The Income Tax Officer, Madras vs S. K.Habibullah, Madras on 24 January, 1962

Equivalent citations: 1962 AIR 918, 1962 SCR SUPL. (2) 716, AIR 1962 SUPREME COURT 918, 1962 44 ITR 809 1963 (1) SCJ 585, 1963 (1) SCJ 585

Author: J.C. Shah

Bench: J.C. Shah, S.K. Das, M. Hidayatullah

PETITIONER:
THE INCOME TAX OFFICER, MADRAS

Vs.

RESPONDENT:
S. K.HABIBULLAH, MADRAS

DATE OF JUDGMENT:
24/01/1962

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
DAS, S.K.
HIDAYATULLAH, M.

CITATION:
1962 AIR 918 1962 SCR Supl. (2) 716
CITATOR INFO :
D 1963 SC1436 (7,9,11,14,20,31,32,42,44,46)
E 1968 SC 623 (5,8,9,11,13,15,17,19,20,21,22
RF 1986 SC 268 (4,8)

ACT:
Income Tax-Assessment of firm completed prior to April 1,1952-Power to rectify partner's assessment-Individual and firm distinct entities-Mistake discovered in firms' assessment-Partners if can be made liable-Income Tax Act, 1922(11 of 1922), s. 35 cls 1, 5

HEADNOTE:
M was a partner in two firms registered under the Indian Income Tax Act . He submitted returns

for assessment of Income Tax for the years 1946-47 and 47-48 with regard to both the firms showing losses. The assessment of one of the firm for the year 1946-47 and 47-48 was completed on 31.10.50 and of the other for the year 1947 48 on 30.6.51 whereby the losses calculated were less than claimed by M before the Income Tax Officer. On receipt of intimation of the orders passed in the assessments of the two firms the Income Tax officer issued on May 4, 1953, notice to M to show cause why the assessment for the year 1946.47 and 47-48 should not be rectified under s. 35 of the Act. M replied that he had no objection if the assessment was completed according to law. On 27.3.54 the Income-tax Officer revised the assessment in respect of the two years after taking into account the share of the losses as computed in the assessment of the two firms. M died on 17.4.54 and his son H applied to the Commissioner of Income Tax for revision of the orders. The Commissioner held that s. 35 was properly invoked for rectification of the assessment. The High Court of Madras on a petition moved by ordered that a writ of certiorari to issue quashing the order. The Commissioner of Income-tax came up in appeal.

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Held, that s. 35 (1) of the Income Tax Act empowers the Income Tax Authorities to rectify mistakes apparent from the record of certain orders passed by them. But if the law does not authorise the Income Tax Officer to rectify the assessment, assent could not validate what was unauthorised.

Held, further, that for the purpose of assessment an individual and a firm are distinct entities; and even if an individual is a partner of a firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake apparent from the record of assessment of the individual partner.

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Held, also, that the Legislature has given to cl. (5) of s. 35 which was incorporated with effect from April 1, 1952, a partial retrospective operation. The provision enacted by cl. (5) is not procedural in character, it affects vested rights of the assessee. Therefore in the absence of compelling reasons the court would not be justified in giving a greater retrospectively to the provision than is warranted by the plain words used by the Legislature. Clause (5) of s. 35 does not purport to amend cl. (1) of the same section.

It confers additional power of rectification upon the Income Tax Authorities; and that power cannot be exercised in respect of assessment of firm which have been completed before the date on which the power was invested.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 557 and 558 of 1960.

Appeals from the judgment and order dated April 10, 1957, of the Madras High Court in W.P. No. 952 of 1955.

K. N. Rajagopal Sastri and D. Gupta, for the appellants.

R. Thiagarajan, for the respondent. 1962. January 24. The Judgment of the Court was delivered by SHAH, J.-One S. K. Mohideen-hereinafter referred to as the assessee-was a partner in two firms-Messrs. Dinshaw and Co. and Messrs. Palanippa Chettiar and Co. The firms were registered under the Indian Income Tax Act. The assessee submitted returns of his income and incorporated therein the estimated share of his losses in the two firms at Rs. 20,000/- and Rs. 10,000/- for the assessment year 1946-47 and at Rs. nil and Rs. 12,436/- for the assessment year 1947-48. The Income-tax Officer, V. Circle, Madras completed the assessment for the two years on February 20, 1950 after adopting the estimates furnished by the assessee, but he made a note that the losses accepted were subject to revision on ascertainment of correct particulars. The assessment of Messrs. Dinshaw & Co, for the years 1946-47 and 1947-48 was completed on October 31, 1950 by the Income-tax officer II Circle, Madrass and the proportionate share of the assessee for the losses was computed for the two years at Rs. 15,839/- and Rs. 1,046/- respectively. Assessment of Messrs. Palaniappa Chettiar & Co. for 1947-48 was completed by the Income-tax Officer, Special Circle on June 30, 1951 and the share of the assessee in the loss suffered by that firm was computed at Rs. 2,009/-. On receipt of intimation of the orders passed in the assessment of the two firms, the Income-tax officer, V Circle, Madras issued on May 4, 1953 notices to show cause why the assessments of the asessee, for the years 1946-47 and 1947-48 should not be rectified under s. 35 of the Income-tax Act. On March 24, 1954, the assessee wrote to the Income-tax Officer stating: "This is to inform you that I have no objection in completing the assessments of the previous years in accordance with law". On March 27, 1954, the Income-tax officer revised the assessment of the assessee in respect of the two years after taking into account the share of the losses as computed in the assessments of the two firms.

The assessee died on April 17, 1954 and his son S. K. Habibullah-hereinafter referred to as the respondent-applied to the Commissioner of Income-tax, Madras praying for revision of the orders. The Commissioner held that s. 35 was properly invoked for rectification of the assessments and rejected the applications. But the High Court of Judicature at Madras in petitions under Art. 226 of the Constitution filed by the respondent ordered that writs of certiorari do issue quashing the orders of the Income-tax Officer, V Circle. The Commissioner of Income-tax, Madras appeals to this Court

with certificate of fitness granted by the High Court.

The plea of the Commissioner that the assessee having assented to the rectification, it was not open to the respondent to challenge the authority of the Income-tax officer, has no force. By his letter dated March 24, 1954 the assessee merely informed the Income-tax officer that he had no objection to rectification according to law. But if the law did not authorise the Income-tax Officer to rectify the assessment, assent could not validate what was unauthorised.

Section 35(1) empowers the income-tax authorities to rectify mistakes apparent from the record of certain orders passed by them. The clause (omiting parts not material) provides that the Income-tax officer may at any time within four years from the date of any assessment order passed by him, on his own motion rectify any mistake apparent from the record of the assessment. The power of rectification may be exercised subject to two conditions: (1) that there is a mistake apparent from the record of the assessment, and (2) that the order of rectification is made within four years from the date of the assessment sought to be rectified. The mistake which may be rectified need not be in the order itself: it may be in any part of the record or proceeding of assessment of the assessee. But for the purpose of assessment an individual and a firm are distinct entities and even if an individual is a partner of the firm, a mistake discovered because of something contained in the assessment of the firm is not a mistake apparent from the record of assessment of the individual partner. In Kanumar lapaudi Lakshminarayana Chetty v. First Additionnal Income-tax Officer, Nellore(1) in dealing with the question whether the record of the assessment of the firm may be regarded as the record of the assessment of the individual partner, Subba Rao, C.J. speaking for the Court observed, and, in our Judgment, correctly:

> "But it is said that section 35 of the Act even without the amendment would have enabled the Income Tax authorities to reopen the assessment on the ground that there was a Mistake apparent from the record. But from the record of final assessment, it is impossible to say that there was a mistake apparent from the record, for the assessing authority accepted a certain figure as representing the share of the assessees in the firm and made a final assessment. The mistake is not in the record but by a subsequent assessment of the firm it was discovered that the earlier assessment, was wrong to the extent of the assessees' share in the firm. It is not a mistake apparent from the record but a mistake discovered from the disposal of another case".

Section 35(1) of the Income-Tax Act could not therefore be resorted to by the Income-tax authorities for rectification of the assessments of the assessee, for there was no error apparent from the record of those assessments.

The Income tax Officer, however, sought to rely upon s. 35(5) which was incorporated by s. 19 of the Indian Income-tax (Amendment) Act, 1953 (25 of 1953) with effect from April 1, 1952. The clause which was incorporated is in the following terms "(5) Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or any reduction or enhancement made in the income of the firm under section 31, Section 66, Section 66A, Section

33B, Section 66 or Section 66A that the share of the partner in the profit or loss of the firm has not been included, in the assessment of the partner or, if included, is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this Section, and the provisions of sub-section (1) shall apply thereto accordingly, the period of four years referred to in that sub-section being computed from the date of the final order passed in the case of the firm."

Clause (5) was one of a group of clauses, added by Act 25 of 1953, dealing with rectification of assessments. Clause (5) dealt with inclusion of income or correction of the income of a partner in a firm consequent upon assessment or reassessment of the firm of which he was a partner. Clause (6) dealt with recomputation of total income of an assessee in consequence of modifications made in the Excess Profits Tax or the Business Profits Tax payable by an assessee subsequent to an assessment made under the Indian Income-tax Act. Clause (7) dealt with rectification consequent upon modification of orders under 8. 23A of the Income- tax Act cl.(8), which was enacted (in the form in which it now exists) by the Indian Finance Act, 1956, dealt with the rectification consequent upon proceedings in reassessment under 8. 34 (1) (a) or

8. 31 (1A). The Legislature by a fiction in all these classes of cases regarded the inclusion, correction, computation or recomputation as rectification of a mistake apparent from the record and prescribed special termini reckoning for the period of four years within which the rectification must be made, Under. cl. (5) with which alone we are directly concerned in these appeals, the inclusion of the share in the assessment of the partners or the correction thereof is deemed to be a mistake apparent from the record within the meaning of the section, and sub-s. (1) applied thereto accordingly-the period of four years being computed from the date of the final order passed in the case of the firm. The discrepancy disclosed as a result of assessment, or reassessment of a firm between the share of a partner included in the individual assessment of that partner and his share disclosed in the assessment of the firm was not an error apparent from the record within the meaning of s. 35(1) and the Legislature enacted a fiction making the inclusion of the share in the assessment or correction thereof such a mistake. If the inclusion of the share or the correction of the assessment were an error apparent from the record and falling under cl. (1) of 8. 35, the enactment of 1. (5) was plainly unnecessary. When the Legislature has deliberately enacted a fiction of the nature set out in cl. (5), we are unable to agree with the contention raised by counsel for the Revenue that the enactment of the fiction was ex-abundanti cautela. Rectification of the nature contemplated by cl. (5) could not have been effected under cl. (1), and to remove the lacuna the legislature declared that what was not a mistake should for the purpose of rectification of assessment be regarded as a mistake apparent from the record and provided a terminus for the computation of the period of four years.

The assessments of the two firms were completed a long time before April 1, 1952 It is also common ground that the individual assessments of the assessee were not provisional but final assessments under 8. 23 (3) of the Income-tax Act.

The question which falls to be considered is whether relying upon cl. (5) of s. 35 an Income tax Officer may rectify the assessment of a person who is a partner of a firm when the assessment of the firm is completed before the 1st of April, 1952. The Legislature has given to cl. (5) a partial

retrospective operation. The provision enacted by cl. (5) is not procedural in character:

> it affects vested rights of the assessee. Therefore in the absence of compelling reasons the court would not be justified in giving a greater retrospectivity to the provision than is warranted by the plain words used by the Legislature. As observed by the Judicial Committee of the Privy Council in Income-tax Commissioner v. Khemchand Ramdas :
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> " x x x x when once a final assessment is arrived at, it cannot, in s their Lordships 'opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act x x x and within the time limited by those section."
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> The orders of assessment are, subject to the provisions relating to appeals, revisions, reassessment and rectification, final: it is not open to the Income-tax Officer to reopen the assessment because he thinks fit to do so. The provisions relating to assessments and rectification or reopening thereof are exhaustive, and may not be extended by analogies. The right to rectify an assessment may therefore be exercised in strict compliance with conditions prescribed by the statute in that behalf. Before April 1, 1952, rectification of assessment of an individual on the disclosure of errors consequent upon assessment of the firm of which he is a partner was not for reasons already stated permissible under cl. (1) of s. 35 This power was conferred for the first time by cl. (5) as from April 1, 1952, and by the express words of the clause arose from the assessment of the firm. If by the law prevailing at the time when the assessment of the firm was made, no such result as is contemplated by the new clause (5) arose, to give a larger retrospective operation than is directed, is to ascribe to the Legislature an intention different from the one expressed, and to make a larger inroad upon the finality of that assessment than is permitted by the Legislature. Section 35(5) does not purport to amend cl. (1); that clause is left untouched by the amending statute. Its application, by fiction, is extended to other clauses of cases by declaring what in truth are not mistakes, as mistakes. clause (5), therefore confers an additional power of rectification upon the Income- tax authorities and in the absence of compelling reasons we will not be justified in upholding the exercise of the power to assessments of firms which have been completed before the date on which the power was invested.
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> Some assistance may be derived from the phraseology used by the legislature in cl. (6) which was enacted simultaneously with. cl. (5). That clause provides, omitting parts which are not material:
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> "Where the excess profits tax or the business profits tax payable by an assessee has been modified x x x x or where any excess profits tax or business profit tax has been assessed after the completion of the corresponding assessment for income-tax (whether before or after the commencement of the Indian Income-tax (Amendment) Act, 1953), and in consequence thereof it is necessary to recompute the total income

> of the assessee chargeable to income-tax, such recomputation shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, x x x".

Manifestly, by the express provisions contained in cl. (6) the fiction applies whether the assessment is completed before or after the commencement of the Indian Income-tax (Amendment) Act, 1953. Even though cl. (6) is also made retrospectively operative as from April 1, 1952, the legislature has authorised the revenue authorities after April 1, 1952 to pass an order recomputing the total income of the assessee whether or not the assessment was completed before the commencement of the Indian Income tax (Amendment) Act, 1953. It is true that by the Explanation to that clause, for the purposes of this sub-section, where the assessee is a firm, the provisions of sub-s. (5) shall also apply as they apply to the rectification of the assessment of the partners of the firm, but thereby an intention to give a larger retrospective operation to cl. (5), in so far as it deals with rectification of assessments of partners consequential upon the completion of the assessment of the firm in which they are partners, is not indicated. When the legislature under cl. (6) of s. 35 expressly authorised rectification in the circumstances mentioned therein even if the assessment has been completed before the Indian Income-tax (Amendment) Act, 1953, and it made no such provision in cl. (5), it would be reasonable to infer that the Legislature did not intend to grant to the revenue authorities a power to rectify assessments falling within cl. (5) where the firm's assessment was completed before April 1, 1952.

In our view, it was rightly held in Kandan Lal v. Income-tax Officer following Kanumaralapudi Lakshminarayana Chetty v. First Additional Income- Tax Officer, Nellore that cl. (5), of s. 35 of the Indian Income-tax Act, which was enacted by the Income Tax, (Amendment) Act, 1953, was not declaratory of pre-existing law, and as it clearly affected vested right which had accrued to the assessee, must be deemed to have come into force from April 1, 1952. It had no greater retrospective effect than was expressly granted to it. The power to rectify assessment of a partner consequent upon the assessment of the firm of which he is a partner by including or correcting his share of profit or loss can therefore be exercised only in Case of assessment of the firm made on or after April 1, 1952. The Income-tax officer has no jurisdiction under cl. (5) of s. 35 of the Act to rectify the assessment of a partner of a firm consequent upon the assessment or reassessment of the firm disclosing an error made before April 1, 1952.

The appeals therefore fail and are dismissed with costs. On hearing fee.

Appeals dismissed.