(1960) 03 MAD CK 0010

In the Madras High Court

Case No : Writ Petition No. 886 of 1957

S. Seethai Achai APPELLANT

Vs

Income Tax Officer, Coimbatore RESPONDENT

Date of Decision : 16-03-1960

Acts Referred:
Income Tax Act, 1922 — Section 23A, 34

Citation : AIR 1961 Mad 69 : (1960) ILR (Mad) 1139 : (1960) 40 ITR 170 : (1960) 73 LW 504 : (1960) 2 MLJ 259

Hon'ble Judges : Ramachandra Iyer, J;Rajagopalan, J

Bench : Division Bench

Advocate : R.V. Venkatram and S. Ramamurthi, for the Appellant; C.S. Rama Rao Sahib and S. Ranganathan, for the Respondent

Final Decision : Allowed

Judgement

Rajagopalan, J.—The petitioner was a shareholder in Soma-sundaram Mills (Private) Ltd., a company which admittedly fell within the scope

of Section 23-A of the Indian Income Tax Act.

2. For the assessment year 1950-51, the previous accounting year for which ended on 1-4-1950, the assessee was assessed to tax, and that

assessment was completed on 31-5-1953. Subsequently, on 31-3-1957, an order was passed against Soma-sundaram Mills, Ltd., u/s 23-A of

the Act. The date of the general meeting, with reference to which the assessee''s divided income must be deemed to have accrued u/s 23-A, was

22-9-1949, which fell within the year of account, for which the assessee was liable to be assessed in the assessment year 1950-51. After an order

had been passed on 31-3-1957, u/s 23-A of the Act, proceedings were taken to reopen the assessment of the assessee for the assessment year

1950-51. A notice was issued by the Income Tax Officer u/s 34(1)(b) of the Act, and it was served on the assessee on 14-9-1957.

3. The assessee applied under Article 226 of the Constitution for the issue of a writ of prohibition, to restrain the Income Tax Officer from

proceeding further with any re-assessment under colour of the notice served on the assessee on 14-9-1957. During the pendency of these

proceedings, however the Department was allowed, without any interim order of stay, to complete the assessment, so that the position now is, that

an assessment has been completed u/s 34. Though it was a writ of prohibition that was asked for, if it is found that the issue of notice u/s 34(1)(b)

did not confer any jurisdiction on the Income Tax Officer to re-open the assessment of the assessee, the appropriate remedy would be the issue of

a writ of certiorari to set aside the notice Issued u/s 34(1)(b) and the assessment that followed it.

4. The period of limitation prescribed for the initiation of the proceedings u/s 34(1)(b) is four years. The question is, what is the date, from which

that four year period has to be computed? The contention of the learned counsel for the assessee was that that period should be computed from

the expiry of the assessment year in question, 1950-51, and that, therefore, the tour year period came to an end on 31-3-1955. Therefore, the

notice, served on the assessee on 14-9-1957, was beyond the prescribed period of limitation, and such a notice could not confer any jurisdiction

on the Income Tax Officer.

That was the contention of the learned counsel for the petitioner. The learned counsel for the Department contended alternatively (1) that the

period of limitation should be computed from the close of the assessment year, jn which the order u/s 23-A was passed, and (2) that no period of

limitation was applicable at all, because, independent of Section 34, under the very term of Section 23-A as it stood in the relevant period, the

notional dividend income of the assessee could be taken into consideration in computing the assessable income of the assessee.

5. In C.W. Spencer and Others Vs. Income Tax Officer, City Circle II, Madras, , this Court had occasion to go only into the question, what the

expression ""year"" in Section 34, meant. It was construed as the assessment year, rejecting the contention of the assessee in that case that it was the accounting year. The further question, whether the decision in Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City, , was

correct, was left open.

6. In Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City, , the Bombay High Court expressed the view, that the period of

limitation would have to be computed only after an order u/s 23-A was passed. That question, however, was reconsidered by the Bombay High

Court in Commissioner of Income Tax, Bombay City Vs. Robert J. Sas, Belgium, . Chagla, C. J., explained the scope of his earlier decision in

Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City, and he said that the period of limitation to be computed u/s 34(1) was to

be computed only with reference to the assessment year of the assessee or shareholder, and that the date, on which an order u/s 23-A was passed

as against the company, would not be relevant in computing the period of limitation, either for the assessment or for re-assessment of the assessee,

that is, the shareholder.

7. If we may say so with respect, we find ourselves in entire agreement with the reasoning and conclusion of Chagla, C. J., in Commissioner of

Income Tax, Bombay City Vs. Robert J. Sas, Belgium, . Section 34(1) refers only to the assessee, and the year with which the assessee is

concerned, the assessment year of that assessee. There is no scope for importing into Section 34(1) any fmther consideration. It should be

remembered that a necessity to reopen assessment u/s 34 may arise under various circumstances, one of which is an order u/s 23-A. Therefore,

that the order u/s 23-A was passed at a given point of time, may have no relevance in determining the period of limitation permissible and

prescribed u/s 34(1) of the Act, If, for instance, discovery or information was beyond four years, that would not extend the period of limitation,

even as a result of discovery, action u/s 34(1) would be permissible only within the period of limitation prescribed thereunder.

8. Learned counsel for the Department next contended that under the terms of Section 23-A, as it stood in the relevant period, re-assessment

could be undertaken without recourse to Section 34. That contention has been repelled more than once. In C.W. Spencer and Others Vs. Income

Tax Officer, City Circle II, Madras, , as well as in other cases, decided u/s 23-A, it has been pointed out that Section 23-A is not concerned with

any assessment or re-assessment. It is only procedural section, and, if an order u/s 23-A is passed, the question of assessment of the shareholder

will have to be taken up -- either it should be his original assessment, or it should be re-opening of the original assessment, if it has been closed

under any of the provisions of the Act.

In the present case, the assessment was reopened by recourse to Section 34(1)(b) of the Act. Without recourse to Section 34, the finality of the

assessment of the assessee in this case could not have been avoided. Section 23-A did not provide for it. It should be remembered that, at that

stage, the shareholder as such does not come into the picture. He is not entitled to a notice before an order is passed u/s 23-A, and he cannot

himself challenge the validity of that order by an appeal. It is only the company that is entitled to a notice and to an appeal.

Acceptance of the contention of the learned counsel for the Department, that without recourse to Section 34, assessment or re-assessment could

be effected under the terms of Section 23-A, would lead to this position, that assessment or re-assessment could be done and completed without

any notice to the shareholder. That is wholly opposed to the scheme of the Income Tax Act. At any rate, it is wholly opposed to the scheme of the

Income Tax Act, as explained in the decisions of this Court and other Courts. We have no hesitation in rejecting the contention, that the

Department had right independent of Section 34 under the term of Section 23-A itself, to re-assess the assessee, shareholder.

9. We are not called upon to consider in this case whether, in the circumstances of this case, the assessment could have been reopened u/s 35. It

was brought to our notice that action u/s 35 was contemplated but was dropped. Therefore, we refrain from saying anything about the applicability

of Section 35 or about the appropriate period of limitation, had action been taken u/s 35 of the Act.

10.Since the four-year period of limitation for initiating proceedings u/s 34(1)(b) ran out on 31-3-1955, and since the notice u/s 34(1)(b) was

served upon the assessee, only after expiry of that period, and further since the service of a valid notice is a condition precedent to the assumption

of jurisdiction u/s 34 of the Act, we have to hold that the Income Tax Officer had no jurisdiction to reopen the assessment or to re-assess the

assessee, even though there was a valid order u/s 23-A of the Act. Since the notice itself was issued beyond the period of limitation, it has to be

set aside by the issue of a writ of certiorari. The writ of certiorari will also be directed to set aside the order of assessment on the basis of

assessment completed after the issue of invalid notice served on the assessee on 14-9-1957.

11. The petition is allowed with costs. Though it is the writ of prohibition that has been asked for, it is the writ of certorari that will issue, in

accordance with the directions given above. Coun sel''s fee Rs. 250/-.