

COMMISSIONER OF INCOME-TAX, BANGALORE

v.

**C. M. JAFFAR KHAN (DECEASED) REPRESENTED BY HIS
WIDOW RAHAMATHUNNISA BEGUM**

September 24, 1971

[C. A. VAIDIALINGAM AND P. JAGANMOHAN REDDY, JJ.]

Mysore Income-tax Act 1923, s. 48—Refund granted by Income-tax Officer under section is an 'assessment'—Income profits and gains for previous year ending 31st March 1949 assessed under Mysore Act not liable to be assessed under Indian Income-tax Act 1922 by virtue of Part B States (Taxation Concession) Order 1950, Paragraph 5(1)—Section 34 of Indian Act has no applicability to income covered by said paragraph—Words 'such income profits and gains' in paragraph, interpretation of.

The assessee was a partner in a registered firm. The firm filed its income-tax return for the period ending 30-6-1949 under the Mysore Income-tax Act 1923 and an assessment was made thereunder. On 15-3-1950 the assessee filed his return in respect of his individual income including his share of income from the aforesaid firm for the accounting year ending 30-6-1949. This return was also made under the Mysore Act. By an order dated 20-3-1950 the Income-tax Officer directed a refund of Rs. 641-3-0 to the assessee due to the difference in the rate of tax applicable to him and the maximum rate. In the course of proceedings for the assessment years 1951-52 and 1952-53 the Income-tax Officer was of the opinion that the assessee's income had escaped assessment in the accounting year ending 30-6-1949 and he therefore issued a notice to him under s. 34 of the Act. The assessee objected to the reopening of the assessment on the ground that he had already been assessed for the said period under the Mysore Act and that according to paragraph 5(1) of the Part B States (Taxation Concession) Order 1950 an assessment under the Indian Income-tax Act 1922 would be possible only if, before the appointed day namely on 1-4-1950 the assessee had not been assessed under the Mysore Act. Since the refund order had been issued to him he claimed to have been assessed under the Mysore Act. The Income-tax Officer rejected this contention and made an assessment under s. 34 of the Indian Act on 6-3-1955. The Appellate Assistant Commissioner held that the assessment under s. 34 was not valid. The Appellate Tribunal was of the view that the refund granted by the Income-tax Officer under s. 18 of the Mysore Act was not an assessment as contemplated under s. 23 of the Indian Act, and that the words 'such income profits and gains' used in paragraph 5(1) of the Part B States (Taxation Concession) Order 1950 referred to identity of income or sources and that it is only in cases wherein income has been assessed under the Mysore Act that the Income-tax Officer is prohibited from taking any further action thereon. On this view the Tribunal restored the order of the Income-tax Officer. In reference the High Court held that the refund order which was made on assessee's return was an order of assessment. On appeal by the Revenue in this Court,

HELD: (i) The refund order given by the Income-tax Officer on the return filed by the assessee was an assessment within the meaning of paragraph 5 of the Order. The assessment of both the firm as well as the individual had been made under the Mysore Act for the year ending 30th June 1949 in respect of income of that year. As such it clearly fell

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within the provisions of sub-paragraph (1) of paragraph 5 of the Order which makes the Act applicable to such assessments. [913 A—B; 914 B]

Esthuri Aswathiah v. Income Tax Officer, Mysore State, 41 I.T.R. 539, relied on.

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It is also provided in sub-paragraph (2) of paragraph 5 that where income profits and gains have not been assessed under the State law they shall be assessed under the Indian Act for the year ending 31-3-1951 which is the assessment year 1950-51 in respect of which the tax payable has been specified therein. There can be no doubt that for the assessment year 1950-51 for which the accounting year is the previous year 1st April 1949 to 31st March 1950, the Act applies and assessments would be made thereunder. This would be a hardship because under the concerned tax law of a Part B State an assessee in that State may have been taxed already. It is in order to remove this hardship that the Order was issued under Section 60A of the Act. [914 C—D]

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Further, any omission to give information, or failure to file a return or failure to disclose truly and fully all material facts which are a condition of the re-opening of assessments under s. 34 of the Act do not appertain to the Income-tax Officer under the Act but to the Income-tax Officer under the Mysore Act. Even on this reading it would appear that Section 34 of the Act would have no application. [914 E]

D

(ii) The finding of the Tribunal that an assessment under s. 34 could be made in the present case because the assessee's income from property and other sources had not been assessed under the Mysore Act was wrong. This reasoning would lead to the startling conclusion and would imply that there would be two assessments in respect of the income of an assessee during one assessment year, i.e., while assessment made under the Mysore Act in respect of income reported by the assessee cannot be reopened, the income not disclosed by him would be liable to be assessed under the Act. Moreover if that reasoning is correct it would not be a case of reassessment under s. 34 but assessment under s. 23 of the Act. This was not the stand taken by the Revenue at any stage.

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The appeals must accordingly be dismissed. [914 G—915 A]

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CIVIL APPEAL JURISDICTION : Civil Appeals Nos. 1306 and 1307 of 1967.

Appeals by special leave from the judgment and order dated February 4, October 5, 1966 of the Mysore High Court in I.T.R.C. No. 4 of 1964 and S.C.L.A.P. No. 214 of 1966.

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B. Sen and R. N. Sachthey, for the appellant (in both the appeals).

The respondent did not appear.

The Judgment of the Court was delivered by—

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P. Jaganmohan Reddy, J. The High Court of Mysore in a reference under Sec. 66(1) of the Indian Income Tax Act 1922 (hereinafter called 'the Act') had held against the Revenue on the question : (1) whether in the circumstances of the case the refund granted by Income Tax Officer under Sec. 48 of the

Mysore Income Tax Act 1923 (hereinafter called 'the Mysore Act') amounted to an assessment and, (2) whether the interpretation placed by the Income Tax Tribunal on the words 'such income profits and gains' in paragraph 5(1) of the Part B States (Taxation Concession) Order 1950 (hereinafter called 'the Order') is correct? On the first question its answer was in the affirmative and on the second in the negative. Against this Judgment two appeals have been filed by special leave by the Commissioner of Income Tax, Mysore.

The facts which gave rise to the reference before the High Court are that a registered firm of partnership known as C. M. Jaffar Khan & Co., Bangalore of which the assessee was a partner filed a return in respect of its income for the period ending 30-6-49 under the Mysore Act and an assessment was made thereon in a sum of Rs. 3376-7-0 which was duly paid. On 15-3-50 the assessee filed his return in respect of his individual income including his share of income from the partnership firm for the accounting year ending 30-6-49. This return was also made under the Mysore Act and it appears that in respect of this return, by an order dated 20-3-1950 the Income Tax Officer directed a refund of Rs. 641-3-0 to the assessee due to the difference in the rate of tax applicable to him and the maximum rate. It further appears that in the course of the proceedings for the assessment years 1951-52 and 1952-53 the Income Tax Officer was of the opinion that the assessee's income had escaped assessment in the accounting year ending 30-6-49 and he therefore issued a notice to him under Sec. 34 of the Act. The assessee objected to the reopening of the assessment on the ground that he had already been assessed in respect of the income for the year ending 30-6-49 under the Mysore Act; that a refund of tax had been given to him, as such the Income Tax Officer has made an assessment under the Mysore Act; and that according to paragraph 5 of the Order an assessment under the Act would be possible only if, before the appointed date namely on 1-4-1950 the assessee had not been assessed under the Mysore Act. The Income Tax Officer rejected these contentions on the ground that the assessment made on the firm could not be regarded as an assessment made on the assessee individually and completed the assessment for the years 1950-51 on 6-3-55 on a total income of Rs. 3,21,821.

The assessee appealed to the Income tax Appellate Assistant Commissioner and raised similar contentions to those raised before the Income Tax Officer. The Income Tax Officer on the other hand contended that as the respondent assessee had disclosed only a share income from the firm 'C. M. Jaffar Khan & Co.' and as the income from the property and other sources was not disclosed such profits and gains had not been assessed under the Mysore

- A Act and, therefore, action under Sec. 34 of the Act was fully justified. The Appellate Assistant Commissioner however, rejected the contention of the Income Tax Officer and held that the re-assessment under Sec. 34 of the Act was not valid. In this view he set aside the assessment made by the Income Tax Officer. The Department filed an appeal to the Income Tax Tribunal against the order of the Appellate Assistant Commissioner. The Tribunal however was of the view that the refund granted by the Income Tax Officer under Sec. 18 of the Mysore Act was not an assessment as contemplated under Sec. 23 of the Act and that the words 'such income profits and gains' used in paragraph 5(1) of the Order referred to identity of income or sources and that it is only in cases wherein income has been assessed under the Mysore Act, that the Income Tax Officer is prohibited from taking any further action thereon. The appeal was therefore allowed and the assessment made by the Income tax Officer restored.
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- The High Court following the decision of this Court in *Esthuri Asmathiah v. Income Tax Officer, Mysore State*⁽¹⁾, held that as the Income Tax Officer had given a refund on the return filed by the assessee for the year in question, that order of refund amounted to an assessment on the assessee. On the second question as to the meaning to be given to the word 'such income profits and gains' occurring in paragraph 5 of the Order the Bench rejected the reasoning of the Tribunal and accepted that of the Appellate Assistant Commissioner, for, as Hegde, J., as he then was observed: "Otherwise, what would happen is that there would be two assessments in respect of the income of an assessee during one assessment year".
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- The contentions of the learned Advocate for the Revenue follow much on the same lines as were the contentions before the High Court of Mysore namely that as the assessee did not disclose his personal income except that of the income of the firm, that income would not have been assessed under the Mysore Act, as such, it is open to the Income Tax Officer to make an assessment under Sec. 34 of the Act. He further contends that the object of the Order was to give relief from double taxation because of the financial integration of Part B States of which Mysore was one, the assessment of income, profits and gains of the previous year ending after 31-3-49 which is a previous year for the said assessment year 1949-50, had to be assessed under the Act for the year ending on 31-3-51, but this could be done "if and only if, such income profits and gains have not before the appointed day been assessed under the State Law". It is therefore submitted that as this order was made in exercise of the powers conferred under Sec. 60(A) of the Act, any income profits and
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(1) 41 ITR 539.

gains which have not been assessed under the State law will become assessable under the Act. Paragraph 5 of the Order and Sec. 34 of the Act are as follows :— A

Paragraph 5(1)

"The income, profits and gains of any previous year ending after the 31st day of March 1949, which is a previous year for the State assessment year 1949-50, shall be assessed under the Act for the year ending on the 31st day of March 1951, if and only if, such income, profits and gains have not, before the appointed day been assessed under the State law". B

(2) Where the income, profits and gains referred to in sub-paragraph (1) have not been assessed under the State law, they shall be assessed under the Act for the year ending on the 31st day of March, 1951, and the tax payable thereon shall be determined as hereunder— C

(3) In this paragraph the State assessment year 1949-50 means the assessment year which commences on any date between the 1st April, 1949 and the 31st December, 1949. D

Sec. 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, or . . . E

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year . . . he may in cases, falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within F

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- A four years of the end of that year, serve on the assessee. . . .”

On the admitted facts which are not in dispute it is apparent that the refund order given by the Income Tax Officer on the return filed by the assessee is an assessment within the meaning of paragraph 5 of the Order. It was so held in *Esthuri Aswathiah* case⁽¹⁾ where on the facts of that case the assessee who had filed his return for the assessment year 1950-51 disclosing that there was no assessable income contended that as it had been assessed for the accounting year ending June 30, 1949 under the Mysore Act there was no assessable income for that year and that only the income for the next accounting year ending on June 30, 1950 was assessable for the year 1951-52. The Income Tax Officer passed an order “no proceeding” and closed the assessment. This decision is not helpful as it did not deal with the question that arises before us. In that case a notice under Sec. 22 of the Act was served on the assessee requiring it to submit its return of income for the assessment year 1950-51. It is in respect of that notice that a return was filed by the assessee to which we have made a reference showing that there was no assessable income. For the next assessment year 1951-52 the assessee filed a return and in the course of those assessment proceeding account books were produced by them which disclosed an opening cash credit balance of Rs. 1,87,000/- as on 1st July 49. When the Income tax Officer called for the books of the earlier year the books were not produced by the assessee. In the circumstances a sum of Rs. 1,37,000/- out of the opening balance as on 1-7-49 was treated as income from undisclosed sources for the year 1951-52. But on appeal the Appellate Assistant Commissioner held that the financial year ending 31-3-50 ought to be taken as the previous year for the income from undisclosed sources. In the meantime the appellant submitted a fresh return for the assessment year 1950-51 on which no action was taken but on October 15, 1957 the Income tax Officer served a notice of reassessment under Sec. 34 of the Act calling upon the Appellant to submit a fresh return. That order was challenged in a Writ Petition before the High Court on the ground that the Income Tax Officer had no jurisdiction to issue a notice of reassessment. That petition was dismissed by the High Court. In an appeal by certificate this Court held that since the Income-tax Officer had passed an order thereon ‘no proceeding’, it meant that he had accepted the return submitted by the Appellant, and assessed the income as nil and if thereafter he 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

(1) 41 I.T.R. 539.

to issue a notice for reassessment under Sec. 34. It was further held that the Appellant was liable to be assessed under the Indian Income-tax Act 1922 and not under the Mysore Income-tax Act for the year 1950-51.

The facts in these appeals before us are different in that the assessment of both the firm as well as of the individual had been made under the Mysore Act for the year ending 30th June, '49 in respect of income of that year. As such, it clearly falls within the provision of sub-paragraph (1) of paragraph 5 of the Order which makes the Act inapplicable to such assessments. It is also provided in sub-paragraph (2) of Paragraph 5 that where income, profits and gains have not been assessed under the State law they shall be assessed under the Act for the year ending 31-3-51 which is the assessment year 1950-51, in respect of which the tax payable has been specified therein. There can be no doubt that for the assessment year 1950-51, for which the accounting year is the previous year 1st April 1949 to 31st March 1950, the Act applies and assessments would be made thereunder. This would be a hardship because under any of the concerned tax law of a Part B State an assessee in that State may have been taxed already. It is in order to remove this hardship that the order was issued under Sec. 60 A of the Act. This apart it may also be noticed that any omission to give information, or failure to file a return or failure to disclose truly and fully all material facts which are a condition of the reopening of assessments under Sec. 34 of the Act do not appertain to the Income Tax Officer under the Act but to the Income Tax Officer under the Mysore Act. Even on this reading it appears to us that Sec. 34 of the Act would have no application. The learned counsel for the Revenue was not able to meet this point. The Tribunal thought that there was some substance in the Departmental representative's contention on the second question, that the words 'such income' profits and gains used in paragraph 5(1) of the order 'refer to identity of income or sources; that it is only in cases where the income had been assessed under the Mysore Act; that the Income-tax Officer is prohibited from taking further action thereon' and as such 'it cannot be said that the assessee had been assessed on incomes such as property income and income under other sources', and it is these that have been brought to assessment under Sec. 34 of the Income-tax Act". As rightly pointed out by the High Court that this reasoning would lead to startling conclusions and would imply that there would be two assessments in respect of the income of an assessee during one assessment year *i.e.* while assessment made under the Mysore Act in respect of income reported by the assessee cannot be reopened, the income not disclosed to him would be liable to be assessed under the Act. Apart

- A** from the incongruity in this reasoning pointed out by the High Court it appears to us that if that reasoning is correct it would not be a case of reassessment under Sec. 34 but assessment under Sec. 23 of the Act. This is certainly not the stand taken by the Revenue either before the High Court or before us. In the circumstances the answers returned by the High Court do not require
- B** any interference and the appeals are accordingly dismissed. There will be no order as to costs since the respondents are *ex-parte*.

G. C.

Appeals dismissed.