

The Commissioner of Income-tax, Punjab, Haryana, Jammu & Kashmir,
Himachal Pradesh & Chandigarh, Patiala v. M/s. Damyanti Mehta
& Yash Raj Mehta (AOP), Sirhind, (Mahajan, J.)

(13) Accordingly we allow this writ petition with costs and quash the impugned orders of the Presiding Officer, Sales Tax Tribunal, Punjab, dated 8th April, 1968 and 6th August, 1968, and send back the case to the Tribunal, respondent No. 2, to decide the appeal of the petitioners in accordance with law. Counsel's fee Rs. 150.

B. S. G.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and Bal Raj Tuli, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB, HARYANA,
JAMMU & KASHMIR, HIMACHAL PRADESH & CHANDIGARH,
PATIALA,—Petitioner.

versus.

M/S DAMYANTI MEHTA & YASH RAJ MEHTA (A.O.P.), SIRHIND,—
Respondent.

Income Tax Reference No. 10 of 1967.

October 13, 1970.

The Indian Income-Tax Act (XI of 1922)—Sections 33-B(2) (a) and 34(1) (a)—Re-assessment notice issued by an Income-Tax Officer—Assessee filing objections—Income Tax officer after applying his mind to the objections passes the order “proceedings filed”—Such order—Whether an order of re-assessment under section 34—Commissioner of Income-Tax—Whether precluded from revising the order under section 33-B(2) (a).

Held, that in every case it has to be determined on the facts and circumstances thereof as to what do the words ‘proceedings filed’ or ‘proceedings disposed of’ or ‘filed’ or ‘disposed of’ connote or mean? In one set of circumstances they may not amount to an order of assessment or re-assessment whereas in other set of circumstances these phrases may amount to an order of assessment or re-assessment. Where an Income-Tax Officer issues a notice under section 34(1) (a) of Income-tax Act 1922, and after applying his mind to the objections raised by the assessee to such notice, passes an order “proceedings filed”, the order amounts to an order of re-assessment and the Commissioner of Income-tax is precluded to revise such an order under section 33-B(2) (a) of the Act. (Para 9).

Reference under section 66(1) of the Income Tax Act, 1922 made by Income Tax Appellate Tribunal Delhi Bench,—vide his order dated 25th November, 1966 for opinion on the question of law arising out of the case ITA No. 795 of 1965-66 regarding the assessment year 1960-61.

“Whether on the facts and in the circumstances of the case, the Income-tax Officer’s order ‘Proceeding filed’ was an order of re-assessment under the provisions of section 34 and consequently the Commissioner of Income-tax was precluded from revising the order by reason of sub-clause (2) (a) section 33-B of the Income-tax Act, 1922 ?”

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the petitioner.

J. N. KAUSHAL, SENIOR ADVOCATE WITH ASHOK BHAN, ADVOCATE, for the respondents.

JUDGMENT

MAHAJAN, J.—The following question of law has been referred for our opinion under section 66(1) of the Income-tax Act, 1922, by the Income-Tax Appellate Tribunal, Delhi Bench ‘B’ :—

“Whether on the facts and in the circumstances of the case, the Income-tax Officer’s order ‘Proceeding filed’ was an order of re-assessment under the provisions of section 34 and consequently the Commissioner of Income-tax was precluded from revising the order by reason of sub-clause (2) (a) of section 33-B of the Income-tax Act, 1922?”

(2) On facts there is no dispute. The controversy relates to the assessment year 1960-61. Shri Yash Raj Mehta and Smt. Damyanti Mehta and her sons owned a factory consisting of land, building and machinery. The shares of both the parties were equal. This factory was leased out at an annual rental of Rs. 20,000 to Messrs Mehta Brothers. The rental income was being assessed in the hands of the assessee in their status as an association of persons. There was an allegation that the factory had been sold on the 1st of September, 1959, for Rs. 2 lacs. The Income-tax Officer, who had completed the assessment of the association of persons for the assessment year 1960-61, having come to know of the said transaction, thought that there was considerable amount of profit involved in the transaction which was liable to assessment under section 10(2)(vii) of the Act. He accordingly issued a notice under section 34(1)(a) of the Act for the assessment year 1960-61. The assessee filed an objection petition to these proceedings under section 34 and took the stand that the sale

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had, in fact, been nullified owing to certain circumstances and as such, there was no sale that had taken place on 1st of September, 1959. Thus, there was no profit liable to assessment under section 10(2)(vii). This objection was accepted by the Income-tax Officer and he dropped the proceedings by his order, dated 28th February, 1963. However, the Income-tax Officer passed the cryptic order, namely, 'proceeding filed'. In fact, this order was recorded after he had seen the assessee's letter. When the matter came to the notice of the Commissioner of Income-tax, he thought that the order of the Income-tax Officer filing the proceedings under section 34 was erroneous and prejudicial to the Revenue. The Commissioner then acted under section 33-B and cancelled the order of the Income-tax Officer filing the proceedings and directed him to continue the proceedings that had been started by him under section 34(1)(a) of the Act. Against this order, an appeal was preferred by the assessee to the Tribunal. The Tribunal relied upon the decision of the Supreme Court in *Esthuri Aswathiah v. Income-tax Officer, Mysore State* (1), and held that the order of the Income-tax Officer filing the proceedings amounted to an order of assessment or reassessment and, therefore, no proceedings could be initiated under section 33-B by the Commissioner. The Department was dissatisfied with the order of the Tribunal and applied under section 66(1) of the Act for a reference of the question of law already stated in the opening part of this order for the opinion of this Court. That is how the matter has been placed before us.

(3) The contention of Mr. Awasthy, the learned counsel for the Department, is that there was no order of reassessment by the Income-tax Officer under section 34 and, therefore, section 33-B(2) is no bar to the order of the Commissioner of Income-tax under section 33-B(1). The learned counsel further argued that the order of the Income-tax Officer was merely an order terminating the proceedings without passing any order of reassessment. In order to appreciate these contentions, it will be proper at this stage to set out the relevant provisions of the Act.

(4) Section 33-B(2), so far as it is relevant, reads thus:—

“No order shall be made under sub-section (1)—

(a) to revise an order of re-assessment made under the provisions of section 34;

Section 34(1) if—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, he may in cases filing under clause (a) at any time proceed to assess or re-assess such income, profits or gains

(5) Keeping in view these provisions and the facts and circumstances of the present case, it is obvious that the income of the assessee for the relevant assessment year was re-assessed under section 34 of the Act. By reason of the supposed sale of 1959, the Income-tax Officer thought it fit to act under section 34. He accordingly issued a notice in that behalf to the assessee. The assessee thereupon preferred his objections and his stand was clear and simple, namely, that in fact there was no sale. This stand of the assessee was accepted by the Income-tax Officer. The very basis on which the proceedings under section 34 were started was knocked out and in this situation the order 'proceeding filed' was passed by the Income-tax Officer. In that order, he clearly made a reference to the assessee's letter. Therefore, in the re-assessment proceedings the Income-tax Officer came to the conclusion that there was no basis on which any reassessment could be made under section 34. The view we have taken of the matter clearly finds support from the decision of the Supreme Court in *Esthuri Aswathiah v. Income-tax Officer* (1). A similar order in an assessment proceedings under section 23(1) was held to amount to an order of assessment. The relevant observations of their Lordships are at page 543 of the report and are reproduced below for facility of reference :—

"The submission that the previous return submitted on September 8, 1952, 'had not been disposed of' and until the assessment pursuant to that return was made, no notice under section 34(1) for reassessment could be issued, has in our judgment no substance. The Income-tax Officer had disposed of the assessment proceeding accepting the submission made by the appellants that they had no income for the assessment year 1950-51. Under section 23(1) of the Indian Income-tax Act, it is open to the Income-tax Officer, if he is satisfied that the return made by assessee under

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section 22 is correct, to assess the income and to determine the sum payable by the assessee on the basis of the return without requiring the presence of the assessee or production by him of any evidence. The appellants had in their return, dated September 8, 1952, submitted that they had no assessable income for the year in question and on this return, the Income-tax Officer had passed the order 'no proceeding'. Such an order in the circumstances of the case meant that the Income-tax Officer accepted the return and assessed the income as 'nil'. If thereafter the Income-tax Officer had reason to believe that the appellants had failed to disclose fully and truly all material facts necessary for assessment for that year, it was open to him to issue a notice for reassessment."

(6) By parity of reasoning and on similar facts the irresistible conclusion is that the present order under section 34 amounts to an order of reassessment and we see no escape from this conclusion. Moreover there is no difference between assessment and the reassessment under the Act. Assessment includes reassessment.

(7) Mr. Awasthy, learned counsel for the Department, placed reliance on the decision of the Supreme Court in *Anglo-French Textile Company Ltd., v. Commissioner of Income-tax, Madras* (2). On the facts of that case, their Lordships of the Supreme Court came to the firm conclusion that there was no return filed and in the absence of a return there can be no question of there being an assessment, particularly when the Income-tax Officer had not resorted to his 'best-judgment assessment'. The position so far the case in hand is concerned may have been different if the assessee in response to the notice under section 34 had not appeared before the Income-tax Officer, and the Income-tax Officer had filed the proceedings. However, the proceedings were filed after active consideration. The assessee did press his point of view and that point of view found favour with the Income-tax Officer. Therefore, no assistance can be derived from the decision of the Supreme Court in *Anglo-French Textile Company's case* (2).

(8) The learned counsel then relied upon another decision of the Supreme Court in *Commissioner of Income-tax, Calcutta v. Bidhu*

Bhusan Sarkar (3). Again, the facts of this case have no parallel with the facts in *Esthuri Aswathiah's* case (1). This is obvious from the following passage in the judgment of their Lordships :—

“We think that the learned counsel for the Commissioner has rightly contended that, in the circumstances of this case, the word ‘filed’ should be interpreted as being equivalent to ‘disposed of’, so that after that order, no proceedings on the basis of notice, dated 23rd February, 1950, remained pending before the A.I.T.O: In effect, therefore, what he did was to terminate the proceedings before him without making any order of assessment, on the ground that the order of assessment in respect of the income in question would be made by the P.I.T.O: in the proceedings before him”:

(9) Thus in every case it has to be determined on the facts and circumstances thereof as to what do the words ‘proceedings filed’, or ‘proceedings disposed of’ or ‘filed’ or ‘disposed of’ connote or mean? In one set of circumstances they may not amount to an order of assessment or reassessment whereas in another set of circumstances these phrases may amount to an order of assessment or reassessment. No hard and fast rule can be laid down. Each case must be determined on its own facts and circumstances. So far as the present case is concerned, we have not the least doubt that these words “Proceeding filed” clearly amount to an order of reassessment. We have already indicated the circumstances in which this cryptic order was passed. In fact, in the circumstances of this case it cannot be said that the order was really cryptic because if one turns to Annexure ‘A’, it is clearly stated on the 27th February, 1963 that the assessee’s letter was seen and thereafter it is recorded ‘proceeding to be filed’. On the 28th of February, 1963, the proceedings were in fact filed. It clearly discloses that the Income-tax Officer did apply his mind and came to the conclusion that there was no sale of 1959, and if there was no sale of 1959, there was nothing else he could do but to close those proceedings by a reassessment order and that is what he has done.

(10) For the reasons recorded above, we must answer the question referred to us in the affirmative. The assessee will be entitled to his costs which are assessed at Rs. 150.

BAL RAJ TULI, J.—I agree.

(3) 63 I.T.R. 278.

B.S.G.