

(1972) 09 MAD CK 0042

In the Madras High Court

Case No : Writ Petition No's. 509 to 514 of 1969

S.B. Ameeruddin

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 27-09-1972

Acts Referred:

Income Tax Act, 1961 — Section 155, 187, 187(1)
Partnership Act, 1932 — Section 32(2)

Citation : (1973) 92 ITR 366

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

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

Judgement

Ramaswami, J.—These are petitions for the issue of writs of certiorari to quash the orders of the respondent made u/s 155 of the Income Tax Act, 1961, in respect of the assessment years 1955-56 to 1958-59, 1960-61 and 1961-62. The petitioner in all these cases was a partner in Messrs. T. M. Abdul Rahim Sahib and Company. The said firm was constituted under a deed of partnership dated April 1, 1954, with seven partners of whom the petitioner was one. The firm carried on business in manufacture of beedis and sale of beedi leaves and beedi tobacco. On September 27, 1960, the petitioner retired from the firm, but the other partners continued to carry on the business under the same name and style. On October 4, 1960, the petitioner also executed a deed in favour of the continuing partners relinquishing his right, title and interest in the business for a consideration of Rs. 30,000. On July 12, 1961, the continuing partners of the firm executed a deed of indemnity indemnifying the petitioner. It is not necessary at this stage to note the relevant portions of the deed of relinquishment and the deed of indemnity, as they would be considered when dealing with the contention of the petitioner on the basis of the recitals in these documents. The partnership firm was assessed to Income Tax on the basis of the returns filed by the firm for the assessment years 1955-56 to 1961-62 under the Indian Income Tax Act,

1922 (hereinafter called "the old Act"). Subsequently, there was a revision of assessment for the years 1955-56 to 1957-58 u/s 35 of the old Act and for the years 1958-59, 1960-61 and 1961-62 u/s 155 of the Income Tax Act, 1961. The petitioner was also assessed on his total income including his share income in the firm computed on the basis of these revised assessments. Subsequent to his retirement from the firm, reassessment proceedings were initiated against the firm u/s 147 in respect of the assessment years 1955-56 to 1958-59, 1960-61 and 1961-62. The continuing partners agreed to the proposed additions and the reassessments for all the years were completed on that basis by orders dated February 27, 1968. On the basis of the reassessment of the firm, revision of the assessments of the individual partners was proposed by issuing notices u/s 155 of the Income Tax Act, 1961, and, ultimately, the orders of assessment of the petitioner were amended u/s 155 for the assessment years 1955-56 to 1957-58 by an order dated January 20, 1969, for the assessment year 1958-59, by an order dated December 31, 1968, and for the assessment years 1960-61 and 1961-62 by an order dated December 30, 1968. It is these orders made u/s 155 that have been challenged in these writ petitions.

2. It was first contended by the learned counsel for the petitioner that the assessment of the petitioner could not be amended or revised u/s 155 on the basis of the reassessment of the firm made u/s 147 as the initiation of the proceeding u/s 147 and the consequent orders passed thereon were subsequent to his retirement from the partnership firm. u/s 155(1) of the Income Tax Act, 1961, corresponding to Section 35(5) of the old Act, where in respect of any completed assessment of a partner in a firm, it is found on assessment or reassessment of the firm that the share of a partner in the income of the firm has not been included in the assessment of the partner or, if included, is not correct, the Income Tax Officer may amend the order of assessment of the partner with a view to inclusion of the share in the assessment or the correction thereof, as the case may be. It is not in dispute that under this provision, if the petitioner has continued to be a partner of the firm and the assessment of the firm was a subject of reassessment u/s 147, the assessment of the petitioner could be amended or revised. The petitioner's contention is that his assessment as a partner could not be reopened after his retirement even when there is a reassessment of the firm. We are unable to agree with this contention of the petitioner. Section 187 of the Act provides that where, at the time of making an assessment u/s 143 or 144, it is found that a change has occurred in the constitution of the firm, the assessment shall be made on the firm as constituted at the time of making the assessment, provided that the income of the previous year shall, for the purposes of inclusion in the total incomes of the partners, be apportioned between the partners who, in such previous year, were entitled to receive the same. u/s 189(1), where any business or profession carried on by a firm has been discontinued or where a firm is dissolved, the Income Tax Officer shall make an assessment of the total income of the firm as if no such discontinuance or dissolution had taken place. Section 2(8) defines "assessment"

as including "reassessment". The reassessment proceedings also could, therefore, be initiated in respect of a firm in which there has been a change in the constitution of a firm or where the firm is dissolved or discontinued at the time when the proceedings were initiated. We do not find anything in the context of these provisions requiring not to give effect to the definition of "assessment". On a plain reading of Section 187, therefore, the reassessment could be made on the reconstituted firm and if the firm's reassessment relates to an accounting period in which the petitioner had continued as a partner of the partnership firm, his assessment could be corrected or amended in respect of that assessment year to include the correct share income u/s 155. It is immaterial whether on the day when the reassessment was made against the firm or on the day when rectification of the order u/s 155 was made, the partner continued in the partnership or not. This view of ours also is supported by the ratio of the judgment in *SETH CHIMANLAL LALBHAI, IN RE.*, . The facts in that case in brief are these : In respect of the assessment years 1938-39 and 1939-40, the share income of one Ashokbhai was included in the total income of the assessee who was his father, u/s 16(3) of the Indian Income Tax Act, 1922. The accounting years concerned were the calendar years 1937 and 1938. The assessee was a partner and his son had been admitted to the benefits of the partnership. Ashokbhai, the son, attained the age of majority on 24th January, 1939. The assessment of the firm for the assessment year 1938-39 was completed on the 4th July, 1938, before the minor attained the age of majority. The assessee's individual assessment for the assessment year 1938-39 was completed on 2nd February, 1939, and for the assessment year 1939-40 on 19th December, 1939, subsequent to the minor attaining the age of majority. The question for consideration in respect of the assessment year 1938-39 was whether the share income of Ashokbhai could be included in the assessment of his father u/s 16(3). It was contended on behalf of the assessee that since the minor had attained the age of majority by the time the assessment was completed on 2nd February, 1939, though the share income related to a period when he was a minor, that income should not be included in the assessee's income u/s 16(3). The same argument was advanced in respect of the assessment year 1939-40 also. It was held that since for the purpose of computing the total income of the assessee, the relevant period is the previous year and since during the previous year Ashokbhai was a minor, the profits coming to the share of Ashokbhai had to be included in the assessment of the assessee. It is relevant to note that when the minor becomes a major, a change in the constitution-of the firm occurs and it is because of that change in the firm the argument was advanced in that case on behalf of the assessee that the share income was liable to be assessed in the hands of the minor who had attained the age of majority and not to be included in the assessee's income. It may also be noted that Section 26 of the old Act was amended by the Income Tax (Amendment) Act, 1939 (VII of 1939), and, as amended, Section 26(1) corresponds to Section 187(1) of the Income Tax Act, 1961. It was considered by the learned judges that under the provisions of Section 26(1), as amended, no doubt could arise as to the liability for inclusion of

the minor's income u/s 16(3) because the profits or gains of the previous year for the purpose of inclusion in the total income of the partners have to be apportioned between the partners who in such previous year were entitled to receive the same. We are, therefore, of opinion that the impugned orders were validly made u/s 155 of the Act.

3. It is next contended by the learned counsel that both under the terms of the deed of relinquishment dated October 4, 1960, and the deed of indemnity dated July 12, 1961, the petitioner was relieved of all liability for Income Tax due or payable by the firm and that, therefore, these assessment orders could not be revised u/s 155. In the deed of relinquishment there was a clause to the following effect :

"The continuing partners hereby and in consideration of the covenants and stipulations made in the indenture jointly and severally covenant with the outgoing partner to pay, discharge and fulfil all debts and obligations of the partnership and at all times hereafter effectually indemnify and keep indemnified the outgoing partner and his representative-in-interest and his estate and effects thereof from all proceedings, claims and expenses in respect thereof."

4. In the deed of indemnity it is provided that the continuing partners jointly and severally :

"hereby undertake to indemnify (the petitioner).....against all claims that may arise after the date of the dissolution for the period before the date of dissolution and that may be raised thereafter by the Income Tax department either in relation to the Income Tax assessment of the said firm or in any such assessment relating to his person during the course of his association with the said firm or any other liability of the firm affecting any period."

5. The petitioner also filed O. S. Nos. 87, 92 and 158 of 1963 and 18 of 1964 on the file of the Court of the Additional Subordinate Judge, Vellore, against the four continuing partners for specific performance of the provisions of the deed of indemnity and claimed to be indemnified against any liability under the proceedings initiated u/s 147. The reassessment orders were not made by then. The Income Tax department was impleaded as the fifth defendant in the suits, but no relief was claimed as against the Income Tax department. The suits, it is stated, were decreed as against defendants Nos. 1 to 4 and dismissed as against the fifth defendant, the Income Tax department. Relying on these documents and the decrees, the learned counsel for the petitioner contended that his assessment cannot be revised u/s 155. Section 155 is not subject to any agreement between the parties nor is the apportionment of the total income of the firm among the partners as provided in the proviso to Section 187(1) made subject to any agreement between the parties. We are unable to see how the terms of the deed of indemnity could be invoked at all as against the income tax authority. The liability of the petitioner is a statutory liability and there is nothing in the statute itself which relieves the petitioner of his obligations. Even in the

suits filed against the partners he did not get any relief against the department. Even assuming that the petitioner could rely on the provisions of the Indian Partnership Act, 1932, it is seen from Section 32(2) that his liability to the department is not discharged by the reconstitution or the deed of indemnity obtained. Therefore, there is no substance in this contention of the petitioner.

6. Though the petitioner has raised a point in the affidavit that the provisions of Section 155 should not be invoked for the assessment years in question and only Section 35(5) of the old Act was applicable, he was not able to show how u/s 35(5) or the provisions of the old Act, the revision of assessment could not have been made. Both under the old Act and under the new Act, there is power to rectify the partner's assessment consequent on the assessment or reassessment of the income of the firm. The provisions in the old Act and in the new Act in respect of this power are substantially the same.

7. For the foregoing reasons, the writ petitions are liable to be dismissed and they are accordingly dismissed. But there will be no order as to costs.

Petitions dismissed.