**K. Simrathmull Vs. the Additional Income-tax Officer**

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**Court** : Chennai

**Decided On :** Oct-17-1958

**Reported in** : (1959)2MLJ189

**Appellant** : K. Simrathmull

**Respondent** : The Additional Income-tax Officer

**Judgement** :

**Balakrishna Ayyar, J.**

1. This is a Petition for the issue of a writ prohibiting the Additional Income-tax Officer, Ootacamund, from continuing certain proceedings which he initiated by means of a notice issued under Section 34 of the Income-tax Act, dated 6th February, 1957 and numbered as 86-S/45-46.

2. The petitioner is an assessee on the file of the Additional Income-tax Officer, Ootacamund, in G.I. No. 86-S. On 18th December, 1946, the Income-tax Officer assessed the petitioner on a total income of Rs. 5,143 under Section 23(3) of the Act. Subsequently, on 31st March, 1956, the Income-tax Officer re-assessed him on a total income of Rs. 39,568. In this amount was included a sum of Rs. 31,000 which the assessee alleged he had taken on loan from Messrs. Mangilal Inderchand, a firm carrying on business in Rajasthan, but which the Income-tax Officer held was Income from undisclosed sources.

3. The petitioner appealed to the Appellate Assistant Commissioner, Coimbatore and raised various contentions. One point that he took was that the Income-tax Officer had not judicially considered the evidence which he had tendered to show that the sum of Rs. 31,000 really represented a loan that he had taken from Messrs. Mangilal Inderchand. Alternatively he contended that in any event the entire sum of Rs. 31,000 would not come in for assessment for the assessment year 1946-47 as his previous year relevant for the assessment year 1946-47 ended on 5th November, 1945, and, it has been held that for assessing the income from other sources the previous year to be adopted is the financial year unless the assessee has any other previous year in respect of the same.

4. The Appellate Assistant Commisisoner did not accept the contention of the petitioner that the amount represented loans he had taken from Messrs. Mangilal Inderchand. He however found that a sum of Rs. 20,000 out of Rs. 31,000 came in as credits on 25th January, 1945 and 8th March, 1945 and that therefore the amount of Rs. 20,000 could not be assessed in the assessment year 1946-47. He therefore ordered that this sum of Rs. 20,000 should be deleted from the income for that year. This is what the Assistant Commissioner said in respect of this matter:

I would, therefore, sustain the action of the Income-tax Officer in treating the amount of Rs. 31,000 as income from undisclosed sources. Mr. Sethuraman argued at this stage that in any event the amount of Rs. 20,000 represented by credits on 25th January, 1945 and 8th March, 1945, would properly fall to be assessed in the assessment year 1945-46 following the judgment of the Patna High Court in the case of Commissioner of Income-tax, Bihar and Orissa v. P. Darolia & Sons : [1955]27ITR515(Patna) . Following the Judgment of the Patna High Court, I would concede the position in favour of the appellant and delete the amount of Rs. 20,000 from the assessment. The Income-tax Officer will be at liberty to re-open the assessment of 1945-46 for including this amount in that assessment.

5. The assessment for 1945-46 had been completed by the Income-tax Officer on 31st December, 1945. But acting on what the Appellate Assistant Commissioner

had said, the Income-tax Officer issued a notice, dated 6th February, 1957, under Section 34 of the Income-tax Act calling upon the petitioner to submit a return for the assesmsnet year 1945-46. On 18th June, 1957, the Income-tax Officer also issued a notice under Section 22(4) of the Income-tax Act calling upon the petitioner to produce his books relating to the year ended Deepavali, 1944. Since the notice related to a year eleven years prior to the date of issue of the notice the petitioner wrote to the Commissioner of Income-tax, Madras, asking to be informed how an assessment which was time-barred was sought to be made on him and also his reasons for sanctioning the commencement of the proceedings under Section 34 of the Act. On 22nd July, 1957, the Commissioner of Income-tax replied that the proceedings had been initiated by the Income-tax Officer under the second proviso to Sub-section (3) of Section 34 of the Act, he however refused to inform the petitioner on what grounds he had accorded sanction to the Income-tax Officer to re-open the assessment.

6. The petitioner has therefore, come to this Court for the issue of an appropriate writ to prohibit the Income-tax Officer, Ootacamund, from proceeding further with the matter.

7. The first contention which Mr. Subbaraya Ayyar, the learned advocate for the petitioner, put forward was that the proceedings which the Additional Income-tax Officer, Ootacamund, has now initiated are barred by limitation. His argument may be put this way. If the Income-tax Officer proceeded on the basis of Section 34(1)(b) of the Act he should have issued a notice within four years from the end of the assessment year, that is to say, on or before 31 st March, 1950. The second proviso to Sub-section (3) of Section 34 was amended by Central Act XXV of 1953. Sub-section (2) of Section 1 of that Act directed:

Subject to any special provision made in this behalf in this Act, it shall be deemed, to have come into force on the 1st day of April, 1952.

The result of it was that the second proviso to Sub-section (3) of Section 34 of the Act took effect only on 1st April, 1952. But before that date action under Section 24(1)(6) had become wholly barred, and if proceedings have once become barred, any subsequent amendments made in the Act cannot be called in aid to re-open

the assessment. This was decided in S.C. Prashar v. Vasantsen Dwarkadas (1955) 29 I.T.R. 857. The facts there were as follows. On 30th April, 1954, the Income-tax Officer served a firm P with a notice under Section 34 of the Income-tax Act for the assessment year 1942-43 on the ground that certain income of that year of a firm V should have been included in the income of the firm P but had been wrongly included in the income of D. The Petitioners therefore applied to the High Court for a writ prohibiting the Income-tax Officer from proceeding with re-assessment. Desai, J., held that the Income-tax Officer in issuing the notice on 30th April, 1954, which was more than eight years after 31st March, 1943, was in error because Section 34 as amended in 1953 could not apply to the assessment year 1942-43 which did not fall within the eight years preceding April, 1952. On appeal Chagla, G.J. and Tendolkar, J., affirmed the judgment of Desai, J. They held that the remedy available to the Income-tax Officer had already become barred under Section 34 before the amendment in the Act made in 1953. The vested right of the assessee could not be affected except by clear and express terms used by the Legislature. The Legislature did not intend to give any retrospective operation further back than 1st April, 1952. The remedy and the right of the Officer to re-assess was lost before 1st April, 1952. In consequence the notice was invalid.

8. We may explain here that the Bombay case was one under Section 34(1)(a) of the Act in relation to which the period is eight years where the income which has escaped assessment is less than one lakh of rupees.

9. To continue the argument of Mr. Subbaraya Ayyar : if the Additional Income-tax Officer proceeded on the basis of Section 34(1)(a) he should have issued his notice within eight years from the end of the assessment year, that is to say, before 1st April, 1954, since the income-tax which is said to have escaped assessment is less than one lakh of rupees. The Income-tax Officer can start proceedings under Section 34(1)(a) after the expiration of eight years only if the income that escaped assessment is one lakh of rupees or more. It was so held in Hiralal Amritlal Shah v. K.C. Thomas, Income-tax Officer, W. Ward, Bombay : [1958]34ITR446(Bom) . And this period of eight years would apply whether or not the notice is issued in consequence of or in order to give effect to any finding or

direction by an Income-tax authority contained in an order mentioned in the second proviso to Section 34(3) of the Act. Even though there may be a finding or direction in an order of an Income-tax authority, no notice of re-assessment can be issued against an assesse whose escaped income is less than one lakh of rupees after the expiry of eight years.

10. These contentions of Mr. Subbaraya Ayyar call for a careful examination of some of the provisions of Section 34 of the Act. That section is intended to deal with cases in which income has escaped assessment wholly or in part. Such cases are placed in two broad categories. Where income has escaped assessment wholly or in part, by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 or to disclose fully and truly all material facts necessary for his assessment for that year, it would fall under Section 34(1)(a). That is one category. Where income has escaped assessment wholly or in part owing to other causes, it would fall under Section 34(1)(b). That is the second category. In respect of cases falling under Section 34(1)(b) the Income-tax Officer may commence proceedings for re-assessment at any time within four years of the end of the assessment year. Cases falling under Section 34(1)(a) are divided into two sub-categories. Where the income which has escaped assessment wholly or in part is less than one lakh of rupees the Income-tax Officer has to take action within eight years. Where the income which has escaped assessment wholly or in part amounts to one lakh of rupees or more, he may take action at any time. Certain safeguards however are provided for the assessee. One is that the Income-tax officer is required to record his reasons for taking action. The other is that where the Income-tax Officer proposes to take action in cases where eight years have elapsed and the amount involved is one lakh of rupees or more the Central Board of Revenue must be satisfied that it is a fit case for issuing notice. In other cases, that is to say, in cases not reserved for the Central Board of Revenue, the Commissioner must be satisfied that it is a fit case for the issue of a notice. There are certain other provisions in the section which are not of present interest.

11. The provisions regarding limitation contained in Section 34(1) may therefore be thus summarised:

(1) Where income has escaped assessment wholly or in part, but such escape is not due to the conduct of the assessee, the priod of limitation is four years- whatever the amount.

(2) Where income has escaped assessment wholly or in part and such escape is due to the conduct of the assessee and the amount involved is less than one lakh of rupees, the period of limitation is eight years.

(3) Where income has escaped assessment wholly or in part and such escape is due to the conduct of the assessee and the amount involved is one lakh of rupees or more, there is no period of limitation.

12. We now come to the second proviso to Sub-section (3) of Section 34 of the Act which runs as follows:

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to a reassessment made under Section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A.

The first thing to be noticed here is that this proviso states 'nothing contained in this section' and not 'nothing contained in this Sub-section'. Therefore, this proviso would apply to Sub-section (1) also. The next thing to be noticed about this proviso is that it applies only to the 'time' prescribed elsewhere in the section and to nothing else. The effect of this proviso therefore is to abrogate or do away with the period of limitation prescribed in the section in those cases where the Income-tax Officer takes action in consequence of a finding or direction given in an order made under Section 31, 33, 33-A, 33-B, 66 or 66-A of the Act. The position, therefore, is that when action is taken in pursuance of a finding or direction given by one of the various authorities indicated in that proviso, the Income-tax Officer can take action at any time. This, of course, is subject to the general rule that he cannot take proceedings where before the proviso became law the remedy of the Income-tax Department had already become barred.

13. The decision in S.C. Parashar v. Vasantsen Dwarkadas (1955) 29 I.T.R. 857, which Mr. Subbaraya Ayyar relied on does not apply here because in that case the remedy of the Department had become barred before the second proviso to Sub-section (3) of Section 34 became law. So far as Hiralal Amritlal Shah's case : [1958]34ITR446(Bom) is concerned we find it difficult with all respect to the learned Judges to agree with the views expressed therein. As we have tried to explain, the second proviso to Sub-section (3) of Section 34 enacts that

Nothing contained in this section limiting the time within which any action may be taken.

shall apply where the Income-tax Officer takes action in consequence of a finding or direction given by the various authorities referred to in that proviso. The effect of these words is to completely abrogate the period of limitation laid down elsewhere in the section. At page 448 the learned Judges say,

Now a direction is not necessary for the issue of a notice. But as against that an assessee whose escaped income is not a lakh of rupees is completely protected and even though there may be a direction contained in an order of an Income-tax Authority no notice can be issued against the assessee if the escaped income is less than a lakh of rupees.

This view, it appears to us, does not give full effect to the words employed in the proviso.

14. That being so, before the plea of limitation which Mr. Subbaraya Ayyar raised can succeed, it must be shown that the remedy of the Department had become barred before 1st April, 1952. This can be shown only if the Department had taken action under Section 34(1)(b) since four years from 31st March, 1946, would end on 31st March, 1950. Now in paragraph 2 of his letter, dated 22nd July, 1957, addressed to the petitioner the Commissioner of Income-tax stated as follows:

The reasons for which sanction has been accorded by the Commissioner cannot be made known to you.

This sentence would be meaningless unless the intention was to refer to Sub-clause (iii) of the first proviso to Sub-section (1) of Section 34. From that the inference emerges that the Department was taking action under Section 34(1)(a) of the Act. The plea of limitation raised by Mr. Subbaraya Ayyar must, therefore, be overruled. Mr. Subbaraya Ayyar next said that there was no finding by the Assistant Commissioner that the amount of Rs. 20,000 would fall to be assessed in 1945-46, and, in this connection he referred to the case reported in Indurkar v. Pravinchandra Hemchand (1957) 34 I.T.R. 397. An examination of that judgment shows that all that the Assistant Commissioner therein said was, 'they could be assessed, if at all, for the tax year 1944-45 for which the Income-tax Officer may take necessary steps, if so advised.' He gave no direction and recorded no finding. The Appellate Assistant Commissioner in the present case, however, has definitely recorded a finding that the sum of Rs. 31,000 represented income from undisclosed sources. He then dealt with the argument of Mr. Sethuraman that the amount of Rs. 20,000 would properly fall to be assessed in the assessment year 1945-46. He accepted that contention following a judgment of the Patna High Court. To our minds this appears to be a finding clear enough to fall within the second proviso to Section 34(3).

15. Mr. Subbaraya Ayyar next said that the finding was not called for, and referred to Indira Balakrishna v. Commissioner of Income-tax, Bombay North : [1956]30ITR320(Bom) , where the learned Judges commented on the inadvisability of giving findings and expressing opinions on matters that did not really arise. But the present is not such a case. As already stated, Mr. Sethuraman, on behalf of the Petitioner, did raise the points on which the Assistant Commissioner has given his findings. It cannot, therefore, be said that the 'findings were gratuitous or uncalled for.

16. Mr. Subbaraya Ayyar then argued that even if it be right to say that the Assistant Commissioner has given a finding in respect of this sum of Rs. 20,000, that finding can be used only in respect of the assessment year in which he gave his decision. To support this argument no authority was cited and it appears to us to be completely untenable. When an assessment is made and either the Department or the assessee appeals, the whole matter would be before the

Assistant Commissioner, and no express provision would be necessary to enable him to give directions in respect of a matter already before him. This would apply also to the Commissioner and the Income-tax Appellate Tribunal. It is only to enable the Income-tax Officer to take action in pursuance of a finding recorded or directions given in respect of an assessment different from that covered by the appeal or revision as the case may be that special provision would be necessary. To construe the proviso in the manner in which Mr. Subbaraya Ayyar invited us to do would be to make that proviso otiose.

17. This is clearly a matter in which the Income-tax Officer has jurisdiction to act. What remedies are open to this petitioner against the decision of the Income-tax Officer does not arise for consideration now. The writ of Prohibition asked for cannot issue. The rule nisi is discharged and the petition is dismissed with costs. Counsel's fee Rs. 250.