courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 17/09/2026

(1968) 02 AHC CK 0021

In the Allahabad High Court

Case No : Writ Petition No. 21 of 1967 connected with Writ Petitions No''s. 19 and 20 of 1967

VITHALDAS — APPELLANT

Vs

Income Tax OFFICER, DISTRICT II(II), KANPUR. — RESPONDENT

Date of Decision : 29-02-1968

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1969) 71 ITR 204

Hon'ble Judges : V. G. Oak, C.J

Bench : Division Bench

Final Decision : Allowed

Judgement

V. G. OAK C.J. - These three connected petitions under article 226 of the Constitution arise out of three connected proceedings for rectification u/s 35 of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act). The facts of the three cases are similar. They raise common questions of law. It will, therefore, be sufficient to refer to the facts of one of the three cases.

Sri Vithaldas is the petitioner in Civil Miscellaneous Writ No. 21 of 1967. On December 15, 1955, the Income Tax Officer, District II, Kanpur, passed an assessment order against the petitioner for the year 1952-53. His total income was fixed at Rs. 57,992. This total income included a sum of Rs. 21,291 being the petitioners share income from a certain firm, M/s. Bhawani Prasad Girdhar Lal, Bombay. The assessment was subject to rectification u/s 35 of the Act. On March 27, 1956, the Income Tax Officer, Bombay, assessed the firm, M/s. Bhawani Prasad Girdhar Lal, Bombay. The total income of the firm was fixed at Rs. 66,472. The present petitioners share was fixed at Rs. 9,678. The share so fixed by the Income Tax Officer, Bombay was far less than the share assumed by the Income Tax Officer, Kanpur. So, the petitioner moved an application before respondent No. 1 to rectify the petitioners assessment. It was requested that the income of Rs. 9,678 be substituted for the assumed income of Rs. 21,291. In

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/vithaldas-appellant-hash-income-tax...

spite of several reminders, respondent No. 1 did not pass any order of rectification as requested by the petitioner. The petitioner made a series of representations o revisions before the Inspecting Assistant Commissioner, Income Tax Commissioner and the Central Board of Revenue. But none of these authorities gave any relief to the petitioner. So, on January 12, 1967, Sri Vithaldas filed the writ petition before this court requesting that necessary directions be given for rectification.

Section 35 of the Act provides for rectification of mistakes. Sub-section (1) of section 35 states :

" the Income Tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion, rectify any mistake apparent from the record of the appeal, revision, assessment or refund, as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee."

Sub-section (5) of section 35 deals with special cases where a partners assessment has to be rectified in view of the subsequent assessment of the firm. In such a case the starting point for limitation is the date of the final order passed in the case of the firm.

Annexure "A" to the writ petition is a copy of the order of assessment dated March 27, 1956, passed against the Bombay firm. Annexure "A" shows that the petitioners share of income was fixed at Rs. 9,678. In the assessment order dated December 15, 1955, the petitioners share in the income of the firm was fixed at Rs. 21,291. The share ultimately fixed in annexure "A" was a good deal below the share assumed in the order dated December 15, 1955. The petitioner was, therefore, entitled to rectification u/s 35 of the Act. But respondent No. 1 did not pass any order of rectification in favour of the petitioner.

Two counter-affidavits have been filed on behalf of the respondents. The first counter-affidavit has been filed by respondent No. 1. In paragraph 8 of the counter-affidavit he has attempted justification for declining to pass an order for rectification. In paragraph 8 of the counter-affidavit it is stated :

". as the period of limitation of 4 years for rectification u/s 35 of the Income Tax Act, 1922, had expired on March 26, 1960, the opposite party No. 1 had no power to rectify the assessment and consequently nothing was done by him."

The assessment order against the Bombay firm was passed on March 27, 1956. So, action under sub-section (5) of section 35 of the Act could be taken up to March 27, 1960. Long before March 27, 1960, the petitioner moved respondent No. 1 for rectification. The petitioners application, annexure "B", is date May 13, 1959. The respondents excuse for not taking action u/s 35 of the Act is that necessary material was not available to respondent No. 1 up to March 27, 1960.

Apart from the firm "Bhawani Prasad Girdhar Lal, Bombay", the petitioner had shares in certain other firms also. In connection with the assessment of those

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/vithaldas-appellant-hash-income-tax…

firms, the question arose about rectification of the petitioners assessment. Such rectification was actually carried out. Annexure "D" dated December 5, 1959, is such an order passed u/s 35 of the Act with reference to those firms. Annexure "D" concluded thus :

"The share income of M/s. Bhawani Prasad Girdhar Lal, Bombay, is under correspondence with the Income Tax Officer, Bombay, and necessary action will be taken after receipt of reply from him."

This order dated December 5, 1959, indicates that at least since December, 1959, respondent No. 1 was making attempts to obtain the petitioners share income with M/s. Bhawani Prasad Girdhar Lal, Bombay. There should have been no difficulty in obtaining the necessary information from Bombay by March, 1960. Annexure "RA-5" to the rejoinder-affidavit is a copy of another order of rectification with respect to Dwarka Nath, Kanpur. In that order dated October 5, 1959, it was mentioned that the share report from the Income Tax Officer, Bombay, was received by respondent No. 1 in August, 1959. Annexure "RA-1" to the rejoinder-affidavit is a copy of the assessment order dated March 27, 1956. The petitioners share in the income of the firm was specified in the order. The endorsement at the foot of annexure "RA-1" indicates that a copy of the assessment order dated March 27, 1956, was sent to respondent No. 1 on April 3, 1959. All these documents filed by the petitioner indicate that the necessary material was available to respondent No. 1 by March 27, 1960. It is not clear why respondent No. 1 declined to pass the necessary order for rectification in favour of the petitioner.

We have shown that the petitioner was entitled to have a rectification order passed in his favour. That was not done. The omission of respondent No. 1 to pass the necessary order for rectification has been prejudicial to the petitioner. Prima facie the petitioner is entitled to have suitable directions issued by this court to respondent No. 1.

Mr. Gopal Behari for the respondents urged before us that no intervention of the cases is called for in these cases. Firstly, he urged that the writ petitions are belated. He points out that the assessment order was passed in December, 1955. Rectification ought to have been done by March, 1960. The present writ petitions were moved on January 12, 1967, - several years after the passing of the assessment orders. It is true that several years have elapsed since the passing of the assessment orders and the appropriate time for passing order u/s 35 of the Act. But the petitioner has explained that between 1959 and the end of 1966 he made a series of representations and revisions to the higher authorities. Annexure "Z" to the petition is a copy of the order dated October 27, 1966, passed by the Commissioner of Income Tax, U.P. He regretted that the petitioners claim could not be entertained. It is thus clear that the petitioner was adopting different methods for getting some relief up to October, 1966. The writ petition was moved on January 12, 1967. There is sufficient ground for condoning delay in moving the writ petition.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/vithaldas-appellant-hash-income-tax…

Secondly, Mr. Gopal Behari urged that the period of limitation u/s 35 of the Act is four years. That period expired in March, 1960. It is not now possible for the court to intervene in the matter.

In Kadirvel Nadar v. State of Madras it was explained that section 34 of the Madras Agricultural Income Tax Act merely lays down a period with in which proceedings under the section should be commenced. If the proceeding s commenced within the period prescribed in the section, the power of the Commissioner under the section can be exercised at any time thereafter. It is not necessary that the power should be exercised within the period fixed in the section.

In Commissioner of Income Tax v. Duncan Brothers and Co. Ltd. the Calcutta High Court had to examine the provisions of section 66(1) of the Indian Income Tax Act. It was held that the provision to the effect that the Appellate Tribunal shall within 90 days of the receipt of an application draw a statement of the case and refer it to the High Court is not mandatory. The reference made by the Tribunal to the High Court is not incompetent merely because it was made after the expiry of 90 days from the date of receipt of an application by the assessee. Where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of that duty would work serious general inconvenience or injustice to persons who had no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, such provisions should be construed as being directly only and not imperative.

In All India Groundnut Syndicate Ltd. v. Commissioner of Income Tax Chagla C.J. observed at page 100 :

"It is an elementary principle of law that no person..... can put forward his own default in defence to a right asserted by the other party."

In Rajagopala Chettiar v. IV Income Tax Officer the Madras High Court expressed doubt whether the court can compel an officer to go outside the limit of time prescribed by section 35 of the Indian Income Tax Act and direct him to rectify an order after the expiry of the time prescribed by the section.

In Rex v. Hanley it was observed at page 531, that "a mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed."

In Halsburys Laws of England, 3rd edition, volume XI, it is observed on pages 91 and 92 under paragraph 172 that :

"If public officials or a public body fail to perform any public duty with which they have been charged, an order of mandamus will lie to compel them to carry it out, even though the time prescribed by statute for the performance of the duty may have passed."

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/vithaldas-appellant-hash-income-tax…

In the present case the rules of limitation are contained in sub-sections (1) and (5) of section 35 of the Act. The material words in sub-section (1) are :

". shall within the like period rectify any such mistake which has been brought to his notice by an assessee."

These words require that the officer must rectify if the mistake has been brought to his notice by the assessee. In the instance case the assessee did bring the mistake to the notice of respondent No. 1. It was the duty of respondent No. 1 to make the necessary correction in the initial assessment order. By omitting to carry out the necessary correction, respondent No. 1 cannot defeat the rights of the assessee. If respondent No. 1 failed to carry out his duty at the proper time, this court can give the appropriate direction to respondent No. 1 to do the needful now. There is, therefore, no difficulty in this courts giving necessary direction to respondent No. 1 to make the necessary rectification at this late stage.

These three connected petitions are allowed. We direct respondent No. 1 to pass necessary order for rectification u/s 35 of the Indian Income Tax Act, 1922, and modify the assessment order passed against the petitioner in December, 1955. In each case the petitioner shall get Rs. 100 as costs from respondent No. 1.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/vithaldas-appellant-hash-income-tax…