
(1961) 03 AHC CK 0001

In the Allahabad High Court

Case No : I. T. Miscellaneous Case No. 143 of 1954 (R.A. No. 873 of 1953-54.)

RAO THAKUR NARAYAN SINGH

APPELLANT

Vs

COMMISSIONER OF INCOMETAX, DELHI.

RESPONDENT

Date of Decision : 09-03-1961

Acts Referred:

Income Tax Act, 1961 — Section 22, 23, 33, 34, 35

Citation : (1962) 44 ITR 178

Hon'ble Judges : Bhargava, J

Bench : Division Bench

Judgement

BHARGAVA J. - The question referred by the Income Tax Appellate Tribunal for our opinion is :

"Whether on the facts and in the circumstances of this case the provisions of section 34(1)(a) were applicable in respect of the assessment year 1942-43 on January 19, 1950, when the notice under that provision was issued for the purpose of assessing the escaped interest income ?"

The statement of the case which is accompanied by copies of certain orders including the appellate order out of which this question arose shows that, for the assessment year 1942-43, the original assessment on the basis of the return submitted u/s 22 of the Income Tax Act was made on March 25, 1944. Later the Income Tax Officer on April 5, 1945, issued a notice u/s 34 of the Income Tax Act and called upon the assessee to file a fresh return. It was said that he had failed to disclose full and complete particulars of his interest income and his forest income in the return filed in the regular assessment. The Income Tax Officer on receipt of a return in regular assessment. The Income Tax Officer on receipt of a return in response to the notice u/s 34 made a revised assessment by his order dated July 12, 1945, and imposed tax on both the forest income and the interest income. The assessee appealed and eventually his appeal came before the Income Tax Appellate Tribunal. By the time this appeal came up the assessee no longer contested the liability to tax of the interest income which had been shown

by him in the return filed in response to the notice u/s 34 but contested the assessment in respect of the forest income mainly on the ground that the notice in respect of it was invalid inasmuch as it had been issued without any definite information that that income had escaped assessment which was required by section 34 as it stood at that time. The Income Tax Appellate Tribunal, when deciding the appeal, examined this argument relating to the forest income and accepted the contention of the assessee that it could not be held that the Income Tax Officer had come in possession of definite information within the meaning of section 34 in respect of this forest income. The Tribunal, however, when passing the final order set aside the assessment of tax not only in respect of the forest income but also in respect of the interest income and restored the original order which had been passed u/s 23(3). The statement of the case further mentions that this mistake which was committed by the Tribunal in setting aside the tax assessed even in respect of interest income which was not disputed before the Tribunal, was not sought to be rectified by any application u/s 35 nor was any reference to this court sought in respect of that error. On the other hand on January 3, 1950, the Income Tax Officer moved the Commissioner of Income Tax for sanction to start proceedings u/s 34, which had been amended by the amending Act of 1948, with respect to the interest income which had escaped assessment. The Commissioner granted the requisite sanction and then on January 19, 1950, the Income Tax Officer issued a fresh notice u/s 34. In the proceedings under that notice the Income Tax Officer made a revised assessment order on September 25, 1950, imposing tax, including the interest income of the assessee also in the revised assessment. The assessee again appealed and ultimately the appeal came before the Income Tax Appellate Tribunal. The Tribunal held that this income had been rightly assessed in the proceedings taken u/s 34 on the basis of the notice dated January 19, 1950, and consequently dismissed the appeal. It is in these circumstances that the question mentioned above arose and has been referred for our opinion.

In deciding this reference we have felt some difficulty because the statement of the case as well as the appellate order out of which the question of law referred to us arose, are so worded that it has been difficult for us to find what are the points decided by the Tribunal for giving the decision against the assessee in the appeal. In, the first paragraph of the appellate order, the Tribunal mentions the facts most of which have been mentioned above. The first few sentences of the second paragraph also contain the same facts. Then the appellate order mentions what was contended before the Tribunal on behalf of the assessee. Thereafter comes a sentence in which the Tribunal mentions what the departmental representative pointed out in the course of arguments and when mentioning the arguments of the departmental representative the Tribunal had put down the word "rightly" indicating that in their opinion the argument put forward by the departmental representative was correct. That argument was that whatever proceedings were started u/s 34 in April, 1945, were quashed by the Tribunal by its order dated April 25, 1949. Having mentioned this the Tribunal puts down two

more sentences to the following effect :

"The position, therefore, was that there were no valid proceedings at all. The assessee failed to disclose the interest income in his return filed u/s 22(2) in connection with the original assessment."

There was some argument before us as to whether these two sentences represent the opinion of the Tribunal and their findings or whether they were also part of the argument of the departmental representative. It appears to us that this aspect is immaterial because of the use of the word "rightly" by the Tribunal in the earlier sentence where they mentioned the argument of the departmental representative. Even if these sentences be treated as part of the argument of the departmental representative it should be held that the word "rightly" would affect the arguments contained in these two sentences also. This would mean that the point urged by the departmental representative in the first sentence as well as the points which are mentioned in these two sentences, if they were parts of the argument of the departmental representative, were accepted by the Tribunal as correct and formed the basis of the opinion which resulted in the dismissal of the appeal of the assessee. On the other hand, if these two sentences be read as apart from the argument of the departmental representative contained in the earlier sentence the position would still would remain unaffected because it would mean that the Tribunal accepted that argument of the departmental representative and then proceeded further to express its own opinion in the subsequent two sentences in question. Consequently for the purpose of answering the reference before us, we proceed on the basis that the views or points contained in all these sentences amount to the decision of the Tribunal on the points which the Tribunal was called upon to decide in order to pass the final order in the appeal.

The contention of the assessee mentioned in the appellate order of the Tribunal is a very limited one. The Tribunal has stated that the contention on behalf of the assessee was that since a return u/s 22(2) had been submitted in response to the notice u/s 34 served the assessee in April, 1945, it was not a case where income had escaped assessment by reason of the omission or failure on the part of the assessee to make a return of his income u/s 22 and the provisions of section 34(1)(a) were, therefore, not attracted. This argument, it appears to us, was rightly rejected by the Tribunal on the basis that the disclosure in the return which was filed in response to the notice issued u/s 34 in April, 1945, was immaterial. The material fact was that the assessee had failed to disclose the interest income in his return which was filed u/s 22(2) in connection with the original assessment. A disclosure made subsequent to the original assessment would in no way be material to the applicability of section 34 of the Income Tax Act if proceedings under that provision of law are sought to be taken. The other view expressed by the Tribunal was based on the acceptance by the Tribunal of the point raised by the departmental representative that the proceedings started u/s 34 in April, 1945, were quashed by the Tribunal by its order dated April 25,

1949, and consequently there were no such valid proceedings at all. This point of view recited by the Tribunal in its appellate order was irrelevant to and had no bearing on the contentions of the assessee which were mentioned by the Tribunal in the appellate order. It was urged by learned counsel for the assessee before us that these remarks were made for the purpose of meeting the ground taken in the grounds of appeal to the effect that the assessment order dated July 12, 1945, for the assessment year 1942-43 u/s 23(3) read with section 34 of the Act had become final u/s 33(6) of the Act and consequently the present assessment proceedings were without jurisdiction. In order to show that such a ground of appeal was taken before the Tribunal, learned counsel for the assessee put before us a copy of those grounds of appeal. Learned counsel for the department stated that he had no objection to the copy of the grounds of appeal being taken by the court and considered when answering this reference in view of the fact that the court could easily get a copy of the grounds of appeal by asking for a supplementary statement of the case u/s 66(4) of the Income Tax Act and such a proceeding would only prolong the case and put parties to unnecessary expense without serving any useful purpose and that could be avoided by taking a copy from the assessee's counsel. We are in agreement with the learned counsel for the assessee that the point which was raised as ground No. 2 in the grounds of appeal and which has been mentioned above is the point in respect of which the views expressed by the Tribunal about the proceedings taken u/s 34 in April, 1945, are relevant. The departmental representative's argument was that those proceedings u/s 34 were quashed by the Tribunal by its order dated April 25, 1949, and that the submission of the departmental representative was accepted by the Tribunal by saying that the departmental representative had rightly pointed this out. Having accepted this argument the Tribunal also proceeded to hold that there were no valid proceedings u/s 34 in April, 1945. On this basis the contention raised in ground No. 2 of the grounds of appeal would naturally not help the assessee at all, because, if there were no valid proceedings u/s 34 in the year 1945, the order passed by the Tribunal ultimately in the appeal arising out of those proceedings would not have the effect of governing subsequent proceedings on the ground of being a final order u/s 33(6) of the Act. An order falling within the provisions of section 33(6) of the Act can only be effective if it be an order made in valid proceedings and not an order in invalid proceedings. The remarks of the Tribunal, therefore, in the judgment were really meant to meet this point of view which was put forward by the assessee in the grounds of appeal though it appears that the Tribunal when putting down the views failed to take notice in the earlier part of the judgment of the fact that such a ground was one of the grounds of appeal before it on behalf of the assessee. This aspect of the case is, therefore, one which can be considered by us when deciding this reference because, as we have just said, the Tribunal at least proceeded to base its decision on this aspect and the mere failure of the Tribunal to mention that this aspect was pressed before it in the course of arguments becomes immaterial. The contention of learned counsel for the department that we are not entitled to examine the question referred to us in this aspect on the ground that

the question of law in this form does not arise out of the appellate order has, therefore, no force.

On this aspect of the case, we find that the Tribunal has gone wrong. The Tribunal without carefully examining the correct position accepted the submission of the departmental representative that the proceedings started u/s 34 in April, 1945, were quashed by the Tribunal by its order dated April 25, 1949. We have looked at the appellate order of the Tribunal dated April 25, 1949, and we are unable to find any words in that order quashing the proceedings which had been taken on the notice u/s 34 at that time. The appellate order of the Tribunal dated April 25, 1949, shows that the Tribunal concentrated its attention on the question whether the notice u/s 34, inasmuch as it affected the forest income, was or was not a valid notice. Examining that aspect in detail, the Tribunal at the end recorded its conclusion that it cannot be said that the Income Tax Officer had come in possession of definite information within the meaning of section 34 and that the proceedings u/s 34 could not be initiated against the assessee for this year. Thereafter, the Tribunal proceeded to pass the operative order and that order was to the effect that the order passed by the Income Tax Officer was set aside and the original order u/s 23(3) was restored. In passing this order, on the face of it, the Tribunal committed an error. The order of the Income Tax Officer which was set aside by the Tribunal affected two items of income : there was the forest income and there was this interest income. The conclusions which had been arrived at by the Tribunal were all with reference to the forest income and the view that had been expressed by the Tribunal was that the notice in respect of that income was void. There was no finding that the notice in respect of the interest income was incorrect and was liable to be set aside. Yet the Tribunal proceeded to set aside the assessment of tax in respect of both the forest income and the interest income. In respect of the forest income, therefore, the order of the Tribunal would amount to a decision that the proceedings u/s 34 were void as the requirements for issue of the notice u/s 34 in respect of that income did not exist. So far as the interest income is concerned, it would appear that the Tribunal set aside the tax assessed on it without applying its mind to the question whether that income was or was not taxable and without recording any finding even incidentally that the proceedings in respect of that income were void. This was, therefore, a case where the Tribunal did not hold that the notice u/s 34 was void in respect of the interest income but committed a clear and manifest error of setting aside the assessment of tax on the interest income without going into the correctness of the imposition of the tax. Such an error would certainly be a manifest error apparent on the face of the record but it cannot be said that the result of the decision by the Tribunal was that the proceedings which had been taken u/s 34 were quashed and became invalid so that they could be treated as non-existent proceedings. In fact, this correct position seems to have been realised by the Tribunal in their subsequent appellate order dated September 7, 1953, out of which the present reference has arisen. The Tribunal has stated that the Income Tax authorities did not bring this

to the notice of the Tribunal by an application u/s 35 nor were any steps taken to have a case stated to the High Court u/s 66(1). An application could have been presented u/s 35 or proceedings initiated u/s 66(1) only on the basis that the order of the Tribunal setting aside the imposition of tax on interest income was an order within the jurisdiction of the Tribunal, though an order which suffered from an error of law which could be rectified either by the Tribunal itself u/s 35 or by the High Court on receipt of a reference u/s 66. The order passed by the Tribunal on April 25, 1949, did not, therefore, invalidate the proceedings which were taken by issue of the notice u/s 34 in April, 1945, and the Tribunal committed an error in accepting the interpretation of the departmental representative that these proceedings had been quashed and that there had been no such valid proceedings at all. There having been proceedings which were valid but which terminated in an order made by the Tribunal, we think that the order which was made by the Tribunal will be a proper order to which the provisions of section 33(6) of the Act would apply. The result of the application of the provisions of section 33(6) would be that the order would be final and the logical conclusion would be that no subsequent proceedings u/s 34 on the same facts and in respect of the same income could be taken by the department by issue of a fresh notice u/s 34. If the department could take fresh proceedings u/s 34 ignoring that appellate order of the Tribunal it would mean that the order would have no finality at all. The proper procedure which the department should have adopted and which has been indicated by the Tribunal itself was not adopted by the department. On the other hand, this procedure of issue of a fresh notice u/s 34 was adopted and that, in the circumstances mentioned above, was clearly an incorrect procedure and not permissible in law.

It was urged by learned counsel for the department that the fresh notice u/s 34 should be held by us to be valid in the special circumstances of this case that this notice was issued under the amended section 34 after the enforcement of the Income Tax (Amendment) Act, 1948, and such a notice should not be held to be barred by a final order passed in proceedings u/s 34 taken before the amendment of that section. There are two reasons why in our opinion this submission cannot be accepted. Firstly, when section 34 was amended by the Amending Act of 1948, the legislature did not say that this amendment shall be retrospective and of such a nature that proceedings which have already been taken once under the unamended section 34 will not stand in the way of taking a second proceeding under the amended section. If the section had remained unamended there would have been no doubt that the proceedings taken under it by issue of the notice in April, 1945, would bar a fresh proceeding under the same section because of the final order passed by the Tribunal on April 25, 1949. Once there was finality to the applicability of section 34 to the case of the assessee in respect of this interest income, the mere amendment of this section would not confer a right to take another proceeding and disregard that finality when the legislature did not grant any such right to the department and did not specifically make the amended section retrospective. The second reason which

appeals to us is that the amendment to section 34 which was brought about by the amendment of 1948 was not of such a nature as to bring about any difference between the proceedings to be taken under the amended section 34 in April, 1945, in so far as the proceedings related to this interest income. All the ingredients required for taking proceedings u/s 34 in respect of this interest income which are relied upon for the issue of the notice under the amended section are the same which did exist and which were taken into account when issuing the notice under the unamended section 34. The main amendment related to the use of the words "definite information" in section 34. In the proceedings taken under the notice issued under the unamended section 34 in April, 1945, there was a finding that there was definite information in respect of this interest income of the nature required and that finding of fact was never set aside. The assessment of tax was, however, set aside. In the proceedings taken under the amended section, the requirement of definite information was given up but that would be immaterial because even in the previous proceedings the want of definite information was given up but that would be immaterial because even in the previous proceedings the want of definite information was not the reason for setting aside the assessment. In these circumstances, it would appear that the amendment of section 34 in no way brought about any change in the nature or validity of the proceedings u/s 34 in respect of this interest income and consequently the mere fact that there was an amendment would give no right to the department to take a fresh proceedings. Consequently, our view earlier that the final order passed by the Tribunal on April 25, 1949, was a bar to the proceedings subsequently taken under the notice dated January 19, 1950, remains unaltered.

As a result of the question referred to us is answered in the negative. The assessee will be entitled to the costs of this reference which we fix at Rs. 400. The same amount shall be treated as the fee of learned counsel for the department.

Question answered in the negative.