(1982) 06 CAL CK 0001

Calcutta High Court

Case No: IT Reference No. 209 of 1974

Commissioner of Income Tax		APPELLANT
	Vs	
Keshardeo Bubna		RESPONDENT

Date of Decision: June 14, 1982

Acts Referred:

- Income Tax Act, 1922 - Section 22, 22(1), 22(2), 22(3), 23
- Income Tax Act, 1961 - Section 139(1), 139(2), 139(4), 143, 143(3)

Citation: (1983) 13 TAXMAN 87

Hon'ble Judges: Suhas Chandra Sen, J; Sabyasachi Mukharji, J

Bench: Division Bench

Advocate: S.K. Mitra and M.L. Bhattacharjee, for the Appellant; D. Pal and Manas Banerjee, for the Respondent

Judgement

Sen, J.
The Tribunal has referred the following two questions of law to this Court u/s 256(1) of the income tax Act, 1961 (''the Act'').

1. Whether, on the facts and in the circumstances of the case, the return of income furnished by the assessee was a valid return of income within the meaning of section 139(4) read with section 139(1) of the income tax Act, 1961?

2. If the answer to Question No. (1) is in the affirmative, then, whether, on the facts and in the circumstances of the case, the Tribunal was correct in cancelling the assessment made by the income tax Officer within four years from the end of the relevant assessment year on the basis of the return of income furnished by the assessee as void?

The facts briefly are that there was a search in the premises of the assessee in December 1965 and some account books were seized therefrom. On perusal of those books, the ITO came to believe that the income of the assessee from

pawn-booking business for the assessment years 1964-65 and 1965-66 had escaped the assessment. He, therefore, served notices u/s 148 of the Act, for these two years on the assessee on 3-2-1967. No status was shown in those notices. The notices also did not have any column for that purpose. In response to these notices, the assessee filed returns on 17-2-1967 showing the status of HUF on which the ITO completed the assessments determining the total income at Rs. 34,759 for the assessment year 1964-65 and Rs. 29,507 for the assessment year 1965-66.

2. The assessee filed appeals before the AAC and contended that the assessments were illegal and ab initio void. It was pointed out that whereas the assessments were completed in the status of HUF, the notices u/s 148 were issued in the name of Shri Keshardeo Bubna, without giving any indication of the status of the assessee. It was argued that the notices u/s 148 which were addressed to the individual Shri Keshardeo Bubna could not be made a valid foundation for proceedings to reassess the income of the HUF of which Shri Bubna was the karta. The AAC held that the notices were defective and not valid in the eye of law and as such the assessment proceedings based on the same were ab initio void. She, accordingly, cancelled both the assessments.

3. Before the Tribunal, it was contended on behalf of the ITO that on the facts of this case a valid notice has been issued by the ITO u/s 147 of the Act. It was also argued that the returns filed by the assessee were valid as these returns could have been filed voluntarily on the dates they were filed under the provisions of section 139(4) of the Act.

4. The Tribunal held that the notices served on the assessee were defective insofar as the assessee''s status was not mentioned therein. In regard to the departmental representative''s reliance on the case of Commissioner of Income Tax, Madras Vs. S. Raman Chettiar, , it was held that this decision turned on a different point namely, obtaining of the sanction of the Commissioner, and so the same was of no help to the department. The departmental appeals were accordingly dismissed.

5. When the application for reference u/s 256(1) was taken up by the Tribunal, it was argued on behalf of the assessee that the question whether the returns filed by the assessee could be treated as returns filed voluntarily u/s 139(4) was not raised before the AAC and this point should not have been allowed to be raised before the Tribunal for the first time. The Tribunal pointed out that there was no objection by the assessee to the raising of this point which was a pure question of law when the appeal was actually argued before the Tribunal. The Tribunal, therefore, referred the two questions of law to this Court.

6. This case relates to the assessment years 1964-65 and 1965-66. The returns pursuant to notices u/s 148 were filed by the assessee in the status of HUF on 17-2-1967. It has been argued that the notices were issued u/s 147(1) on the assessee on 3-2-1967 in respect of both the assessment years. The Tribunal has held

that the notices were bad. The finding, however, will not render the assessments bad because the returns having been filed within a period of four years could be treated as valid returns and the assessments could be made on these returns in accordance with law.

7. This argument advanced on behalf of the revenue finds support from the decision of the Supreme Court in the case of Raman Chettiar (supra). In that case for the assessment year 1944-45, the ITO issued a notice u/s 34 of the 1922 Act on 3-4-1948. A return was filed by the assessee pursuant to the notice on 4-9-1948. Prior sanction of the Commissioner for issue of the notice u/s 34 had not been obtained; the assessee also disclosed his income below taxable limit. The proceedings for the assessment were dropped by the ITO. In the case of the assessment proceedings for the year 1945-46, the Tribunal held that a sum of Rs. 46,760 was assessable in the assessment year 1944-45, and thereupon, the ITO issued a notice u/s 34 on 27-2-1953, in respect of the assessment year 1944-45, and passed an assessment order on 30-6-1953. The validity of the notice issued u/s 34 on 27-2-1953 and the assessment made pursuant thereto on 30-6-1953 was challenged. It was argued on behalf of the assessee that "in this case the assessment could have been made by the ITO, till 31-3-1949, u/s 23 treating the return as one made u/s 22". The Supreme Court in that context observed as follows:

Section 22(3) permits an assessee to furnish a return at any time before the assessment is made. By virtue of section 34(3), as it stood in 1949, assessment could have been made at least up to 31-3-1949 if the return was valid. Therefore, it may be implied, as laid down in S. Santosha Naddar v. First Addl. ITO, Tuticorin and Commissioner of income tax v. Bhagwandas Amersey that the return must be filed before the time mentioned in section 34(3). This condition is, however, satisfied in this case. Mr. Sastri says that it is further implict in section 22(3) that the return must be voluntary. We are unable to appreciate that every return made u/s 22(3) must be a voluntary return, in the sense that it must be suo motu. If a return is made in pursuance to a general notice u/s 22(1) or a special notice u/s 22(2), it is a return made voluntarily but not suo motu. It is a return made in response to a public notice or a special notice. If no return is made in response to notices u/s 22(1) and section 22(2), the Act attaches certain penalties. In our view, it is not correct first to describe a return made u/s 22(3) in response to a notice u/s 22(1) or section 22(2) as voluntary, and then say that a return made in response to a notice u/s 34 is not voluntary just because it warns the assessee that some income has escaped assessment. In our opinion, both types of returns are u/s 22(3) of the Act. In the first type of cases it is directly u/s 22(3). In the case of a notice u/s 34, it is deemed to be a notice u/s 22(2) and the return deemed to be a return u/s 22(3). From the language of section 22(3), we are unable to say that the return dated September 4, 1948 was not a return within section 22(3). (p. 634)

8. On behalf of the assessee, it has been contended that the Supreme Court has laid down a contrary proposition of law in the case of Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty, . If the notice u/s 148 is invalid, the return filed pursuant to such a notice is also non est and no assessment can be made on the basis of such a return. It has been further argued that there is a conflict between the two judgments of the Supreme Court in the cases of Adinarayana (supra) and Raman Chettiar (supra) and the later decision of the Supreme Court should be followed.

9. In our opinion, there is no conflict between the two decisions of the Supreme Court that has been cited before us. In the case of Adinarayana (supra), a notice u/s 34 was issued for the assessment year 1949-50, on 22-3-1957 in the status of an ''individual''. A return had been filed by the assessee, pursuant to that notice. The ITO, however, dropped the proceedings pursuant to the first notice and issued a fresh notice u/s 34 on 12-2-1958, which was served on the assessee describing the assessee as a HUF. The question that came up before the Supreme Court was, whether it was competent for the ITO to issue the second notice dated 12-2-1958 ignoring the return already filed by the assessee in pursuance of the first notice u/s 34. It was argued before the Supreme Court that the assessee filed his return in the status of HUF in response to the first notice and the ITO ought not to have ignored that return. The Supreme Court repelled that argument and observed:

...We are unable to accept the argument put forward on behalf of the assessee as correct. The ITO could not have validly acted on the return filed by the assessee in the status of ''Hindu undivided family'' and any assessment made by the income tax Officer on such return would have been invalid in law because the notice u/s 34 had been issued in the status of ''individual'' and sanction of the Commissioner for the issue of a notice u/s 34 was also obtained on that basis. We, therefore, consider that the income tax Officer was entitled to ignore the return filed by the assessee as non est in law. It is not disputed that the income tax Officer issued the first notice u/s 34 of the Act on March 22, 1957, to the assessee in the status of ''individual''. The Appellate Tribunal has stated in paragraph 3 of the statement of the case that the income tax Officer had taken the view that the correct status of the assessee was ''individual'' and in accordance with that view a notice u/s 34 was issued to the assessee as above for making an assessment in the status of ''individual''. As there was some ambiguity in the statement of the case on this point, we referred to the original file of the income tax proceedings and satisfied ourselves that the assertion of fact made in the statement of the case is correct. It appears that on February 13, 1957, the income tax Officer had applied for the sanction of the Commissioner for instituting proceedings u/s 34(1)(a) of the Act against the assessee to make an assessment in the status of an ''individual'' with regard to the procurement agency business. Sanction of the Commissioner was given to the proposal of the income tax Officer and thereafter the first notice u/s 34 of the Act was issued on March 22, 1957. In this state of facts we are of opinion that the proceeding taken under the

first notice u/s 34 of the Act was invalid and ultra vires. The correct status of the assessee was that of ''Hindu undivided family'' as was held by the Appellate Assistant Commissioner in the assessment for the year 1954-55 and since the first notice u/s 34 was issued to the assessee as an ''individual'' for making assessment in that status, it is manifest that the proceedings taken under that notice were illegal and without jurisdiction. Under the scheme of the income tax Act the ''individual'' and the ''Hindu undivided family'' are treated as separate units of assessment and if a notice u/s 34 of the Act is wrongly issued to the assessee in the status of an ''individual'' and not in the correct status of ''Hindu undivided family'' the notice is illegal and all proceedings taken under that notice are ultra vires and without jurisdiction.... (pp. 610-11)

10. It has to be borne in mind that when the notice dated 22-3-1957 was issued, the ITO could not lawfully make an assessment u/s 23 of the 1922 Act and the assessee could not file a valid return of income for the assessment year 1949-50. The proceedings for the assessment had become barred by limitation and the only way an assessment could have been made on that date was by taking recourse to the provisions of section 34. By issuing a notice u/s 34 in the status of an individual, the ITO could not have assessed the assessee in the status of a HUF. Even if the assessee filed a return voluntarily as a HUF after limitation had set in, the ITO could not proceed to assess the HUF without invoking jurisdiction for doing so by issuing a proper notice u/s 34. Seen in the context of the facts of the two cases there does not appear to be any conflict between the two judgments of the Supreme Court.

11. The facts of the case before us are similar to the facts of the case of Raman Chettiar (supra). In this case, the assessee could have filed returns for the assessment years 1964-65 and 1965-66 at any time before 31-3-1969 and 31-3-1970. The returns were actually filed on 17-2-1967. The assessments were completed on 28-3-1969 and there was no legal impediment to completing those assessments. The ITO in this case did not have to fall back upon a notice u/s 148 to overcome the period of limitation or to reopen a completed assessment. It has been argued on behalf of the assessee that if the notice u/s 148 is held to be bad, it must follow that the returns made in pursuance of it must also be treated as bad. The Supreme Court in the case of Raman Chettiar (supra), specifically rejected this argument and held that there was no substance in this contention. The Supreme Court observed that "we are unable to appreciate that if the ITO had based his assessment on the return treating it to be a return u/s 22(3), the assessment would not stand a moment''s scrutiny".

12. In that view of the matter in this case the return being a valid return, the assessment made on that return cannot be said to be bad merely because the notice u/s 148 was held to be defective by the Tribunal. In this case, it has further to be borne in mind that for issuing a notice u/s 148 within a period of four years from the end of the assessment year, the ITO did not have to obtain the sanction of the

Commissioner. He could have proceeded to make an assessment u/s 143 or u/s 144 even without any return being filed by the assessee. He had jurisdiction to pass the orders of the assessment under sections 143 and 144 of the Act, and he did not have to invoke jurisdiction by issuing a notice u/s 148 as in the case of Adinarayana (supra).

13. An argument was advanced on behalf of the assessee that this construction of law should be avoided because in that event, the ITO will have an unfettered discretion to start the proceedings u/s 148 or to make a regular assessment u/s 143 or 144 in all cases of reopening of the assessment within a period of four years. We are unable to accept this contention. The proceedings for the assessment whether in a case of reopening under sections 147 and 148 or in a regular assessment u/s 143(3) are not different. Even in a case where a notice has been issued u/s 148, the assessment will have to be done under the provisions of the Act as if the notice was a notice u/s 139(2). This has been specifically provided by section 148. Therefore, there is no question of two alternative procedures for the assessment being open to the ITO, one in case of a notice u/s 148 and another in the case of a regular assessment u/s 143.

14. It has also been argued that unlike the repealed Act, the Act provides for the assessment u/s 147 itself. It has been argued that under the 1922 Act u/s 34 only a notice could be issued but the assessment had to be done u/s 23 whereas under the 1961 Act it has been specifically provided that u/s 147 ''the ITO may assess or reassess''. The phraseology used in section 34 is that the ITO ''may proceed to assess or reassess''. It has been argued that the significance of the difference between the two phraseologies ''proceed to assess and reassess'' has been pointed out by the Supreme Court in the case of The Indian Aluminium Cables Ltd. and Another Vs. The Excise and Taxation Officer and Another, . In our opinion, the scheme of the assessment proceedings u/s 34 of the repealed Act and the proceedings under sections 147 and 148 of the 1961 Act are not different in the way it has been suggested. Section 147 merely authorises the ITO to make an assessment. It is not an assessing section by itself. The ITO will have to fall back upon section 143 or section 144 to complete the assessment proceedings. The decision of the Supreme Court in the case of Indian Aluminium (supra) does not render any assistance to the contention of the assessee. In that case, the Supreme Court was construing the provisions of the Punjab General Sales Tax Act. An argument was made on behalf of the appellant in that case that the assessing authority could not assess the tax payable by the appellant on the expiry of the period of five years from the end of each quarter. The Supreme Court repelled that argument and observed that if a dealer does not file a return being liable to pay tax, then action under subsection (5) or sub-section (6), has to be taken by the assessing authority within the period of five years prescribed therein. The expression ''proceed to assess'' in those two sub-sections as also in sub-section (4) means taking some effective step towards proceedings to make the best judgment assessment in

accordance with the sub-section which may be applicable. In a given case action may be taken u/s 11-A(1) of the Act treating the case as a case of escaped assessment within the meaning of said section. But the assessing authority has got to proceed to assess or reassess within five years following the close of the year for which the turnover is proposed to be assessed or reassessed."

15. Strong reliance has been placed by the assessee on the passage we have extracted above from the judgment of the Supreme Court. In our opinion, the problem before us is quite different. The distinction between ''assess and ''proceed to assess'' does not throw any light on the question before us.

16. In view of the facts of this case, and in view of the principles laid down by the Supreme Court in the case of Raman Chettiar (supra), the assessment orders must be held to be validly made. We, therefore, answer the first question in the affirmative and in favour of the revenue. The second question is answered in the negative and in favour of the revenue.

Mukharji, J. -

I agree.