(1981) 04 CAL CK 0005

Calcutta High Court

Case No: IT Reference No 234 of 1971

Commissioner of Income Tax	APPELLANT
Vs	
Barick Screen Corpn.	RESPONDENT

Date of Decision: April 22, 1981

Acts Referred:

- Income Tax Act, 1922 - Section 34, 34(1), 66(2)
- Income Tax Act, 1961 - Section 139, 148, 25A(3), 34(1)(a)

Citation: (1981) 7 TAXMAN 304

Hon'ble Judges: Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench: Division Bench

Advocate: S.C. Sen and B.K. Naha, for the Appellant; D. Pal and A.K. Roy Chowdhury, for the Respondent

Judgement

Sabyasachi Mukharji, J.
In this reference u/s 66(2) of the Indian income tax Act, 1922, as directed by this court, the following two questions have been referred to this court.

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the pre-requisite condition for initiating proceedings u/s 34 of the Indian income tax Act, 1922, was not satisfied and that consequently the assessment made u/s 34(1)(a) of the said Act is liable to be cancelled?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessment made u/s 34(1)(a) of the Indian income tax Act, 1922, was not valid on the ground that the assessee was assessed in the status of an association of persons?

To answer these questions, it must be stated that three brothers, Sambhu Nath Barick, Sarojendra Nath Barick and Sachindra Nath Barick, jointly purchased a house property situated at No. 84, Cornwallis Street, Calcutta. The purchase deed

mentioned the three persons as joint owners. After the purchase of the property, a portion of it was demolished and in its place a cinema house was constructed and the machinery etc., were installed in the course of a few years. The cinema hall was opened for exhibition in 1954. During the period of construction, a cash book was maintained in the name of M/s. Barick Screen Corporation and accounts were audited by M/s. Green & Co. Subsequently, a partnership deed was executed on June 11, 1954, by which a partnership in the name of M/s. Barick Screen Corporation was formed to run the cinema hall. Since, in the opinion of the ITO, the income of M/s. Barick Screen Corporation had escaped assessment for the assessment year 1952-53, he intended to initiate reassessment proceedings against it. For this purpose, a proposal for issuing notice u/s 34(1)(a) of the Indian income tax Act, 1922, was submitted by the ITO, Cinema Circle, A-Ward, to the CIT. It would be necessary to set out the name in which the action was sought for, which was as follows:

Name and address.... Messrs. Barick Screen Corporation,

of the assessee 84, Cornwallis Street, Calcutta.

Status.... U.R.F.

2. The Commissioner gave his approval on May 7, 1959. Pursuant to this, notice dated May 21, 1959, u/s 34(1) of the Act was issued that was addressed as under:

M/s. Barick Screen Corporation, 84, Cornwallis Street, Calcutta.

3. The notice did not indicate the status of the assessee. The notice in question was sent by registered post and the acknowledgment on record showed the date of receipt as May 25, 1959. On June 26, 1959, the assessee wrote to the ITO, that the notice, issued u/s 34 of the Act and served on it, had no legal validity for the assessment year 1952-53, inasmuch as there was no existence of the firm during that year and that the firm named Barick Screen Corporation was registered oh June 11, 1954. Subsequent to this, the ITO made certain enquiries, and wrote a letter to Barick Screen Corporation on July 1, 1960, which was to the following effect:

Kindly refer to your letter No. Nil dated June 26, 1959, in the above matter filed by your authorised advocate, Sri S.K. Ghatak. It is stated that M/s. Barick Screen Corporation was not in existence in the previous year for the assessment year 1952-53. If it is so, kindly let me know how the books of account were written up and maintained in the name of Barick Screen Corporation from the calendar year 1948 onwards. It may also be noted, in this connection, that these books of account were audited by a chartered accountant and he has certified about these accounts after the audit was completed.

It shows from the books of account then that Barick Screen Corporation, Calcutta, existed as far back as 1948. It was only on June 11, 1954, that the partnership agreement was reduced in writing and a formal deed was executed.

If you still do not agree that there was an existence of M/s. Barick Screen Corpn. in the previous year for the assessment year 1952-53, then you would kindly let me know who is the accountable person in respect of investment made in the property at No. 84, Cornwallis Street, during the previous year and if such persons are more than one what should be their status.

4. On August 5, 1960, a return of income was filed by M/s. Barick Screen Corporation in the status of a firm. This return was signed by one of the partners and was dated August 1, 1960. The partners of the firm as shown in the return were (1) Sambhu Nath Barick, (2) Sarojendra Nath Barick, and (3) Sachindra Nath Barick. Each partner was shown as having one-third share. The return showed nil income. On August 9, 1960, the authorised advocate of M/s. Barick Screen Corporation again wrote to the ITO that his client no longer disputed as to the actual date of the establishment of the firm and, therefore, it had filed the returns called for u/s 34 of the Act for the assessment years 1951-52 to 1954-55 which might be treated as final compliance with the ITQ''s letter dated July 1, 1960. Subsequently, further investigation was made by the ITO and in the course of the assessment proceedings, a partner of the firm, Sambhu Nath Barick, addressed to the ITO, a letter which reads as follows:

We, the partners of Barick Screen Corporation, try to point out the following facts in respect of 1952-53 assessment year, proceedings for which you have initiated u/s 34 against us:

Our business-name came into existence in 1954, when we formed a partnership; a copy of the instrument of partnership is already in your records. Therefore, there was no firm in existence in the name of Barick Screen Corporation before 1954, neither the present partners were partners therein; moreover there was absolutely no business in existence at that time.

In the circumstances, we may humbly point out that your notice u/s 34 to such a person or firm for the year 1952-53 was wrong.

5. The assertion made in that letter that in respect of the assessment year 1952-53, there was no firm by the name of Barick Screen Corporation was reiterated also in the subsequent letter. There was no dispute that the partnership deed is dated June 11, 1954. The ITO made the assessment and in the assessment order, the particulars given were as follows:

2. Name of assessee (with complete address)	Sambhunath Barick & Others, 84, Cornwallis Street, Calcutta.
3. Status	Association of persons.

6. Though the name of the assessee given was, as indicated above, the assessment order stated, after discussing the facts, as follows:

That being the case, the assessment is made on M/s. Barick Screen Corporation, as an association of persons.

7. The ITO after discussing the facts relating to the purchase of the property by the three brothers in the joint names and subsequent construction of the cinema house, held that the brothers constituted an association of persons and the assessment was so made by him. The ITO also enquired into the source of the funds utilised for the construction of the cinema house and found a deposit of Rs. 1,10,000 in the names of 9 different persons. As the deposit could not be proved by the assessee, these amounts were treated as assessable income of the assessee.

8. The assessee appealed to the AAC and contended that the proceedings initiated u/s 34 of the Act were illegal and ultra vires, inasmuch as the condition precedent to such proceedings did not exist. It was, then, contended that there was no association of persons in existence in the name of Sambhu Nath Barick and others and in any case Barick Brothers or Barick Screen Corporation had no taxable income in the relevant previous year in respect of the house purchased and, therefore, the ITO had erred in treating the cash credits as the income of the assessee from undisclosed sources. The AAC after discussing the relevant authorities, confirmed the order of the ITO.

9. The assessee, thereupon, went on appeal before the Tribunal. One of the grounds urged before the Tribunal was that the condition precedent to the proceedings u/s 34 of the Indian income tax Act, 1922, did not exist in this case and, hence, the assessment made was illegal and ultra vires. It was submitted on behalf of the assessee that for the initiation of proceedings u/s 34, service of a valid notice on the assessee was a pre-requisite. It was submitted that in the instant case that had not been done and further there was no waiver in the instant case and as such the assessment made was illegal and was liable to be quashed. The Tribunal, after noting the relevant contentions, was of the view that the notice was addressed to Barick Screen Corporation which did not mention the status. The Tribunal further noted that the approval of the Commissioner was obtained for initiating the proceedings u/s 34 in respect of M/s. Barick Screen Corporation, in the status of an unregistered firm. The Tribunal further stated that the return was filed in the name of Barick Screen Corporation in the status of a firm and the assessment order gave a clear finding that the assessment was made on Barick Screen Corporation as an association of persons. The Tribunal was of the view that so far as the assessee''s status was concerned the approval of the Commissioner was obtained for initiating proceedings u/s 34 in respect of the unregistered firm but the assessment was made on an association of persons. In that view of the matter, the Tribunal was of the view that the notice served on the assessee initiating proceedings u/s 34 of the Act were bad and, therefore, the assessment order was cancelled. In the premises,

after a refusal by the Tribunal to refer certain questions of law, as directed by this hon''ble court u/s 66(2) of the Indian income tax Act, 1922, the Tribunal has referred the questions, as we have indicated before. Though, two questions are before us, really they are inter-linked. If the condition precedent for the initiation of proceedings has not been fulfilled then the assessment is liable to be quashed. If, on the other hand, the condition precedent was fulfilled, then on this ground, the assessment was not liable to be quashed. Now, in this case, it is manifest, the principles are fairly well settled and it is not necessary, in our opinion, to mention them though we will briefly note, out of deference to the arguments advanced from the bar, and refer to some decisions. Unlike the assessments in the regular course, for reassessments notices u/s 34 were a pre-condition. A valid notice u/s 34 must be served. In order to be a valid notice, the notice should not be vague. The sanction should be obtained from the Commissioner for the purpose of reopening the assessment. It is also well settled that the status of an assessee in the case of a first assessment can be determined in the assessment proceeding. There is no clear finding whether this was the first assessment. But it is evident from the facts that there was no assessment either in the name of Barick Screen Corporation as a firm or as an association of persons, or as an unregistered firm prior to the issue of the notice u/s 34 in the instant case. It is true that the notice was issued to M/s. Barick Screen Corpn. But the notice itself did not indicate the status of the person to whom the notice was given. It cannot also be disputed and it was not, in fact, disputed that the notice did not indicate the status. It is true that the sanction of the Commissioner was obtained for an unregistered firm. The assessee was indicated as unregistered firm while the assessment was made on the association of persons. The question is, does the alteration of this status alter the identity of the assessee against whom the sanction was obtained. In our opinion, it is clear, it does not. Status is a matter which has to be determined in the assessment proceedings, specially when an assessment is being made, for the first time. Reliance in this connection, was placed on behalf of the assessee on the decision of the Supreme Court in the case of Commissioner of Income Tax Andhra Pradesh Vs. K. Adinarayan Murty, . In that case, there were two different assessees and it was held that since the correct status of the respondent was that of an HUF, the first notice issued in the status of an individual was illegal and without jurisdiction and could not have been validly acted upon, according to the Supreme Court. There, the facts were, the respondent was an HUF. Subsequent to the original assessment, the ITO had an information that the respondent had done some procurement business and earned large profits which had escaped assessment for the assessment year 1949-50. Since the assessment year 1954-55, the ITO had taken the status of the respondent to be that of an individual. He issued a notice u/s 34 of the Indian income tax Act, on March 22, 1957, to reopen the assessment for the assessment year 1949-50, in that status. The respondent, however, filed the return in the status of an HUF. Pending the proceedings, the AAC, in an appeal against the assessment for the year 1954-55, held that the status of the respondent was that of an HUF. Thereafter, the ITO

issued a fresh notice u/s 34 on the February 12, 1958, to reassess the income of the respondent for the year 1949-50, as an HUF. A second return was duly filed pursuant to the second notice and the ITO made an assessment on August 16,1958. Both the notices were, however, in identical terms. The question was whether the assessment made pursuant to the second notice and the second return, ignoring the first return, filed pursuant to the first notice was valid. It was held that since the correct status of the respondent was that of an HUF, the first notice in the status of an individual was illegal and without jurisdiction and the ITO could not have validly acted on the return filed by the respondent, pursuant to that notice, notwithstanding that it was made in the status of an HUF and any assessment made on such a return would have been invalid. The ITO was entitled to ignore that return as non est in law. The second notice issued on February 12, 1958, was valid and the return filed in response to that notice and the assessment thereon were valid. The Supreme Court reiterated that under the scheme of the income tax Act, an individual and an HUF were there as separate units of assessment and if a notice u/s 34 of the Act was wrongly issued to the assessee in the status of an individual and not in the correct status of an HUF, the notice was illegal |and all proceedings taken under that notice were ultra vires and without jurisdiction. There, as the narration of the facts would indicate, were two assessees. Therefore, the status of the assessee was necessary to indicate the identity of the assessee. For the same purpose, our attention was drawn to several other decisions to which we shall presently refer. Our attention was drawn to a Bench decisions of this court in the case of SEWLAL DAGA Vs. COMMISSIONER OF Income Tax, CALCUTTA., , to a single Bench decision of mine in the case of Shyam Sundar Bajaj Vs. Income Tax Officer, "A" Ward and Others, . This court had an occasion to discuss this proposition in a Bench decision of this court in the case of Mahabir Prasad Poddar Vs. Income Tax Officer, "B" Ward and Others, . There, it was contended that for reassessment, a valid notice u/s 148 of the income tax Act, 1961, indicating to whom it was issued, whether to an individual or to an HUF, was a necessity and that, as the notice u/s 148, in that case, did not indicate in what capacity the notice was issued, the assessment was invalid. It was found in that case, that where the question was of first assessment, as in the instant case before us, and M, the person responsible for filing the return, in his own showing, had first indicated that the assessee was an individual and, thereafter, indicated that it was an HUF and the reassessment was made by a notice served on M and, without indicating any official capacity the notice had been given, it could not be said that the assessment made, in that case, was without jurisdiction. It was reiterated that it was not obligatory to indicate before the service of the notice u/s 139 under what capacity the notice was served but in a case of reopening it was emphasised that the obligation of an assessee would arise on the service of the notice and, before the service of the notice, the Revenue authority should fulfil certain conditions precedent and one of the conditions required to be fulfilled was that the ITO should have reasons in his possession to believe that the income of the particular assessee had escaped assessment and until and unless the ITO was sure, as to who the

assessee was, it was not possible for the ITO to serve notice u/s 148 of the income tax Act, 1961. In this background, it was stressed that an individual and an HUF were two different and separate entities in the scheme of the income tax Act and, therefore, as there were two different and separate entities to be assessed, on the notice given to one entity indicating one status, an assessment on another would be invalid. But, in the case of the first assessment, where are no two separate assessees, if the status, which is determinable in the assessment proceedings, had not correctly been determined before the proceedings, or before the notice, in our opinion, that would not invalidate the proceedings. In that case, we discussed the special features of the decisions of the Supreme Court and reiterated that it was in the peculiar facts that the Supreme Court came to the conclusion. The view that we took was fortified by a Division Bench decision of the Gujarat High Court in the case of Chooharmal Wadhuram (Decd.) (by Legal Representatives) Vs. Commissioner of Income Tax, Gujarat II, and we relied on the observations of the Acting Chief Justice Bhagwati at page 100 of the report. It is not necessary for us to reiterate the said observations. In our opinion, the said observations would be apposite to the facts of this case. It is well settled and we reiterated in the aforesaid decision in the case of Mahabir Prasad Poddar Vs. Income Tax Officer, "B" Ward and Others, , that if the status of an assessee was wrongly described, it could always be corrected by the ITO in the course of the assessment proceedings, but that cannot affect the validity of the assessment proceedings. The same would be the position in obtaining the sanction. The position would, of course, be different where the status was inextricably mixed up with the question, as to who was the assessee, when the description of the status one way would be referable to one assessee while the description of the status the other way would be referable to another assessee. That is, however, not the case before us.

10. The view we are taking is also corroborated by the decision of the Allahabad High Court in the case of KANODIA BROTHERS Vs. Income Tax OFFICER., and the observations of the Supreme Court in the case of Manji Dana Vs. Commissioner of Income Tax, Madhya Pradesh Bhandara and Nagpur, . There the Supreme Court reiterated that there was nothing in the Act which precluded the ITO from coming to a conclusion that, even though in the previous year the assessment was made on the footing that the assessee was an HUF, but there was, in fact, no HUF, and so the income for the purpose of assessment belonged to an individual, and on that footing to make an order of assessment. It was also open to the ITO to come to a conclusion, notwithstanding the terms of section 25A(3), that the income sought to be assessed was not the income of the HUF and on that footing to assess such income as that of an individual.

11. Mr. Justice Shah observed at page 585 of the report as follows:

It is only where such family existed and the income earned was of the family that the income tax Officer is obliged to assess the income of the members of the family

in the status of a Hindu undivided family, notwithstanding a plea that a partition has taken place among the members. But there is nothing in the Act which precludes the income tax Officer from coming to a conclusion that even though in the previous year the assessment was made on the footing that the assessee was a Hindu undivided family, there was in fact no Hindu undivided family and the income for the purposes of assessment belonged to an individual, and on that footing to make an order of assessment. It is also open to the income tax Officer to come to a conclusion, notwithstanding the terms of section 25A(3), that the income sought to be assessed or reassessed is not the income of the Hindu undivided family, and on that footing to assess such income as that of an individual.

12. Our attention was drawn to a decision of Bombay High Court in the case of Madhav Motor Stores Vs. Commissioner of Income Tax, . There the reference was concerned with the assessment year 1946-47 and the corresponding previous year was 1945. The assessee was an HUF doing business in petrol and textiles. One Srikrishna Baijnath, who died in 1933, left behind him three sons. The income from this business was assessed in the status of an HUF. Another business called Ruia Textiles Co. was started after his death in or about 1939. Similarly, two other businesses in the names of Textile Agents and Chemical Agents were also started in 1941 and 1942, respectively. On December 15, 1941, the three brothers entered into an agreement in which it was stated that they had effected a severance amongst themselves from January 1, 1940. The agreement was apparently to keep a record of the partition to avoid future disputes. In the document it was, inter alia, mentioned that the first two businesses could not be divided and were, accordingly, held by them as tenants-in-common in equal shares. On that very date, a partnership deed covering the two, businesses were entered into. From 1942-43 onwards, it was claimed that the income from these businesses would be assessed on the firm. This claim, however, was not accepted. Similar claims were made by them for the subsequent years including the one which was concerned and met with the same fate. All the assessments were done on the basis of income earned by the HUF. Subsequent to the original assessments, it came to light that the income had escaped assessment in these years among others. The cases were originally referred to the Investigation Commission. Therefore, notice was issued. In that background, it was held by the Division Bench of the Bombay High Court that where a notice of reassessment u/s 34(1)(a) was issued to the assessee in the status of a firm and no valid notice was issued to the assessee in the status of an HUF and, accordingly, the assessment in the status of an HUF would not be valid. As we have mentioned before, in case, there was a previous assessment in one status, thereafter the issue of the notice would indicate a particular status in order to identify the assessee; but in the facts of this case, that principle would not be attracted.

13. Similarly, in the case of Bhagwan Devi Saraogi and Others Vs. Income Tax Officer, ''E'' Ward and Others, , Mr. Justice A.N. Sen observed that if no valid notice of

reassessment had been given or if the notice issued was illegal or invalid, the entire reassessment proceedings would be without jurisdiction. There were two assessees and the status of the assessee had to be indicated, as to whom the notice had been given and in respect of whose assessment, the assessment was sought to be reopened. To a similar effect is the observation of mine in the case of Madanlal Chowdhury Vs. Income Tax Officer, . There were two HUFs-one bigger HUF and the other smaller HUF. The notice was not addressed to any person in any particular capacity. It did not appear in what capacity the notice was served, nor was it clear from the notice itself whether the notice was served on the bigger HUF or smaller HUF. Admittedly, at that time, there were two HUFs and two assessment orders had already been passed. In that background, the said position was considered.

14. The facts of the instant case are entirely different.

15. Similar has been the position before the Division Bench of this court in the case of Income Tax Officer, "E" Ward and Others Vs. Chandi Prasad Modi, . The facts of Rama Devi Agarwalla and Others Vs. Commissioner of Income Tax, were also different. There the court, however, held that from the notice it could not be ascertained who was the assessee.

16. In this case, as we have mentioned before, the identity of the assessee was not in dispute. Therefore, the condition precedent was fulfilled before the sanction. It is not also obligatory that the status should clearly be determined before the sanction. Sanction was obtained, in this case, where there was no prior assessment or where there was no confusion as to the identity of the assessee. In the cause title of the assessment there is a mistake. A ground was taken pointing out that mistake and it was clarified in the assessment order, that the assessment was being made in the name of "Barick Screen Corporation". As a matter of fact, Barick Screen Corporation preferred an appeal thereafter. The question was never raised as to the service of the notice on the principal officer of an unregistered firm, or that the notice was served on a person, who could not allow him to be treated as the principal officer of an association of persons. If the condition precedent was duly fulfilled, then, in our opinion, the assessment order is also valid.

17. In that view of the matter, both the questions must be answered in negative and in favour of the Revenue. Parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

I agree.