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**(1957) 04 MAD CK 0006**  
**In the Madras High Court**

S.K. Habibullah

APPELLANT

Vs

The Income Tax Officer and Another

RESPONDENT

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**Date of Decision :** 10-04-1957

**Acts Referred:**

Income Tax Act, 1961 — Section 35

**Citation :** (1957) 2 MLJ 191

**Hon'ble Judges :** Rajagopalan, J

**Bench :** Division Bench

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**Judgement**

Rajagopalan, J.—The petitioner is the son of the late S. K. Mohideen, hereinafter referred to as the assessee. The assessee was a partner of

Dinshaw and Company and of the firm Palaniappa Chettiar (Jupiter Pictures) among other concerns. The assessment of Mohideen for the

assessment years 1946-47 and 1947-48 was completed on 20th February, 1950. By that date the assessment of the firm of Palaniappa Chettiar

for 1947-48 and that of Dinshaw and Company, for the years 1946-47 and 1948 had not been completed. Mohideen's assessment was however

completed, accepting provisionally his estimates of his share of the losses of those two partnership concerns. The assessee's share of the losses of

Dinshaw and Company was shown as Rs. 20,000 for 1946-47 and as Rs. 10,000 for 1947-48, and his share of the losses in the firm of

Palaniappa Chettiar for 1947-48 was shown as Rs. 12,436.

2. The assessment of Dinshaw and Company for both the years was completed on 31st October, 1950. As against the Rs. 20,000 provisionally

accepted as the assessee's share of the loss for 1946-47, Rs. 15,839 was ascertained as his share. For the assessment year 1947-48 the

assessee's share of the loss was ascertained as Rs. 1,046; the provisional basis for assessment was Rs. 10,000. The assessment of the firm of

Palaniappa Chettiar for 1947-48 was completed on 30th June, 1951, when the assessee's share of the losses was determined as Rs. 2,009 as

against the provisionally accepted figure of Rs. 12,346.

3. Act XXV of 1953, which amended Section 35 of the Income Tax Act (hereinafter referred to as the Act) and added sub-clause (5) to Section

35, received the assent of the President on 24th May, 1953. But as Section 1(2), of Act XXV of 1953 directed that this amendment among others

should be deemed to have come into force on 1st April, 1952, the position was as if Section 35(5) had become part of the Act on 1st April, 1952.

4. On 4th May, 1953, that is, even before Act XXV of 1953 received the assent of the President the Income Tax Officer issued a notice to the

assessee u/s 35 of the Act to show cause why the assessment for 1946-47 and 1947-48 should not be rectified on the basis of the completed

assessments of Dinshaw and Company and Palaniappa Chettiar. The assessee represented that that could be done if the law permitted it. The

Income Tax Officer however recorded:

The assessee in his reply dated 24th March, 1954, intimated that he has no objection to the revision of the assessment.

5. It was not disputed that as a statement of fact this was incorrect. The Income Tax Officer revised the assessment of the assessee for 1946-47

and 1947-48 by his order dated 27th March, 1954. An additional tax of Rs. 847-14-0 was demanded for 1946-47. The additional tax for 1947-

48 that was demanded was Rs. 16,984-11-0. By 27th March, 1954, the period of four years for which Section 35(1) of the Act provided,

computed from the date of the original assessment 20th February, 1950, had expired.

6. The assessee Mohideen died on 17th April, 1954. His son the petitioner, moved the Commissioner of Income Tax to revise the orders of the

Income Tax Officer, dated 27th March, 1954, on the grounds, that the power to rectify the assessment of 1946-47 and 1947-48 u/s 35 was

barred by limitation, and that Section 35(5) could not apply to assessments completed before 1st April, 1952. The petitioner also pointed out to

the Commissioner that the Income Tax Officer had refused the petitioner's

request to rectify the assessment for 1948-49, the original assessment for which also had been completed on 20th February, 1950. The petitioner would have been entitled to some relief had that rectification been allowed.

7. By his order, dated 30th September, 1955, the Commissioner rejected the petitioner's request to set aside the orders of the Income Tax

Officer directing his rectification of the assessment for 1946-47 and 1947-48. The Commissioner however instructed the Income Tax Officer:

As a corollary, the relief prayed for the assessment for 1948-49 by incorporating the correct share income should be allowed and if necessary to that extent to revise the 1949-50 assessment.

8. The relevant portion of Section 35(1) ran:

The Income Tax Officer may at any time within four years from the date of any assessment order...passed by him on his own motion rectify any

mistake apparent from the record of...the assessment...and shall within like period rectify any such mistake which has been brought to his notice by

an assessee,

9. Section 35(5) which as we pointed out must be deemed to have been part of the Act on 1st April, 1952 ran:

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...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.

10. The principal contention of the learned Counsel for the assessee was that the provisions of Section 35(5) could not be applied to any

assessment completed before 1st April, 1952. He relied on KANUMARLAPUDI LAKSHMINARYANA CHETTY AND OTHERS Vs.

FIRST ADDITIONAL Income Tax OFFICER, NELLORE., .

11. The defence of the learned Counsel for the Department was on the following lines. The assessments for 1946-47 and 1947-48 did not

become final when they were completed on 20th February, 1950 because they could be reopened either u/s 34 or u/s 35(1) of the Act within the

time of four years allowed by either of these provisions. Before that period of four years expired Section 35(5) of the Act came into force on 1st

April, 1952. That extended the period of limitation to reopen and correct an assessment, as the period of four years allowed by Section 35(5)

could be computed not from 20th February, 1950, the date of the original assessment, but from 31st October, 1950 and 30th June, 1951, the

dates of the final orders in the case of the firms of which the assessee was a partner. In other words, the assessee had no vested right to any finality

of the assessments completed on 20th February, 1950, so long as the department had the right to reopen an assessment u/s 34 or u/s 35 of the

Act. As within that period a further right was conferred on the department by Section 35(5) that right could be validly exercised within the time

prescribed by Section 35(5).

12. In Commissioner of Income Tax, Bombay and Aden v. Khemchand Ramdas (1938) 2 M.L.J. 115 : L.R. 65 IndAp 236 : 6 ITR 414 (426)

their Lordships of the Privy Council, after referring to the terms of Sections 34 and 35 of the Act observed at page 426:

In view of these express provisions of the Act it is in their Lordships' opinion quite impossible to suppose that the Income Tax Officer may in every

kind of circumstance and after any lapse of time make a fresh assessment or issue fresh notice of demand.... In their Lordships' opinion the

provisions of the two sections are exhaustive and prescribe the only circumstance in which and the only time in which such fresh assessments can

be made and fresh notices of demand can be issued.

13. Whether the assessee's case could have been reopened u/s 34 of the Act does not arise for consideration in these proceedings for the simple

reason that Section 34 was never invoked. It was the power to rectify that was vested in the Income Tax Officer by Section 35 of the Act that was

invoked. On 4th May, 1953 when the Income Tax Officer invoked these powers and issued notices to the assessee, Section 35(5) had not yet

been enacted, but when it was enacted on 24th May, 1953 Section 35(5) was given effect from an anterior date 1st April, 1952. Thus the Income

Tax Officer had jurisdiction to exercise the powers vested in him by Section 35(1) as well as those vested in him by Section 35(5) on 4th May,

1953 and thereafter.

14. There is one feature of this case to which we shall advert at this stage. The learned Counsel for the Department was, in our opinion right in his

contention, that in the circumstances of this case, the assessment of Mohideen for 1946-47 and 1947-48 could have been rectified u/s 35(1) itself,

as it was really a case of rectifying a mistake apparent on the face of the record of assessment. The assessment orders, dated 20th February, 1950

specifically referred to the shares of the assessee in the losses sustained by the two firms of which he was a partner, Dinshaw and Company and

Palaniappa Chettiar. They were determined on a provisional basis. The determination was provisional till the assessments of Dinshaw and

Company and Palaniappa Chettiar could be completed. The assessment orders specifically recorded that the assessments of Dinshaw and

Company and Palaniappa Chettiar had not been completed. That made the assessment orders in relation to Dinshaw and Company and

Palaniappa Chettiar part of the assessee's record of assessments. That the figures shown in the orders of the assessee's assessment on 20th

February, 1950 were incorrect tested by another portion of the record of that assessment, the assessment of Dinshaw and Company and

Palaniappa Chettiar which were completed only later, did not admit of any controversy. The assessment of Dinshaw and Company was completed

on 31st October, 1950 and that of Palaniappa Chettiar on 30th June, 1951. At any time thereafter, when the mistake on the face of the assessee's

record of assessment was established, the Income Tax Officer could have rectified the assessment of the assessee u/s 35(1). but that rectification

could have been validly effected only if it had been ordered within four years from 20th February, 1950, as that was all the period for which

Section 35(1) provided. The rectification ordered on 27th March, 1954 fell outside that period.

15. That however, does not lead to the conclusion that every case of rectification necessitated by the fact, that an assessee's share of the profits or

losses of a firm of which he was a partner had been either omitted or had been incorrectly assessed would be a rectification within the scope of

Section 35(1). That in a given case, the assessee's for example, such a rectification could fall within Section 35(1) as well as u/s 35(5) does not

mean that every such rectification could be dealt with under either Sub-section. Section 35(1) is a general provision. Section 35(5) is not only a

special provision for rectification in the contingency specified; it provided for rectification on the basis of a legal fiction. Section 35(5) directs that

where 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 shall be deemed to be a rectification of a mistake apparent from the record within

the meaning of Section 35. Therefore, even if it is not a case of a mistake apparent from the record or on the face of the record of assessment, it is

deemed to be such a mistake; and thereafter the provisions of Section 35(1) apply, subject however to the period of limitation prescribed by

Section 35(1) being computed from the date specified in Section 35(5). The necessity to enact a legal fiction by which something which is not a

mistake apparent on the face of the record is deemed to be such a mistake is wholly inconsistent with the view, that Section 35(5) was merely

declaratory of the previous law on the subject as embodied in Section 35(1) and as implied in these provisions.

16. We are in respectful agreement with the dictum of Subba Rao, C.J., in *Lakshminarayana Chetty v. Additional Income-tax Officer Nellore*

(1956) An.W.R. 243 : 29 ITR 419 at 425 that Section 35(5) was not declaratory of a pre-existing law.

17. Section 35(5) authorised a new class of mistakes to be rectified. What had not hitherto been a mistake apparent on the face of the record of

assessment within the meaning of Section 35(1) became such a mistake by the operation of the legal fiction enacted by Section 35(5). That mistake

also could thereafter be rectified in addition to the mistakes for the rectification of which provision had already been made in Section 35(1). The

power to rectify what we can conveniently refer to at this stage as "" fictional"" mistake was vested in the Income Tax Officer on 1st April, 1952.

There was no express provision in section 35(5) to make it apply to assessments completed before 1st April, 1952. Nor can we find anything in

the language of Section 35(5) which could sustain a plea that by necessary intendment Section 35(5) applied also to assessments completed before 1st April, 1952.

18. Neither in express terms nor by necessary intendment did Section 35(5) in any way amend the provisions of Section 35(1). Section 35(1) was

left intact even after the addition of Section 35(5) to the Act. Therefore the fact that on 1st April, 1952, when Section 35(5) came into force, the

period of limitation prescribed by Section 35(1) had not run out in the case of the assessee, could not enlarge the period of limitation prescribed by

Section 35(1). It was independent of Section 35(1) that the powers u/s 35(5) could be invoked. That the period of limitation prescribed by

Section 34 had not expired in the case of the assessee on 1st January, 1952 had even less relevancy. The assessee's case was not dealt with u/s

34. It was not dealt with u/s 35(1). It could not have been dealt with u/s 35(1) after the expiry of four years reckoned from the date of the original

assessment 20th February, 1950. That left only Section 35(5) which, as we have pointed out, conferred a power independent of those for the

exercise of which Section 34 and Section 35(1) provided. Section 35(5) could not apply, as the assessment in this case had been completed long

before 1st April, 1952, when a fresh power to rectify assessments was conferred on the Income Tax Officer. As pointed out in Commissioner of

Income Tax Bombay and Aden v. Khemchand Ramdas (1938) 3 M.L.J. 115 : L.R. 65 IndAp 236 : 6 ITR 414 the power to reopen an

assessment must be sought within the limits of the specific statutory provisions. It may not be necessary to put it solely on the basis that the

assessee has a vested right to claim finality of assessment. The question, in our opinion, really is what was the statutory power that was exercised ?

What was the jurisdiction of the Income Tax Officer to reopen an assessment ? That power and that jurisdiction must be based upon a specific

statutory provision in the Act. In the case of the assessee the power given by Section 35(1) could not have been exercised on 27th March, 1954.

That given by Section 35(5) should not have been exercised in relation to assessments completed before 1st April, 1952. In our opinion, on 27th

March, 1954 the Income Tax Officer had no jurisdiction to rectify the assessments of the assessee for the assessment years 1946-47 and 1947-

48.

19. The learned Counsel for the Department pointed out that the order of the Commissioner dated 30th September, 1955 confirmed the

rectification order by the Income Tax Officer with reference to the assessment years 1946-47 and 1947-48, and further directed rectification of

the assessment for 1948-49, under which the petitioner would be entitled to a considerable amount of relief. The petitioner in these proceedings

attacked only the validity of the rectification ordered by the Income Tax Officer and confirmed by the Commissioner with reference to the

assessments for the assessment years 1946-47 and 1947-48. The learned Counsel for the Department was right in his contention that the assessee

should not be permitted by any order of ours to retain a benefit that accrues to him under the order dated 30th September, 1955, while avoiding

the liability imposed upon him by that order.

20. The petition is allowed and the rule will be made absolute. The entire order of the Commissioner dated 30th September, 1955 and the orders

of the Income Tax Officer in relation to the assessment years 1946-47 and 1947-48 will stand set aside. No costs.