

(1963) 08 MAD CK 0003
In the Madras High Court

Sundaram and Co. (Private), Ltd.

APPELLANT

Vs

The First Additional Income Tax Officer

RESPONDENT

Date of Decision : 09-08-1963

Acts Referred:

Income Tax Act, 1961 — Section 35

Citation : (1964) 1 MLJ 1

Hon'ble Judges : G.R. Jagadisan, J

Bench : Division Bench

Judgement

G.R. Jagadisan, J.—The petition prays for a writ of certiorari under Article 226 of the Constitution to quash the order, dated 20th March,

1961, in G.I. No. S. 1002 of 1956-57 of the First Additional Income Tax Officer, Madurai. The petitioner, which is a limited company, is an

assessee under the Indian Income Tax Act and the question raised is whether the Income Tax Officer had jurisdiction to pass the impugned order

u/s 35 of the Act.

2. There was an order of assessment on 29th March, 1957 of the assessee's income, profits and gains for the assessment year 1956-57. Its total

income was determined at Rs. 5,69,396. The Income Tax and super-tax payable thereon was fixed at Rs. 2,47,325. The super-tax was computed

on the basis that it was entitled to a rebate of Rs. 1,42,349 at the rate of four annas in the rupee as provided for under the Finance Act, 1956. The

assessee had not distributed any dividend for several of the previous years relevant to the assessment years 1946-47 to 1951-52. Action was

therefore taken against the assessee u/s 23-A of the Act by the Income Tax Officer. This resulted in appropriate orders under that provision.

Giving effect to the order u/s 23-A , the assessee passed a resolution in its general body meeting distributing the undistributed dividends during the

period 1st July, 1954 to 31st March, 1956, a further dividend of Rs. 1,37,609 from out of the profits of the previous years relating to the

assessments for 1955-56 and 1956-57. This led to proceedings u/s 34 of the Act. The assessee's assessment for 1956-57, which had already

been completed, was reopened, and, fresh assessment orders were passed. The assessee's income on re-assessment was determined at Rs.

5,69,396 as had already been determined in the original assessment, but, the Income Tax and super-tax payable were computed at Rs. 3,28,304.

The difference in the levy of the tax between the original levy and the revised levy was due to the fact that the Income Tax Officer withdrew a part

of the rebate of four annas in the rupee on the super-tax payable because of the declaration of dividend by the company of a sum of Rs. 4,32,325

in the previous year ending 31st March, 1956. The assessee filed an appeal to the Appellate Assistant Commissioner against the order of re-

assessment dated 28th March, 1959 and contended that Section 34(1)(b) of the Act was not applicable. By order dated 31st August, 1959 the

Appellate Assistant Commissioner held that the company's assessment for 1956-57 was validly reopened u/s 34(1)(b) of the Act, but that the sum

of Rs. 3,54,716, being the dividend actually distributed in the previous year ending 31st March, 1956, should not be taken into account for the

purpose of withdrawing the rebate on the super-tax payable. The assessee, therefore, obtained partial relief before the Appellate Authority.

3. The Department took the matter by way of an appeal to the Income Tax Appellate Tribunal and challenged the correctness of the order of the

Assistant Commissioner granting relief in respect of the sum of Rs. 3,54,716. The appeal failed as the Tribunal took the view that the proceedings

u/s 34(1)(b) were not well-founded. Against this order of the Tribunal a reference was sought to this Court and the Tribunal referred three

questions of law. We have dealt with that matter in C.I.T., Madras v. Sundaram & Co. (1963) 2 ITR 486 : (1963) 2 M.L.J. 584

4. By way of caution the Department appears to have taken action u/s 35 of the Act. The Department was apparently not sure whether the

proceedings u/s 34 could be sustained or not. Alleging that the original order of assessment dated 29th March, 1957 manifested an error apparent

on the face of the record due to the non-reduction of the rebate as provided for under the Finance Act, the Income Tax Officer rectified that

assessment and passed orders prejudicially to the assessee. It is this order which is now canvassed before us.

5. Though the question whether there is an error manifest on the face of the record has been debated before us, it is unnecessary to express any

opinion on that matter. It seems to us to be obvious that in the present case the Income Tax Officer acted in excess of his jurisdiction in passing the

order of rectification u/s 35 of the Act. The order sought to be rectified dated 29th March, 1957 did not subsist on the date when proceedings

were initiated u/s 35. That order was cancelled and set aside by the Income Tax Officer himself in the purported exercise of his jurisdiction u/s 34.

As stated already, there was an appeal from that order to the Appellate Assistant Commissioner who modified it. The effect of the dismissal of the

appeal by the Tribunal is to keep intact the order of the Appellate Assistant Commissioner. The only order that is now in force is that of the

Appellate Assistant Commissioner who modified the re-assessment order of the Income Tax Officer dated 28th March, 1959. There cannot be

any doubt that the Income Tax Officer could not rectify the order dated 29th March, 1957 which ceased to exist on and from 29th March, 1959

when the Income Tax Officer himself passed the order of re-assessment u/s 34 of the Act.

6. Learned Counsel for the Department is unable to justify the proceedings u/s 35 of the Act in view of the events that happened subsequent to the

original order dated 29th March, 1957. On the short ground that there was no order which could form the subject-matter of a proceeding u/s 35

and that therefore the proceedings were wholly misconceived and were without jurisdiction, this writ petition should be allowed.

7. In the result, the petition is allowed and the Rule nisi is made absolute. There will be no order as to costs.