

(1977) 09 MAD CK 0008
In the Madras High Court
Case No : Writ Petition No. 359 of 1975

A.C. Paul

APPELLANT

Vs

Tax Recovery Officer and Another

RESPONDENT

Date of Decision : 20-09-1977

Acts Referred:

Constitution of India, 1950 — Article 14
Income Tax Act, 1961 — Section 220(7), 5

Citation : (1979) 117 ITR 412

Hon'ble Judges : P. Govindan Nair, C.J;A. Varadarajan, J

Bench : Division Bench

Advocate : V.P. Raman, for N.R. Chandran and Jyothi Balasundaram, for the Appellant; A.N. Rangaswamy and Nalini Chidambaram, for the Respondent

Judgement

P. Govindan Nair, C.J.—The petition is mainly concerned with the interpretation to be placed on Sub-section (7) of Section 220 read with

the Explanation to that section of the I.T. Act, 1961 (hereinafter called "the Act"). Certain other points had also been argued at the time of the

hearing of the case. One of such points was that Circular No. 25 dated July 25, 1969 (See [1969] 73 ITR (St.) 23 issued by the CBDT should be

quashed as discriminative and violative of Article 14 of the Constitution or that the same concession that had been granted to assesseees who had

income arising or accruing in Pakistan must be extended to the writ petitioner. The other points urged, we do not consider that we should

pronounce upon in this judgment. We shall now refer to certain essential facts for disposing of the main question as well as the reasoning based on

Article 14 of the Constitution of India. The petitioner-assessee seems to be a very enterprising person who left the country early in life and who

established a fairly successful business at Colombo in Ceylon. He had considerable income accruing or arising from his business in Colombo. He

had also income accruing to him in India. Statements have been filed which are in the typed set of papers showing Indian income as a percentage

of total world income as assessed in India. This is at p. 1 of the typed set of papers. From this, it is seen that from the year 1951-52 onwards, the

writ petitioner had been assessed to Income Tax on considerably large amounts and that the percentage of Indian income to total world income

ranged from 2.48 to 11.57 for the years-which have been referred to therein. The circular to which we adverted categorically stated thus :

...assesseees having income in Pakistan, which cannot be brought into India, should be asked to pay tax only on the Indian income by treating it as

the total income for the purposes of the Income Tax Act. The balance of the tax should be stayed by the Income Tax Officer u/s 220(7).

2. Admittedly, as is clear from what we have already stated, the income arising in India and that which had accrued or arisen in Ceylon varied to

such an extent that it may be stated that the income arising in India was comparatively negligible.

3. We do not consider it necessary to refer to any other facts though the counter-affidavit, the reply-affidavit and the additional counter-affidavit

that have been filed in the case have referred to very many matters and very many figures, and that taxes have been imposed not only in relation to

the years with which we are concerned in this petition but also in regard to subsequent years. For the collection of tax alleged to be due for the

years with which we are concerned, coercive steps were taken which had reached the stage of sale by the issue of the sale proclamation dated

November 18, 1974. It was at this juncture that the petitioner first applied to the first respondent, the Tax Recovery Officer, then the CIT, Madras

(second respondent) and thereafter to the Central Board of Direct Taxes for relief and one of the points taken before the Board was that the

benefit of the circular which gave relief to Income Tax assesseees who had income accruing in Pakistan should be extended to the petitioner as well.

But the request of the petitioner was not granted and the TRO proceeded with the coercive steps for the collection of taxes and the sale

proclamation was issued and it was then that this court was approached by the petitioner and the prayer in this writ petition is for the issue of ""a

writ of mandamus or order or direction in the nature of a writ forbearing the first respondent from proceeding with the threatened recovery

proceedings pursuant to the sale proclamation dated November 18, 1972".

4. We may also mention that there was an earlier Writ Petition No. 3223 of 1969 (W.P. 3223/69 A.C. Paul v. Spl. Deputy Tahsildar for income

tax] where the petitioner prayed that he should not be treated as in default, particularly in view of the fact that he was not able to get the foreign

income remitted to India in view of the foreign exchange regulations and the restrictions and prohibition imposed in Ceylon. Reference was made to

Section 220(7) of the Act as well. But that question was not considered by the learned judges who dealt with the said petition. They proceeded on

another aspect as to whether it has been established that he had made any bona fide attempts to get the foreign income remitted in India. The court

felt that an opportunity should be given to the petitioner to establish this aspect and, in the circumstances of the case, directed that the revenue

should not bring the attached property for sale for arrears of tax due on the foreign income. The writ petition was dismissed subject to the above

observations.

5. At this stage, we must also refer to a preliminary objection raised by Mr. Rangaswamy on behalf of the revenue that in view of the approach by

the petitioner to this court by way of W.P. No. 3223 of 1969 and the dismissal of that petition, the petitioner should not be allowed to reagitate the

matter as the earlier decision would operate as res judicata. Though this argument was put forward at the time of the hearing, we do not find on a

perusal of the pleadings that any such specific plea was put forward that the present petition is not maintainable in view of the decision in W. P.

No. 3223 of 1969. We do not think, therefore, that it would be proper or just to dismiss this petition which, as far as we are able to see, raises the

question of interpretation of an important provision of the Act, namely, Section 220(7), on which no decision of any court has been brought to our

notice and the matter is res integra and the question is vital as far as the petitioner-assessee is concerned and further it is a question of general

importance. We, therefore, now propose to deal with the question as to the principles to be applied in "the apportionment of tax on the Indian

income and on the foreign income by applying the provision in Section 220(7)

which is as follows :

(7) Where an assessee has been assessed in respect of income arising outside India in a country the laws of which prohibit or restrict the remittance of money to India, the Income Tax Officer shall not treat the assessee as in default in respect of that part of the tax which is due in respect of that amount of his income which, by reason of such prohibition or restriction, cannot be brought into India, and shall continue to treat the assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed.

Explanation.--For the purposes of this section, income shall be deemed to have been brought into India if it has been utilised or could have been utilised for the purposes of any expenditure actually incurred by the assessee outside India or if the income, whether capitalised or not, has been brought into India in any form.

6. Before we proceed to scrutinize the section, the wording of it and its import, it is necessary to refer very briefly to the scheme of the Act.

Section 4, the charging section, states that ""where any Central Act enacts that Income Tax shall be charged for any assessment year at any rate or rates, Income Tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year or previous years, as the case may be, of every person.

7. Section 2(45) defines ""total income"" in these terms:

"total income " means the total amount of income referred to in Section 5, computed in the manner laid down in this Act.

8. Now, turning to Section 5, we find that the income which; had accrued or arisen to a person outside India during any previous year will form part of the total income of that person.

9. Section 5, so far as it is relevant, runs as follows :

5. Scope of total income.--(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year.....

10. Clause (c) clearly makes the income which had accrued or arisen to the writ petitioner in Ceylon a part of the total income of the writ petitioner

and in view of the charging section, the tax has been imposed in accordance with the terms of the Act on the entire total income including the

income that arose in Ceylon. That is the manner in which the assessment orders have been passed in relation to the various years against the

assessee. We consider that those assessment orders are in accordance with the provisions of the Act and those assessment orders have not been

challenged as being in violation of any provisions of the Act or as not supported by the provisions of the Act. The total tax, therefore, imposed on

the petitioner must be taken to have been settled except in regard to such assessment orders which have been questioned in appeal and the

appeals are pending before the AAC or in second appeals before the Tribunal or by way of reference to the High Court. The principle adopted

and the mode or manner of assessing by clubbing the Indian income along with the foreign income is the correct procedure to be followed.

11. We shall now scrutinise Section 220(7) which we have already extracted earlier in the judgment. Section 220(7) is meant certainly for the

purpose of giving relief to an assessee who had not been able to, due to the laws of the foreign country wherein the income had accrued or arisen

to him--the laws having prohibited or restricted the remittance of money to India--make remittances of money to India. In those circumstances, the

section inhibits the ITO from treating the assessee in default in respect of that part of the tax which is due in respect of that amount of the income

which by reason of such prohibition or restriction cannot be brought to India. The section demands that the ITO should continue to treat the

assessee as not in default in respect of such part of the tax until the prohibition or restriction is removed. We shall not at the moment cloud the issue

by referring to the Explanation by concentrating on the section. The question to be determined is whether the words ""that part of the tax"" applicable

to that amount of the income must be the tax calculated on the foreign income as if the foreign income is the total income imposing tax only on that

part of the total income treating that part of the income as the total income. The argument that has been advanced strenuously by Mr. V.P. Raman

before us was that, taking the wording of the section, the tax that can be demanded from the assessee in so far as that he had not been able to

bring the foreign income to India, as he had been restricted from doing so by the laws of that country must be determined by treating the Indian

income as the total income and by calculating the tax payable on the Indian income. The assessee's case is that larger amounts than due to the

revenue from him on calculation made on that basis had already been paid and in view of the fact that the terms of the section have been satisfied

regarding the foreign income, the petitioner-assessee cannot be treated as in default at all and no coercive steps should have been taken against

him. We are unable to accept the argument of counsel that after the determination of the tax that is due from a person in accordance with the

provisions of the Act which necessarily implies that tax must be calculated on the basis of his total income and at the rate applicable to that total

income, the ITO can alter the quantum of the total tax due from the assessee by bifurcating the foreign income and the Indian income and by

treating them as two separate incomes on which separate taxes have to be calculated in accordance with the provisions of the Act. The effect of

such a procedure in given cases, where the foreign income is large, would be to reduce the total tax that is imposable on a person. If the argument

of counsel is not accepted, the assessee will no doubt have to pay very much more by way of tax on the Indian income, which is a negligible part of

his total income, than what he would have had to pay if tax is calculated on his Indian income as if that was his total income. The tax that he would

then have to pay would be negligible because his Indian income was only an insignificant part of his total income. But if the tax is to be calculated

by taking into account the foreign income as well, the average rate of tax in regard to the Indian income will go up. The complaint was that the

assessee would then have to pay almost all the Indian income towards tax in India. That may be so. But it is a necessary and inevitable

consequence arising from the provisions of the Act which have not been impugned before us and this consequence must follow and it is not

possible for us to help the assessee assuming that the assessee has not been able to transfer or has been prohibited or restricted from transferring

his foreign income to India. We have no hesitation whatever in concluding that the method to be adopted is by finding out the average rate of tax applicable on the total income determined by the assessing authorities--i.e., the tax finally determined after the appeals and references if any for the concerned years are disposed of--by dividing the total tax so imposed by the total income. That average rate will have to be applied to the Indian income and the tax that can be collected will be the tax so calculated on the Indian income. There is no case before us that that has not been the method adopted in determining and demanding the tax due on the Indian income. So, there can be no complaint that the amount claimed as due from the assessee was not the amount that can be claimed in accordance with the provision in Section 220(7) of the Act. The main point on which this petition has been rested, therefore, fails.

12. We shall now turn to the second aspect, to which mention had been made at the beginning of the judgment, that Article 14 of the Constitution had been infringed by giving to assesseees who had foreign income accruing or arising in Pakistan the benefit of the circular to which reference has been made, We have already extracted the relevant and the emphatic part of that circular and we should repeat the words of that part. It is stated there that the tax on the Indian income must be determined by treating the Indian income as the total income of the assessee and only tax on that amount should be recovered from the assessee. We are constrained to say that this direction by the CBDT is a direction diametrically opposed to the statutory provision, a direction which we are unable to support on the basis of any provision under the Act or Rules, and we fail to understand how the Board issued such a circular. Even so, we are not called upon to quash that circular and we cannot quash that circular because that circular in no manner can be said to have caused any grievance to the petitioner excepting perhaps the disappointment that what the assesseees, if they had income in Pakistan would have got, he did not get. Such a disappointment we cannot treat as a grievance for the purpose of Article 226 of the Constitution.

13. Now, we shall deal with the question whether where assesseees who had income in Pakistan having been given by the CBDT a concession which they gave by stating that the tax should be calculated on the basis that

their Indian income should be treated as their total income, the same should also be extended to the assessee in view of the equality clause embodied in Article 14 of the Constitution. What has been done in the circular is against the provisions of law. No one can contend before us in proceedings under Article 226 of the Constitution that the wrong act must be extended to him as well in order to satisfy the provisions of Article 14. The equality before law does not mean that there must be equality in illegality. The statute compels us to take the view that we took and no action done without authority interpreting the statute in a wrong manner can be claimed to have conferred any benefit on the petitioner before us which he can by any stretch of imagination claim to have conferred a right on him which would compel us to issue a writ by the exercise of our extraordinary jurisdiction. We, therefore, negative this contention as well.

14. At this stage, we shall refer to a few more facts which we are able to glean from the additional counter-affidavit filed on behalf of the revenue after steps had been taken by the proclamation dated November 18, 1974, which is sought to be quashed. There had been assessments for the years subsequent to that for which the tax had been included in the demand which gave rise to the proclamation and astronomical figures are mentioned in its affidavit as due from the assessee by way of tax. We are not concerned in this case in regard to the assessments or demands made for the subsequent years and we shall not, therefore, express any opinion regarding what is due and what is not due.

15. The only other question that came up for discussion and which we should pronounce upon turns on the Explanation to Section 220(7) which has been extracted earlier. Counsel on behalf of the revenue stated before us two points on the basis of the Explanation and on the basis of Sub-section (7) of Section 220. He first emphasised that the petitioner has been indifferent in producing materials before the assessing authority as well as the TRO, the first respondent, that there were really laws in the foreign country which restricted or prohibited the transmission of funds, which belonged to him and which were in Ceylon, to India. In the absence of proof produced to the satisfaction of the TRO and the ITO, it is submitted that the petitioner should not be heard to say that he is entitled to the benefit of Section 220(7).

16. The second argument that has been advanced on this aspect of the matter was that the words ""for the purposes of any expenditure actually incurred by the assessee outside India"" in the Explanation will include the tax the assessee will have to pay on the foreign income in the foreign country imposed on him under the provisions of the Income Tax Act applicable in that country. This is an entirely new aspect which does not find a place in the petition and we will be entering on a hypothetical discussion on a question which is not in existence before us in this writ petition and we shall not, therefore, express any opinion on that question in this case.

17. Regarding the first point on this aspect, we consider that considerable time having elapsed and very much larger amounts having been claimed by the Income Tax authorities as due from the petitioner and steps for the recovery of those amounts having also been initiated, it is necessary that the writ petitioner must be afforded reasonable and full opportunities for raising any contention that may be available to him regarding the quantum of the taxes that is claimed and which, according to him, is not actually due from him ; regarding the question whether the Explanation is attracted at all and regarding the question whether he has satisfied the conditions of Section 220(7) in order to claim the benefits of the Act. We consider that the principles of natural justice require that the assessee must be given further opportunity before his properties are sold and coercive steps taken to collect the very large amounts claimed to be due. It cannot be gainsaid that he has been, as we said earlier, an active man and had earned large income which had also benefited the revenue and it is not necessary that when he Has retired from his business and has come back to India, he must be denied an opportunity to state his case, if he has any, before the few properties that he is said to own in India (and these are claimed to be his only properties as he has a case that he lost all his properties and wealth which were in Ceylon) are sold by taking coercive steps. In these circumstances we direct that the first respondent, namely, the TRO concerned, will issue a communication to the petitioner stating in clear terms and in chronological order, referring to the assessment years, as to what is the tax due for each of the years from him, if necessary after securing a fresh certificate and a detailed statement from the ITO concerned explaining how the figure claimed has been reached. He will also mention what

amount of tax had accrued due from him for each of the years, how much had been paid towards that for each year and how much balance remained to be paid for each of the years. If the revenue has a case that Section 220(7) is not attracted, the officers will also state the reasons for the same in the communication to be issued. They will further give reasons for saying that the Explanation has been attracted if they have such a case as well. We consider that it would be better if such a communication is issued by the ITO concerned and not by the TRO who would not have with him all the necessary facts and figures. After issue of notice by registered post acknowledgement due, the assessee will be afforded a reasonable opportunity to state his case regarding the claim put forward in the communication. If the assessee submits representations in answer to the claim put forward by the Income Tax authorities, those representations will be duly and judicially considered and if they are to be negated, reasons will be stated and a written order would be made giving reasons for rejecting the representations made by the assessee. This order too will be served on the assessee and only thereafter any further coercive steps should be taken against the assessee for the payment of any tax that is alleged to be due from him.

18. We can realise that very large sums of money are said to be due from the assessee and the matter has taken a long time and has been pending for a long number of years. But in the process of judicial administration the wheels of which grind but slowly, much to our regret, we cannot help this consequence, unless the Bar will be far more vigilant and exert very much more and we on our side are enabled by the court having its full sanctioned strength and unless all of us too turn out very very hard work in the disposal of the large number, we would say the alarming number of cases that are pending in this court, and in every court in India.

19. We dispose of this writ petition on the terms we have mentioned earlier in this judgment. We direct the parties to bear their respective costs.

20. Expeditious steps will be taken by the revenue and we expect that the assessee having been given a second life will not ruin himself by his own carelessness and will also act promptly by responding to the communication and by producing the materials, if any, necessary to establish the factors essential for the purpose of the application of Section 220(7) and for

avoiding the applicability of the Explanation of the sub-section.