
(1978) 05 CAL CK 0002

In the Calcutta High Court

Case No : Income-tax Reference No. 321 of 1970

Commissioner of Income Tax

APPELLANT

Vs

B.R. Vasa

RESPONDENT

Date of Decision : 08-05-1978

Acts Referred:

Income Tax (Amendment) Act, 1959 — Section 2, 4
Income Tax Act, 1922 — Section 34, 34(1), 34(4)
Income Tax Act, 1961 — Section 147, 148, 297(2)

Citation : (1979) 116 ITR 940

Hon'ble Judges : Dipak Kumar Sen, J; C.K. Banerji, J

Bench : Division Bench

Advocate : B.L. Pal and Ajit Sengupta, for the Appellant; Sanjoy Bhattacharya, amicus curiae, for the Respondent

Judgement

Sen, J.—The facts found and/or admitted in these proceedings, inter alia, are as follows :

B. R. Vasa, the assessee, had been assessed to Income Tax in the assessment year 1947-48, the relevant previous year being the one ended on the 31st March, 1947. Subsequently, on the 29th February, 1964, it was found that in the said year the assessee had made deposits totalling Rs. 56,996 in an account with the United Bank of India at Bombay which had not been disclosed by the assessee in his return. With the approval of the CBDT, on the 29th March, 1964, a notice u/s 147 of the I.T. Act, 1961, was issued and served on the assessee. Explanations given by the assessee in reassessment proceedings were rejected and the said deposits were added to his total income and brought to tax.

2. Being aggrieved, the assessee preferred an appeal before the AAC, who confirmed the reassessment. The assessee preferred a further appeal to the Tribunal. It was contended before the Tribunal for the first time that the reassessment proceedings u/s 34 of the Indian I.T. Act, 1922, had become time-barred on the 31st March, 1962, in the instant case and could not have been

validly initiated thereafter. This contention was sought to be supported by the decision of the Supreme Court in *J. P. Jani, J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, . It was contended on behalf of the revenue on the other hand that the decision in *J. P. Jani* was on the basis of a concession by the revenue to the effect that the right of the ITO to reopen the assessment under the Indian I.T. Act 1922, had become time-barred. There was no such concession in the instant case. It was submitted that even if the earlier Act of 1922 had not been replaced by the I.T. Act, 1961, the ITO could have validly initiated proceedings u/s 34(1)(a) of the earlier Act.

3. The Tribunal, however, on the basis of *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, came to the conclusion that under the later Act of 1961 a notice u/s 148 for reopening an assessment could not be issued where such right to reopen had already become barred under the earlier Act on the date when the new Act came into force. The Tribunal found that in the instant case the right of the revenue to proceed u/s 34(1)(a) of the earlier Act had become time-barred after the 31st March, 1962, and could not be revived thereafter. The Tribunal, however, found that in March, 1964, the ITO had reason to believe that income, profits and gains of the assessee aggregating Rs. 1 lakh or more had escaped assessment in the years 1947-48 and 1948-49. The Tribunal, accordingly, allowed the appeal of the assessee.

4. On an application of the CIT, West Bengal I, u/s 256(2) of the I.T. Act, 1961, this court has directed the Tribunal to draw up a statement of case and refer the following question of law arising out of the Tribunal's order:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessment made u/s 147 of the Income Tax Act, 1961, was invalid in view of the Supreme Court decision in the case of *J. P. Jani, ITO v. Induprasad Devshankar Bhatt*?"

5. At the hearing, no one appeared on behalf of the assessee. Being of the view that the question was of some importance we requested Mr. Sanjoy Bhattacharya, learned advocate, to assist us in the instant case as "*amicus curiae*".

6. Mr. B. L. Pal, learned counsel for the revenue, has drawn our attention to Section 34(1)(a) of the Indian I.T. Act, 1922, as it stood at the relevant time. The section was, *inter alia*, as follows :

"34. Income escaping assessment. (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 u/s 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 falling under clause (a) at any time...serve on the assessee, ... a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains... :

Provided that the Income Tax Officer shall not issue a notice under clause (a) of Sub-section (1)...

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to Income Tax which have escaped assessment... .. amount to, or are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March, 1941;

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case falling under Clause (ii), unless the Central Board of Revenue, and, in any other case, the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice:..

(4) A notice under Clause (a) of Sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that sub-section before its amendment by Clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates."

7. Mr. Pal next drew our attention to the facts in J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt, , where the assessee had been assessed to Income Tax in the assessment year 1947-48. The assessment order was passed on the 31st January, 1952. The ITO, thereafter, obtained information that some profits received by the assessee through a benamidar had escaped assessment by reason of non-disclosure of the same by the assessee. After obtaining the approval of the Commissioner, the ITO issued a notice dated the 27th March, 1956, u/s 34(1)(a) of the earlier Act. By an order made on the 19th March, 1957, the income of the assessee was reassessed, the undisclosed profit was added to the assessee's income and brought to tax. On appeal the AAC by his order dated the 5th January, 1963, set aside the reassessment on the ground that there was no valid service of the notice. On the 4th January, 1963, the ITO issued a fresh notice u/s 147(a) of the 1961 Act. This was followed by a notice u/s 148 dated the 13th November, 1963. On the ground that reassessment proceedings under the earlier Act had become time-barred and that the new Act could not be invoked, the assessee instituted proceedings under Article 226 of the Constitution for quashing the said notices. The High Court allowed the application of the assessee and set aside the same. The matter finally came up before the Supreme Court.

8. It was admitted on behalf of the revenue before the Supreme Court that the right of the ITO to reopen the assessment for the year 1947-48 had become

barred under the earlier Act before the later Act came into force. On the basis of such admission the Supreme Court held that it was not permissible to construe Section 297(2)(d)(ii) of the later Act as reviving the right of the ITO to reopen an assessment already barred. Such construction would result in giving a retrospective operation to the section, which was warranted neither by the express language thereof nor by implication. The Supreme Court accepted the contentions of the assessee and the appeal of the revenue was dismissed.

9. Mr. Pal reiterated that the decision in *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, proceeded on the above concession of the revenue that the right of the ITO to reopen the assessment for the year 1947-48 in that case had become time barred before the later Act had come into force. The ratio of the decision was that Section 297(2)(d)(ii) of the I.T. Act, 1961, did not revive the right to reopen an assessment which had become barred under the earlier Act. The Supreme Court in deciding Jani's case did not consider or construe Sub-section (4) of Section 34. The sub-section clearly indicated that the notice u/s 34(1)(a) of the earlier Act could have been validly issued up to the time when the new Act came into force.

10. Mr. Sanjoy Bhattacharya, as "amicus curiae", has drawn our attention to several amendments introduced in Section 34 of the Indian I.T. Act, 1922, from time to time.

11. Prior to the Finance Act, 1956, the said section read, inter alia, as follows :

"34. Income escaping assessment.--(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 u/s 22 for any year or to disclose fully or truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to Income Tax has escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or.....

he may in cases falling under Clause (a) at any time within eight yearsof the end of that year, serve on the assessee..... a notice containing all or any of the requirements which may be included in a notice under Subsection (2) of section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

12. By the Finance Act of 1956 the said section was amended and the words "within eight years" were deleted and the old proviso was substituted by three new provisos. After the amendment the section read as follows:

"34. Income escaping assessment.--(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 u/s 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 falling under Clause (a) at any time.....serve on the assessee.....a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains.....:

Provided that the Income Tax Officer shall not issue a notice under clause (a) of Sub-section (1)--...

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to Income Tax which have escaped assessment.....amount to, or are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March, 1941 ;

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case falling under Clause (ii), unless the Central Board of Revenue, and, in any other case, the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice :....."

13. By Section 2 of the Indian I.T. (Amend.) Act, 1959, Sub-section (4) was added to Section 34 of the Act of 1922. The said Sub-section (4) read as follows:

"(4) A notice under Clause (a) of Sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that sub-section before its amendment by Clause (a) of Section 18 of the Finance Act, 1956 (18 of 1956), had expired in respect of the year to which the notice relates."

14. By Section 4 of the said Act of 1959, notices, assessments, etc., in certain cases already issued were sought to be saved from being time-barred. The said section read as follows :

"Saving of notices, assessments, etc., in certain cases.--No notice issued under Clause (a) of Sub-section (1) of section 34 of the principal Act at any time before the commencement of this Act and no assessment, reassessment or settlement made or other proceedings taken in consequence of such notice shall be called in question in any court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or reassessment was made, the time within which such notice should have been issued or the assessment or reassessment should have been made under that section as in force before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired."

15. Section 292(2)(d)(ii) of the Act of 1961 reads, inter alia, as follows :

"(2) Notwithstanding the repeal of the Indian Income Tax Act, 1922 (hereinafter referred to as the repealed Act),--.....

(d) where in respect of any assessment year after the year ending on the 31st day of March, 1940.....

(ii) any income chargeable to tax had escaped assessment within the meaning of that expression in section 147 and no proceedings u/s 34 of the repealed Act in respect of any such income are pending at the commencement of this Act, a notice u/s 148 may, subject to the provisions contained in section 149 or section 150, be issued with respect to that assessment year and all the provisions of this Act shall apply accordingly."

16. Mr. Bhattacharya cited another decision of the Supreme Court in S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, . The facts in that case were that on the 30th April, 1954, the ITO issued a notice on the firm, Purshottam Laxmidas, u/s 34 of the Indian I.T. Act, 1922, stating that he had reason to believe that the income of the said firm for the year ending 31st March, 1943, had been under-assessed. The notice was issued after obtaining the satisfaction of the Commissioner and reassessment was made. On the 9th July, 1954, the said firm instituted proceedings under Article 226 of the Constitution in the Bombay High Court seeking to quash the said notice. It was held by a Single Bench of the High Court that the notice was bad and without jurisdiction inasmuch as it had been issued more than 8 years after the close of the relevant assessment year. A Division Bench of the High Court affirmed the decision on appeal. Finally, the matter went up to the Supreme Court, where it was contended on behalf of the revenue that by reason of the provisions of s, 4 of the Indian I.T. (Amend.) Act, 1959, the said notice must be held to be valid. It was contended on behalf of the assessee that Section 4 of the Amending Act of 1959 operated only to validate actions taken after the 1956 amendment and that Sub-section (4) introduced in s, 34 operated from the date of its introduction. The majority of S. K. Das, Kapur and Sarkar JJ. held that Section 34(4) validated actions initiated after the I.T. (Amend.) Act, 1959, came into force. The majority consisting of Sarkar, Hidayatullah and Raghubar Dayal JJ. also held that Section 4 of the Indian I.T. (Amend.) Act, 1959, validated notices issued u/s 34(1)(a), as amended in 1948, including notices in respect of assessment years prior to March 31, 1956.

17. The relevant observations in the judgment of Das J. (at p. 20 of the report) are as follows:

"It is manifest that Sub-section (4) of Section 34 does not help the appellants. That sub-section is clearly prospective and is intended to authorise action after the coming into force of the 1959 amendment."

18. By reason of the language of Sub-section (4) of Section 34 as it stood at the

relevant time and in view of the majority judgment in *S. C. Prashar*, reopening of the assessment in the instant case u/s 147 of the I.T. Act, 1961, in our opinion, must be held to be valid. On the day the I.T. Act, 1961, came into force, that is, on 1st April, 1962, it cannot be said that the right of the ITO to reopen the assessment in the instant case had become time-barred as up to 31st March, 1962, the ITO concerned could have issued a notice under Sub-section (4) of Section 34. In that view of the matter Section 297(2)(d)(ii) of the later Act applies to the facts of this case. The relevant assessment year 1947-48 is an assessment year after the year ending on the 31st March, 1940. The reassessment has proceeded on the basis that in this assessment year an income chargeable to tax has escaped assessment within the meaning of that expression u/s 147 of the new Act and no proceedings u/s 34 of the repealed Act in respect of such escaped income was pending on the 1st April, 1962. Therefore, the ITO in the instant case was justified in issuing notice u/s 148 with respect to the escaped income in the assessment year 1947-48.

19. In *J.P. Jani, Income Tax Officer, Circle IV, Ward G, Ahmedabad and Another Vs. Induprasad Devshanker Bhatt*, the effect of Sub-section (4) of Section 34 was not at all considered inasmuch as the case proceeded solely on the concession of the revenue that the proceedings for reopening had become time-barred before the new Act came into force.

20. For the reasons given above, we answer the question referred in the negative and in favour of the revenue. In the facts and circumstances, there will be no order as to costs.

21. In conclusion, we record our appreciation of the able assistance rendered by Mr. Sanjoy Bhattacharya as *amicus curiae*.

C.K. Banerji, J.

22. I agree.