# The Inspecting Assistant Commissioner ... vs V.M. Ravi Namboodiripad, Etc. on 17 September, 1971

## Equivalent citations: AIR1974SC1369, [1974]96ITR73(SC), (1972)4SCC389, AIR 1974 SUPREME COURT 1369, 1972 4 SCC 389, 1974 TAX. L. R. 520, 1971 KER L T 882, 96 ITR 73, 1974 SCC (TAX) 79, 1974 KER LT 882

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## Bench: A.N. Grover, K.S. Hegde

JUDGMENT

K.S. Hegde, J.

1. These are appeals by special leave from the decision of the High Court of Kerala. The questions of law arising for decision in these two appeals are identical. Therefore, it would be sufficient if we set out the facts of the case in Civil Appeal No. 2569 of 1969. The respondent in that appeal is ex parte but the respondent in Civil Appeal No. 2570 of 1969 is represented by Mr. Sardar Bahadur. Hence the opposing view points on that question have been fully debated before us.

2. Now coming to the facts of the case the respondent is the Manager of a Nambudri Illom. That illom was assessed to tax under the Kerala Agricultural Income-tax Act, 1950 (hereinafter to be referred to as 'the Act') in respect of the assessment years 1958-59, 1959-60, 1960-61 and 1961-62. All the assessments were made on March 14, 1962.

3. Section 3 of the Act provides:

> Agricultural Income-tax at the rate or rates specified in the Schedule to this Act shall be charged for each financial year in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year....
>
> Sub-sections (3) and (4) of that section as it stood on March 14, 1962 read as follows:
>
> (3) In the case of an undivided Ali-yasanthana family or branch of Maru-makkathayam tarwad including a Nambudiri family or a family like that of the Moothathu or any other class governed by the law applicable to Nambudiries consisting of more than five members and whose agricultural income exceeds six thousand rupees, the tax shall be assessed at the average rate applicable to the share of the agricultural income due to five members of the family or to six thousand

> rupees, whichever is higher.
>
> (4) In the case of an undivided Hindu family consisting of brothers only or of a brother or brothers and the son or sons of a brother or brothers and whose agricultural income exceeds six thousand rupees, the tax shall be assessed at the average rate applicable to the share of income due to a brother or to six thousand rupees, whichever is higher.

Explanation-For the purposes of this sub-section

(a) the expression 'share of income due to a brother' means the portion of the total agricultural income of the family which would have accrued to a brother, if a partition of the assets had been effected according to law on the day before the assessment is made; and

(b) 'son' includes a son's son.

4. Subsequent to the passing of assessment orders on March 14, 1962, Act XII of 1964 was passed by the Kerala Legislature. That Act amended Sub-section (3) of the Act and omitted Sub-section (4). That amendment came into force with effect from April 1, 1958. Amended Sub-section (3) reads:

> In the case of a Hindu undivided family consisting of more than 5 members entitled to claim a share on partition and whose agricultural income exceeds six thousand rupees, the tax shall be assessed at the average rate applicable to the share of the agricultural income due to five members of family or to rupees six thousand whichever is higher.

5. The amendment was given retrospective effect.

6. Subsequent to that amendment, the Agricultural Income-tax Officer by having recourse to his power under Section 36 of the Act, corrected the assessments in accordance with the amended provision. Section 35 of the Act provides for bringing to tax the income that has escaped assessment or has been assessed at too low a rate. Section 36 empowers the Agricultural Income-tax Officer to rectify the mistakes in an assessment order which are apparent on the face of the records. Under Section 35, the reassessment can be done only within three years of the end of the concerned financial year but under Section 36 the rectification can be made within three years of the date of the assessment. If the power exercised by the Agricultural Income-tax Officer can be held to have been exercised under Section 36, then all that we have to see is whether the powers exercised by the Agricultural Income-tax Officer were exercised within three years from the date of the assessment order, in respect of each one of those assessments. If, on the other hand, we come to the conclusion that the case falls within Section 35 then what we have to see is whether the power was exercised in respect of each of the assessment within the period prescribed therein.

7. The High Court has come to the conclusion that on the facts of the case, the Agricultural Income-tax Officer could only have exercised his power under Section 35 as he was dealing with a

case where assessment had been made at too low a rate.

8. For the reasons to be presently stated the judgment of the High Court cannot be accepted as correct. Section 35 of the Act corresponds to Section 34 of the Indian Income-tax Act, 1922 and Section 36 corresponds to Section 35 of that Act. This Court had occasion to deal with the scope of Section 35 of the Indian Income-tax Act, 1922 in M.K. Venkatachalam, I. T. O. v. Bombay Dyeing and Mfg. Co. Ltd. . Therein the Income-tax Officer, by his order dated October 9, 1952, assessed the assessee for the assessment year 1952-53 and gave him credit for Rs. 50,603-15-0 as representing interest on tax paid in advance under Section 18-A(5) of the Income-tax Act. On May 24, 1953, the Indian Income-tax (Amendment) Act, 1953 came into force adding a proviso to Section 18-A(5) of the Act to the effect that the assessee was entitled to interest not on the whole of the advance tax paid by him but only on the difference between the payment made and the amount assessed. The Amendment Act provided that it shall be deemed to have come into force on April 1, 1952. The Income-tax Officer, acting under Section 35 of the Act, rectified the assessment order holding that the assessee was entitled to a credit of only Rs. 21,157-6-0 by way of interest on tax paid in advance as a result of the retrospective operation of the amendment in Section 18-A(5) and issued a notice of demand against the assessee for the balance of Rs. 29,446-9-0. The assessee filed a petition in the High Court of Bombay under Article 226 of the Constitution praying for a writ prohibiting to be issued to the appellants from enforcing the rectified order and notice of demand. The High Court issued the writ prayed for holding that Section 35 was not applicable to the case as the mistake mentioned in Section 35 had to be apparent on the face of the order and the question could only be judged in the light of the law as it stood on the day when the order was passed. Overruling that decision this Court held that the Income-tax Officer was justified in exercising his powers under Section 35 and rectifying the mistake. This Court held that as a result of the legal fiction brought about as a result of the retrospective operation given to the Amending Act, the subsequently inserted proviso must be read as forming part of Section 18-A(5) of the principal Act as from April 1, 1952, and consequently the order of the Income-tax Officer dated October 9, 1952, was inconsistent with the provisions of the proviso and suffered from a mistake apparent from the record. Dealing with the scope of Section 35 of the Indian Income-tax Act, 1922, Gajendragadkar, J. as he then was, speaking for the court observed:

> It is in the light of this position that the extent of the Income-tax Officer's power under Section 35 to rectify mistakes apparent from the record must be determined; and in doing so, the scope and effect of the expression "mistake apparent from the record" has to be ascertained. At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the, assessment order can be rectified under Section 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. Prima facie it may appear somewhat strange that an order which was good and valid when it was made

should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction we must read the subsequently inserted proviso as forming part of Section 18-A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with ' the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record. That is why we think that the Income-tax Officer was justified in the present case in exercising his power under Section 35 and rectifying the said mistakes.

There is another decision of this Court bearing on the question of law which we are considering and that decision is Maharana Mills' (Private) Ltd. v. The Income-tax Officer, Forbandar .. The assessee in that case was a Private Ltd. Co. It was assessed to income-tax for the assessment year 1953-54 under the provisions of the Indian Income-tax Act. 1922. As per the assessment order dated June 30. 1955. the amount of depreciation allowed under Section 10(2)(vi) of the Act was Rs. 3,48,105/-. By his order of February 27 1956, the Income-tax Officer corrected the written down value of the different properties of the assessee and determined the total allowable depreciation to be Rs. 1,94,074/-. The (appellant) assesses challenged the order dated February 27, 1956 on the grounds, infer alia, (1) that he was not given a written notice of the intended rectification of the written down value, (2) that the provisions under which the Income. tax Officer acted, i.e., Section 35 of the Act, was not meant for the purpose of making corrections in written down values, the correct provision being Section 34 which specifically refers to excessive depreciation, and (3) that, in any case, he had exceeded his jurisdiction under Section 35 of the Act in calculating the depreciation on the written down value of the buildings and the machinery of the appellant acting sua motu, and that he could correct only those mistakes which had been pointed out by it. It was found that notice was given to the appellant of the intended determination of the written down value, though it was not a written notice, and that the matter was discussed with the assessee's representative. Overruling the contentions of the assessee this Court held that the rectification in question could be made under Section 35 of the Indian Income-tax Act, 1922 even though a re-assessment could have been made under Section 2A of that Act.

9. Unfortunately in the present case the attention of the learned Judges of the High Court was not invited to any of the two decisions referred to earlier. For the reasons mentioned above, we come to the conclusion that the Agricultural Income-tax Officer was empowered to make the rectification under Section 36 of the Act. But from the material before us, it is not possible for us to decided which of all assessments would fall within the period prescribed in Section 36 of the Act. For that reason these cases have got to go back to the High Court for deciding that question in accordance with the decision.

10. In the result' these appeals are allowed and they are remitted to the High Court for disposal according to law as stated earlier. No costs.