He had filed a return and an assessment could have been made by the department u/s 23 in pursuance of that return.

Under those circumstances, it cannot be said that the income chargeable to Income Tax had escaped assessment, and therefore, the Income Tax Officer had no jurisdiction to issue a notice u/s 34 of the Act.

9. For the reasons stated above, we answer the question in the negative and hold that on the facts and in the circumstances of the case the assessment u/s 34 is not valid. The assessee is entitled to his costs.

10. Hearing fee one hundred rupees.

Mohapatra, J.

11. I agree.