

# PATNA HIGH COURT

Fazal Dhala

Vs

Commissioner of Income-Tax

(Manohar Lall, J.)

03.02.1944

## JUDGMENT

### **Manohar Lall, J.**

The Appellate Tribunal under Section 66 (1) of the Indian Income-tax Act has referred the following question for our opinion :-

"(1) Whether the notice under Section 34 of the Income-tax Act issued on 29th July 1939 is tenable in law ?

(2) Whether in respect of the revised return filed on 27th July 1940 a further notice under Section 23 (2) was required ?

(3) (a) Whether the Governor had power (i) to make the Regulations in question, and (ii) to order retrospective application thereof ?

(b) Whether the Regulation in question comes within the powers of the Governor to legislate for the peace, order and good government of the Province ?"

Question No. 1. - The facts which are necessary to be stated are these. For the year 1937-38 the assessee was assessed for a sum of Rs. 9,000 on the 4th of September, 1937. On the 7th May, 1938 proceedings under Section 34 of the Act were started on the ground that "income from Madras branches of the assessee had escaped taxation." On the 30th of November, 1938, these proceedings terminated and the assessee was assessed for a sum of Rs. 22,000 including the income from the Madras branches which had not been included in the earlier assessment. On the 30th of August 1938, the assessee was assessed for the succeeding year 1938-39 under Section 23(4) of the Act on an income of Rs. 25,000. On the 29th of July 1939, a notice under Section 34 of the Act was issued stating that his income had partially escaped taxation. The assessee filed his return on the 14th of September 1939 for a sum of Rs. 9,786 and a notice was also issued to

him under Section 22 (4) and Section 23 (2) on the 30th October 1939, to produce his books. On the 27th of July 1940, the assessee filed a revised return for Rs. 40,990 and the final assessment was made on the 10th August 1940 for Rs. 78,052. Upon these facts it was contended on behalf of the assessee that the notice issued under Section 34 of the Act was untenable in law. The Income-tax authorities have not accepted his contention for the reasons given by the Appellate Tribunal which may be reproduced here : "Thus it would appear that on 7th May 1938 the Income-tax Officer had in mind the existence of the Madras branch of the business when the assessment in respect of the year 1938-39 was completed on 30th August 1938. It is thus contended that the subsequent proceedings in respect of 1938-39 were not valid as the existence of the Madras branch was present in the mind of the Income-tax Officer and the assessment is final and when completed it could not be said that this Madras branch had escaped his notice. We considered the arguments of the parties and found that the notice under Section 34 of the Income-tax Act was issued on 29th July 1939 and in this notice it was not intended to assess the Madras branch or any other branch but the notice clearly stated that income of the appellant had partially escaped assessment. The appellant was not assessed in respect of his full income and because of the partial escapement the further notice was perfectly valid and the subsequent assessment was properly completed under Section 34 of the Indian Income-tax Act." It does not seem to have been drawn to the notice of the Income-tax authorities that the provisions of Section 34 which apply in this case are the provisions under the new Act which came into force on the 1st of April 1939. The proviso to Section 34 of the new Act states that "when the income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939)..... this subsection shall have effect as if for the periods of eight years and four years a period of one year were substituted." It is clear to my mind that the new section must apply in this case and therefore the notice under Section 34 should be issued only "if the consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment." Upon the facts stated the only reason for the Income-tax Officer to start proceedings under Section 34 was that the income of the assessee has partially escaped assessment on the ground that the income of the Madras branch had not been assessed. The Appellate Tribunal, however, has found that the Income-tax Officer had in mind the existence of the Madras branch of the business, and the assessment in question was completed on the 30th August 1938. If the Income-tax Officer had some other reason which induced him to issue the notice he has not stated them anywhere so that the requirements of Section 34 of the Income-tax Act that the Income-tax Officer has discovered in consequence of a definite information which has come into his possession, have not been satisfied. For these reasons the answer to the first question must be given in favour of the assessee, and I must hold that the notice under Section 34 of the Indian Income-tax Act issued on

the 29th July 1939 was not enable in law.It was conceded on behalf of the assessee and on behalf of the Income-tax Department that it that answer to the first question was in favour of the assessee, the other questions referred to would become academic and need not be answered. Accordingly it is unnecessary to express any opinion on those questions.As the assessee has succeeded on the first question which would result in the revised assessment being set aside, he is entitled to the costs of this reference. I would assess the hearing fee at Rs. 250. The assessee is also entitled to the refund of the fee deposited by him under Section 66(1) of the Act.

**Fazl Ali, C.J. - I agree.**

Reference answered accordingly.