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C.I.T. BOMBAY

v.

ONKARMAL MEGHRAJ (H.U.F.) & ORS.

August 16, 1973

[H. R. KHANNA AND A. ALAGIRISWAMI, JJ.]

B *Indian Income Tax (Amendment) Act* 1953—*S.* 34(3)—*Its scope.*

16 persons constituted a partnership firm under an agreement dated 19-5-1930. Out of the 16 partners, 3 were outsiders and 13 were members of 3 Hindu Undivided Families. Though the firm consisted of 3 Hindu Undivided Families, the income tax assessment till 1939-40 was on all the 16 individuals. From 1939-40 to 1941-42, the Income Tax Department assessed the 13 persons not as individuals but as 3 Hindu Undivided Families, on the basis of a settle-
C ment between them and the department. After 1941-42, all the 16 persons were to be individually assessed. Nevertheless, the Income Tax Officer proceeded to make the asessment as though the 3 Hindu Undivided Families still continued. The members of the Hindu Undivided Families disputed this and on appeal, the Income Tax Appellate Tribunal directed that the assessment for the year 1943-44 had to be made on each individual partner. In respect of the year 1944-45, the I.T.O. had, meanwhile, assessed the 3 H.U. Families as Hindu Undivided Families by declaring the cases of the individuals as cases of "No assessment". These assessments were, however, set aside by the Appellate Assistant Commis-
D sioner according to the directions given by the Tribunal earlier.

After receipt of the orders of the Appellate Assistant Commissioner the I.T.O. issued notices under s. 34 to all the 13 persons in April 1954. By that time, the Indian Income-tax (Amendment) Act 1953, which amended s. 34(3) became operative retrospectively from 1-4-1952. The notices under s. 34 were served on 8th April 1954 and the assessments were made on 31-1-1955 on the footing that under that Section, there was no time limit. Both the Appellate
E Assistant Commissioner and Tribunal dimissed the appeals filed by the assessees. These assessments were, however, set aside by the Appellate Assistant Commis-(i) whether, having regard to the directions given by the Appellate Assistant Commissioner, and having regard to the second proviso to Section 34(3) as amended, the reassessment made by the I.T.O. on 31-1-1955 is governed by any limitation period, such as mentioned in s. 34(3).

(2) In respect of 4 other assessees, who furnished individual returns, "whether
F the remedy available to the I.T.O. had already become time-barred under s. 34 before that Section was amended in 1953 with retrospective effect."

The High Court answered the questions in the affirmative and hence, the appeals before this Court.

Allowing 3 appeals and dismissing the others.

HELD : (i) The direction given by the Tribunal on 31-3-53 was in respect of the assessment for 1943-44. The I.T.O. had even before that date, assessed
G the three units as H.U.F., for 1944-45 and passed an order of 'No assessment' in respect of the individuals. For that year also, all of them had filed their returns as individuals. Therefore, there was no question of omission or failure to make a return or to disclose fully all material facts necessary for their assessment and escapement of assessment was not due to any such fact but due to the action of the I.T.O. assessing non-existent Hindu Undivided Families and passing an order of 'No assessment' in respect of individuals. Section 34(1)(a) cannot, therefore, apply and only section 34(1)(b) can apply. [395D—F]

H

(i) As regards the application of the second proviso to s. 34(3), it applies only to the three individuals (Narayandas, Meghraj and Hanumandas) who filed returns as individuals but who had been assessed as Hindu Undivided Families and who were before the Appellate Assistant Commissioner and the Tribunal

but not to other eight respondents who were not parties to the proceedings and there was no Hindu Undivided Families at that time—all these eight persons having filed their returns as individuals. [395F—396C] A

I.T.O. v. *Murlidhar Bhagwan Das,* [1964] 52 I.T.R. 325, referred to.

The right of the I.T.O. to assess these persons can be upheld only if the notice under the substantive part of s. 34 can be said to be a valid notice. The assessment year being 1944-45, the notice under s. 34 issued in April 1954 was beyond the period of 4 years under s. 34(1)(b) and so, the second proviso to s. 34(3) does not apply to them. [397A—B] B

(iii) The effect of the amendment of s. 34 in 1953 is not to enable the I.T.O. to take action under that Section where the period mentioned therein had expired before 1.4.1952. In the case of the 3 assessees, however s. 34(3) would apply, whether it is the old proviso or the proviso introduced in 1953. [398D—F]

S. C. Prashar v. *Vasantsen Dwarkadas,* [1956] 29 I.T.R. 857 and *J. P. Jani, I.T.O.* v. *Indraprasad Devshanker Bhatt,* [1969] 72 I.T.R. 595 and *Income Tax Officer* v. *T. S. Devinathan Nadar,* [1968] 68 I.T.R. 252, referred to. C

CIVIL APPELLATE JURISDICTION :—Civil Appeals Nos. 2263-2274 of 1969.

Appeals by certificate from the Judgment and Order dated the 29th/30th January, 1968 of the High Court of Judicature at Bombay in Income Tax Reference No. 54 of 1958. D

T. A. Ramachandra and S. P. Nayar, for the appellant.

Respondents Nos. 1 to 9, 10(iii), 11 and 12 *did not appear.*

The Judgment of the Court was delivered by E

ALAGIRISWAMI, J. Sixteen persons constituted a partnership firm known as M/s. Narayandas Kedarnath under an agreement dated 19-5-1930. Out of the said 16 persons three were outsiders and thirteen were members of three Hindu undivided families whose kartas were respectively Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. Narayandas Pokarmal had three sons—Govindram. Bhagwandas and Vasudeo; Meghraj Pokarmal had also three sons—Onkarmal, Banarsilal and Beniprasad; and Hanumandas Sewakram had four sons—Kedarnath, Bnarsidas, Durgaprasad and Harkisondas. Though the firm consisted of 3 undivided Hindu families the income tax assessment till the year 1939-40 was on all the sixteen individuals. From 1939-40 to 1941-42 the Income-tax Officer assessed these 13 persons not as individuals but as three Hindu undivided families on the basis of a settlement between them and the Department. Thereafter all the sixteen persons were to be individually assessed. Nevertheless, the Income-tax Officer proceeded to make the assessment as though the three HUFs still continued. The members of the HUFs disputed this and the Income-tax Appellate Tribunal by an order dated 31-7-1953, relating to the appeals by the three families for the assessment year 1943-44, directed that the assessment had to be made on each individual partner. In respect of the year 1944-45 the Income-tax Officer had meanwhile assessed the three HUFs as HUFs by declaring the cases of the individuals as cases of 'No Assessment'. These F G H

A assessments were set aside by the Appellate Assistant Commissioner who followed the directions given by the Tribunal in respect of the year 1943-44, on 9-3-1954.

After the receipt of the orders of the Appellate Assistant Commissioner the Income-tax Officer issued notices under section 34 to all the 13 persons in April 1954 after obtaining the Commissioner's approval. By that time the Indian Income-tax (Amendment) Act, 1953, which B among other things amended section 34(3), had come into effect on 24-5-1953 but had retrospective effect from 1-4-1952. The notices under section 34 were served on or about 8th April, 1954 and the assessments were made on 31-1-1955 on the footing that under that section there was no time limit. For the purpose of these assessments the three Kartas of the Hindu undivided families, Narayandas, Meghraj and Hanumandas, earlier referred to, and Beniprasad, son of Meghraj C had already filed their returns as individuals and the others as HUFs. It should be made clear that these are the HUFs consisting of the other 7 individuals and their decendants, to which we shall hereafter refer as the smaller HUFs. The Appellate Assistant Commissioner having dismissed their appeals there were 11 appeals to the Tribunal. Banarsidas and Harkisondas, sons of Hanumandas did not file any appeal.

D

The Tribunal held that all the eleven cases were governed by section 34(1)(a) and dismissed the appeals. The Tribunal thereafter at the instance of the parties referred the following questions to the High Court :

> 1. Whether, having regard to the direction given by the Appellate Assistant Commissioner in his order dated E 9-3-1954 in the case of the appropriate H.U.Fs. and having regard to the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953 the reassessment made by the Income-tax Officer on 31-1-1955 in the case of any one or more of the assessees is governed by any limitation period such as mentioned in the sugstantive part of section 34(3) ? F

In respect of Narayandas Pokarmal, Meghraj Pokarmal, Beniprasad Meghraj and Hanumandas Sewakram the further question referred was :

> 2. Whether in the case of the assessees, the remedy available to the Income-tax Officer had already become time barred G under section 34 before that section was amended in 1953 with retrospective effect from 1-4-1952 ?

Along with these 11 appeals one more appeal by Onkarmal Meghraj regarding the assessment year 1943-44 also was heard by the Tribunal and in that case also the second question was referred to the High Court.

H Before the High Court a contention was raised on the basis of the provisions of the Indian Income-tax (Amendment) Act (I of 1959) that notices issued and the action taken in the present cases could not be called in question on the ground that the period prescribed in that

behalf had expired. The High Court thereupon called for a supplementary statement of the case. That was forwarded by the Tribunal annexing thereto such record as was indicated by the High Court in its order calling for the supplementary statement. The High Court, thereupon, framed a further question as follows : A

> "Whether section 4 of the Income-tax (Amendment) Act (I of 1959) was applicable to any one or more of these assessments ?" B

The High Court held against the Department on this question. This was not argued before us and we need not therefore spend any further time over it.

For the purpose of deciding whether section 34(3) applied, the High Court went into the question whether the notices in these cases were issued under clause (a) or clause (b) of section 34(1). After considering all the facts and circumstances relevant to the determination of the question the High Court came to the conclusion that the notices issued should be deemed to have been issued under section 34(1)(b). This was based upon the proposal made by the Income-tax Officer, the sanction given by the Commissioner, the notice issued by the Income-tax Officer and the return made by the assessees, as well as the assessment order of the Income-tax Officer. The High Court also came to the same conclusion in respect of the case of Onkarmal Meghraj for the assessment year 1943-44. C D

It then considered the question whether the case came under the 2nd proviso to section 34(3). The High Court pointed out that neither group could be regarded as falling under section 34(1)(a) and held that the cases of the seven persons could not be treated as cases of no return and that the order of 'no assessment' made in respect of these persons was not because of a wrong or improper return having been submitted by these assessees, but because of an erroneous view taken by the Income-tax Officer that the income had to be assessed in the hands of the HUFs. As regards the second group of four persons it observed that they had submitted their returns as individuals and had fully and truly disclosed the income received by them, which was liable to assessment. The Income-tax Officer had, however, made the assessment on three HUFs represented by three of the four persons and assessed the income as the income of the HUFs. The result was not because of a failure or omission on the part of these persons to make a return of their respective income, but because the income was assessed in the hands of the HUFs. Thus the escapement of assessment of income was not due to any failure or omission on the part of the assessees but because of the erroneous view taken by the Income-tax Officer. It thus held that the cases did not fall under section 34(1)(a) and that they could not fall under the second proviso to section 34(3) because that proviso became applicable only from the 1st day of April 1952 and the assessment under section 34 being in respect of the assessment year 1944-45, the action to be taken under section 34 would be barred. The same view was taken in the case of the solitary appeal of Onkarmal Meghraj for the assessment year 1943-44. Even in respect of E F G H

A Narayandas, Meghraj and Hanumandas it observed that although they were undoubtedly parties to the proceedings in which the findings or orders were given, and the second proviso to section 34(3) would not be inapplicable but it could be applied only within the period of limitation that had expired before 1st April, 1952. In the result the High Court answered two of the questions in the affrmative. The Commissioner of Income-tax has, therefore, filed these 12 appeals.

B

It appears to us that the conclusion reached by the High Court in respect of the question whether clause (a) or clause (b) of section 34(1) applies is correct. Neither the proposal submitted by the Income-tax Officer to the Commissioner for taking action under section 34 nor the sanction of the Commissioner, nor the notices issued in these cases nor the returns filed by the parties, nor even the assessment orders of C the Income-tax Officer point to the conclusion that action was either contemplated or taken under clause (a). It has to be kept in mind that all the eleven persons had filed their returns in their status as individuals. The fact that seven of them filed as smaller HUFs makes no difference to this fact. The larger HUF of Narayandas, Meghraj and Hanumandas was neither in existence nor did it file a return as such. Indeed from the year 1930 it never existed. The assessment for 1939- D 40 to 1941-42 of the three HUFs was only by agreement between the parties and the Department and was not questioned. The assessment for 1942-43 was somehow not taken up on appeal. The direction given by the Tribunal on 31-7-1953 was in respect of the assessment for 1943-44. The Income-tax Officer had even before that date assessed the three units as HUF for 1944-45 and passed an order of 'No Assessment' in respect of the individuals. For that year also all of them had E filed their returns as individuals. Clearly, therefore, there was no question of omission or failure to make a return or to disclose fully and truly all material facts necessary for their assessment and the escapement of assessment was not due to any such fact but due to the action of the Income-tax Officer assessing non-existent HUFs and passing an order of 'No Assessment' in respect of individuals. Section 34(1)(a) cannot, therefore, apply and only section 34(1)(b) can apply.

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The second proviso to section 34(3) does not apply to eight of the 11 respondents in the appeals regarding the assessment year 1944-45, as they were not parties to the proceedings in which the direction of the Tribunal was given, and the same consideration applies to the respondent Onkarmal Meghraj for the assessment year 1943-44. Only Narayandas, Meghraj and Hanumandas who had filed returns as indivi- G duals but who had been assessed as HUFs were parties thereto. The others had no occasion to go up in appeal because the Income-tax Officer had passed an order of 'No assessment' in their cases. Regarding the assessment for the year 1943-44, the assessments were made in pursuance of the directions given by the Appellate Assistant Commissioner in the three appeals preferred by the persons who were treated as Kartas of the three HUFs in whose hands the income was assessed by the H Income-tax Officer. These were Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. In these cases the settlement between the Department and the parties earlier was on the basis that there was partial partition in the HUFs. It has already been mentioned that be-

fore the year 1939-40 the various partners of the firm had been assessed in their individual capacities. Therefore, the appeals filed by Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram cannot represent the separated members of the family. These three persons, however, were parties to the said proceedings. They had filed their returns as individuals and because they had been assessed as HUFs, had carried the matter up on appeal. In respect of the other eight persons who also filed returns as individuals the direction issued by the Assistant Appellate Commissioner in the appeals filed by Narayandas, Onkarmal and Hanumandas cannot be said to apply to them as there was no HUF and they were not members of a HUF. The words "any person" in the second proviso to section 34(3) has been interpreted by this Court in *Income-tax Officer* v. *Murlidhar Bhagwan Das*(1) as any person intimately connected like members of a HUF, partners of a firm or individuals forming an association of individuals because in such cases though they are not *eo nomine* parties they could be deemed to be represented by the HUF, partnership or association before the relevant Income-tax Authority. Such is not the case with regard to these individuals because no HUF was before the concerned Income-tax Authority—indeed there was no HUF—and therefore they would not be bound by those orders. In the case of individuals who were actually before the Appellate Assistant Commissioner and the Tribunal the orders would bind those three individuals. In their cases, therefore, the second proviso can be rightly applied.

We have now held that the notices in these cases should be deemed to have been issued under section 34(1)(b) and the orders of the Tribunal and Assistant Appellate Commissioner would apply to the three persons who were *eo nomine* parties before them but not others. The next question is whether the bar of limitation applies in any of the cases. A good deal of argument was advanced before us as to whether the second proviso to section 34(3) could be availed of at any time. It appears to us that it could be so availed of in respect of persons in whose cases reassessments are made under section 27 or in pursuance of an order under section 31, 33A, 33B, 66 or 66A, that is Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. There is no difficulty in holding that the second proviso applies to them. They had filed their returns as individuals and been assessed as HUFs. It is open to persons in that situation to contend, as indeed they did, thet they should be assessed as individuals and not as HUFs. And when the Appellate Assistant Commissioner and the Tribunal make an order that they should not be assessed as HUFs but as individuals they are only giving effect to the contention of the parties. Their cases come directly under the principle of the decision in *Income-tax Officer* v. *Murlidhar Bhagwan Das* (supra). Even if they are not assessees, they are intimately connected with the assessee, that is the HUF. The earlier order of 'No Assessment' made by the Income-tax Officer in their case does not affect this situation.

But as far as the other eight persons are concerned, they did not have anything further to do after the Income-tax Officer in spite of their filing returns as individuals made an order of 'No Assessment'. They

(1) [1964] 52 I.T.R. 335.

were not before the Appellate Assistant Commissioner or the Tribunal. They were not assessees nor were they intimately connected with the assessee that is the HUF as there was no HUF. Therefore, the second proviso to section 34(3) is not applicable in their cases. The right of the Income-tax Officer to assess these persons can be upheld only if the notice under the substantive part of section 34 can be said to be a valid notice. The assessment year being 1944-45 the notice under section 34 issued in April 1954 was beyond the period of 4 years under s. 34(1) (b) which we have held applies to them. For the reasons just set forth the second proviso to s. 34(3) does not apply to them.

That raises the question whether that proviso could be applied without reference to any period of limitation. It is a well settled principle that no action can be commenced where the period within which it can be commenced has expired. It is unnecessary to cite authorities in support of this position. Does the fact that the second proviso says that there is no period of limitation makes a difference? The first thing to be noticed is that that provision was given retrospective effect only from 1-4-1952 though the Income Tax (Amendment) Act came into effect from 24-5-1953. Where it is intended that the retrospective effect should be without any limit it is usual and proper to provide that the amendment would have effect and would be deemed always to have had effect as if it had been part of the Act from its inception. That that was not done shows that the intention was only to give limited retrospective effect, that is to say, there would be no bar of limitation if it had not expired before 1-4-1952.

We will now refer to some of the decisions which were relied upon. In *S. C. Prashar* v. *Vasantsen Dwarkadas*(1) the effects of the amendment made to section 34 were considered by the Bombay High Court. A Bench of that High Court consisting of Chagla, C. J. and Tendolkar, J. held that where the period mentioned in the substantive part of section 34 had expired before the amendment in 1953 *i.e.*, before 1st April 1952 no action can be taken under that section. The court also took the view that the second proviso to section 34(3) offended article 14 of the Constitution in so far as it affected third parties. That question has now been set at rest by the decision of this Court in *Income-tax Officer* v. *Murlidhar Bhagwan Das* (supra) as already noticed. In this Court out of the 5 Judges who heard the appeal in *Prashar* v. *Vasantsen Dwarkadas*(2) two of the Judges, Das, J. and Kapur, J. held that section 31 of the Income-tax (Amendment) Act 1953 did not operate as regards assessment years for which assessment or reassessment was barred before April 1, 1952, in accordance with section 34 before it was amended in 1948. Hidayatullah, J. and Raghubar Rayal, J. took the contrary view. Sarkar, J. expressed no opinion on the point. In *J. P. Jani, I.T.O.* v. *Induprasad Devshankar Bhatt*(3) this Court held that the Income-tax Officer cannot issue a notice under section 148 of the Income-tax Act, 1961 in order to reopen the assessment of an assessee in a case where the right to reopen the assessment was barred under the 1922 Act at the date when the new Act came into force. It was held

(1) [1956] 29 I.T.R. 857. (2) [1963] 49 I. T. R. (S.C.) 1.

(3) [1969] 72 I.T.R. 595.

that s. 297(2)(d)(ii) of 1961 Act was applicable only to those cases where the right of the Income-tax Officer to reopen an assessment was not barred under the repealed Act. This decision is broadly in line with the opinion of Das and Kapur, JJ. in *Prashar's* case. The decision of this Court relied upon by the appellant, in *Income-tax Officer* v. *T. S. Devisatha Nadar*,(1) which was a case under section 35(5), which was introduced into the Income-tax Act by the 1953 amendment at the same time as the amendment to section 34, does not really affect this position. This Court observed :

> "As we have already said, sub-section (5) becomes operative as soon as it is found on the assessment or reassessment of the firm or on any reduction or enhancement made in the income of the firm that the share of the partners in the profit or loss of the firm had not been included in the assessment of the partner or if included was not correct. The completion of the assessment of the partner as an individual need not happen after April 1, 1952. The completed assessment of the partner is the subject matter of rectification and this may have preceded the above-mentioned date. Such completion does not control the operation of the sub-section. In the result we find ourselves unable to concur in the decision or the reasoning in *Atmala Nagaraj's case*."(2)

The position can, therefore, be said to have been satisfactorily established that the effect of the amendment of section 34 in 1953 is not to enable the Income-tax Officer to take action under that section where the period mentioned therein had expired before 1-4-1952. That would apply in these cases to persons other than Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. In their cases the second proviso to section 34(3) would apply, whether it is the old proviso or the proviso introduced in 1953.

In the result Civil Appeals Nos. 2264 of 1969, 2268 of 1969 and 2272 of 1969 are allowed with costs. The other 9 appeals are dismissed with costs.

S.C. *Appeals partly allowed.*

(1) [1968] 68 I.T.R. 252. (2) [1962] 46 I.T.R. 609(sc.)