

(1971) 03 MAD CK 0061

In the Madras High Court

Case No : Writ Petition No. 1042 of 1966

S. Arthanari

APPELLANT

Vs

First Income Tax Officer and Another

RESPONDENT

Date of Decision : 26-03-1971

Acts Referred:

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

Citation : (1972) 83 ITR 828

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : K. Narayanaswami, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

Ramaprasada Rao, J.—The petitioner is challenging the order of the Commissioner of Income Tax (Central), Madras-34, the 2nd respondent herein, dated June 10, 1965, which relates to the assessment of the income of the petitioner for the assessment year 1956-57. The petitioner was a partner in the firm of Ramani Bus Service, Salem, in which his wife was also a partner. The firm returned provisionally an income of Rs. 17,294 for the assessment year 1956-57. On the basis of the said provisional return of the firm, the petitioner's individual assessment as partner of the firm for the aforesaid year was completed on March 19, 1957. The firm's final assessment was, however, completed later, on June 28, 1957. In the said order, the Income Tax Officer granted depreciation under the first part of Section 10(2)(vi) as also additional depreciation u/s 10(2)(vib), but did not allow initial depreciation under the latter part of Section 10(2)(vi). This initial depreciation was disallowed on the ground that the bus MDS 2953 for which additional depreciation allowances were granted was put on road by the petitioner and was run for about a fortnight before being transferred to the partnership of Ramani Bus Service. The firm unsuccessfully appealed on the main order of assessment, and ultimately even in the revision proceedings before the Commissioner of Income Tax the assessment order was confirmed. But, on May 13, 1959, the original authority addressed a letter to the partnership firm u/s 35

of the Indian Income Tax Act, 1922, hereinafter referred to as the Act, proposing to revise the assessment for the year 1956-57 as the additional depreciation allowed in the original order was not correct. The firm filed its objections on the merits and sought to justify the grant of additional depreciation which was being questioned in the proceedings u/s 35 of the Act. We are not here concerned at this belated stage with the merits on which such allowance was made or disallowance was sought to be maintained. Finally, on January 30, 1961, the original order of assessment made on the firm on June 28, 1957, was rectified u/s 35(1) of the Act. Consequent upon such a rectification of the original order of assessment made on the firm, steps were taken to rectify the order of assessment made on the petitioner as partner of the said partnership firm. Such proposals were initiated u/s 35(5) of the Act on September 9, 1963, and on such rectification the assessment was revised on September 28, 1963. As already stated, the petitioner took up the matter before the Commissioner of Income Tax who, by his impugned order, confirmed the order of the Income Tax Officer dated September 28, 1963. The challenge is against the order of the 2nd respondent.

2. Mr. Narayanaswami raised three contentions. Firstly, the order of rectification made on the firm on January 30, 1961, is not warranted in law and the said order is without jurisdiction and should be deemed as non est. On this basis the impugned order is challenged for which reliance is placed on *Arulanandam v. Income Tax Officer, Tuticorin*, [1961] 42 ITR 229 (Mad.). It is stated that a rectification u/s 35(1) is possible only when there is a mistake apparent on record. The proceedings do not disclose any such apparent error but reflect only a change of opinion. The revenue however states that it was the apparent mistake of allowing an additional depreciation that was corrected later by the order u/s 35(1) and it cannot be deemed to be one passed because of change of view.

3. Secondly, it is said that even if the order dated January 30, 1961, made on the firm is justified, the impugned order could not have been made as it relates back to the date of the original assessment on the petitioner as partner and as it is beyond the period of four years from the date of the order of assessment made on the firm on June 28, 1957.

4. Thirdly, it is said that an order made u/s 35(1) is not an order of assessment but a procedure adopted for assessment, though the order of rectification may be an independent order by itself. As Section 35(5) does not expressly refer to orders passed u/s 35(1) as coming within its compass, the impugned order is illegal and has to be quashed as it cannot be undertaken u/s 35(5).

5. Relying on *Arulanandam v. Income Tax Officer, Tuticorin*, and *Vijayaranga Mudaliar v. Additional Income Tax Officer*, W.P. No. 495 of 1956 Mr. Narayanaswami contends that there was no jurisdiction to rectify the assessment order on the firm as it did on January 30, 1961. The facts disclose that the Income Tax Officer disallowed the initial depreciation but granted additional depreciation to the firm. The mainstay of the argument is that the order was

subject to appeal and revision to the appropriate authorities and the disallowance of the initial depreciation was fully fought out. It is in this view it is stated that if the mistake was not discovered till all the available avenues of attack on the original order of assessment are over, then it ceases to be an apparent error. If a mistake is apparent, it does not cease to be so on the only ground that the appellate or revisional authorities failed to notice the same. They have obviously committed an error in not noticing it. The further proceedings before the higher hierarchy was only to canvass the correctness of the disallowance of the initial depreciation, which is granted by reason of a special privilege granted by the Act to assessee under certain stated circumstances. In those proceedings there could not have been an argument on the grant of additional depreciation by the assessee since it was to his benefit. It is in such circumstances that the notice to rectify the order of assessment was given on February 23, 1961. In his objections the assessee never pleaded that this matter was adverted to by the appellate or revisional authorities, but, on the other hand, his case was :

" The Income Tax Officer who made the assessment for the relevant year was fully aware that the assets had been taken over by the firm from the partners and since the entries were only adjustment entries he had allowed the additional depreciation. Hence submit that the depreciation allowed to the vehicle MDS 2953 as additional depreciation should not be revised."

6. The present contention in this writ petition is that the appellate and revisional authorities did have the opportunity to apply their mind to the question whether the additional allowance was granted rightly or mistakenly. I am unable to agree that the grant of the allowance was deliberate and that it was so even in the hands of the appellate and revisional authorities as well. The revenue rightly says that, as regards the original authority, namely, the Income Tax Officer, who granted the allowance, obviously erred in granting it by misappreciating the facts and law. It is only in such cases it could be said that there appears to be an error apparent on the record. The rectification undertaken is in order, *Rajagopala Ayyangar J. in Vijayaranga Mudaliar v. Additional Income Tax Officer* was of the view that rectification proceedings are not available in a case where the basis is change of opinion by the assessing authority. It is by now settled that if the genesis of action by the revenue in attempting to rectify a concluded assessment is mere change of view or opinion, then the resultant order in exercise of such assumed power is without jurisdiction. It would be so even if the rectification can be made only after due investigation and debate. Indeed such an order would be a nullity in the eye of law for want of jurisdiction, because rectification u/s 35(1) can only be on the ground of discovery of the apparent error within the time provided. The facts here do not present a change of opinion. Mr. Narayanaswami relied upon *Arulanandam v. Income Tax Officer, Tuticorin*, not so much to further his case in this writ petition, but to strike at the bottom of the process initiated u/s 35(5). When once the parent rectification order u/s 35(1) is non est, then the impugned order which springs from it would be liable to be set aside. I have already held that the first order of rectification u/s 35(1) was passed in the

rightful exercise of statutory power by the appropriate authority and in this view of the matter, the ancillary contention as above also fails and the order impugned is justified.

7. The second contention based on the plea of limitation has no substance. Section 35(5) is a deeming provision projecting a statutory fiction. It is wholly dependent upon the assessment or reassessment of the firm, in which the assessee concerned is a partner. Reassessment of a firm takes place even if the original order of assessment is rectified u/s 35(1). The jurisdiction of the officer to act u/s 35(5) being consequential upon such a reassessment of the firm by the appropriate authority, it is to the date of the order of the corrected or rectified assessment of the firm, one should look upon to work out his rights and obligations u/s 35(5). One such right a partner of a firm, which has suffered a reopening of the assessment by rectification, has is to see that the assessment order made on him earlier is not reopened after four years from the date of the final order of rectification and assessment passed in the case of the firm. The process of assessment is an integrated one though it assumes different shapes in different levels according to the Tribunal dealing with the subject. When it is dealt with by the Income tax Officer, the order is called the assessment order; at the level of the Appellate Assistant Commissioner, it is the appellate order ; with the Commissioner, it is a revisional order ; with the Tribunal it is the Tribunal's order ; on reference it is the High Court's order. But sandwiched between the two available stages of attack as above, the power of rectification is available u/s 35(1). No doubt, it is exercisable within the statutory time prescribed. But, once it is invoked and an order of rectification is made, the order of assessment becomes merged in the order corrected by rectification. The corrected order is then the " statutorily deemed order of assessment " for it would be anomalous to hold that even after correction, a mistaken order ought to prevail. In cases where assessment orders are rectified, the original orders whose mistakes and errors are corrected no longer can hold the field. As pointed out in *Vedantham Raghaviah Vs. Third Additional Income Tax Officer, City Circle V, Madras.* :

" Once an order of rectification is passed the assessment itself is modified and what remains is not the order of rectification, but only the assessment as rectified."

8. The facts in that case are very much similar to the facts in the instant case. There the firm's first assessment order was made on March 30, 1957, and the partner's individual assessment was made, as in this case, earlier on December 31, 1956. As a result of the order of final assessment on the firm on March 30, 1957, the partner's assessment was finalised u/s 35(1) on January 29, 1958, correcting an error apparent in the earlier order dated December 31, 1956. In fact, a second order u/s 35(1) was also made on the individual partner because of discovery of certain other mistakes and this was on July 30, 1958. The firm's assessment however was revised consequent upon certain directions issued by the Appellate Tribunal in its order dated March 9, 1959, and a fresh assessment

was made on the firm on March 11, 1960. Consequent upon such a fresh assessment on the firm, an order u/s 35(5) was made again as against the individual partner on March 23, 1960. It was in this context that the court held that what survives in such proceedings is the assessment as rectified. If, therefore, it is the rectified order made u/s 35(1) that is the order of assessment, vis-a-vis the firm, it would be illogical to say that the period of limitation contemplated in Section 35(5) should commence only from the erroneous original order of assessment and not from the corrected order made on the firm u/s 35(1). I am, therefore, of the view that the reopening of the assessment made as against the partner, within four years from January 30, 1961, is proper and unassailable.

9. The third contention is that, in the absence of the enumeration of Sub-section (1) of Section 35 in Section 35(5) of the Act, the rectification is not warranted. There is a fallacy in the argument. Section 35(5) reads :

" Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction 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....."

10. If there is an assessment or reassessment of a firm and as a consequence of such a reassessment or original assessment it is found that the share of a partner has not been correctly brought to tax, then rectification can be undertaken of such an inchoate assessment of the individual partner as if the error is an apparent mistake. What is assessment or reassessment ? Assessment is one integrated process, the purpose of which is to reckon correctly the tax liability of an assessee. The process is compartmentalised by statute. There is the original order of assessment; on appeal it merges with the appellate order ; thereafter with the order of the Commissioner on revision or of the Appellate Tribunal on appeal; then the order is tempered by the advice given by courts u/s 66 of the Act and later by the final order made by the Supreme Court. Though all the stages are independent and mutually exclusive, yet it concerns itself only with the assessment of the taxpayer and the determination of the tax liability. Even so the proceeding involving rectification of an assessment is but yet another channel through which the purpose of assessment is achieved. It is well-settled that the word " assessment " is used in the Income Tax Act in a number of provisions in a comprehensive sense and includes all proceedings starting with the filing of return and ending with determination of tax (see *Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*, . Therefore, rectification is one of the accredited processes by which the correct amount of tax payable is arrived at. As this subserves the purpose of assessment it is also

caught in the stream of assessment. If, therefore, rectification is a procedure which ultimately leads to a reappraisal of the mistaken original order of assessment at whatever stage it may be, then the first part of Section 35(5) enables the revenue to rectify the order of assessment on a partner if the firm's assessment is reopened u/s 35(1) as a result of which the firm is reassessed. The sections referred to in Section 35(5) are specific; illustrative cases. But the contingency of the firm suffering a reassessment is the foundation for reopening the partner's assessment, because the legislature considers such an event of reassessment of the firm as reflecting an error apparent on record, enabling rectification of the first order of assessment against the partner.

11. Thus, my conclusion is that the firm's assessment has been validly reopened u/s 35(1) and in consequence the rectification of the order of assessment on the assessee as partner of the firm is competent. Such a reopening of the assessee's tax liability is well within time as well. The assessee's contentions fail. The writ petition fails and is hereby dismissed. In the circumstances, there will be no order as to costs.

Petition dismissed.