

Mohd. Haneef vs Commissioner Of Income-Tax. on 17 November, 1954

Equivalent citations: [1955]27ITR447(ALL)

JUDGMENT

This is a reference under section 66 (2) of the Indian Income-tax Act and the two points that have been referred to us for decision are as follows :-

"1. Whether in the facts and circumstances of this case the notice issued to Mohd. Hanif under section 34 was bad in law and whether it is necessary to mention that the notice issued to him represented himself and others, i.e., to an association of individuals ?

2. Whether on the above facts and circumstances of this case, it was open to the Tribunal to convert an assessment made against Mohd. Hanif as representing an association of individuals composed of Mohd. Husain and Mohd. Jan and assess him as representing an association of individuals composed of himself, Mohd. Zahir, Anwar Ali and Abdul Hasan ?"

The facts of the case are not complicated though some difficulty has been created by reason of the way the case was dealt with at its various stages by the Income-tax authorities and further by reason of the fact that certain papers, which we would have liked to examine, were not available.

On some date in the year 1935 or 1936 a notice, for the assessment year 1936-37, was served on Mohd. Hanif under section 22 of the Indian Income-tax Act to file a return of his income up to 31st March, 1936. The notice is not available and it is not known in what status Mohd. Hanif was required to submit his return. He, however, submitted his return in the status of "an individual" and claimed that he had suffered a loss of Rs. 1,364.

Mohd. Hanif was a resident of village Kotwari, District Ballia, where money-lending business was carried on by members of his family. The family tree given in the statement of the case is as follows :-

Sh. Rahim Bux H. Mohd. Husain H. Mohd. Jan Mohd. Hanif Mohd. Zahir Anwar Ali Abul Hasan The family had also some income from interest received from a private limited company known as Sugauli Sugar Works. The loan had been made to the company, so far as we could ascertain, in the name of Mohammad Hanif alone.

The Income-tax Officer passed the assessment order on the 19th of October, 1938. He disallowed certain expenses claimed and held that Mohammed Hanif was liable to pay a sum of Rs. 115-10-0 as income-tax. The Income-tax Officer, however, passed

the assessment order against Mohammad Hanif not in the status of an "individual" but in the status of an "association of individuals" of which he was held to be the "principle officer". The relevant portion of the order is as follows :-

"In the return of income the assessee declared himself to be individual. However the account books showed capital is contributed by four persons namely, Mohd. Hanif, Mohd. Zahir, Mohd. Anwar and Abul Hasan. There is a common account in the name of Mohd. Hanif, Mohd. Zahir, Mohd. Anwar and Abul Hasan to which final profit or loss is transferred. The profit and loss is not divided. From the account books of assessee it is clear that the assessee's status is that of an association of individuals. However in the company (Sugauli Sugar Works) the deposit has been made and the shares have been purchased in the name of Mohd. Hanif alone. In my opinion according to accounts the status is clearly that of an association of individuals with Mohd. Hanif as principal officer."

On the same date the Income-tax Officer made the assessments for the years 1937-38 and 1938-39 and in all these three years the status in which the assessment was made was "association of individuals".

Mohammed Hanif did not object to the assessment, nor did he file any appeal. He had pleaded before the Appellate Tribunal that he did not know in what status he was being assessed but that plea was given up by learned counsel before the Tribunal.

During the assessment proceedings for the assessment year 1939-40 the Income-tax Officer received definite information that a business in hides was being carried on in Calcutta in the name of Mohammed Hussain Mohammad Jan by the same association of individuals, that is, Mohammad Hanif, Mohammad Zahir, Anwar Ali and Abul Hasan. The Calcutta firm was assessed to income-tax there with Mohammad Hussain and Mohammed Jan as proprietors of the firm. The Income-tax Officer at Ballia was, however, of the opinion that the income of the tax Calcutta business should have been included in the return for the assessment year 1938-39 filed at Ballia and that income had thus escaped assessment at least partially and issued a notice under section 34 of the Income-tax Act on the 5th of March, 1940. This notice was sent to "Mohammed Hanif, son of Chhote Mohd. Hussain, village Kotwari, at present at Sugauli" and was as follows :-

"Whereas I have reason to believe that your income from business which arose, accrued or was received in the previous year ending 31st March, 1938, and which should have been assessed for the financial year ending the 31st March, 1939 :-

(a) has partially escaped assessment,

(b) has been assessed at too low a rate, and I therefore propose -

(a) to assess the said income that has escaped assessment,

(b) to re-assess your said income at the correct rate, I hereby require you to deliver to me, not later than 10th April, 1940, or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March, 1939."

Two things are here noticeable : The notice was to Mohd. Hanif and it was not indicated that the notice to him was as "principal officer" of the "association of individuals" consisting of himself and three others, nor was any indication given that the Income-tax Officer was referring to the income of the Calcutta firm Haji Mohammad Hussain Mohammed Jan.

On the 3rd of May, 1940, Mohammad Hanif filed a fresh return for the assessment year 1938-39 and submitted that the Calcutta firm Haji Mohammad Husain Mohammad Jan was a separate and independent firm and its income had, therefore, not been included in the return. The notice was characterised as ultra vires, invalid and illegal and it was submitted that the return was filed under protest.

The Income-tax Officer passed a fresh assessment order on March 31, 1941, holding that the hide business at Calcutta, the money-lending business at Ballia, the deposits with the Sugauli Works all belonged to Mohammad Husain and Mohammad Jan to whom the entire capital belong, that Mohammad Jan to whom the entire capital belonged, that Mohammad Hanif was working merely as their agent and that the other three, Mohammed Zahir, Anwar Ali and Abul Hasan were minors aged only 13 years, 14 years and 12 years respectively. Mohammad Husain and Mohammad Jan were also found to have some income from house property at Calcutta. The entire income was held to be the income of Mohammad Hussain and Mohammad Jan and the assessment order was made on that basis, the name of assessee being Mohammad Hanif and the status being "association of individuals" consisting of Mohammad Hussain and Mohammad Jan.

Mohammad Hanif filed an appeal against this assessment order and the Appellate Assistant Commissioner reduced the income for purposes of taxation by a sum of Rs. 48,198. He, however, held that the "association of individuals" to whom the income belonged were not Mohammad Hussain and Mohammad Jan but Mohammad Jan, Mohammad Hanif, Mohammed Zahir, Anwar Ali and Abul Hasan, and they were the "association of individuals" who were represented by Mohammad Hanif as "principal officer".

Mohammad Hanif filed an appeal before the Tribunal. The Tribunal reduced the income by a sum of Rs. 2,300, which was the income of the house property in Calcutta belonging to Mohammad Husain and Mohammad Jan and held that the association of individuals, who were taxable, were Mohammad Hanif, Mohammad Zahir, Anwar Ali and Abul Hasan.

An application was filed before the Tribunal for a reference to this Court under section 66 of the Income-tax Act but it was held that no question of law arose and the application was dismissed on the 22nd of July, 1944.

Mohammad Hanif then moved this court under section 66 (2) of the Income-tax Act and on the 12th of September, 1949, a Bench of this Court directed the Appellate Tribunal to state a case and formulate the points of law for decision by this court, and it was a result of that order that the present reference has been made and the two questions mentioned above have been referred to us for decision.

Learned counsel for Mohammad Hanif has urged that the original notice issued under section 22 of the Income-tax Act directing Mohammad Hanif to file his return for the assessment year 1936-37 with reference to the year ending 31st March, 1936, being addressed to Mohammad Hanif as an individual and he having submitted his return as an individual, the Income-tax Officer could not in the assessment order change the status to an "association of individuals" treating Mohammad Hanif as its principal officer. Apart from the fact that this question has not been referred to us for decision, we have the further difficulty that the facts relating to it are not mentioned in the statement of the case, nor is the original notice available. Mr. Jagdish Swarup, learned counsel for the Department, has urged that in the notice under section 22 the Income-tax Officer could not have mentioned the status in which he intended to tax Mohammad Hanif, as he could not have had information on the point, and it was for Mohammad Hanif to state in his return what his "status" was, that Mohammad Hanif no doubt gave his "status" as an "individual", but it was open to the Income-tax Officer, if on examining the account books and going into the facts he found that the income was not of Mohammad Hanif as an "individual" but was the income of an "association of individuals", to make the assessment giving the status which he considered was appropriate.

Before the amendment of the income-tax Act in the year 1939, section 22 (2) of the Income-tax Act required that if the total income of a person rendered him liable to income-tax, the Income-tax Officer had to serve him a notice to furnish within a period specified a return of his income in the prescribed form. This notice had to be served in accordance with the provisions of section 63 (2) and in the case of an association of individuals it had to be addressed to the "principal officer thereof". "Principal officer" was defined in section 2 (12) as "the secretary, treasurer, manager or agent of the authority, company, body or association."

Notice in this case was served on Mohammad Hanif. Whether the "status" was mentioned or not is not known. He, however, filed his return as an "individual", but at the time of making the assessment the Income-tax Officer treated him as an "association of individuals" consisting of himself, his brother and his two cousins. This was done as a result of the examination of the account books made by the Income-tax Officer and it is now admitted that Mohammad Hanif knew that he had been assessed in that status. On the same date, that is, 19th October, 1938, assessments for the subsequent years 1937-38 and 1938-39 were also made in the same status and it is not disputed now that it was done to his knowledge.

At the time when the application under section 66 (2) of the Income-tax Act was made, one of the points of law urged was that Mohammad Hanif could be treated as the "principal officer" only if a notice under section 2 (12) (b) had been given to him. Section 2 (12) (b) Provides that -

"Any person connected with the authority, company, body or association upon whom the Income-tax Officer has served a notice of his intention for treating him as the principal officer thereof."

Rejecting the request made that a question of law be referred on that point, a Bench of this Court said on the 12th of September, 1949 :-

"The second question is that Mohammad Hanif could not be treated as the principal officer of the association of individuals without a notice under section 2 (12) (b) of the Indian Income-tax Act. Notice under section 2 (12) (b) is only necessary if an Income-tax Officer wants to treat a person as the principal officer of a local authority or a company or any other body or association, a person, who is not the secretary, treasurer, manager or agent. In the cases of secretaries, treasures, managers or agents no such notice is needed. The question, therefore, was not whether the Income-tax Officer should have issued notice under section 2 (12) (b), but whether Mohammad Hanif was the manager or agent of this association of individuals. A point in that form was not raised before the Tribunal, but we have it from the Judgment of the Income-tax Officer and from the other papers on the record that the three other persons, who were said to be associated with Mohammed Hanif in this business, were all minors, and that it was Mohammad Hanif, who was looking after the business, and it was through him that the assessments had been made in the previous years. The question therefore is more a question of fact than a question of law."

It must, therefore, now be taken that Mohammad Hanif was the manager or agent of the association of individuals, i.e., himself, his brother and his two cousins. The mere fact that he made the return as an "individual" will not debar the Income-tax Officer from assessing him as the "principal officer" of an "association of individuals", he being in fact the manager or agent of that association.

In this connection learned counsel for the Department, Mr. Jagdish Swarup, has relied on two decisions of this Court.

In *In re Radhey Lal Balmukand*, it was observed that it was not obligatory upon the Income-tax Officer in a notice issued to an assessee under section 22 (2) of the Income-tax Act to strike off such of the four capacities as do not apply to the assessee and to clearly indicate in which capacity the assessee was required to submit his return, but it was the duty of the person receiving the notice to score out the irrelevant capacities in the notice.

In *Gopaldas Parshottamdas v. Commissioner of Income-tax, C. P. and U. P.*, the learned judges said :

"We have seen the notice that was issued to the assessee and in that notice, as in all such notices, the assessee was required to submit a return and four capacities were indicated one above the other and the notice went to assessee without any one of

these capacities having been scored out. The contention of the assessee was in doubt he might well have asked for elucidation from the Income-tax authorities or, when he was submitting his return, he should have made clear the capacity in which he was furnishing the return. He also submitted the return without scoring out any of the four capacities. It is not possible, therefore, to hold that the notice issued by the Department was invalid or illegal."

Learned counsel for Mohammad Hanif has cities a number of cases to the effect that an assessment order made before the amendment of the Income-tax Act in the year 1939 depended for its validity on the notice under section 22 of the income-tax Act and, if the notice was defective, the entire proceedings must be deemed to be illegal and the Income-tax Officer could not depend on the illegal assessment for the purpose of making a reassessment under section 34 of the Income-tax Act. He has relied on a passage in the judgment in *In re L. Pitamber Prasad* where the learned judges pointed out at page 378 that :

"The Act is a highly technical one, and Income-tax Officers would be well advised in further when they send a notice under section 34 read with section 22 of the Act, to emphasise the fact that a return duly setting forth the total income is require and a mere reference to the former return would not be treated as valid."

The decision in the case is not relevant for our purposes. Reliance is placed merely on the observation that "the Act was highly technical one" which fact cannot be disputed or denied. In *In the matter of Kajori Mal Kalyan Mal of Generalganj, Cawnpore*, where a notice under section 22 (2) of the Income-tax Act gave only twenty-nine days to an assessee to make his return from the date of service of notice, even though the time was extended, a Bench of this Court held that the subsequent proceedings were vitiated by reason of the defective notice and strong reliance is placed by learned counsel on that decision. Similarly, in the case of *Kunwar Bishwanath Singh v. Commissioner of Income-tax, C. P. and U. P.*, even though the return was filed by the Maharaja on receipt of a notice issued to him under section 22, instead of to his agent, it was pointed out at pages 334 and 335 of the report that the notice being invalid the Court had held in an earlier case that "the entire proceedings were void from the start to finish".

There can be no doubt that before the amendment of section 22 of the Act the proceedings started with a notice by the Income-tax Officer under section 22 (2) of the Act and, if the notice was bad, any defect in the subsequent proceedings, it was held, would not entitle the Income-tax Officer to relay on the previous proceedings which were null and void and penalise the assessee. In the case before us, however, the question of the invalidity of the original notice was not raised before the Income-tax Tribunal nor was it referred to us for decision. In the absence of the facts, specially in the absence of the notice, it is not possible for us to assume that the notice was given to Mohammad Hanif as an individual and was defective. He have already quoted from the order of this Court passed on the 12th of September, 1949, from which it would appear that Mohammad Hanif was in fact the manager or the agent of his brother and his two cousins and, even though he might have filed his return as an individual, there was nothing to prevent the Income-tax Officer to assess him as an association of individuals and if he was not satisfied with that order it was open to him to have

it rectified in appeal either to the appellate Assistant Commissioner or to the Tribunal.

It is no doubt true that the order of the Income-tax Officer dated the 19th of October, 1938, that the entire income belonged to an association of all the four individuals could not operate as res judicata and the reference made by learned counsel to the decisions in T. M. M. Sankaralinga Nadar and Brothers v. Commissioner of Income-tax, Madras, Sirdar Bahadur Indra Singh v. Commissioner of Income-tax, Bihar and Orissa, and Kamlapat Motilal v. Commissioner of Income-tax, U. P. was hardly necessary. The question, however, in this case is not whether the assessment order passed on the 19th of October, 1938, operates as res judicata but, whether in view of the fact that on the 19th of October, 1938, the Income-tax Officer had made an assessment on Mohammad Hanif as the principal officer of an association of individuals consisting of himself and three others the Income-tax Officer could serve him in his individual capacity with a notice under section 34 of the income-tax Act.

It would have been better if the Income-tax Officer had indicated in that notice that it was being served of Mohd. Hanif as the "principal officer" of an association of individuals consisting of himself and three others but the fact of the previous assessment having been mentioned Mohammad Hanif could have in his mind no doubt as to the status in which the notice was being served on him.

Notice under section 34 of the Act on the ground that a part of the income had escaped assessment or the income had been assessed to income-tax at too low a rate can only be given to the person assessed under section 23 of the Act and the answer to the first question, therefore, must be that in the circumstances of this case the notice issued to Mohammad Hanif under section 34 was not bad in law and it was not necessary, though it would have been desirable if the fact had been mentioned in the notice that it was being issued to him as "principal officer" of an "association of individuals" consisting of himself and three others.

The second question raises certain difficulties. The Income-tax Officer while making the assessment under section 34 of the Income-tax Act held that the entire income belonged to the association of individuals consisting of Mohammad Husain and Mohammed Jan, that Mohammad Hanif was the "principal officer" of that "association of individuals", that the same two persons were also the owners of the Calcutta business and the house property in Calcutta and that the income of the Calcutta business and the house property in Calcutta had, therefore, escaped assessment. This order was clearly wrong as the assessment in Ballia was made against Mohammad Hanif as the "principal officer" of an association of individuals consisting of himself and three others and the notice under section 34 of the Act must be deemed to have been given to him in the same capacity. The Income-tax Officer could not at the time of the reassessment assess an entirely new "association of individuals".

When Mohammad Hanif appealed against the order and when he was assessed to income-tax as the "principal officer" representing an association of individuals consisting of himself, Mohammad Husain and Mohammad Jan, the appeal filed by him before the Assistant Income-tax Commissioner must be deemed to be an appeal filed by a principal officer representing those two persons. In that appeal the Appellate Assistant Commissioner could pass an order under section 31 of the Act

confirming, reducing, enhancing or annulling the assessment. He could not make a new assessment against persons who were not assessed to income-tax by the Income-tax Officer. He, however, held that the association of individuals consisted of Mohammad Jan, Mohammad Hanif, Mohammad Zahir, Anwar Ali and Abul Hasan and Mohammad Husain had no concern with it. He, therefore, assessed to income-tax Mohammad Jan, Mohammad Hanif, Mohammed Zahir, Anwar, Ali and Abul Hasan in their status as an "association of individuals" treating Mohammad Hanif as the "principal officer" of that "association of individuals." On a further appeal to the Tribunal the Tribunal tried to regularise the proceedings by omitting the name of Mohammad Jan and omitting the income of the house property in Calcutta. The association of individuals was held by the Tribunal to consist of four persons, Mohammad Hanif, Mohammad Zahir, Anwar Ali and Abul Hasan. The Appellate Tribunal could not assess to income-tax persons who had not been assessed to income-tax by the Income-tax Officer. In the appeal before them the Tribunal could no doubt pass such order as it thought fit. [Section 33 (4)]. The case should have been sent back to the Income-tax Officer to make a fresh assessment. Because Mohammad Hanif was treated all along as the "principal officer" he could not be assessed by the Income-tax Officer as the principal officer of say A and B, by Appellate Assistant Commissioner as the principal officer of an association of individuals consisting of B, C, D, E and F, and by the Appellate Tribunal as the Principal officer of C, D, E and F. Learned counsel, Sri Jagdish Swarup, has urged that Mohammad Hanif must be deemed to be the assessee and, so long as the assessment order was passed in his presence, it did not matter whom he was in fact representing. This argument may have had some force if the tax was recoverable only from the principal officer and his property, but a principal officer may not even be personally liable for the tax. In this case no doubt he has now been held to have a share in the income but the Income-tax Officer when making the assessment under section 34 held that the association of individuals consisted of only Mohammad Husain and Mohammad Jan and Mohammad Hanif was merely treated as "principal officer", being their agent or manager.

Section 29 of the Income-tax Act Provides for the issue of a notice of demand upon the assessee or other person liable to pay the tax assessed. Chapter V deals with liability for payment of tax in special cases where a person may be vicariously liable to pay the tax for another. Section 40 in this Chapter is in regard to the liability of guardians, trustees and agents; agent in this section is an agent of any person "not resident" in the taxable territories. Section 41 deals with the liability of the Court of Wards, the Administrators-General, the Official Trustees or any receiver or manager appointed by or under any order of a Court and section 44 deals with the liability in case of a discontinued firm or association of the members thereof. A principal officer who is being taxed merely as an agent of an association of individuals residing within the taxable territories has not been made personally liable in these sections. Chapter VI makes it clear that the tax can be recovered from the association of individuals and their property. In the Circumstances there should be no doubt as to who are the members of the association of individuals who are being taxed, say, C, D, E and F as forming an "association of individuals" who are liable to pay the tax and has held that the association of individuals consists of A and B, but the Tribunal is of the opinion that the Income-tax Officer was wrong in treating the association as of A and B and that it really consists of C, D, E and F the case should go back to the Income-tax Officer so that he may start the proceedings against them and pass a suitable assessment order : merely because the same person was treated as the principal officer of different groups of persons it was not open to the Income-tax authorities from one stage to another

to go on changing that group. As been pointed out in most cases this Act being a fiscal Act of a highly technical nature it must be strictly construed and no laxity should be encouraged which would jeopardies the rights of the assessee given to him under the law. If the Income-tax Officer had passed the order against Mohammad Hanif as the principal officer of the association of individuals consisting of C, D, E and F, these four persons had a right to have it challenged before the Assistant Commissioner and the Commissioner of Income-tax. They might have liked to be personally present. They might have like to place further facts and circumstances before the Income-tax authorities. By the procedure followed by the Appellate Tribunal and the final order was passed against them without giving them an opportunity of making a proper representation.

We are of the opinion that the answer to the second question must be in the negative, that is, on the facts and circumstances of this case it was not open to the Tribunal to convert an assessment made against Mohammad Hanif as representing an association of individuals composed of Mohammad Husain and Mohammad Jan and assess him as representing an association of individuals composed of himself, Mohammad Zahir, Anwar Ali and Abul Hasan.

In the circumstances of the case we think that the assessee should get his costs which we assess at Rs. 400.

The fee payable to counsel for the Commissioner is also assessed at the same figure.

Reference answered accordingly.