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## ICE &amp; GENERAL MILLS

v.

INCOME TAX OFFICER, CENTRAL CIRCLE II, MEERUT

November 20, 1979

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[V. D. TULZAPURKAR AND E. S. VENKATARAMIAH, JJ.]

C

*Escaped income—Reopening of assessment under section 147 of the 1961 Act not permissible when in respect of the self-same escaped income, proceedings under section 34(1) of the 1922 Act had been undertaken and were pending on April 1, 1962 i.e. the date of coming into force of the 1961 Act—Income Tax Act, 1961, Section 297(2)(d) (ii) refers to factual pending of a proceeding under section 34(1) of 1922 Act.*

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The appellant-assessee is a firm carrying on business of manufacturing ice and preservation of potatoes in its cold storage. By an assessment order dated July 5, 1961 it was assessed to income tax for the assessment year 1961-62 on a total income of Rs. 53,548/-. The Income Tax Officer, in his proceedings started on December 21, 1961 under section 34(1) of the 1922 Act, found certain property income and income to the extent of one lakh from potato transaction put through in the name of *benami* persons by the assessee had escaped assessment and therefore, by his order dated December 22, 1965 he brought them to tax. The said order of the Income Tax Officer was annulled in appeal, on May 10, 1967 on the ground that the initiation of reassessment was not justified. This order became final as the department did not take further steps. On July 14, 1967 the Income Tax Officer issued a notice under section 148 of the Income Tax Act, 1961 in respect of the self same assessment year after obtaining the sanction of the Commissioner of Income Tax. Pursuant to the notice the appellant filed a return under protest on August 14, 1967. The appellant challenged the said notice by filing a writ petition in the Allahabad High Court, *inter alia* on the ground that under section 297(2)(d)(ii) of the 1961 Act no reassessment proceedings could be undertaken under section 147 of the 1961 Act inasmuch as in respect of the self-same escaped income, proceedings under s. 34(1) of the 1922 Act had been undertaken and were pending on April 1, 1962 when the 1961 Act came into force. The High Court rejected the contention on the ground that in order that S. 297(2)(d)(ii) should apply, proceedings under section 34 of the 1922 Act must be legal proceedings with jurisdiction.

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Allowing the appeal by certificate, the Court

HELD : The factual pendency of the proceedings under Section 34 of the 1922 Act on the relevant date, and not their legality is material for purposes of S. 297(2)(d)(ii) of the 1961 Act. [238 D-E]

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In the instant case : (a) admittedly proceedings under s. 34(1) of the 1922 Act in respect of the item of Rupees one lakh (which was said to have escaped assessment) were factually pending on April 1, 1962 and therefore, the notice under s. 148 of the 1961 Act would be incompetent, and [239 C-D]

(b) The initiation of the proceedings under section 34 by the Income Tax Officer cannot be regarded as being without jurisdiction and hence *non est*. The reassessment order made by the Income Tax Officer on December 22, 1965 clearly shows that he had initiated the proceedings (in respect of property income) under section 34(1)(b) i.e., in consequence of information gathered by him from Assistant Appellate Commissioner's order for earlier year and not under section 34(1)(a). [239 F-H]

*S. B. Jain v. Mahendra*, 83 I.T.R. 104 (SC) and *Gujar Mal Modi v. Commissioner of Income Tax*, 84 I.T.R. 261; applied.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2015 of 1972.

From the Judgment and Order dated 18-1-1971 of the Allahabad High Court in Civil Misc. Writ Petition No. 4632/70.

*S. T. Desai*, *B. R. Agrawala* and *P. C. Gokhale* for the Appellant.

*V. S. Desai*, *Miss. A. Subhashini*, *J. Ramamurthy* and *Miss R. Vaigai* for the Respondent.

The Judgment of the Court was delivered by

TULZAPURKAR, J. The point raised in this appeal by certificate seems to be covered by two decisions of this Court in favour of the assessee and hence we propose to dispose of the appeal by a short Judgment.

The appellant, a firm, carries on business of manufacturing ice and preservation of potatoes in its cold storage. It was assessed to income-tax for the assessment year 1961-62 by an assessment order dated July 5, 1961 on a total income of Rs. 53,548. In proceedings started on December 21, 1961 under s. 34(1) of the Indian Income Tax Act, 1922, the Income Tax Officer found certain property income and income to the extent of one lakh from potato transactions put through in the name of *benami* persons by the assessee had escaped assessment and, therefore, by his order dated December 22, 1965 he brought them to tax. The said order of the Income Tax Officer was annulled by the Appellate Assistant Commissioner in appeal on May 10, 1967 on the ground that the initiation of reassessment proceedings was not justified. The Department allowed the matter to rest there and the Assistant Appellate Commissioner's order became final. On July 14, 1967 the Income Tax Officer issued a notice under s. 148 of the Income-Tax Act, 1961 in respect of the self-same assessment year after obtaining the sanction from the Commissioner of Income-Tax. Admittedly, while seeking sanction for reopening the assessment under s. 147, the Income-Tax Officer in his report categorically stated that

**A** the assessee had concealed the income of Rs. 1,00,000 from undisclosed source on account of *benami* storage of potatoes in various names and the same had escaped assessment owing to the failure on the part of the assessee to disclose his income fully and truly. Pursuant to the notice the appellant filed a return under protest on August 14, 1967. The appellant challenged the notice by filing a writ petition in the Allahabad High Court, *inter alia*, on the ground that no reassessment proceedings could be undertaken under s. 147 of the 1961 Act inasmuch as in respect of the self-same escaped income proceedings under s. 34(1) of the 1922 Act had been undertaken and were pending on April 1, 1962, when the 1961 Act came into force and in this behalf reliance was placed on s. 297(2) (d) (ii) of the 1961 Act. The High Court rejected the contention on the ground that in order that s. 297 (2) (d) (ii) should apply, the proceedings under s. 34 of the 1922 Act must be legal proceedings with jurisdiction which was not the case here.

**D** It is difficult to sustain this decision of the High Court in view of two decisions of this Court in *S. B. Jain v. Mahendra*<sup>(1)</sup> and *Gujar Mal Modi v. C.I.T.*<sup>(2)</sup> where it has been held that s. 297 (2) (d) (ii) is concerned with the factual pendency of proceedings under s. 34 of the 1922 Act and not with their legality. It must in fairness be stated that none of these decisions on the proper construction of s. 297(2) (d) (ii) had been rendered by this Court when the Allahabad High Court decided the matter.

**E** In *S. B. Jain v. Mahendra* (supra) the Income-Tax Officer had issued notice to the respondent-assessee on January 5, 1962 under s. 34(1)(a) of the 1922 Act to reopen his assessment for the assessment year 1946-47. The High Court quashed the notice by its order dated March 6, 1963, on the ground that the notice was barred by limitation. In the meantime the 1961 Act came into force on April 1, 1962, whereafter the Income Tax Officer again issued a notice on March 26, 1963 under s. 148 of the 1961 Act. This Court held that what s. 297(2) (d) (ii) of the 1961 Act, required was the factual pendency of a proceeding under s. 34 of the repealed Act, on April 1, 1962. The question whether that proceeding was barred by limitation or not was irrelevant. Though the earlier proceeding was quashed for the reason that notice on which the proceeding was based was issued beyond time, it could not be said that no proceeding under s. 34 of the 1922 Act was either factually or legally pending at the time when the 1961 Act came into force and since the proceedings initiated

(1) 83 I.T.R. 104.

(2) 84 I.T.R. 251.

under s. 34(1) (a) of the 1922 Act were pending at the time when 1961 Act came into force, the Income-Tax Officer was not competent to issue any fresh notice under s. 148 of the 1961 Act. In *Gujar Mal Modi's* case (supra) the notice under s. 34(1)(a) of the 1922 Act for reopening the assessment of the deceased assessee was served only on one of the heirs of the deceased assessee. The Assistant Appellate Commissioner set aside the assessment made pursuant to that notice on the ground that it was necessary to issue notices to all the legal representatives of the deceased assessee. In the meantime the 1961 Act came into force and, thereafter the Income-Tax Officer issued notice under s. 148 of that Act to all the heirs of the deceased assessee. This Court held that since the proceedings under s. 34(1)(b) of the 1922 Act were pending on April 1, 1962, the second notice was incompetent. In other words in both the cases this Court laid emphasis on the factual pendency of the proceedings under s. 34 on the relevant date, and not their legality as being material for purposes of s. 297(2)(d) (ii) of the 1961 Act. In the case before us admittedly proceedings under s. 34(1) of the 1922 Act in respect of the item of Rs. 1,00,000 (which was said to have escaped assessment) were factually pending on April 1, 1962 and, therefore, the notice under s. 148 of the 1961 Act would be incompetent.

An attempt was made by counsel for the Revenue to distinguish the aforesaid decisions on the ground that in the instant case the earlier proceedings under s. 34 of the 1922 Act being without jurisdiction, must be regarded as *non est* inasmuch as the Assistant Appellate Commissioner had annulled the revised assessment made by the Income-tax Officer on the ground that the initiation of the proceedings (which was in respect of property income that had escaped assessment) was not justified inasmuch as it was not a case of omission or failure on the part of the assessee to furnish full particulars of the property income. The submission, in our view, is factually incorrect. The reassessment order made by the Income Tax Officer on December 22, 1965 clearly shows that he had initiated the proceedings (in respect of property income) under s. 34(1) (b) i.e. in consequence of information gathered by him from Assistant Appellate Commissioner's order for an earlier year and not under s. 34(1)(a) on account of any omission or failure on the part of the assessee to make a full disclosure and during the proceedings so initiated he came across the item of Rs. 1,00,000 being the income from undisclosed source which he held had been concealed and was liable to be included under s. 34(1)(a). Therefore, the initiation of the proceedings under s. 34 by the Income Tax Officer cannot be regarded as being without jurisdiction and hence

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- A** *non est*. As stated earlier the Department allowed the Assistant Appellate Commissioner's order whereby the reassessment order was quashed to become final. Instead of challenging that order a fresh notice under s. 148 of the 1961 Act was issued, which, in our view, the Income-tax Officer was not entitled to do in view of the fact that proceedings under s. 34 of the 1922 Act were factually pending on April 1, 1962 when the new Act came into force.
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In the result the order passed by the High Court is set aside and the impugned notice under s. 148 of the 1961 Act is quashed. It is obvious, that if any orders are passed pursuant to the impugned notice, those will be of no avail to the Revenue. The appeal is allowed but in the circumstances there will be no order as to costs.

**C**

S.R.

*Appeal allowed.*