
(1956) 03 AHC CK 0015
In the Allahabad High Court
Case No : Misc. Writ No. 1001 of 1955

Sriniwas and Others

APPELLANT

Vs

Income Tax Officer "A" Ward, Sitapur

RESPONDENT

Date of Decision : 29-03-1956

Acts Referred:

Income Tax Act, 1922 — Section 34, 34(1), 34(3), 63

Citation : AIR 1956 All 657 : (1956) 26 AWR 417 : (1987) 23 ITD 204

Hon'ble Judges : Mootham, C.J.;Upadhyaya, J

Bench : Division Bench

Advocate : R.N. Gulati, for the Appellant; J. Swarup, for the Respondent

Judgement

Mootham, C.J.—This is a petition under Article 226 of the Constitution, the circumstances in which it has been filed being shortly as follows :

2. On 31-3-1955, the respondent, who is the Income Tax Officer, A Ward, Sitapur, issued two notices u/s 34, Income Tax Act, to the petitioners who are five in number. The address of the petitioners was given in each of these notices as being care of Messrs. Pushkar Mal Sagar Mal, Nai Bazar, Lakhimpur Kheri, within this State.

The notices (which were the same in form) stated that the respondent had reason to believe that the. income of the petitioners assessable to Income Tax for the year ending 31-3-1947 had both escaped assessment and had been under-assessed, that he proposed to assess such income and it called upon the petitioners to deliver within the time stated in the notices a return of their total income and total world income assessable to Income Tax for the year ending 31-8-1947. These notices, it is to be observed, were issued by the respondent on the last day of the maximum period of eight years within which a notice may be issued u/s 34 of the Act.

3. One of these notices was sent by post and was delivered on the following day, the 1st April, to Sri Banarsi Das, a partner of the firm Pushkar Mal Sagar Mal.

The learned Standing Counsel does not contend that this constituted service on the asses-sees or any of them. The other notice was delivered on the same day, the 31st March, by a peon in the service of the Income Tax Department to one Maha-bir Prasad who is a son of Ham Deo the second petitioner.

It is not in dispute that at that time the first and second respondents resided in Jhajhar in Jaipur and that the other three respondents resided at Kan-pur. Mahabir Prasad forwarded the notice to his father at Jhajhar who received it on the 22nd April.

4. A reply to this notice was sent by the second petitioner to the respondent on the 27th April. In his reply this petitioner stated that the petitioner did not do any business together as members of a joint family or as an association of persons and that they had never carried on any business together at any time; but as a precautionary measure he submitted "under protest and without prejudice" a return showing that no income had been received. This petitioner stated further that the petitioners were not liable to assessment and that the notice which had been served upon Mahabir Prasad was not a valid notice.

5. On the 9th June the respondent issued a notice to the petitioners u/s 23 (2) of the Act requiring them to attend at his office at Sitapur on 20-6-1955. This notice was addressed, as had been the earlier notice, to the petitioners care of Pushkar Mal Sagar Mal, Lakhimpur, Thereafter counsel for the petitioners sought to obtain some information from the respondent as to the income which it was said had escaped assessment or had been under-assessed, but without success.

It seems however that the proposed proceedings u/s 34 related to certain payments made in 1945 to two banks in Jaipur by the petitioners as trustees under a deed of trust executed by the petitioners on 28-8-1945. "On the 30th June the respondent issued a further notice u/s 23 (2) fixing the 29th July for the attendance before him on the petitioners and the production of the evidence on which their return had been based, It is not clear what happened on that date save that the respondent issued a notice to counsel appearing for the petitioners u/s 23(3) requiring the production of evidence with reference to certain matters.

6. On the 20th August the respondent referred the question of his jurisdiction to assess the petitioners to the Commissioner of Income Tax but no order appears to have been made by the 18th October on which date this petition was filed, the reliefs which the petitioners seek being, first, the issue of a writ of certiorari to quash the notice u/s 34 of 31-3-1955, and all proceedings thereunder and, secondly, the issue of a writ in the nature of prohibition commanding the respondent not to proceed further with the assessment proceedings.

7. The validity of the proceedings is attacked on a number of grounds. It is contended that the petitioners are not assesseees within the meaning of Section 34, that there is no evidence to show that the petitioners were in receipt of any income delivered in the accounting year, that the respondent proceeded only on the basis of suspicion, that he had no jurisdiction and that the proceedings are

beyond limitation. We think it unnecessary to examine each of these submissions as in our opinion the petition can be decided on a short point, that of limitation.

8. A notice, as we have said, u/s 34 was issued by the respondent addressed to the petitioners on the 31st March and it was served on the same day on Mahabir Prasad at Lakhimpur Kheri. None of the petitioners resided at Lakhimpur Kheri but the first and second petitioners Sri Niwas and Ram Deo were two of the five partners of Messrs. Pushkar Mal Sagar Mal, a firm which had come into existence in March 1948 and carried on business at Lakhimpur Kheri. .

9. The learned Standing Counsel contends that service of the notice upon Mahabir Prasad was in law a notice upon the petitioners; alternatively he argues that provided the notice is issued, as admittedly it was, within the period of eight years, service of the notice could be effected after the expiry of that period and the admitted receipt of the notice by Ram Deo the second petitioner on the 22nd April constituted due service on the petitioners.

10. The notice was addressed to "Messrs. Sri Niwas, Ram Deo, Chaju Ram, Ram Kumar and Bal-kishan" and in it the respondent stated that he proposed to assess "your income" for the year ending 31-3-1947, which he had reason to believe has (a) escaped assessment (b) been under-assessed, and we agree with learned counsel for the petitioners that the notice implies that the respondent proposed to treat the petitioners as a unit of assessment either as an undivided family, a firm, or an association of persons.

It is not suggested that the petitioners were mem-bers of an undivided family or constituted a firm; they could therefore be assessed jointly only as an association of persons. Now Section 63 of the Act provides that a notice under the Act may be served either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, and in the case of an association of persons, other than a linn or a Hindu undivided family, it may be addressed to the principal officer thereof. It is common ground that Mahabir Prasad was neither the principal officer in fact nor had he been served by the Income Tax Officer with a notice of the latter's intention to treat him as the principal officer.

The learned Standing Counsel referred to Order 5, Rule 15, Civil P. C., but this rule, which provides that where the defendant cannot be found and has no agent empowered to accept service on his behalf, service may be made on any male member of the family of the defendant who is residing with him, lias no application, for it is common ground that Ham Deo the father of Mahabir Prasad resided in Jaipur. We are therefore of opinion that service of notice on Mahabir Prasad 011 the 3.1st March did not constitute service on the petitioners.

11. The second contention of the respondent is that it is unnecessary for the notice to be served within the period of limitation provided it is issued within that period. Section 34 (1) divides income escaping assessment into two categories.

In the first category, which is the subject of Clause (a) of this sub-section, falls

that income which the Income Tax Officer has reason to believe has escaped assessment, or has been under-assessed, or assessed at too low a rate on account of the omission or failure on the part of an assessee to make a full disclosure of his income; and in the second category, the subject of Clause (b), falls that income which has escaped assessment, or has been under-assessed, or assessed at too low a rate for some reasons other than the omission or failure of the assessee to make a full disclosure. The sub-section then provides that the Income Tax Officer

"may in cases falling under Clause (a) at any time within eight years, and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee.a notice. .. . and may proceed to assess or re-assess such income, profit or gains...."

Sub-section (3) of this section, so far as is material, then provides that

"(3) No order of.....assessment or re-assessment in cases falling within Clause (a) of Sub-section (1) of this section shall be made after the expiry of eight years, and no order of assessment or re-assessment in any other case 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 that where a notice under Sub-section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of notice even if such period exceeds the period of eight years or four years, as the case may be."

The contention of the learned Standing Counsel is that Sub-section (1) imposes no limitation on the period within which a notice has to be issued or served, the limitation being found in the first proviso to Sub-section (3). The provision in Sub-section (1) of periods of eight years and four years is, it is said, a limitation not upon the period within which a notice must be served on the assessee but on the period within which the Income Tax Officer must arrive at the stage of believing that income has escaped assessment in the circumstances stated in either Clause (a) or Clause (b). Alternatively it is contended that the word "served" in Sub-section (1) means "Issued".

12. The first of these submissions is, in our opinion, contrary to the plain wording of Sub-section (1) of this section which invests the Income Tax Officer with the power, in cases falling under Clause (a) or Clause (b), to take certain action within eight or four years as the case may be; and that action is to serve notice on the assessee.

13. The alternative submission that the word "serve" in this sub-section means "issue" is founded on the first proviso to Sub-section (3). Undoubtedly some difficulty is created by this proviso, the terms of which are not wholly consistent with those of Sub-section (1), but we do not think that the terms of the proviso

necessarily lead to the conclusion that the word "serve" in Sub-section (1) must be construed as "issue".

14. In the first place, Sub-sections (1) and (3) deal with different matters. Sub-section (1) states the circumstances in which an Income Tax Officer may assess income which has escaped assessment wholly or in part; and the giving of notice is a condition precedent to the assumption of jurisdiction. Sub-section (3) deals with another matter altogether, namely, the period within which an assessment may be made; the sub-section in other words makes provision for a situation which only arises after there has been a valid assumption of jurisdiction by the Income Tax Officer under Sub-section (1).

15. In the second place we think that had it been the intention of the legislature that the assumption of the jurisdiction by the Income Tax Officer should be dependent on the mere issue of a notice to the assessee it would have been a simple matter, when this section was redrafted in 1948, for the legislature to have put the matter beyond doubt by using the word "issue" in place of the word "serve". It must be remembered that between 1922, when the present Act came into force, and 1948, when for the second time Section 34 was substantially changed, the obligation on the Income Tax Officer was to serve on and not merely to issue a notice to the person liable to payment.

16. Section 34, so far as is material, originally read thus :

"34. If for any reason income, profits or gains chargeable to Income Tax has escaped assessment in any year, or has been assessed at too low a rate, the Income Tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains...., .a noticeand may proceed to assess or re-assess such income, profits or gains....."

The provisions of this section imposed on an Income Tax Officer who proposed to take action under that section an obligation to serve on the person liable to pay tax a notice within one year of the end of the year in respect of which income had escaped assessment. In 1939 a new section was substituted for the original Section 34. Sub-section (1) of the new section provided, inter alia, that the Income Tax Officer,

"may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve upon the person liable to pay tax on such income, a notice."

17. Sub-section (2) then provided that no order of assessment or re-assessment under Sub-section (1) shall be made after the expiry of either eight or four years from the end of the year in which the income, profits or gains were first assessed. This section again leaves no room for doubt that the notice which the

Income Tax Officer was required to issue had to be served within one or the other of the prescribed periods of eight or four years.

18. In these circumstances it appears to us highly unlikely that the legislature intended in 1948 to effect a radical alteration in the law by the indirect method of inserting a proviso to a sub-section dealing with another matter when, as we have already said, the object could have been achieved directly by the substitution of the word "issue" for the word "serve" in Sub-section (1),

19. For these reasons we are of opinion that the notice in the ease now before us was not served within the prescribed time and the Income Tax Officer has no jurisdiction to continue proceedings against the petitioners u/s 34. As in our opinion the further exercise of jurisdiction by the respondent would be illegal we think this is a fit case in which a writ in the nature of prohibition should issue directing him to refrain from proceeding further with the contemplated assessment of the petitioners u/s 34, Income Tax Act, and we direct accordingly.

20. The petitioners are entitled to their costs which we assess at Rs. 200/-.