
(1991) 09 BOM CK 0067
In the Bombay High Court
Case No : Writ Petition No. 618 of 1991

Devidas

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 13-09-1991

Acts Referred:

Income Tax Act, 1961 — Section 120, 124, 124(3), 127, 142

Citation : (1993) 200 ITR 697

Hon'ble Judges : W.M. Sambre, J;V.A. Mohta, J

Bench : Division Bench

Advocate : P.S. Lambat, for the Appellant; P.N. Chandurkar and Mrs. S.S. Wandile, for the Respondent

Judgement

V.A. Mohta, J.—Rule returnable forthwith. Heard by consent.

2. Is an assessee under the Income Tax Act, 1961 ("the I.T. Act"), entitled to a reasonable opportunity of hearing and a reasoned order when his application calling in question the jurisdiction of an Assessing Officer and for transfer of a case to the other Assessing Officer is rejected ?

3. In this matter, the above question falls for determination against the following factual matrix.

4. The petitioner resided and carried on business at Gondia (District Bhandara) where he was assessed to Income Tax up to the assessment year 1986-87. Since he did not file the return of income for the subsequent years at Gondia, he was served with notices u/s 142 of the Income Tax Act, by the Assessing Officer, Gondia. The petitioner had not filed the return for the assessment year 1987-88, anywhere. But for subsequent years he filed the return at Nagpur. He raised an objection to the jurisdiction of the Assessing Officer, Gondia, to assess his income on the ground that he had shifted his entire business activity to Kamptee (District Nagpur). He also requested for transfer of his case from Gondia to Nagpur. The Commissioner made enquiries, called for the report from the

Assessing Officer, Gondia, and on that basis (but without hearing the petitioner) rejected the application by making a short order dated January 14, 1991, saying that transfer would not be "in the interest of the Revenue".

5. The material provisions governing the jurisdiction of the Income Tax authorities and transfer of cases are sections 120, 124 and 127 of the Income Tax Act. Section 120 as substituted by the Direct Tax Laws (Amendment) Act, 1987, and brought into force with effect from April 1, 1988, is a general provision regarding jurisdiction of all Income Tax authorities. Section 124 deals with the jurisdiction of Assessing Officers. Sub-section (1) provides that within the territorial limits assigned to him, the Assessing Officer has jurisdiction in respect of a person residing or carrying on business in that area. Sub-section (2) refers to the authorities empowered to determine the question of jurisdiction. Sub-section (3) lays down the time limit in which the jurisdiction of the Assessing Officer can be called in question by the assessee. Sub-section (4) refers to the manner in which the objection regarding jurisdiction is to be decided. Sub-section (5) is a non obstante provision entitling the concerned Assessing Officer to assess only in those cases in which the entire income of the assessee accrued or arose within his area. Section 127 relates to transfer of cases. Sub-sections (1) and (2) lay down that the Director-General or Chief Commissioner or Commissioner may, "after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case" from one Assessing Officer to another. Sub-section (3) lays down that the requirement of giving "opportunity" referred to in sub-sections (1) and (2) does not apply where transfer is made to the Assessing Officer whose office is situated in the same city, locality or place.

6. The short historical background of section 127 is this : It corresponds to section 5(7A) of the Indian Income Tax Act, 1922. The validity of section 5(7A) (which did not provide either for hearing or for a speaking order in the matter of transfer of a case) was challenged before the Supreme Court on the ground that it violates articles 14 and 19(1)(g) of the Constitution, in the case of Pannalal Binjraj Vs. Union of India (UOI), . While upholding the validity of that section, it was observed (at page 589 of 31 ITR) (para 36) :

"We may, however, before we leave this topic, observe that it would be prudent if the principles of natural justice are followed, where circumstances permit, before any order of transfer u/s 5(7A) of the Act is made by the Commissioner of Income Tax or the Central Board of Revenue, as the case may be, and notice is given to the party affected and he is afforded a reasonable opportunity of representing his views on the question and the reasons of the order are reduced however briefly to writing..."

7. It is thus clear that the above rule of prudence has been translated into a rule of law in section 127 of the Income Tax Act. There have been some changes in section 127 but they related only to the form and not to the substance.

8. Learned counsel for the petitioner contends - and in our view rightly - that, considering the letter and/or spirit of section 127, there is no reason to draw, in the matter of an opportunity, a distinction between an order of transfer made despite opposition of an assessee and an order not made despite his request, specially when section 124(3) has given him a right to call in question the jurisdiction of a particular Assessing Officer. The total scheme relating to jurisdiction and transfer (sections 120, 124 and 127) is a proportionate mix of consideration for convenience of an assessee and interest of the Revenue and it aims at striking a balance between the private and public interest. The provisions of section 124 are a combination of the provisions of sections 5(5) and 64 of the Indian Income Tax Act, 1922. Section 124 speaks of a vested right of an assessee to have his assessment made at the principal place of his business and in the case of any objection relating thereto to have the same determined at the hands of a high authority like the Commissioner. The following observations of this court in the case of DAYALDAS KUSHIRAM Vs. COMMISSIONER OF INCOME TAX, (CENTRAL) AND ANOTHER., at pages 237 and 238 though made in the context of the scheme under the Indian Income Tax Act, 1922, need notice :

"In my opinion, section 64 was intended to ensure that as far as practicable an assessee should be assessed locally, and the area to which an Income Tax Officer is appointed must, so far as the exigencies of tax collection allow, bear some reasonable relation to the place where the assessee carries on business or resides.

..... A plain reading of section 64 shows that the same is imperative in terms. It also gives to the assessee a valuable right. He is entitled to tell the taxing authorities that he shall not be called upon to attend at different places and thus upset his business."

9. Thus, in the matter of objection to the jurisdiction of the Assessing Officer and transfer of a case, a valuable right of an assessee is clearly involved which cannot be adversely adjudicated upon without affording him an opportunity of hearing and disclosing to him the reasons for not accepting his point of view.

10. Such functions are essentially quasi-judicial and not purely administrative in character. But, assuming that they are so, there is a duty to act fairly even in the exercise of such administrative functions involving discretion. In this context, the following passage from de Smith's Judicial review of administrative Action, fourth edition, may be noticed (at pages 238, 239) :

"That the donee of a power must "act fairly" is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative."

11. This element of fair play is one of the inspirations behind the rule of

prudence referred to by the Supreme Court in PANNALAL BINJRAJ AND ANOTHER Vs. THE UNION OF INDIA AND OTHERS. (AND OTHER CASES)., and the rule of law incorporated in section 127.

12. The following propositions are put forth on behalf of the Department in defence of the impugned order :

- (1) A statute can, in appropriate cases, exclude the principle of natural justice.
- (2) Since the assessee has no legal right of being assessed by any particular Assessing Officer, the principle of natural justice can be validly excluded in the matter by the Income Tax Act.
- (3) Section 127 restricts the obligation of hearing and passing a speaking order only when the case is to be transferred suo motu.
- (4) Section 127 excludes by necessary implication an opportunity of hearing when there is refusal to transfer.
- (5) In any case, perusal of the contents of an application made by the petitioner and the enquiry report obtained from the Assessing Officer is sufficient compliance with the principles of natural justice.

13. Now, the first proposition is well settled and admits of no debate. (See for example the case of Union of India (UOI) Vs. Col. J.N. Sinha and Another, .

14. In support of the second proposition, strong reliance is placed upon the following observations made by the Delhi High Court in the case of Kanjimal and Sons Vs. Commissioner of Income Tax, New Delhi, :

"One can, however, easily appreciate that all these safeguards are not really necessary and the objection as to jurisdiction would only be a purely hypertechnical objection in a case where, when all is said and done, an assessee has been assessed by an Income Tax Officer, who is in charge of the area, where he resides or principally carries on business and the assessee has been put to no inconvenience or harassment. After all, no assessee can claim a basic right of being assessed by one officer rather than another; the earmarking of the jurisdiction to officers vis-a-vis assessee has two principal objects : one, that of causing least inconvenience and harassment to the assessee, and two, maximum organisational advantage and convenience to the officers of the Revenue to effectively discharge their statutory functions."

15. The above observations are made while explaining the general scheme of section 124 of the Income Tax Act relating to jurisdiction and cannot be torn out of context. The gist of the ratio decidendi is that old sub-section (7) - equivalent to now sub-section (5) - entitled the concerned Assessing Officer to assess only in those case where the whole income of the assessee accrued or arose within the area falling within his jurisdiction. The case does not lay down a broad proposition - as canvassed on behalf of the Department - that in the matter of objection to the jurisdiction of the Assessing Officer and transfer of his case, the

assessee has no legal right whatsoever, Indeed, it is to the contrary. In this connection, the following passage from the case of DEVI DAYAL MARWAH Vs. COMMISSIONER OF Income Tax, ANDHRA PRADESH, AND OTHERS., may be usefully quoted (at page 839) :

"That this is a right conferred on the assessee as also a provision for facilitating the Income Tax authorities for the better assessment and collection of revenue, is evident from a plain reading of the section itself. This is further reinforced by the provisions of sub-section (3), because it prescribes the procedure for determining a question relating to the principal place of business or of residence, where such a question arises, and it further enjoins that before such determination could be made by the authorities specified therein, the assessee should be given an opportunity of representing his view."

16. The third proposition is based on a strict literal construction of section 127. In our view, such a literal construction leads to obvious anomalies and unfairness which could not have been intended. It is well settled that, when from construction of a statue, two views are possible, one which results in anomaly and the other not, it is the duty of the court to adopt the latter and not the former. Hence, in our view, this section calls for contextual and object-oriented construction, keeping in view its historical background. The clear object of section 127 is to afford an opportunity to the assessee to put forth his point of view in the matter of transfer and to inform him, though briefly, of the reasons for not accepting the same. What can be the logic behind providing an opportunity only when the case is to be transferred despite his objection and not providing such an opportunity when the case is not to be transferred despite his request ? One of the rules of interpretation of statutes is that imprecision in the language used in the statute should not be allowed in the way of adopting a reasonable construction which avoids incongruities and advances the object substantial justice. Therefore, in our view, section 127 will apply not only when the case is to be transferred despite objection of the assessee but also when it is not to be transferred despite his request.

17. The fourth proposition is based on the maxim "Expression unius est exclusio alterius" which is a rule of prohibition by necessary implication. We do not think that the above rule will apply in the instant case. In this context, we can do no better than to quote the following passage from de Smith's Judicial review of Administrative Action, fourth edition (at page 187) :

"(3) Where legislation expressly requires notice and hearing for certain purposes but imposes no procedural requirement for other purposes.

Here the maxim Expression unius est exclusion alterius may be invoked to deny a right to notice and hearing in a context where the statute or the rules are silent. But this maxim, like so many other aids to interpretation, "certainly requires to be watched", it may be "a valuable servant, but a dangerous master to follow... The exclusio is often the result of inadvertence or accident, and the

maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

18. In support of the fifth proposition, strong reliance was placed on the case of *Autofin Ltd. Vs. Commissioner of Income Tax and Another*, . The said decision involves transfer of a case from one Assessing Officer to the other in the same city-a situation covered by sub-section (3) of section 127 which makes the provisions of sub-sections (1) and (2) inapplicable to such cases. In the instant matter, sub-section (3) is not attracted and hence, the ratio of that decision will not apply since the observations therein will have to be read in that context only. Here is a case where behind the back of the assessee, certain enquiry is made and that material has been used against the assessee without affording him an opportunity to offer any principal business activity of the assessee was shifted from Gondia to Kamptee. In our view, even the nature of the case demanded an opportunity of hearing.

19. It is true that section 127 refers to suo motu jurisdiction, but it is settled law that such jurisdiction can be triggered either by an assessee or the Revenue. The power is conferred to remedy any injustice and it is always open to bring to notice any error, illegality or injustice.

20. We, therefore, see no merit in any of the five propositions put forth before us on behalf of the Department. In our view, the impugned order is vitiated because of absence of hearing and recording of reasons. We may, before coming to the close, hasten to add that no hard and fast rule can be laid down about the extent and manner of hearing and reasons to be recorded. All depends upon the facts and circumstances on each case.

21. Under the circumstances, the petition is allowed and the impugned order passed by the Commissioner dated January 14, 1991, is quashed and set aside. In order to curtail the delay and procedure, we direct the petitioner to appear before the Commissioner on September 25, 1991, for fixing a suitable date for hearing. Needless to mention the Commissioner is free to pass an appropriate speaking order hearing the petitioner in accordance with law.

22. Rule made absolute accordingly. No order as to costs.