

---

**(1981) 06 CAL CK 0016**

**In the Calcutta High Court**

**Case No :** Income-tax Reference No's. 189 of 1976 and 272 of 1980

Mohendra J. Thacker and Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

---

**Date of Decision :** 16-06-1981

**Acts Referred:**

Income Tax Act, 1961 — Section 153

**Citation :** (1982) 29 CTR 1 : (1983) 139 ITR 793

**Hon'ble Judges :** Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

**Bench :** Division Bench

**Advocate :** R.M. Bajoria and A.K. Roychowdhury, for the Appellant; B.K. Bagchi and B.K. Naha, for the Respondent

---

## **Judgement**

Sabyasachi Mukharji, J.—These two references are taken up together and disposed of by this common judgment.

2. In these references, the first one under s. 256(1) of the I.T. Act, 1961, and the second under s. 256(2) of the I.T. Act, 1961, we are concerned with the assessment year 1964-65. The assessee filed the original return on June 25, 1965, and a revised return on December 5, 1967. The assessment was completed on the March 26, 1969. The assessee preferred an appeal before the AAC. It was urged before him that the demand notice dated May 30, 1969, was served on the assessee on June 3, 1969, and as such the assessment made was barred by time and should be cancelled. The AAC held that the assessment should have been completed by March 31, 1969. But the demand notice was dated on May 30, 1969, and it was received by the assessee on June 3, 1969. It would be appropriate in this case to refer to the order of the AAC. He observed in his order, inter alia, as follows:

" I have carefully considered the appellant's contention with reference to the Income Tax record and find them to be correct. The original return was filed on June 25, 1965. Revised return filed on December 5, 1967. Due date for filing of the return was June 30, 1964. Ordinarily, the assessment for the assessment

year 1964-65, should have been completed on March 31, 1969. It is seen that the demand notice is dated on May 30, 1969, received by the appellant on June 3, 1969. So, I find that the assessment has not been completed within the time allowed by the Income Tax Act, 1961. So, I hereby cancel the assessment as void and time-barred. The appeal is allowed."

3. Being aggrieved by the aforesaid order of the AAC, the Revenue went up in appeal before the Tribunal. The Tribunal, after dealing with the rival contentions observed, *inter alia*, as follows.

" We have considered the rival submissions. We have perused the assessment records. We find that the assessment order which is signed by the Income Tax Officer is dated March 26, 1969. We have also seen duplicate copy of the demand notice and it is dated March 27, 1969. We have also seen the computation assessment form in which the tax liability on the total income assessed has been determined and this is dated March 27, 1969. In view of this, we are satisfied that the Income Tax Officer did determine the tax liability on March 27, 1969, and issued a demand notice dated March 27, 1969. This could not be served on the assessee for some reason or other. In view of that he has issued another demand notice dated May 30, 1969, which was served on the assessee on June 3, 1969. Merely, because the notice of demand which was served on the assessee is dated May 30, 1969, it cannot be presumed that the assessment was completed on that date. The original assessment order is dated March 26, 1969, and the assessment form determining the tax liability was also signed on March 27, 1969, and the duplicate copy of the demand notice is dated March 27, 1969. In view of this, we are satisfied that the assessment has been completed within the time and as such the assessment is not time-barred."

4. The Tribunal further observed in its order as follows; \*" In the instant case, there is no dispute that the assessment order was made on March 26, 1969, and we are satisfied that it was made on March 26, 1969. In our view, merely because the demand notice dated May 30, 1969, is served on the assessee on June 3, 1969, it cannot be contended that the assessment is barred by limitation. The assessment has been made within the period of limitation and the tax payable was also determined on March 27, 1969. Thus, the assessment order is not barred by time. The decision relied on by the assessee's counsel has no application to the facts in the instant case. The Appellate Assistant Commissioner was in error in coming to the conclusion that the assessment was time-barred. In our view, the assessment has been completed within the period of limitation and it is valid. Accordingly, we cancel the order of the Appellate Assistant Commissioner. Since, the Appellate Assistant Commissioner has not considered the other grounds of appeal relating to the merits of the additions, we restore the appeal to his file for fresh consideration on the other grounds raised before him."

and allowed the Revenue's appeal.

5. Upon this, the assessee sought by an application before the Tribunal to raise the following three questions :

"1. Whether the finding of the Tribunal that the assessment form determining the tax liability was also signed on March 27, 1969, is based on any material and/or evidence and whether the said finding is perverse ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessment has been made within the period of limitation prescribed u/s 153(1)(a) of the Income Tax Act, 1961 ?

3. Whether, an assessment made by the Income Tax Officer without communicating the said order of assessment and the demand notice of the said assessment within time can be treated as a valid assessment made within the period of limitation prescribed u/s 153(1)(a) of the Income Tax Act, 1961 ?"

6. The Tribunal by its order held that the first question was a question of fact and was not referable to the High Court. The Tribunal was, however, of the view that questions Nos. 2 and 3 aforesaid should be referred. The Tribunal made a reference and the first reference is regarding those two questions. The assessee being aggrieved by the order of the Tribunal moved an application under s. 256(2) of the I.T. Act, 1961, for a reference on the first question indicated above. The High Court allowed that application and directed the Tribunal to make a statement of the case, regarding the first question and the Tribunal has in the second reference referred the first question as directed by the High Court. We are, therefore, concerned primarily and basically with the question, whether the finding of the Tribunal that the assessment form determining the tax liability was also signed on March 27, 1969, was based on any material and/ or evidence and whether the said finding was perverse. It was the case of the Revenue that not only the order of assessment determining the total income or computing the total income as well as determining the tax liability to be paid but also the communication of the same were done prior to March 31, 1969. It was the case of the Revenue that the notice of demand had been sent by March 27, 1969. Unfortunately, that notice, it appears from the Income Tax records, was not even served or received by the assessee. No copy of the said notice was also on the record and there is no evidence of the despatch of the said letter of demand either in the form of an acknowledgment receipt, which is supposed to come back from the recipient either served or unserved, or the receipt from the postal authorities indicating that such letter was registered or posted before March 31, 1969. Nor does it appear from the order of the AAC or the Tribunal that, apart from the so called date appearing on the order of the ITO, there was any indication that the order in question was passed before March 31, 1969. There was no independent evidence of the same. Now, on these facts the AAC had observed as we have indicated that "I have carefully considered the appellant's contention ". The original return was filed and he found that there was nothing to indicate that the order was passed before March 31, 1969. On the contrary, the Appellate Tribunal had observed that "we have seen the duplicate copy of the

demand notice and it was dated March 27, 1969". This appears to be rather difficult because it appears that before the Tribunal it was contended by the departmental representative as under :

" The learned departmental representative strongly urged before us that the assessment was completed on March 26, 1969, and the demand notice was issued on March 27, 1969, and sent by registered post; but the registered cover came back unserved. Hence, another demand notice dated May 30, 1969, was issued. This was nothing but a duplicate one as the original demand notice was issued on March 27, 1969. Thus, he submitted that the assessment had been completed within time and the same was not time-barred. He also submitted that the Appellate Assistant Commissioner did not correctly apply the ratio laid down by the Madras High Court in the case of RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, , and the ratio laid down by the Supreme Court in Commissioner of Income Tax, West Bengal III Vs. Balkrishna Malhotra, . Thus, he submitted that the order of the Appellate Assistant Commissioner should be cancelled.

The learned counsel for the assessee submitted that the demand notice dated May 30, 1969, was the only one which was served on the assessee and it was not written on this notice that it was a duplicate one. Hence, it should be taken that it was the original demand notice issued for the first time on May 30, 1969. Hence, the assessment made was barred by time and the Appellate Assistant Commissioner was perfectly justified in cancelling the assessment. He further submitted that the registered notice which came back unserved had not been produced and the original notice dated March 27, 1969, is also not available on record. In view of this he submitted that the only demand notice that was issued is the one dated May 30, 1969. Thus, he justified the order of the Appellate Assistant Commissioner. He relied on the decision of the Gujarat High Court in the case of Shanabhai P. Patel Vs. R.K. Upadhyaya, Income Tax Officer, Ahmedabad, ."

7. The departmental representative was contending before the Tribunal that another demand notice dated May 30, 1969, was issued and that this was " a duplicate one of the original demand notice which was issued on March 27, 1969 ". How a " duplicate copy " of a letter of March 27, 1969, could bear the date of May 30, 1969, has not been explained in the order of the Tribunal. Nor did the Revenue give any explanation to that effect; nor is there any material, apart from the so-called " duplicate copy " dated March 27, 1969, to show that any assessment order was indeed passed on any date prior to March 31, 1969, and it does not appear from the order of the Tribunal that the copy available which was examined by the Tribunal did indicate that it was a " duplicate copy " of any letter. If the assessee had been sent a demand notice bearing the date May 30, 1969, it could not be a duplicate copy of the demand notice of March 27, 1969. It must be another copy. If it was intended that a duplicate copy was sent, then it could not have borne the date of May 30, 1969, because May 30, 1969 letter

could not be a duplicate of the demand notice of March 27, 1969. In view of these facts, it is not possible to accept that there was any material before the Tribunal to come to the conclusion that the order in question was indeed passed before March 31, 1969, and the notice of demand was issued before March 31, 1969. On the facts as found by the Tribunal the conclusion arrived at by the Tribunal is unwarranted by any evidence on record and, therefore, cannot be sustained in law and must be held as perverse in law.

8. Learned advocate for the Revenue sought to urge that the basic conclusion on facts arrived at by the Tribunal could not be challenged as a question of law though an inference drawn from such basic facts might be challenged as a question of law. He drew our attention to the observations of the Supreme Court in the case of *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, where the Supreme Court reiterated that the jurisdiction conferred on the High Court u/s 66(1) of the I.T. Act was limited to entertaining a reference involving questions of law. If the point raised in the reference related to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it was a pure question of law. Though the High Court might have due regard for the view taken by the Appellate Tribunal, its decision would not be fettered by the Tribunal's view. It was free to adopt such construction of a document or the statute, as appeared to it reasonable. Where the point sought to be raised on a reference was a pure question of fact, the finding of fact recorded by the Tribunal must be regarded as conclusive in proceedings u/s 66(1) of the 1922 Act. The Supreme Court observed that if, however, such a finding of fact was based on an inference drawn from primary evidentiary facts proved in the case, its correctness and validity were open to challenge in a reference proceeding within narrow limits. Here the Tribunal has not arrived at its conclusion that the assessment order was passed within March 31, 1969, on any fact apart from the fact that the so called order which was produced before them bore the date March 27, 1969. Apart from that, the Tribunal has not indicated any other fact. The question, therefore, is whether the Tribunal was justified in drawing the inference that was in fact drawn in the light of the facts and circumstances. As we have mentioned before we find in the background of the preponderance of other evidence that the Tribunal was not justified in drawing the conclusion that was in fact arrived at by looking at the date of the order. Therefore, it cannot be said that the conclusion arrived at by the Tribunal was based on primary facts basically found. The presumption of regularity of official conduct which is normally applicable u/s 114 of the Evidence Act would not be attracted in this case as the conditions applicable to that principle are not present in the instant case and specially in the background of the preponderance of other facts which we have indicated before. It is true that the Evidence Act as such is not applicable in proceedings of this nature but the principles might have some bearing in determining this issue.

9. The other aspect of the question is that, whether, in this case, it was necessary to compute the total income as well as determine the tax payable. In

order to come within the mischief of Section 153 of the I.T. Act, 1961, whether the order of assessment was completed or not is a material question. Section 153 at the relevant time\* with which we are concerned was as follows:

" 153. Time limit for completion of assessments and reassessments.--(1) No order of assessment shall be made u/s 143 or section 144 at any time after-

(a) the expiry of four years from the end of the assessment year in which the income was first assessable ; or

(b) the expiry of eight years from the end of the assessment year in which the income was first assessable, in a case falling within Clause (c) of Sub-section (1) of section 271; or

(c) the expiry of one year from the date of the filing of a return or a revised return under Sub-section (4) or Sub-section (5) of section 139, whichever is latest.

(2) No order of assessment, reassessment or recomputation shall be made u/s 147-

(a) where the assessment, reassessment or recomputation is to be made under Clause (a) of that section, after the expiry of four years from \*As it stood prior to 1-4-68. for a.y. 1964-65. the end of the assessment year in which the notice u/s 148 was served;

(b) where the assessment, reassessment or recomputation is to be made under Clause (b) of that section, after-

(i) the expiry of four years from the end of the assessment year in which the income was first assessable, or

(ii) the expiry of one year from the date of service of the notice u/s 148, whichever is later.

(3) The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recompilations which may be completed at any time-

(i) where a fresh assessment is made u/s 146 ;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 250, 254, 260, 262, 263 or 264 ; [or in an order of any court in a proceeding otherwise-than by way of appeal or reference under this Act ];

(iii) where in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm u/s 147."

10. The question is whether the order of assessment as contemplated u/s 152

would mean a determination of both the total income as well as the tax to be paid. There we find that Sub-sections (1), (2) and (3) of Section 143 before the Taxation Laws (Amend.) Act, 1970, with which we are concerned were as follows:

" 143. Assessment.--(1) Where a return has been made u/s 139 and the Income Tax Officer is satisfied without requiring the presence of the assessee or the production by him of any evidence that the return is correct and complete, he shall assess the total income or loss of the assessee, and shall determine the sum payable by him or refundable to him on the basis of such return.

(2) Where a return has been made u/s 139 but the Income Tax Officer is not satisfied without requiring the presence of the assessee or the production of evidence that the return is correct and complete, he shall serve on the assessee a notice requiring him on a date to be therein specified, either to attend at the Income Tax Officer's office or to produce, or to cause to be there produced, any evidence, on which the assessee may rely in support of the return.

(3) On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, the Income Tax Officer, after hearing such evidence as the assessee may produce and such other evidence as the income tax Officer may require on specified points, and after taking into account all relevant material which the Income Tax Officer has gathered, shall, by an order in writing, assess the total income or loss of the assessee, and determine the sum payable by him or refundable to him on the basis of such assessment."

11. This was in identical terms with Section 23(1) of the 1922 Act. This question was discussed by the Supreme Court in the case of Commissioner of Income Tax, West Bengal III Vs. Balkrishna Malhotra, . There, the Supreme Court was dealing with Section 34(1)(a) of the Indian I.T. Act, 1922. There, the Supreme Court made reference to Section 23(1) and (3) of the Act and referred to Section 34(3) which enjoined that no order of assessment should be passed beyond a certain time. The Supreme Court at p. 762 of the report observed as follows:

" It has been stated over and over again by this court as well as by the Judicial Committee that the words " assessment" and " assessee" are used in different places in the Act with different meanings. Therefore, in finding out the true meaning of those words in any provision, we have to see to the context in which the word is used and the purpose intended to be achieved. It is true that Sub-sections (1), (3) and (4) of section 23 require the Income Tax Officer to " assess the total income of the assessee and determine the sum payable by him." In other words, in those provisions the word " assess " has been used with reference to computation of the income of the assessee and not the determination of his tax liability. But in section 34(3) the word used is not " assess" but " assessment". The question for decision is what is the meaning of that word ? As long back as September 24, 1953, the High Court of Madras in RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, came to the conclusion that the word " assessment" in the proviso to section 34(3) means

not merely the computation of the income of the assessee but also the determination of the tax payable by him. "

12. The Supreme Court, however, noted that the Act of 1922 was repealed by the I.T. Act, 1961, and the provisions of the new Act were materially different from the previous Act. Now the Supreme Court was delivering judgment on July 28, 1971. So far as we are concerned, as we have noticed, the provisions prior to April 1, 1971, would be identical with Section 23(1) and (3) of the 1922 Act. Therefore, in the light of the Supreme Court decision, it appears to us that the assessment order must include not only the computation of the total income but also determination of tax and that is the order which is contemplated by Section 153 of the I.T. Act, 1961, with which we are concerned. We are also inclined to say that even after the Amendment Act the position will be materially the same on this aspect. We, however, need not in this reference express any opinion on this aspect of the matter. This conclusion is also corroborated by the view that we have expressed in the unreported judgment in Income Tax Reference No. 479 of 1074 Commissioner of Income Tax Vs. Smt. Krishwanti Punjabi and Another (L.Rs. of Om Prakash Punjabi), . In that view of the matter, we are of the view that the assessment order passed in this case was barred by limitation.

13. In the premises, the first question referred to this court in the reference u/s 256(1) of the I.T. Act, 1961, that is to say, Income Tax Reference No. 189 of 1976 must be answered in the negative and in favour of the assessee. So far as the next question in the said reference is concerned, in view of the decision of this court in the case of BADRI PROSAD BAJORIA Vs. COMMISSIONER OF Income Tax (CENTRAL), CALCUTTA., , the same must be answered in the negative and in favour of the Revenue. But, in this case it is academic because the Revenue's contention was both that the assessment order was passed and communicated before March 31, 1969. So far as the question referred at the instance of the assessee in Income Tax Reference No. 272 of 1961 is concerned, in the light of the observations that we have made, we must hold that the finding of the Tribunal that the assessment determining the tax liability was also signed on March 27, 1969, was based on no material and/or evidence and as such perverse. This question is answered in favour of the assessee.

14. In the facts and circumstances of the case, parties will pay and bear their own costs in both the references.

Sudhindra Mohan Guha, J.

15. I agree.