

**(1965) 12 P&H CK 0012**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Civil Writ No. 1085 of 1962

Ram Bhagat

APPELLANT

Vs

The Commissioner, Income Tax  
and Another

RESPONDENT

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**Date of Decision:** Dec. 15, 1965

**Acts Referred:**

- Income Tax Act, 1922 - Section 35(1), 35(5)

**Citation:** AIR 1967 P&H 493 : (1966) 2 ILR (P&H) 393 : (1966) 61 ITR 146

**Hon'ble Judges:** S.B. Capoor, J; I.D. Dua, J; D.K. Mahajan, J

**Bench:** Full Bench

**Advocate:** D.C. Gupta and M.R. Aggarwal, for the Appellant; D.N. Awasthy and B.S. Gupta, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

1. This case has been referred to the Full Bench at the instance of my learned brother D.K. Mahajan, J. the reason being certain conflict of authorities bearing on the point involved in the case.

2. Briefly the facts are that Messrs. Fateh Chand-Jai Ram Das of Kaithal, a joint Hindu family firm (to be referred to as the Kaithal firm) was a partner in the firm Messrs. Ambala Flour Mills, Ambala City, the former's share being four annas in the rupee. For the assessment year 1948-49 the aforesaid share of the Kaithal firm was assessed at Rs. 7,499 and this assessment was finalised on the 15th September 1950.

3. However, the assessment of Messrs. Ambala Flour Mills was reopened u/s 34 of the Indian Income Tax Act, 1922 (Act No. XI of 1922), hereinafter to be referred to as the Act, by an order, dated the 31st March 1958, and for the aforesaid assessment year the income of the share of the Kaithal firm was determined at Rs. 53,843.

Thereafter, on the 6th August 1958, the Income Tax Officer issued a notice under Sub-section (5) of Section 35 of the Act to the Kaithal firm why its assessment should not be reopened. The assessee objected that Sub-section (5) of Section 35 was not applicable as the assessment for the year 1948-49 was completed on the 15th September 1950, but this objection was overruled by the Income Tax Officer by his order, dated the 16th October 1958, and he further issued demand notice against the assessee for the assessment year 1948-49 for Rs. 46,345, the difference in the share income (copy of order being Annexure "D" to the petition). The assessee's revision petition to the Commissioner of Income Tax, Punjab, was dismissed by the order, dated the 7th May 1962 (copy Annexure F) without giving hearing to him. The assessee then filed a writ petition under Article 226 of the Constitution to which the Commissioner, Income Tax, Punjab, as well as the Income Tax Officer, B Ward, Karnal, were parties and in essence the submissions made are that in the order of assessment of the Kaithal firm made on the 15th September 1950. there is no such error apparent on the face of the record which would attract the provisions of Sub-section (1) of Section 35 of the Act and inasmuch as the notice for rectification, dated the 6th August 1958, issued by the Income Tax Officer, was beyond the period of four years from the date of the finalisation of the assessment, the order could not be touched under Sub-section (1) of Section 35. As regards the deeming clause in Sub-section (5) of Section 35 of the Act, it is pointed out that it was enacted in the year 1953 and not being retrospective in its effect, it cannot be applicable to the assessment of a partner completed before the 1st April 1952.

4. Sub-section (1) of Section 35 of the Act, so far as material, is as follows:--

"The Commissioner or Appellate Assistant Commissioner may, at any time within four years from the date of any order passed by him in appeal or, in the case of the Commissioner, in revision u/s 33-A and the Income Tax Officer may, at any time within four years from the date of any assessment order or refund order passed by him on his own motion rectify any mistake apparent from the record of the appeal, revision, assessment or refund as the case may be, and shall within the like period rectify any such mistake which has been brought to his notice by an assessee".

5. The only other provision which needs notice is Sub-section (5), which is as follows:--

"Where in respect of any completed assessment of a partner in a firm it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm u/s 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A 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".

6. In support of the contentions advanced on behalf of the petitioner, there is a direct authority of the Supreme Court which is on all fours with the facts of the instant case [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others](#), . In that case the assessment of the assessee was completed on the 22nd January 1952. As the assessment of a firm in which the assessee had a share was not completed at that time, a certain amount was included as his share in the firm and the assessment orders were passed with a note that action u/s 35 of the Act would be taken when the correct share income was known. It was in the year 1954 that the assessment of the firm was completed and it was then discovered that the income of the share of the assessee in the firm was much higher than the figure previously included and then the revised assessment orders were made under Sub-section (5) of Section 35. It was held by Habibullah, J. speaking for himself and for the other Judges constituting the Bench, that Sub-section (5) of Section 35 was not applicable to cases where the assessment of the partner was completed before the 1st April 1952, even though the assessment of the firm was completed after the 1st April 1952. The ratio was that, though Section 35 (1) empowered the Income Tax authorities to rectify mistakes apparent from the record within four years from the date of the assessment order sought to be rectified, a mistake which becomes apparent only from the record of the firm was not a mistake apparent from the record so far as the assessment of the partner was concerned.

7. The learned Judges reiterated what had been held by them in a previous case in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah](#), , that a mistake discovered from the record of the disposal of an other case could not be said to be a mistake apparent from the record of the assessment already finalised in the assessee's own case. It should, however, be noted that the facts in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah](#), were somewhat different because the assessments of the assessee himself as well as of the two firms in which he was the partner had all been completed before the 1st April 1952. From the records of the firm it transpired that the proportionate share of the assessee in the losses of the firm was less than that which had been computed in his assessment. The Income Tax Officer on the 27th March 1954, revised the assessment of the assessee in respect of the two years in question after taking into account the share of the losses as computed in the assessments of the two firms. The Commissioner of Income Tax, to whom the assessee went in revision, held that Section 35 was properly invoked for rectification of the assessments and rejected the applications. The Madras High Court allowed the writ petitions under Article 226 of the Constitution filed by the assessee and quashed the order of the Income Tax Officer. The appeal by the Commissioner of Income Tax, Madras, to the Supreme Court failed.

8. In a Bench decision of this Court in [KUNDAN LAL Vs. Income Tax OFFICER, B WARD, AMRITSAR.](#), it was held that the Income Tax Officer had jurisdiction u/s 35 (5) of the Act to rectify an assessment of a partner of a firm completed in 1946, on a re-assessment of the firm u/s 34 made in March 1956, which necessitated the inclusion of the partner's correct share of the profits in his assessment. Though it is correct that in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#), the learned Judges referred with approval to certain observations in [KUNDAN LAL Vs. Income Tax OFFICER, B WARD, AMRITSAR.](#), yet that approval was not, to the decision of the case on the facts but to the principle enunciated, which was that Clause (5) of Section 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 rights which had accrued to the assessee, must be deemed to have come into force from the 1st April 1952. It had no greater retrospective effect than was expressly granted to it.

9. It has, however, been pointed out by Mr. D.N. Awasthy, learned counsel for the respondents, that in the decision of the Supreme Court in [The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another,](#) some of the learned Judges have cast doubts on the correctness of the previous decision of that Court in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#) and [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#). But it must be remembered that in [The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another,](#), the learned Judges were dealing not with Sub-section (5) of Section 35 but with Sub-section (10) of Section 35 of the Act, which deals with recomputation of the tax payable by a company on account of rebate of Income Tax being availed of by it wholly or in part for declaring dividend in any year, which amount would be deemed to have been made subject of incorrect relief under the Act. The counsel for the appellant in that case relied on [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#) and [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#). Out of the five Judges constituting the Court two (S.K. Das, J. who spoke for himself as well as for Kapur, J.) held that so far as the case before them was concerned, there was no reason why the principle laid down in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#) should not be applied, the principle being simply this: "A statute which is not declaratory of a pre-existing law nor a matter relating to procedure but affects vested rights cannot be given a greater retrospective effect than its language renders necessary, and even in construing a section which is to a certain extent retrospective, the line is reached at which the words of the section cease to be plain".

He observed, however, that the decision in [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#), may perhaps require reconsideration but about that the Judges did not express any final opinion then. Two other of the

learned Judges (Hidayatullah, J. and Raghubar Dayal, J.) considered the same arguments and were of the view that both [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah, \)](#) and [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#) may have to be reconsidered on some future occasion but they also emphasised that they did not express a final opinion on Sub-section (5) of Section 35 but would leave that to a future case. Sarkar, J., who agreed with Hidayatullah, J. and Raghubar Dayal, J. in holding that the appeal be dismissed, was of the view that [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#) as well as [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#) were entirely different from the case before the Court as the language used in Sub-sections (5) and (10) of Section 35 seems to be wholly different.

10. Mr. Puran Chand, learned counsel for the petitioner, has also emphasised that despite the doubts which some of the Judges constituting that Bench in [The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another,](#) expressed to the correctness of the decision in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah,](#) and [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#) . they were cautious to say that they were not expressing any final view on the scope of Sub-section (5) of Section 35 and that would have to be done at some future date when the appropriate occasion arose. So Mr. Puran Ghana argued that this Court cannot assume to itself the functions of the Supreme Court, and so far as it is concerned the authority of the Supreme Court in [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others,](#) , holds the field, and as it is fully applicable to the facts of the present case, it must be held that the Income Tax Officer had no jurisdiction on the facts as mentioned above to reopen on the basis of his notice u/s 35 (5) of the Act the assessment on the assessee, which had already been finalised before the 1st April 1952. This argument, in our view, is unanswerable and it must, therefore, be held that the enhanced assessment in the order, dated the 16th October 1958 of the Income Tax Officer in pursuance of the notice issued under Sub-section (5) of Section 35 of the Act is without jurisdiction and of no effect. This order and in consequence the order of the Commissioner of Income Tax, dated the 7th May 1962, are quashed by a writ of certiorari. As the legal question involved in this case is not free from difficulty, the parties are left to bear their own costs.