

Income-Tax Officer, V Circle, Madras and Another

Vs

S.K. Habibullah

Civil Appeals Nos. 557 And 558 of 1960

(S. K. Das, M. Hidayatullah, J. C. Shah JJ)

24.01.1962

JUDGMENT

SHAH J. –

One S.K. Mohideen - (hereinafter referred to as the assessee) - was a partner in two firms - Messrs. Dinshaw and Co. and Messrs. Palaniappa Chettiar and Co. The firms were registered under the Indian Income-tax Act. The assessee submitted returns of his income and incorporated therein the estimated share of his losses in the two firms at Rs. 20,000 and Rs. 10,000 for the assessment year 1946-47 and at Rs. nil and Rs. 12,436 for the assessment year 1947-48. The Income-tax Officer, V Circle, Madras, completed the assessment for the two years on February 20, 1950, after adopting the estimates furnished by the assessee, but he made a note that the losses accepted were subject to revision on ascertainment of correct particulars. The assessment of Messrs. Dinshaw & Co. for the years 1946-47 and 1947-48 was completed on October 31, 1950, by the Income-tax Officer, II Circle, Madras, and the proportionate share of the assessee for the losses was computed for the two years at Rs. 15,839 and Rs. 1,046 respect

The assessee died on April 17, 1954, and his son, S.K. Habibullah (hereinafter referred to as the respondent), applied to the Commissioner of Income-tax, Madras, praying for revision of the orders. The Commissioner held that section 35 was properly invoked for rectification of the assessments and rejected the applications. But the High Court of Judicature at Madras in petitions under article 226 of the Constitution filed by the respondent ordered that writs of certiorari do issue quashing the orders of the Income-tax Officer, V Circle. The Commissioner of Income-tax, Madras, appeals to this court with certificate of fitness granted by the High Court.

The plea of the Commissioner that the assessee having assented to the rectification, it was not open to the respondent to challenge the authority of the Income-tax Officer, has no force. By his letter dated March 24, 1954, the assessee merely informed the Income-tax Officer that he had no objection to rectification according to law. But if the law did not authorise the Income-tax Officer to rectify the assessment, assent could not validate what was unauthorised.

Section 35(1) empowers the income-tax authorities to rectify mistakes apparent from the record of certain orders passed by them. The clause (omitting parts not material) provides that the Income-tax Officer may at any time within four years from the date of any assessment order passed by him, on his own motion rectify any mistake apparent from the record of the assessment. The power of rectification may be exercised subject to two conditions : (1) that there is a mistake apparent from the record of the assessment, and (2) that the order of rectification is made within four years from the date of the assessment sought to be rectified. The mistake which may be rectified need not be in

the order itself; it may be in any part of the record or proceeding of assessment of the assessee. But for the purpose of assessment an individual and a firm are distinct entities and even if an individual is a partner of the firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake

"But it is said that section 35 of the Act even without the amendment would have enabled the income-tax authorities to reopen the assessment on the ground that there was a mistake apparent from the record. But from the record of final assessment, 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."

Section 35(1) of the Income-tax Act could not therefore be resorted to by the income-tax authorities for rectification of the assessments of the assessee, for there was no error apparent from the record of those assessments.

The Income-tax Officer, however, sought to rely upon section 35(5) which was incorporated by section 19 of the Indian Income-tax (Amendment) Act, 1953 (25 of 1953), with effect from April 1, 1952. The clause which was incorporated is in the following terms :

"(5) 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 under section 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, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

Clause (5) was one of a group of clauses, added by Act 25 of 1953, dealing with rectification of assessments. Clause (5) dealt with inclusion of income or correction of the income of a partner in a firm consequent upon assessment or reassessment of the firm of which he was a partner. Clause (6) dealt with recomputation of total income of an assessee in consequence of modifications made in the excess profits tax or the business profits tax payable by an assessee subsequent to an assessment made under the Indian Income-tax Act. Clause (7) dealt with rectification consequent upon modification of orders under section 23A of the Income-tax Act and clause (8), which was enacted (in the form in which it now exists) by the Indian Finance Act, 1956, dealt with the rectification consequent upon proceedings in reassessment under section 34(1)(a) or section 31(1A). The legislature by a fiction in all these classes of cases regarded the inclusion, correction, computation or recomputation as rectification of a mistake app

The assessments of the two firms were completed a long time before April 1, 1952. It is also common ground that the individual assessments of the assessee were not provisional but final assessments under section 23(3) of the Income-tax Act.

The question which falls to be considered is whether relying upon clause (5) of section 35 an Income-tax Officer may rectify the assessment of a person who is a partner of firm when the assessment of the firm is completed before the 1st of April, 1952. The legislature has given to clause (5) a partial retrospective operation. The provision enacted by clause (5) is not procedural in character; it affects vested rights of the assessee. Therefore, in the absence of compelling reasons the court would not be justified in giving a greater retrospectivity to the provision than is warranted by the plain words used by the legislature. As observed by the Judicial Committee of the Privy Council in *Commissioner of Income-tax v. Khemchand Ramdas* [[1938] 6 I.T.R. 414, 424 (P.C.)]. :

"... when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in circumstances detailed in sections 34 and 35 of the Act... and within the time limited by those sections."

The orders of assessment are, subject to the provisions relating to appeals, revisions, reassessment and rectification, final; it is not open to the Income-tax Officer to reopen the assessment because he thinks fit to do so. The provisions relating to assessments and rectification or reopening thereof are exhaustive, and may not be extended by analogies. The right to rectify an assessment may therefore be exercised in strict compliance with condition prescribed by the statute in that behalf. Before April 1, 1952, rectification of assessment of an individual on the disclosure of errors consequent upon assessment of the firm of which he is a partner was not for reasons already stated permissible under clause (1) of section 35. This power was conferred for the first time by clause (5) as from April 1, 1952, and by the express words of the clause arose from the assessment of the firm. If by the law prevailing at the time when the assessment of the firm was made, no such result as is contemplated by the new clause

Some assistance may be derived from the phraseology used by the legislature in clause (6) which was enacted simultaneously with clause (5). That clause provides (omitting parts which are not material) :

"Where the excess profits tax or the business profits tax payable by an assessee has been modified... or where any excess profits tax to business profits tax has been assessed after the completion of the corresponding assessment for income-tax (whether before or after the commencement of the Indian Income-tax (Amendment) Act, 1953), and in consequence thereof it is necessary to recompute the total income of the assessee chargeable to income-tax, such recomputation shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section,...."

Manifestly, by the express provisions contained in clause (6) the fiction applies whether the assessment is completed before or after the commencement of the Indian Income-tax (Amendment) Act, 1953. Even though clause (6) is also made retrospectively operative as from April 1, 1952, the legislature has authorised the revenue authorities after April 1, 1952, to pass an order recomputing the total income of the assessee whether or not the assessment was completed before the commencement of the Indian Income-tax (Amendment) Act, 1953. It is true that by the Explanation to that clause, for the purposes of this sub-section, where the assessee is a firm, the provisions of sub-section (5) shall also apply as they apply to the rectification of the assessment of the partners of the firm, but thereby an intention to give a larger retrospective operation to clause (5), in so far as it deals with rectification of assessments of partners consequential upon the completion of the assessment of the firm in which they are pa

In our view, it was rightly held in Kundan Lal v. Income-tax Officer, Amritsar [[1959] 37 I.T.R. 337 (Punj.)], following Kanumarlapudi Lakshminarayana Chetty v. First Additional Income-tax Officer, Nellore [[1956] 29 I.T.R. 419 (A.P.)], that clause (5) of section 35 of the Indian Income-tax Act, which was enacted by the Income-tax (Amendment) Act, 1953, was not declaratory of pre-existing law, and as it clearly affected vested rights which had accrued to the assessee, must be deemed to have come into force from April 1, 1952. It has no greater retrospective effect than was expressly granted to it. The power to rectify assessment of a partner consequent upon the assessment of the firm of which he is a partner by including or correcting his share of profit or loss can therefore be exercised only in case of assessment of the firm made on or after April 1, 1952. The Income-tax Officer has no jurisdiction under clause (5) of section 35 of the Act to rectify the assessment of a partner of a firm consequent upon

The appeals therefore fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

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