

Kishanlal Haricharan

Vs

Income-Tax Officer, Nizamambad

Civil Appeal No. 1143 of 1969

(P. Jagmohan Reddy, H. R. Khanna JJ)

08.09.1972

JUDGMENT

JAGANMOHAN REDDY J. -

1. This is an appeal by certificate against the judgment of the Andhra Pradesh High Court refusing to interfere with the order of the Income-tax Officer made under section 35(5) of the Indian Income-tax Act, 1922 (hereinafter called the "Act").

The appellant was assessed in the status of Hindu joint family for the years 1949-50 and 1950-51. In the course of the assessment proceedings for 1950-51 it was represented to the Income-tax Officer that the petitioner had an eight annas share in the firm of M/s. Sriram Harichandradas at Bombay. The Income-tax Officer, therefore, while completing the assessment for the said year on October 30, 1953, specifically mentioned therein that the assessment order was subject to rectification under section 35 of the Act. The assessment of the firm of M/s. Sriram Harichandradas, Bombay, as appears, was based on best judgment subsequently completed on November 30, 1954. That assessment, it appears, was based on best judgment estimate under section 23(4) of the Act and the firm charged to tax on an income of Rs. 26 lakhs. Against that assessment a revision was filed by the firm before the Commissioner under section 33A(2). The Commissioner held that as the petitioner had filed his application for reconsideration under section 27 out of time which application had been rejected by the Income-tax Officer, he could not interfere with that order. None the less the Commissioner held that the Income-tax Officer had not adopted a proper basis as he had no information regarding the scope of the business done during the year and that it was also possible that the estimate made by him was excessive. In this view, he remanded the matter to the Income-tax Officer with the direction that he should call for the books of the assessee and arrive at an estimate of the income after taking into account the information contained therein and to "substitute such estimated for the income already assessed and modify the assessment accordingly". Thereafter, the Income-tax Officer pursuant to the orders of the Commissioner, called upon the assessee to produce his account book, but it appears that the assessee did not co-operate with the Income-tax Officer, who after giving him several opportunities, ultimately fixed January 16, 1963, as the final date for production of books. On that date the assessee did not appear at all. As a consequence, on January 29, 1963, he passed a final order estimating the total income of the firm of M/s. Sriram Harichandradas at Rs. 26 lakhs. The Income-tax Officer thereafter passed the rectification order under section 35(5) of the act on March 16, 1965, against the appellant by including an income of Rs. 13 lakhs as his share of the income derived from the firm. The validity of this order was challenged in the writ petition in which it was contended that the assessment under section 35(5) of the Act was barred inasmuch as the rectification was made after four years from the date of the final order under section 33A(2). Before the High court two questions were raised, namely :

"(1) that inasmuch as the notice under section 35(5) of the Income-tax Act, 1922, was issued on 28-8-1964 after the Income-tax Act, 1961, came into force, the proceedings under section 35 of the 1922 Act were not saved by the repealing section 297 of the 1961 Act and consequently the proceedings under section 35 of the old Act are void ab initio; and

(2) that the rectification order made under section 35 is barred by limitation."

The first question was, however, given up having regard to the decision of this court in *S. Sankappa v. Income-tax Officer*. The High Court rejected the petitioner's contention on the second question that the rectification order made under section 35 of the Act was barred by limitation.

Before us, the learned advocate for the appellant contends that the final order which is referred to under section 35(5) is an order of the commissioner made under section 35A(2) on August 31, 1955, and the limitation for rectification of the mistake should be computed as from that date. As we have seen earlier, the order of the commissioner under section 33A(2) of the Act could not be the final order because it required the Income-tax officer to look into the books of account and made an estimate in the light of the material based on those books. The order of the Commissioner as already pointed out, specifically directed that the Income-tax Officer should substitute his estimate for the income already assessed and modify the assessment accordingly. This order could not be the final order because the Commissioner having set aside the estimate made by the Income-tax Officer already had not himself substituted any estimate for the estimate made by the Income-tax Officer. In pursuance of that order the Income-tax Officer had by his order dated January 29, 1963, substituted his estimate which though was the same was none the less a fresh order. The final order, therefore, is not the one, as contended by the learned advocate, made on August 31st, 1955, but the one made by the Income-tax Officer on January 29, 1963. In this view the four years' period which is prescribed under section 35(5) of the Act on March 16, 1965, is within time. In this view the appeal fails and is dismissed with costs.

Appeal dismissed.

</html