

(1963) 03 KL CK 0027

High Court Of Kerala

Case No: W.A. No. 59 of 1962

The 1st Addl. Income Tax Officer,
Trichur

APPELLANT

Vs

Paul Perincheri

RESPONDENT

Date of Decision: March 27, 1963

Acts Referred:

- Income Tax Act, 1922 - Section 35

Citation: (1963) KLJ 472

Hon'ble Judges: M.S. Menon, C.J; P. Govindan Nair, J

Bench: Division Bench

Advocate: G. Rama Iyer, for the Appellant; C.S. Venkiteswara Iyer and G. Rajagopal Rao, for the Respondent

Final Decision: Allowed

Judgement

M.S. Menon, C. J.

1. This is an appeal by the 1st Additional income tax "Officer, Trichur-the respondent in Original Petition No. 1012 of 1960- against the decision in that petition in so far as it is adverse to the Department. There is a memorandum of cross-objections by the petitioner in that case-the assessee, the respondent before us-challenging that portion of the decision which is not in his favor. This petition questioned the correctness of Ext. P. 2, an order of the 1st Additional income tax Officer, Trichur dated the 29th June 1960. That order was passed u/s 35(5) of the Indian income tax Act, 1922. The sole question for determination is whether action under that sub-section is permissible in this case.

2. Sub-section (5) of section 35 of the Indian income tax Act, 1922, reads as follows:

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 on any reduction or enhancement

made in the income of the firm u/s 31, section 33, section 33 A, 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 subsection (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.

The sub-section was inserted into section 35 by the Indian income tax (Amendment) Act, 1953 with effect from 1st April 1952.

3. Sub-section (5) of section 35 has no application to assessments completed before 1st April 1952. The decision of the Supreme Court in [Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others](#), is a direct authority for the proposition that the sub-section affects the vested rights of an assessee and is not "applicable to cases where the assessment of the partner was completed before April 1, 1952, even though the assessment of the firm was completed after April 1, 1952.

4. Another decision of interest is the decision of the Supreme Court in [Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah](#), . In that case the Supreme Court held that the income tax Officer had no jurisdiction under sub-section (5) of section 35 "to rectify the assessment of a partner consequent on the assessment of the firm, in cases where the firm's assessment was completed before 1st April 1952.

5. The assessee before us was a partner in a firm. He was originally assessed to income tax in respect of the assessment year 1950-"51 (accounting period 1124 M. E.) on the 28th December 1951." The original assessment of the firm was on the 9th June 1951. And so, if these are the material assessments, sub-section (5) of section 35 cannot certainly be invoked as they were anterior to 1st April 1952.

6. But there has been a reassessment, both of the firm and the assessee. The reassessment of the firm-in pursuance of an order of the Commissioner u/s 33 B dated the 21st May 1953-was "on the 28th April 1955. The reassessment of the assessee-in pursuance of a notice u/s 34 dated the 3rd August 1953-was on the 26th March 1959.

7. The assessment now sought to be rectified under sub-section (5) of section 35 is the reassessment of the assessee on the 26th March 1959, and the proceedings under that sub-section are consequent on the reassessment of the firm on the 28th April 1955. In these circumstances the dates, that are material, are the dates of reassessment, the 26th March 1959 in the case of the assessee and the 28th April 1955 in the case of the firm, and as both the dates are subsequent to the 1st April 1952, the proceedings u/s 35(5) have to be considered as valid and effective.

8. The learned Judge has not upheld Ext. P. 2 to the extent of Rs. 13,597/- on the ground that certain prior proceedings precluded that amount from being included in the order. The prior proceedings invoked cannot possibly affect the jurisdiction to rectify u/s 35(5) of the Act and we must hold that Ext. P. 2 has to be sustained in its entirety. It follows that the appeal filed by the Department has to be allowed and that the memorandum of cross-objections filed by the assessee has to be dismissed. We do so; but without any order as to costs.