

(1963) 01 MP CK 0014

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 46 of 1962

Naraindas Lalchand

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 19-01-1963

Acts Referred:

Income Tax Act, 1922 — Section 35, 35(1), 35(5)

Citation : AIR 1963 MP 247 : (1964) ILR (MP) 538 : (1963) 49 ITR 768 : (1963) JLJ 543 : (1963) MPLJ 353

Hon'ble Judges : P.V. Dixit, C.J.;K.L. Pandey, J

Bench : Division Bench

Advocate : Jagdish Swaroop and R.K. Tankha, for the Appellant; M. Adhikari, General and R.J. Bhawe, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dixit, C.J.

This order will also govern the disposal of Misc. Petitions Nos. 47, 48 and 49, all of 1962.

These four petitions under Articles 226 and 227 of the Constitution of India are by persons who are partners in two registered firms engaged in the business of bidi manufacturing under the name and style of M/s. Udhoji Shri Kishandass of Satna and M/s. Ramadhin Bhagwatdin of Sehora. The prayer of each of the petitioners is for the issue of a writ of certiorari for quashing an order of rectification of assessment u/s 35 of the Indian Income Tax Act, 1922, passed against him by the Income Tax Officer, Satna, on 31st December 1960.

The material facts are these. The assessment of the firm M/s. Udhoji Shri Kishandass of Satna for the year 1955-56 was completed on 21st February 1956 by the Income Tax Officer, Satna, and the proportionate share of profits of each of the petitioners, Naraindas, Gopaldas and Madhoji was computed at Rs. 7684/- and of the petitioner Kishandas at Rs. 7685/-. In the return of his income

submitted by each of the petitioners for the material year, the share of profits from the firm M/s. Udhoji Shri Kishandass was shown with a note that "the assessee has got share income in R.F. M/s. Ramadhin Bhagwatdin, Sihora (M.P.). Share income may be taken as per orders." On 24th February 1956 each of the petitioners was assessed for the assessment year 1955-56 on the basis of his share of profits in the firm M/s. Udhoji Shri Kishandass. The assessment of the other firm, M/s. Ramadhin Bhagwatdin, was, however, completed on 16th March 1960 by the Income Tax Officer, Special Investigation Circle, Nagpur, and the proportionate share of each of the applicants, of the profits in that firm was computed. On receipt of intimation of the order passed in the assessment of the firm M/s. Ramadhin Bhagwatdin, the Income Tax Officer, Satna, revised the assessment of each of the petitioners, u/s 35(5) of the Act, for the year 1955-56 by including the share of his profits in the firm M/s. Ramadhin Bhagwatdin and made the impugned orders of assessment.

Shri Jagdishswaroop, learned counsel appearing for the petitioners, contended that the Income Tax Officer, Satna, had no jurisdiction to revise the assessment u/s 35(1) as there was no mistake apparent from the record in the assessments made against the petitioners on 24th February 1956; that he had no jurisdiction to rectify the assessments even under Sub-section (5) as there was no mistake in the assessment of the firm M/s. Udhoji Shri Kishandass which was completed on 21st February 1956 and which assessment formed the basis of the assessments made against the petitioners on 24th February 1956; that the non-inclusion of the share of profits by the petitioners in the firm M/s. Ramadhin Bhagwatdin, when they were assessed on 24th February 1956 could not be regarded as a mistake either under Sub-section (1) or Sub-section (5) of Section 35; and that consequently the fact that the assessment of the firm M/s. Ramadhin Bhagwatdin was completed on 16th March 1960 could not furnish any ground to the Income Tax Officer to rectify under Sub-section (5) the assessment against each of the petitioners. It was also urged that the rectification was bad as it had the effect of enhancing the original assessments against the petitioners and this could not be done without giving a notice to the assessee concerned under the first proviso to Section 35(1); and that no notice was given to any of the petitioners.

In our judgment, there is no force in the contention that the Income Tax Officer had no jurisdiction to rectify the assessments against the petitioners after the completion of the assessment of the firm M/s. Ramadhin Bhagwatdin on 16th March 1960. It is quite true that there was no mistake apparent from the record of the assessments of the petitioners and there was also no mistake in the record of assessment of the firm M/s. Udhoji Shri Kishandass and in the computation of the proportionate share of profits of each of the petitioners in that firm. If there was no mistake apparent from the record of assessments of the petitioners, then clearly Section 35(1) could not be resorted to. But if there had been a mistake in the assessment of the firm M/s. Udhoji Shri Kishandas and in the computation of the proportionate share of profits of the petitioners in that firm, it would have

been open to the Income Tax Officer to rectify the assessment under Sub-section (5) of Section 35. Again, if at the time the assessments were made against the individual partners by including their share of profits in the firm M/s. Udhoji Shri Kishandass, the assessment of the other firm had not been completed, Sub-section (5) could be invoked for rectifying the assessment of the partners by including the amount of their shares of profits in the firm M/s. Ramadhin Bhagwatdin. This is clear from the very plain language of Sub-section (5) and the object with which that clause was incorporated in the Act by the Income Tax (Amendment) Act, 1953 (Act No. 25 of 1953). Sub-section (5) of Section 35 is as follows:

"(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 deduction 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."

In *Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah*, the Supreme Court pointed out that Section 35(1) empowered the Income Tax authorities to rectify mistakes apparent from the record of assessee within four years from the date of the assessment order sought to be rectified; that the mistake which could be rectified need not be in the order itself; that it could be in any, part of the record or proceeding of the assessment of the assessee; but that a mistake not apparent from such record could not be said to be made apparent from another record, which the record of the firm would be. It was, observed in that case that:

".....for the purpose of assessment an individual and a firm are distinct entities and even if an individual is a partner of the firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake apparent from the record of assessment of the individual partner."

Dealing with Sub-section (5), the Supreme Court then proceeded to say in *Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah*, that Sub-section (5) enacted a fiction by which the non-inclusion or the incorrect inclusion of the share of a partner in the profit and loss of a firm in the completed assessment of the partner, which was not a mistake apparent from the record of the assessee falling under Sub-section (1), was to be deemed to be so apparent. It was observed by the Supreme Court that:

"Under Clause (5).....the inclusion of the share in the assessment of the partners

or the correction thereof is deemed to be a mistake apparent from the record within the meaning of the section, and Sub-section (1) applies thereto accordingly -- the period of four years being computed from the date of the final order passed in the case of the firm. The discrepancy disclosed as a result of assessment or reassessment of a firm between the share of a partner included in the individual assessment of that partner and his share disclosed in the assessment of the firm was not an error apparent from the record within the meaning of Section 35(1) and the legislature enacted a fiction making the inclusion of the share in the assessment or correction thereof such a mistake."

These observations of the Supreme Court make it very clear that in the present case even if the Income Tax Officer had no jurisdiction to rectify the assessments u/s 35(1), he could use Sub-section (5) to effect a rectification of the type contemplated by that sub-section. Now, the opening words of Sub-section (5) are clear enough to show that the first condition for the applicability of that sub-section is that, there must be a completed assessment of a partner in a firm. The completed assessment must be of the partner and not of the firm. The second condition that must be satisfied is that in that completed assessment the share of the partner in the profit or loss of the firm of which he is a partner must not have been included or must not have been correctly included. If these two conditions are satisfied, then the assessment of a partner can be revised by the inclusion of the share in the assessment or the correction thereof, and this is deemed to be the rectification of a mistake apparent from the record within the meaning of Section 35. For the applicability of Sub-section (5) it is immaterial whether the assessee is a partner in one firm only or in several firms and whether (sic) if he is a partner in several firms and if in his completed assessment his share of the profit or loss of only some firms was included, whether there is any error in that inclusion. The words "assessment or reassessment of the firm", as also the words "inclusion of the share in the assessment or the correction thereof" unmistakably show that no matter whether the assessee is a partner in one firm or several firms and whether in his completed assessment his share of profit or loss in any firm was not included, Sub-section (5) can be resorted to for revising the assessment if his share in any firm's profit was not included in the completed assessment or if it was incorrectly included. Learned counsel's suggestion that as there was no mistake in the inclusion of the shares of the petitioners in the firm M/s. Udhoji Shri Kishandass, and no mistake in the assessment of that firm, Sub-section (5) could not be used for revising the assessments of the petitioners so as to include their shares of profit or loss in the other firm, has no support whatsoever in the language of Sub-section (5). In our judgment, the Income Tax Officer had jurisdiction to rectify the assessments of the petitioners on the completion of the assessment of the firm M/s. Ramadhin Bhagwatdin by including in the original assessments their shares of profit and loss in firm M/s. Ramadhin Bhagwatdin.

The contention that the rectification made by the Income Tax Officer, Satna, enhancing the assessments of the petitioners was invalid as no notice as required

by the first proviso to Section 35(1) was given to them must be given effect to. Learned Advocate General appearing for the Department did not dispute that a notice under the said proviso was necessary even for a rectification under Sub-section (5) if that had the effect of enhancing the assessment. He, however, submitted that under the aforesaid proviso a notice to the assessee was not necessary for initiation of rectification proceedings but that it was necessary only if the intended rectification had the effect of the enhancing the assessment or reducing a refund. That no doubt appears to be the correct position on the language of the proviso. But in the present case, no notice of any kind was given at all to any of the assesseees before the making of the impugned assessment orders u/s 35(5) read with Sub-section (1). There is also nothing to show that the assesseees knew of the proceedings and of the intention of the Income Tax Officer to revise the assessments to their detriment and that they had a reasonable opportunity of showing cause against the intended enhancement. The fact that in the returns submitted by the petitioners there was a note to the effect that they had "share income in R.F. M/s. Ramadhin Bhagwatdin" and that it "may be taken as per orders" did not relieve the Income Tax Officer of the obligation of giving notice as required by the proviso. Those notes did not make the assessments of the petitioners provisional (see *Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others*, and *Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah*,) The assessments which were made against the petitioners on 24th February 1956 were final, and they could be revised only in compliance with Sub-sections (1) and (5) and with the proviso to Sub-section (1) of Section 35.

For all these reasons, these petitions are allowed and the orders of assessment made on 31st December 1960 by the Income Tax Officer, Satna, u/s 35, against the petitioners are quashed. Each of the petitioners shall have costs of his petition. Counsel's fee in each case is fixed at Rs. 100/-. The outstanding amount of security deposit shall be refunded to the petitioner in each case.