

**(1976) 12 CAL CK 0024**

**In the Calcutta High Court**

**Case No : Income-tax Reference No. 222 of 1967**

Smt. Bhagirathi Devi Jalan

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision : 09-12-1976**

**Acts Referred:**

Income Tax Act, 1922 — Section 33B, 33B(2)

**Citation : (1978) 112 ITR 534**

**Hon'ble Judges : Sankar Prasad Mitra, C.J.;S.C. Deb, J**

**Bench : Division Bench**

**Advocate : R. Murarka, for the Appellant; S.C. Sen and Ajit Sengupta, for the Respondent**

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## **Judgement**

Sankar Prasad Mitra, C.J.—In this reference u/s 66(2) of the Indian Income Tax Act, 1922, the question under consideration is :

" Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in authorising the Commissioner to pass an order u/s 33B of the Indian Income Tax Act, 1922, after the period of limitation laid down in that section by directing him to dispose of the matter afresh ? "

2. The relevant provisions of Section 33B run thus ;

" 33B. Power of Commissioner to revise Income Tax Officer's orders.-

(1) The Commissioner may call for and examine the record of any-proceeding under this Act and if he considers that any order passed therein by the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under Sub-section (1)--.....

(b) after the expiry of two years from the date of the order sought to be revised.

(3) Any assessee objecting to an order passed by the Commissioner under Sub-section (1) may appeal to the Appellate Tribunal within 60 days of the date on which the order is communicated to him....."

3. In the instant reference the assessee filed voluntary returns for the assessment years 1953-54 to 1961-62 on May 12, 1961. The assessee gave her address as 13, Rameswar Malia Lane, Howrah, before the Income Tax Officer, "D" Ward, Howrah. For the assessment years 1960-61 and 1961-62 the assessee's name was described as M/s. Universal Trading Corporation.

4. The Income Tax Officer took cognizance of the above returns on November 17, 1961, and completed the assessments on December 4, 1961.

5. The Commissioner of Income Tax upon going through the assessment records was of opinion that the assessment orders were erroneous in so far as they were prejudicial to the interests of the revenue.

6. The Commissioner issued a show-cause notice to the assessee by a letter dated 18th October, 1963, for giving her an opportunity of being heard on 12th November, 1963.

7. There was no appearance on 12th November, 1963, on behalf of the assessee. The assessee also did not send any written communication.

8. As the notice was served first by registered post and then by affixation the Commissioner took the view that the notice had been duly served. He proceeded to pass an ex parte order. He cancelled the assessment orders for the years 1953-54 to 1961-62 and directed the Income Tax Officer to make fresh assessments in accordance with law.

9. The assessee went up on appeal under the provisions of Section 33B(3). Before the Tribunal the assessee submitted that no notice to show cause u/s 33B had been served on her either actually or constructively. The Commissioner sent the show-cause notice by registered post addressed to the assessee at 13, Rameswar Malia Lane, Howrah, but it came back unserved with the postal remark " not known ".

10. Thereafter, personal service was attempted through process server at No. 5, Abdul Rasul Avenue. On 21st October, 1963, the Inspector reported that he went to No. 5, Abdul Rasul Avenue, but he was informed that the assessee was out of station and was expected to return within a week. The Inspector reported further that he received the notice on 19th October, 1963 ; he tried to contact the assessee for personal service on two dates, namely, 19th October, 1963, and 21st October, 1963, and having failed in these attempts he served the notice by affixation on 21st October, 1963.

11. The Tribunal was satisfied that there was prima facie ground for the Commissioner to take action u/s 33B but the Tribunal accepted the assessee's submission that there was no proper service and, as such, the assessee did not have knowledge of the show-cause notice and was not given an opportunity of being heard as required by Section 33B. The Tribunal held that it would be just and proper to send the matter back to the Commissioner of Income Tax and, accordingly, vacated the consolidated order u/s 33B. The Tribunal directed the Commissioner to pass appropriate orders afresh after giving due opportunity to the assessee of being heard.

12. On the facts and in the circumstances aforesaid the above question has been referred to us pursuant to the provisions of Section 66(2) of the Indian Income Tax Act, 1922.

13. On behalf of the assessee reliance has been placed on Sub-section (3) of Section 34 of the 1922 Act and on Section 263 of the Act of 1961.

14. Sub-section (3) of Section 34 of the 1922 Act provides :

" No order of assessment or reassessment, other than an order of assessment u/s 23 to which Clause (c) of Sub-section (!) of Section 28 applies or an order of assessment or reassessment in cases falling within Clause (a) of Sub-section (1) or Sub-section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable.....

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a reassessment made u/s 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

15. Sub-section (1) of Section 263 of the 1961 Act and Sub-section (1) of Section 33B of the 1922 Act make provision for revision by the Commissioner of orders prejudicial to the revenue, and Sub-sections (2) of these two sections provide, inter alia, that no order shall be made under Sub-section (1) after the expiry of two years from the date of the order sought to be revised.

16. Mr. Murarka, for the assessee, argues that in view of the special period of limitation provided in Section 33B of the 1922 Act the Commissioner has no power to revise the orders of the Income Tax Officer inasmuch as two years have already passed from the date of the orders of the Income Tax Officer and hence the Tribunal had no power to direct the Commissioner to pass orders afresh under that section because, according to him, the Commissioner has no power to give effect to it in view of the aforesaid special period of limitation.

17. In support of the above contentions he argues that, so far as the Income Tax Officer is concerned, the Act of 1922 in respect of the identical situations makes

provisions in the second proviso to Section 34(3) but, so far as the Commissioner is concerned, omits to provide in Section 33B to enable him to make an order afresh after his order is remanded to him by the Tribunal on appeal after the expiry of two years from the order of the Income Tax Officer. In Section 263 of the 1961 Act this contingency has been taken into account and specific provision has been made. There is, therefore, a deliberate omission in Section 33B and such omission cannot be filled in by the court.

18. It is argued further that the second order which the Commissioner would have to pass to give effect to the Tribunal's direction would still be an order u/s 33B and such order must satisfy the limitations provided in that section.

19. Thirdly, the Tribunal u/s 33(4) may give such directions as it thinks fit but it cannot give a direction which in law could not be given effect to by the Commissioner in view of the special period of limitation in Section 33B.

20. It appears that similar arguments were advanced before a Division Bench of this court in Income Tax Reference No. 117 of 1967 (National Taj Traders v. Commissioner of income tax). The Division Bench refrained the question as follows :

" Whether, on the facts and in the circumstances of the case, the Tribunal acted properly in directing the Commissioner to dispose of the case under the said section afresh after giving due opportunity to the assessee after having vacated the order of the Commissioner u/s 33B ? "

21. The facts in that reference (income tax Reference No. 117 of 1967) were similar to those in the instant reference. The Division Bench answered the question in the negative and against the revenue.

22. After this judgment of the Division Bench was delivered, the Supreme Court was faced with identical problems in The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another, . In the Supreme Court case Sections 132(5), (10), (11) and (12) of the 1961 Act came up for consideration. The said provisions are as follows :

" 132(5). Where any money, bullion, jewellery or other valuable article or thing (hereinafter in this section and Section 132A referred to as the assets) is seized under Sub-section (I), the Income Tax Officer, after affording a reasonable opportunity to the person concerned for being heard and making such enquiry as may be prescribed, shall, within ninety days of the seizure, make an order, with the previous approval of the Commissioner.....

(10) If a person legally entitled to the books of account or other documents seized under Sub-section (1) objects for any reason to the approval given by the Commissioner under Sub-section (8), he may make an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents.

(11) If any person objects for any reason to an order made under subsection (5), he may, within thirty days of the date of such order, make an application to such authority, as may be notified in this behalf by the Central Government in the Official Gazette (hereinafter in this section referred to as the notified authority), stating therein the reasons for such objection and requesting for appropriate relief in the matter.

(12) On receipt of the application under Sub-section (10) the Board, or on receipt of the application under Sub-section (11) the notified authority, may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit."

23. In the Supreme Court case *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, pursuant to an authorisation issued u/s 132(1) of the Income Tax Act, 1961, searches were carried out on October 15 and 16, 1971, at the residence and business premises of P, an individual, and at certain premises of firms in which he was a partner, and jewellery, cash and account books were seized. There was also a search of two banks and a restraint order was made u/s 132(3) in respect of 114 silver bars pledged with those banks on the ground that they were the property of P.

24. On January 12, 1972, the Income Tax Officer passed a summary order u/s 132(5) on the basis that all the assets seized and the 114 silver bars belonged to P.

25. Thereupon, P & Sons, one of the firms in which P was a partner, filed a petition under Article 226 of the constitution challenging the order dated January 12, 1972. On April 6, 1972, on the basis of consent of the parties, the High Court quashed the order and permitted the department to make a fresh enquiry after giving an opportunity to the petitioner to pass a fresh order within two months. After a fresh enquiry the Income Tax Officer passed an order on June 5, 1972, holding that the silver bars belonged to P, the individual, and not to the firm, P & Sons.

26. Thereupon, the firm and P again filed a writ petition challenging the second order. The High Court held that the Income Tax Officer had no jurisdiction to pass that order beyond the period prescribed in Section 132(5) and set aside the order. The High Court directed the return of 114 silver bars.

27. The Supreme Court has held, inter alia, that the order made in pursuance of a direction given u/s 132(2) or by a court in writ proceedings was not subject to the limitations prescribed u/s 132(5). The Supreme Court observed--See *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, :

" Even if the period of time fixed u/s 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter, if any direction is given u/s

132(12) or by a court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed u/s 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. We cannot accept the contention.....that even such a fresh order should be passed within ninety days. It would make the Sub-sections (11) and (12) of Section 132 ridiculous and useless."

28. In view of the general propositions which the Supreme Court has laid down in the above case, it seems to us that our Division Bench judgment in Income Tax Reference No. 117 of 1967 can no longer be followed.

29. We are, therefore, of opinion that the special period prescribed in Section 33B applies to the first order that the Commissioner had made in the instant reference. That order was passed within time. The subsequent order of the Tribunal has to be given effect to by the Commissioner irrespective of the period of limitation prescribed by Section 33B.

30. In this view of the matter, our answer to the question referred to us is in the affirmative and in favour of the revenue.

31. We make no order as to costs.

32. In this case Mr. Murarka, appearing for the assessee, orally applies for a certificate for leave to appeal to the Supreme Court. As our judgment is based on the Supreme Court decision reported in *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, the application of Mr. Murarka is rejected.

Deb, J.

33. I agree.