
(1963) 03 MAD CK 0018
In the Madras High Court
Case No : Writ Petition No. 187 of 1961

Vedantham Raghaviah

APPELLANT

Vs

Third Additional Income Tax Officer, City Circle V, Madras.

RESPONDENT

Date of Decision : 07-03-1963

Acts Referred:

Income Tax Act, 1922 — Section 23(3), 23(4), 27, 35, 35(1)

Citation : (1963) 49 ITR 314

Hon'ble Judges : Jagadisan, J

Bench : Single Bench

Judgement

Jagadisan, J.—The Third Additional Income Tax Officer, attached to City Circle V, Madras, passed an order on March 23, 1960,

purporting to be one u/s 35 of the Indian Income Tax Act and levied a tax of Rs. 49,965.08 on the petitioner for the assessment year 1955-56.

The petitioner challenges the validity of the said order and prays for the issue of a writ of certiorari or other appropriate writ for quashing the same.

The facts leading up to this writ petition are briefly as follows : The petitioner (assessee) is a professional cinedance director. He was also a partner

of a firm called Vinodha Pictures, carrying on business of production of motion pictures. The firm of partnership was constituted by a deed dated

January 20, 1950. At the inception there were four partners including the petitioner. This partnership functioned between January 20, 1950, and

June 27, 1952. One of the partners, Subburam, retired from the firm and a fresh partnership was constituted between the other three partners

which subsisted between June 28, 1952, and July 28, 1953. Then another partner, Raghavacharya, went out of the partnership and the two

business between July 29, 1953, and November 12, 1954. In respect of the

assessment years 1953-54, 1955-56, applications were made on behalf of the firm u/s 26A of the Income Tax Act for registration. These applications were signed by the partners of whom the petitioner was one.

Registration was granted for all the years. The firm was assessed as a registered firm and the particulars of assessment are as detailed below :

Assessment year	Account year	Date of assessment	Total income order determined
Rs.			

1953-54	27-6-1952	30-3-1957	1,54,184
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1954-55	28-6-1953	30-3-1957	36,000
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1955-56	30-6-1954	30-3-1957	2,50,000
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2. The assessment for the years 1954-55 and 1955-56 were made u/s 23(4) of the Act. Applications u/s 27 of the Act were filed to set aside the

assessments u/s 23(4) of the Act. Appeals were preferred to the Appellate Assistant Commissioner against the assessments for 1953-54 u/s 23(3)

of the Act and also against the assessments for the years 1954-55 and 1955-56 u/s 23(4) of the Act. The Income Tax Officer having dismissed

the applications u/s 27 of the Act, appeals were preferred to the Appellate Assistant Commissioner against these orders as well. The appellate

authority, after hearing the appeals, computed a loss for 1953-54 at Rs. 25,849 and the income for 1954-55 as nil. He, however, confirmed the

Income Tax Officers computation of income for 1955-56 at Rs. 2,50,000. Further appeals to the Appellate Tribunal were preferred on behalf of

the firm. The Tribunal, by its order dated March 9, 1959, allowed the appeals against the orders dismissing the applications u/s 27 and directed the

Income Tax Officer to make a fresh assessment in accordance with law in respect of the years 1954-55 and 1955-56. The Income Tax Officer

carried out the directions of the Tribunal and completed the assessment of the firm in regard to these two years on March 11, 1960, u/s 23(3) of

the Act. He determined a loss of Rs. 75,511 for the assessment year 1954-55 and computed a profit of Rs. 2,66,787 for the assessment year

1955-56. He also determined the petitioners share income from the firm. No appeals were preferred against these assessments and they have,

therefor, become final.

3. There war also proceedings against the petitioner under the Act for assessment of his income as an individual. The details of the assessment are set out below :

Assessment Account Date of assessment Income Total income

year year returned computed

Rs. Rs.

1953-54 3-3-1953 26-1-1955; loss 5,723 Profit 1,499

under profession

Share of loss from 9,216 Declared ""N.A.

Registered firm firm

Total loss... 14,939

1954-55 21-3-1954 29-1-1955

: profession loss 2,570 nil

1955-56 31-3-1955 31-12-1956 :

profession income 1,008 2,508

4. The petitioner admitted that he was a partner of Vinodha Pictures for purposes of assessment relating to the accounting year 1952-53 or the

assessment year 1953-54. He disclosed in his return his share income from the firm as a loss of Rs. 9,216 for the assessment year 1953-54. The

petitioner disclosed in his return that he was a partner of Vinodha Pictures and requested the Income Tax Officer to include his share income from

the firm after the determination of his share of profit or loss resulting from the assessment of the firm. For the assessment year 1955-56 the

petitioner submitted in his return that he had executed a release deed on November 4, 1954, to the other partner and stated that he ceased to be a

partner from the very inception of the firm and that he was entitled only to a sum of Rs. 40,000 for the services rendered by him and expressed his

willingness to bring that amount for taxation as and when the amounts were received. It is thus seen that there were two parallel proceedings, one

in respect of the petitioners individual income and the other in respect of the income of the firm of which, at all relevant days, the petitioner was a

partner.

5. After the assessment of the firm for the assessment year 1955-56 necessarily

the petitioners individual assessment, which was completed prior to the assessment of the firm, has to be modified. Action was therefore taken by the Income Tax Officer u/s 35(5) of the Act and the petitioner was duly served with notice of the contemplated proceedings under that section. By order dated January 29, 1958, the total income of the petitioner, viz., his individual earning as a film director and his share income as a partner of Vinodha Pictures, was computed at Rs. 1,27,508. This resulted in a tax demand of Rs. 77,838.07. Subsequently, on July 30, 1958, the Income Tax Officer again passed an order u/s 35 computing the petitioners income at Rs. 1,22,537, after allowing the carried forward loss of Rs. 4,983 for the assessment year 1953-54. The tax due was therefore reduced from Rs. 77,838.07 to Rs. 72,896.64.

6. The stand taken by the petitioner in resisting these proceedings u/s 35 of the Act was that the assessment of the firm was pending before the Appellate Assistant Commissioner and also before the Tribunal and that until the firms assessment reaches a stage of finality no action u/s 35 should be taken against him. The petitioner did not file any revision to the Commissioner of Income Tax from the orders of the Income Tax Officer u/s 35 of the Act as apparently at that stage he was willing to abide by the result of the pending appeal in connection with the firms assessment. He merely prayed for time to pay the tax and permission to pay the total amount in instalments of Rs. 2,000.

7. The termination of the appeal proceedings arising out of the assessment of the firm necessitated a fresh order u/s 35 in regard to the petitioners assessment. On March 23, 1960, the Income Tax Officer computed the petitioners share income as per the firms assessment at Rs. 1,33,393, and, after absorbing the carried forward loss of Rs. 25,170 for the assessment year 1954-55, computed the total income at Rs. 1,10,723. By reason of this rectification order the tax liability on the petitioner was reduced from Rs. 77,838.07 to Rs. 49,965.08. It is this order of rectification which is now called in question before us.

8. Mr. K. Srinivasan, learned counsel for the petitioner, contends that the Income Tax Office had no jurisdiction to pass any order of rectification u/s 35 of the Act. This submission is obviously untenable in view of section 35(5) which reads as follows :

Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm u/s 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly.....

8. Section 35(1) provides for rectification of mistakes. It is not every kind of mistake that can however be rectified under this provision. The

mistake must be one which is manifest or apparent from the record. In order to obviate any contention on behalf of an assessee that the non

inclusion of his share income from a firm would not be an apparent mistake on the face of his individual assessment, the legislature thought fit to

introduce section 35(5). This provision came into effect on and from 1st April, 1952, as a result of the Income Tax (Amendment) Act, 1953.

Failure to include in the assessment of an individual his share income as a partner of a firm, or the inclusion of an incorrect figure as his share

income of the firm is deemed to be a mistake apparent on the face of the record within the meaning of section 35. This is no doubt a statutory

fiction, but, nevertheless, it enables the authorities to act u/s 35 so as to compute the correct income of an individual who earns income both in his

own right as well as a partner of his business firm. Learned counsel for the petitioner is certainly not well-founded in submitting that the action of the

Income Tax Officer in the instant case is lacking in jurisdiction.

9. The substantial ground, if not the only ground, urged on behalf of the petitioner is that the order dated March 23, 1960, is bad as it was passed

without notice to the petitioner. It is conceded on behalf of the department that no notice was issued by the concerned officer before the impugned

order was passed asking the petitioner to show cause why an order u/s 35 should not be passed. But, it must, however, be remembered that the

result of the rectification proceeding, which is now challenged before us, was to place the petitioner in a better position than he occupied prior to

the order. We may refer to the proviso to section 35(1) which reads :

Provided that no such rectification shall be made, having the effect of enhancing an assessment or reducing a refund unless the Commissioner, the

Appellate Assistant Commissioner or the Income Tax Officer, as the case may be, has given notice to the assessee of his intention so to do and has

allowed him a reasonable opportunity of being heard;.

10. It is implicit from this proviso that an order for rectification can be passed behind the back of the assessee if that would not, in any way, cause

prejudice to him either by way of enhancement of assessment or by way of prejudice to him either by way of enhancement of assessment or by

way of reduction of the refund due. In other words, where a rectification order secures a benefit or advantage to the assessee he cannot complain

of that order by reason only of the fact that there was no notice to him of the invitation of the proceedings. Nor can it be said that the failure to

issue notice in such a case, where a benefit is conferred on the assessee, would amount to violation of the principles of natural justice. In our

opinion, this contention of the learned counsel for the assessee, viz., that the proceedings are bad because of want of notice, is also devoid of sub-

stance.

11. Mr. Srinivasan, however, contends that factually there has been no reduction of assessment but only an enhancement of assessment. He

contends that the prior order of rectification should be treated to be non est and void in law is the foundation for the said order was knocked out

by reason of the decision of the Income Tax Appellate Tribunal. Thus, according to the learned counsel, if the prior orders were treated as null and

void and totally ignored, the result of the latest rectification proceedings was to throw a greater burden on him than what it was previously.

12. We must observe that we are wholly unable to follow or appreciate this contention. Right or wrong, there was an order u/s 35 and that was

an order which was passed in the presence of the petitioner and after due notice to him. It cannot be said that the order fell to the ground by

reason of certain other proceedings before the Income Tax Appellate Tribunal relating to the assessment of the firm. These proceedings were

independent proceedings, and, whatever effect they may have upon the individual assessment of the petitioner, they cannot have the legal effect of

wiping out order passed by the competent Income Tax Officer in relation to the petitioners personal or individual assessment. The proper remedy which the petitioner should have adopted was to have preferred a revision petitioner to the Commissioner, or taken other steps to have the previous order of rectification corrected or modified. He did not choose to do so and the result was that that order became final. It is impossible to accept the contention that the order became ineffective or wiped out by reason of the order of the Appellate Tribunal in a proceeding relating to the firm of which no doubt the petitioner was a partner. After the prior order of rectification the position was that there was an assessment against the petitioner individually in a particular figure. Once an order of rectification is passed the assessment itself is modified and what remains is not the order of rectification, but only the assessment as rectified. It should, therefore, be presumed that there was an assessment against the petitioner in respect of the year 1955-56 after the rectification order u/s 35 and it was that assessment which was again the subject-matter of a fresh rectification proceedings at the instance of the Income Tax Officer. There can be doubt that on the facts and circumstances of this case there has been no enhancement of assessment or reduction of refund amount so far as the petitioner was concerned.

13. The petitioner contends that he was never a partner of Vinodha Pictures, and that, therefore, there can be no question of including his alleged share income as a partner of that firm. Obviously this contention is wholly untenable. The assessment of the firm has proceeded on the footing that the petitioner was a partner of that firm. Indeed, the petitioner himself cannot repudiate that fact, he having subscribed his signature to the application for registration u/s 26A of the Act. It is too late in the day for the petitioner to contend that he was never a partner or that he should be deemed never to have been a partner as a result of the release deed executed by him. The assessment on the firm has become complete and final, and, if the petitioner was aggrieved because of the fact that he was deemed to be a partner of that firm, his remedy was to have filed an appeal against the order of assessment on the firm. This again he failed to do. It is true that the partnership was now been dissolved, but, that would not avail the petitioner in avoiding tax on his share income from the firm. This position has now been settled by a decision of the Supreme Court in

Muthappa Chettiar v. Income Tax Officer.

14. We have reached the conclusion that there is no error of law or jurisdiction apparent on the face of the record to justify the issue of a writ

under article 226 of the Constitution. The petitioner had certainly another remedy to the Commissioner of Income Tax u/s 23A of the Act against

the order of rectification passed by the Income Tax Officer. But, in the view which we have taken, it is unnecessary to consider how far this

remedy by way of revision would have been quite adequate and effective, and, whether the present writ should be entertained though he had an

alternative remedy under the Act. This writ petition fails and is dismissed with costs. The rule nisi is discharged. Counsels fee Rs. 150.

Petition dismissed.