

(1971) 01 CAL CK 0010

In the Calcutta High Court

Case No : Income-tax Reference No. 287 of 1968

Smt. Sumitra Devi Khirwal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 05-01-1971

Acts Referred:

Income Tax Act, 1922 — Section 33B, 34

Citation : (1972) 84 ITR 26

Hon'ble Judges : Sankar Prasad Mitra, J;A.N. Sen, J

Bench : Division Bench

Advocate : S.L. Saraf, for the Appellant;Ajit K. Sen Gupta, for the Respondent

Judgement

Sankar Prasad Mitra, J.—In this reference u/s 66(1) of the Indian Income Tax Act, 1922, this court has been invited to answer the following questions :

" (1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Commissioner's order dated the 28th December, 1963, u/s 33B of the Indian Income Tax Act, 1922, setting aside the assessments for the assessment years 1957-58 to 1961-62 and directing the Income Tax Officer to make fresh assessments was valid in law ? and

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the return filed by the assessee for the assessment year 1956-57 on the 14th November, 1961, was invalid and that no fresh assessment could be made on the basis of the Commissioner's order u/s 33B of the Indian Income Tax Act, 1922, for that year ? "

2. The first question has been referred at the instance of the assessee and the second question of the Commissioner. Counsel for the department concedes that the second question must be answered in the affirmative and against the department, in view of the decision of this court in Commissioner of Income Tax Vs. Srimati Minabati Agarwalla, .

3. So far as question No. 1 is concerned the first contention of Mr. Saraf appearing for the assessee is that the order of the Commissioner setting aside assessments for 1957-58 to 1961-62 and directing the Income Tax Officer to make fresh assessments is invalid, because, (a) the Commissioner gave a consolidated notice u/s 33B, and (b) the Commissioner had passed a consolidated order in respect of all the assessment years in question.

4. Let us first deal with the point of consolidated notice. Section 33B(1) runs thus:

"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."

5. Now, the Supreme Court in *Gita Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal and Others*, has discussed the scope of Section 33B(1). The Supreme Court says:

"It is necessary to point out that Section 33B of the Act does not in express terms require a notice to be served as in the case of Section 34 of the Act. Section 33B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice u/s 34 cannot, therefore, be applied to a proceeding u/s 33-B of the Act."

6. The main purpose of Section 33B, therefore, is to give to the assessee an opportunity of being heard before the Commissioner passes an order under that section. A notice u/s 33B cannot be equated with a statutory notice u/s 34 which gives to the Income Tax Officer the necessary jurisdiction to proceed under the Act. In this context, a consolidated notice covering several assessment years would, in our opinion, be a valid notice as the assessee would have the necessary opportunity of being heard by the Commissioner in respect of each of the years. In any event, in the instant reference, the Commissioner has cancelled the assessments and has directed fresh assessments. The assessee would, therefore, have ample opportunities of defending herself with regard to each of the assessment years before the Income Tax Officer concerned when he gives effect to the order of the Commissioner. This contention of Mr. Saraf, therefore, we are unable to uphold.

7. As regards the Commissioner's consolidated order covering several assessment years, our attention has not been drawn to any procedure laid down by the Act or the Rules thereunder which the Commissioner is required to follow in a proceeding u/s 33B. In the absence of any such specific procedure, it seems to us that the Commissioner should be free to evolve his own procedure provided

that he does not violate any of the rights given to the parties under the Act or contravene the rules of natural justice. It is true that in this case the Commissioner has passed a consolidated order, but we do not find that any prejudice has thereby been caused to the assessee and, as such, we see no reason why the order should be set aside. Reference in this connection may be made to this court's decision in *Bokaro and Ramgur Ltd. Vs. Commissioner of Income Tax*, .

8. The next contention of Mr. Saraf is that u/s 33B it is the duty of the Commissioner to call for and examine the record of any proceeding and if he considers upon such examination that the Income Tax Officer's order is erroneous in so far as it is prejudicial to the interests of the revenue he may exercise his powers under that section. In the instant reference, according to learned counsel, the Commissioner did not himself call for any records but certain records were placed before him and he acted thereon. From this point of view, submits counsel for the assessee, the Commissioner's consolidated order cannot be sustained. In our opinion, there is no substance in this contention. At page 26 of the paper book we find the notice u/s 33B. The opening words of this notice are: " On calling for and examining your case for the assessment years 1956-57, 1957-58, 1958-59, 1959-60, 1960-61 and 1961-62 and other connected records These statements in the notice were challenged before the authorities below. It is possible, as the departmental representative himself conceded before the Tribunal, that the records were put up before the Commissioner by his subordinates but that was no reason why he was debarred from exercising the powers u/s 33B. All that the section requires is that before issuing a notice u/s 33B he must call for all relevant papers and documents, examine them and then issue the notice if he is satisfied that the interests of the revenue have suffered. Going through the records of the tax authorities in this reference we have no doubt that the Commissioner had complied with these provisions and, as such, his order ought to be sustained.

9. Finally, Mr. Saraf contended that the principal ground on which the consolidated order of the 28th December, 1963, at page 28 of the paper book was made, was a ground which was not available to the Commissioner at all. This ground was the introduction by the assessee of an initial capital of Rs. 35,500 into her business of speculation in the assessment year 1956-57. And since transactions during that assessment year cannot be reopened by the Commissioner on the ground of limitation, his order with respect to the subsequent assessment years must be held to be invalid.

10. In recent times both the Supreme Court and our court, in dealing with references arising out of orders u/s 33B, have indicated that a Commissioner's order under this section may have a basic ground as well as various supporting grounds. We may refer to the Supreme Court's decision in *Rampyari Devi Saraogi Vs. Commissioner of Income Tax, West Bengal and Others*, , and the decision of our court in *Commissioner of Income Tax Vs. Panna Devi Saraogi*, .

11. We have examined the consolidated notice as well as the consolidated order in this reference. The basic ground of the Commissioner appears to be that the assessment orders passed by the Income Tax Officer, "D" Ward, Howrah, on the 22nd January, 1962, " are erroneous in so far as they are prejudicial to the interests of the revenue " : (vide pages 27 and 35 of the paper book). His supporting grounds are :

(1) the Income Tax Officer concerned had no jurisdiction to make the assessments, as there was no evidence to show that the assessee carried on business at 37, Matrumal Lohia, Howrah ;

(2) there was no evidence to support the assessee's case that she carried on any business at all in speculation ; and

(3) the facts revealed that the Income Tax Officer made the assessments in post haste without making any enquiry or investigation into: (a) the antecedents of the assessee, (b) whether the assessee was actually carrying on any business, (c) whether the jurisdiction was correct, (d) whether the assessee was likely to be in possession of the initial capital; and (e) other factors relevant for making correct and proper assessments (vide pages 32 to 34 of the paper book.)

12. The basic ground and the supporting grounds were both applicable to all the assessment years subsequent to the assessment year 1956-57. These grounds were indicated in the Commissioner's consolidated notice and had been fully discussed in his consolidated order. In the premises, we cannot accept the argument of Mr. Saraf that the very basis of the Commissioner's order having disappeared, the order can no longer be sustained.

13. In the result, our answers to the questions already referred to are as follows:

(1) in the affirmative and in favour of the revenue.

(2) in the affirmative and against the revenue.

14. The assessee will pay to the department one-half of the costs of this reference.

A.N. Sen, J.

14. I agree.