

## **Chowdhary Mithoo Missar vs Commissioner Of Income-Tax, U. P. And C. ... on 9 May, 1950**

### **Equivalent citations: [1950]18ITR530(ALL)**

#### **JUDGMENT**

This reference contains more than one matter. the first of it is reference under Section 66(1) of the Income-tax Act with reference to a notice under Section 34 of that Act reopening the assessment for the years 1940-41, 1941-42 and 1942-43. the reference was made by the Income-tax Appellate Tribunal by on order dated the 28th February 1946. the reference is of the same date but relates to the excess profits for the three years.

The assessee is a Hindu undivided family. It carries on an extensive trade in bristles which are exported to the England and are also sold locally. The assessee had for some years previous to the years in question adopted the method of interning in is books of account at the time of sending out the consignment a notional figure giving the value of each consignment. This amount was credited to the malkhata and debited to stock. When the bristles were sold in England accounts realised from the sales was received by the assessee, who then made final adjustments in his books. The adjustment were made in this way that the amount realised in excess of the notional value was entered in the account books as sales, while if the amount was less, the deficiency was deducted from the sales.

For the three years in question the finding of the Appellate Tribunal is that Mr. N. K. Saksena, the Income-tax Officer, did not himself examine the account books, but depended on certain notes of examination and on those notes he came to the conclusion that the account books, in particular the cash book, did not appear to have been maintained regularly from day to day. He did not therefore rely on the books to find out the actual profits made, but the officer was of the opinion that the turnover mentioned in the books could be accepted as no definite omissions had been discovered. He then determined a reasonable rate and after having fixed the rate at a certain percentage of the turnover calculated the profits During assessment for the period 1943-44 Mr. Saksena examined the books himself and he then discovered that the accounts did not show the total figures representing sales in India plus sales in London correctly and as a result thereof it was not notice before that the actual sales far exceeded the figures shown in the books. He, thereupon, issued notices under Section 34 of the Income-tax Act on the 20th of August, 1943, and having examined the figures for himself passed fresh assessment orders on the 15th February, 1944.

There was an appeal filed before the Appellate Assistant Commissioner and learned counsel, who represented the assessee, did not contest the figure of the sales as found in the represented assessment under Section 34. When the matter come up before the Tribunal the correctness of the figure found after issue of notice under Section 34 was again not disputed. The Tribunal said as follow : -" The correctness of the figure of sales on consignment considered at the Section 34 assessment was not disputed by the appellant either before the Appellate Assistant Commissioner or

before us. "The Tribunal further said : "It was conceded that the appellants' accounts did not show the total figure representing sales in India plus sales in London (on consignment) in any particular year. Goods sent on consignment were given a notional price which was noted in the consignment account concerned. When account sales came from London the entire amounts of sale proceeds were noted in the consignment account concerned, but only the differences between the total amounts of the sale proceeds and the notional prices originally noted at the time the goods were consigned were shown as sales. It must be, and was, admitted that accounting, at least for as the computation of the total sales in a year is concerned, was defective although it was urged that if the accounts were not rejected, the profits shown would have been the correct profits.

The facts, therefore, are that during the pendency of the assessment proceeding for the year 1943-44, while examining the books of assessee, Mr. Saksena discovered that if the profits were calculated at certain percentage basis on the total sales as entered in the books, a large part of the income was left out as the sales were not correctly recorded in the books and as a result thereof income liable to tax had escaped assessment in previous years.

In the assessment of the case the finding recorded is as follows :-

"..... the accounts for this three years were originally examined by the Income-tax Officer, Cawnpore, namely, Mr. G. S. Srivastava, and they were not examined by the Excess Profits Tax Officer (Mr. Saksena) who actually made this assessment. The Bench held that Mr. Saksena was, therefore, not aware of the real state of accounts. It was in the year of assessment 1943-44 When Mr. Saksena himself examined the accounts that he found that the sales were not correctly recorded." It was held by a Bench of this Court in *Mahabir Prasad Munna Lal v. Commissioner of Income-tax* that though the Income-tax Officer cannot institute a fresh investigation or inquiry with the object of finding out facts which would entitle him to re-open the previous years assessment yet if in the course of the assessment of a subsequent year some definite information comes into his possession, from which he is satisfied that income has escaped assessment, he is entitled to proceed under section 34 of the Act. On the facts found by the appellate Income-tax Tribunal that decision is fully applicable.

Our answer, therefore, to the first question, "Whether under the circumstances of the case the officer could be said to have in consequence of definite information which has come into his possession discovered that income has escaped assessment within the meaning of Section 34 and whether the notice under Section 34 was valid in all respects", is in the affirmative.

The second question seems to be covered by our answer to the first question. The second question is as follows : -"Whether Section 34 of the Income-tax Act had at all any application to the case ?"

The argument of learned counsel is that the proper section to be applied was Section 35. Section 35 deals with errors apparent on the face of the record, which can be corrected at any stage. That Section can not cover a case where a reassessment has been made by discovery of new facts. In our view, Section 34 of the Income-tax Act did apply to the facts of the case.

In other reference raising out of the excess profit tax of the assessment a further question referred to us as follow : - "If the notice under Section 34 issued under the Income-tax Act is held to be illegal and the income determined therein is accordingly cancelled, will the maintenance of the same income for excess profit tax assessments be in accordance with Rule 1 of Schedule I of the Excess profits Tax Act ?"

Learned counsel has admitted that in view of our answer to the first question this question does not arise. We find from the paper book that it was not till the 15th of the February, 1944, that is, after orders had been passed on the notices issued under Section 34 and the assessment had been revised, that orders under Section 14(1) of the Excess Profits Tax Act were passed by the Excess Profits Tax Officer, who happened to be the same officer, Mr. N. K. Saxena. There was no previous order relating to these years under Section 14(1) of the Excess Profits Tax Act. There was, therefore, no question of reopening those assessments, nor any question of notice under Section 15 of the Excess Profits Tax Act could arise. As learned counsel has not pressed for an answer to this question it is not necessary for us to say anything more.

The assessee must pay to the Department the cost of this reference which we assess at Rs. 600.

Reference answered accordingly.