

(1957) 12 AP CK 0022

In the Andhra Pradesh High Court

Case No : W. P. No"s. 201 to 203 of 1956

Uppala Nookaiah Chetty

APPELLANT

Vs

Additional Income Tax Officer

RESPONDENT

Date of Decision : 04-12-1957

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1922 — Section 22(2), 23(3), 35, 35(1), 35(5)

Citation : (1959) 35 ITR 483

Hon'ble Judges : Kumarayya, J

Bench : Single Bench

Advocate : P. Rama Rao and N. V. Ranganathan, for the Appellant;

Final Decision : Dismissed

Judgement

Kumarayya, J.

1. These are three petitions made by Uppala Nookayya Chetty, Uppala Satyanarayanamurthy and Uppala Peda Venkataramayya respectively of the issue of a writ of certiorari to quash the orders of the Additional Income Tax Officer dated March 30, 1955, March 30, 1955, and March 31, 1955, whereby the individual assessments made on March 31, 1952, u/s 23(3) were revised in exercise of his powers u/s 35 of the Income Tax Act.

2. The Petitioners are admittedly partners in Messrs. Uppala Peda Venkataramanayya and Sons, Oil Mills, Anakapalli, and have each 1/4th share therein in the profits and losses. In response to the notice issued u/s 22(2) of the Income Tax Act the Petitioners submitted their individual returns on August 31, 1951, declaring their income and including therein a provisional sum representing their share of income from the aforesaid firm. As the firm's assessment was not completed by that time, each of the Petitioners expressed in writing that they have no objection to adopting correct share income after the firm's assessment is completed and revising the order u/s 35. The Income Tax

Officer on the basis of this statement, without waiting for the completion of the assessment of the firm, made their individual assessment. Subsequently when the firm's assessment was completed it was found that the provisional figure representing the share of the partners in the return submitted by them was not correct. He therefore revised the assessment of income and assessed them to additional tax and sent the impugned notices to the Petitioners in the year 1955 before the completion of the four years period from the date of the original assessment. The Petitioners have come to this court challenging the legality of the order and the competence of the authority to make the same u/s 35 of the Income Tax Act. The respondent resisted the contention on the ground that since the Petitioners had given the respondent to understand that the correct share of the income may be ascertained and the revision made on completion of the firm's assessment, and the respondent acted on their word, it is no longer open to the petitioners to go behind their promise and further that the assessment being of a provisional nature could be varied on the completion of the firm's final assessment. The other contentions advanced are that the Income Tax Officer had jurisdiction to rectify the mistake both u/s 35(5) and also u/s 35(1) as the mistake was a mistake on the face of the record itself. The questions for consideration in these petitions are : (i) whether the original assessment is of a provisional nature and what is the effect of the Petitioners agreement in writing; (ii) do the provisions of section 35(5) apply to the assessments made on March 31, 1951, and March 31, 1952; and (iii) whether the impugned order has been validly made u/s 35(1) of the Act. If section 35(5) applied to the case, there will be an end of the matter and the petitions would fail. So then, the first question for consideration is, whether section 35(5) applies to the present case. As observed in *Lakshminarayana Chetty v. Additional Income Tax Officer* there is nothing in section 35(5) which would render the amendment more retrospective than its language and it cannot therefore cover the assessments made prior to April 1, 1952. The original assessment having been made prior to that date, the case cannot be said to be covered by the provisions of section 35(5).

3. Now the question is, whether the original assessment orders are provisional and can, on that basis, be subject to variation. It would appear that the original order purports to have been made u/s 23(3) and not u/s 23B. So, strictly speaking, it is not a provisional assessment, though it is made subject to revision, if need be. Then the question arises, whether the agreement that can be gathered from the returns of income under original assessments can be called in aid to revise the assessments. That is possible if in consequence of the agreement the record of the firm is made part of the record of the assessee for the assessment of his share of income in the firm. In that case it would fall directly within the ambit of section 35(1) of the Income Tax Act as the revision is made within four years. It is well settled that when once a final assessment is made it cannot be reopened except in the circumstances detailed in sections 34 and 35 of the Act and within the time limited by those sections. Since section 34 does not apply, we have to consider whether what the Income Tax Officer had

done is in rectification of the mistake apparent from the record. For the application of section 35(1) there should be a mistake and that should appear from the record. The record contemplated is a record of the final assessment of the assessee himself, though the mistake discovered may be the product of any subsequent circumstance. In *Commissioner of Income Tax v. Khemchand Ramdas* what was the correct assessment of the registered firm was held to be a mistake in consequence of subsequent cancellation of registration. In that case the order of cancellation of registration was taken to be part of the record and since the firm could no longer be entitled to exemption from super-tax in consequence of this cancellation it was held that the previous assessment was a mistake apparent from the record. Similarly in *S. K. Habibullah v. Income Tax Officer the Madras High Court* had to deal with a question whether the assessment orders of the firm could form part of the record of the assessee for the purposes of section 35(1). Having regard to the provisional nature of the previous assessment as in this case, the learned Judges came to the conclusion that rectification could have been made u/s 35(1) provided it was not barred by limitation. But in *Lakshminarayana Chetty v. Additional Income Tax Officer*, where the facts are somewhat different, the following observations were made : "... it is impossible to say that there was a mistake apparent from the record for the assessing authority accepted a certain figure as representing the share of the assessee in the firm and made a final assessment. The mistake is not in the record but by a subsequent assessment of the firm, it was discovered that the earlier assessment was wrong to the extent of the assessee's share in the firm. It is not a mistake apparent from the record but a mistake discovered from the disposal of another case."

4. The facts of the case do not disclose that the assessee had made any such request as in this case and the Income Tax Officer on the basis of the same had made the assessment, making it clear that the figure so far as the share in the firm was concerned was provisionally accepted. On that ground the facts of this case are distinguishable and as the observations made therein were confined to the facts of that case, they will not apply to the facts of the present case. Whether there is a mistake apparent from the record is a question of fact. There can be because where the record of the firm so far as the share of the partner is concerned by agreement is made the record of the partner's assessment. If the assessment is expressly made subject to that agreement, it cannot be said the firm's assessment record does not form part of the record of the partners within the meaning of section 35(1). Any mistake discovered on the completion of the assessment of the firm will therefore fall within the ambit of section 35(1) of the Act. In this view, the order passed by the Income Tax Officer rectifying the mistake cannot be said to be without jurisdiction and the petitions should therefore fail.

5. There is yet another point on the basis of which this court should refuse to extend any help in exercise of the extraordinary prerogative powers. It is evident that there is no statutory limit of time in which the assessment of the Petitioners

under the provisions of sections 23 and 29 should have been completed. After the returns are filed the Income Tax Officer could have, but for the promise of the assessee, waited till the completion of the firm's assessment. The assessee made the Income Tax Officer act on his word that his share of profit and loss in the firm as shown in the return may be treated as provisionally correct and may be rectified after the completion of the firm's assessment. The returns and the assessment orders bear clear reference to this. Thus when the assessee had made the Income Tax Officer act in full faith in their word and had thus derived a benefit thereunder, can they now turn round and dispute the competence of the Income Tax authority or be allowed to go back on their word to the detriment of the other party. No doubt, as already stated, the party has after a final assessment a vested right not to be assessed to an enhanced tax save in cases falling under sections 34 and 35. But this right is for their personal benefit. They could waive the same without any offence to the public policy. As a matter of fact, knowing full well that they had such right, they waived the same by their agreement and made the Income Tax authority act on their word. They have thus relinquished their right. At any rate, their conduct would not entitle them to the benefit of the discretionary relief under article 226 of the Constitution. These petitions, both on facts and law, do not merit any consideration. They are therefore dismissed. No order as to costs. Petitions dismissed.