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(1951) 03 PAT CK 0008

In the Patna High Court

Case No : Miscellaneous Judicial Case No. 230 of 1949

In Re: CHATTURAM HORILRAM LTD

Date of Decision : 14-03-1951

Acts Referred:
Income Tax Act, 1961 — Section 149, 22, 23, 33, 34

Citation : (1951) 19 ITR 600

Hon'ble Judges : Sarjoo Prosad, J;Ramaswami, J

Bench : Full Bench

Judgement

RAMASWAMI, J. - This reference is made by the Income Tax Appellate Tribunal u/s 66(1) of the Indian Income Tax Act.

The assessee Chatturam Horilram Limited of Kodarma is a private limited company which is composed of two Hindu undivided families of which Chatturam and Darsanram are the Kartas. The assessee carried on the business of exporting mica for sale to foreign countries. On December 22, 1939, the Income Tax Officer made assessment for the year 1939-40 and determined the total income to be Rs. 1,09,200. In appeal the Appellate Tribunal set asides the assessment on the ground that the Indian Finance Act of 1939 was not in force in Chota Nagpur which was a partially excluded area. At the instant of the Commissioner of Income Tax reference was made to the High Court on the following question :- "Whether levy of Income Tax should be made on the assessee for the year 1938-40 in the absence of a notification u/s 92(1) of the Government of India Act by the Governor extending the Finance Act of 1939 to the excluded area ?" On September 30, 1943, the High Court Answered the question in the negative.

After the decision of the Appellate Tribunal but before the date of the judgment of the High Court the Governor of Bihar enacted Bihar Regulation IV of 1942 to which the Governor-General gave assent on June 30, 1942. The notification was published in the Bihar Gazette on July 7, 1942. As a result, the Indian Finance Act of 1939 was brought into force in Chota Nagpur Division and the Santal Parganas District with retrospective effect from March 30, 1939.

On July 8, 1941, the Income Tax Officer had issued notice to the assessee u/s 34 of the Income Tax Act. At the instance of the assessee, the proceedings were stayed for some time but on February 8, 1944, the Income Tax Officer made the following order :-

"Due to recent judgment of the High Court the assessment u/s 23(3) stands cancelled and with it the notice u/s 34 issued in this case becomes ineffective and is withdrawn. Assessee derives income from mica mining and dealing, money-lending, mining rents and non-agricultural sources of zamindary, and this has escaped assessment in its entirety. Issue notice u/s 22(2) read with Section 34 again to file a return of income in the prescribed form and within the prescribed time, and inform the assessee that the original notice u/s 34 has been cancelled".

A fresh notice u/s 34 was issued on February 12, 1944, after which the income of the assessee was determined to be Rs. 4,86,351. On appeal the Assistant Commissioner reduced the amount by Rs. 11,187. The assessee preferred an appeal to the Income Tax Appellate Tribunal who held that the notice u/s 34 was validly issued. It was also argued before the Tribunal that the cash credits amounting to Rs. 4,04,618 in the books were satisfactorily explained. The Tribunal held that the assessee had failed to discharge the onus which lay upon him to explain the cash credits and that the Income Tax Officer had rightly held that the cash credits were secret profits of the assessee.

at the instance of the Appellate Tribunal has propounded the following question of law for being determined by the High Court :- "Whether in the circumstances of the case, the notice issued on February 12, 1944, u/s 34 of the Indian Income Tax Act was validly issued for the assessment of the year 1939-40 ?"

On behalf of the assessee Mr. Baldeva Sahay stressed the argument that the notice issued u/s 34 was illegal since the Income Tax Officer had no "definite information", and since there was no "discovery" that income chargeable to Income Tax had escaped assessment. Learned counsel, therefore, maintained that the conditions precedent for the issue of the notice were not existing and the assessment made u/s 34 was illegal. In my opinion this argument is wholly untenable. From the statement of the case it is plain that on February 8, 1944, the Income Tax Officer cancelled the original notice which had been issued u/s 34 on July 8, 1941. Instead the Income Tax Officer issued a fresh notice u/s 22(2) read with Section 34 requiring the assessee to file return of income. It is true that in the order dated February 8, 1944, the Income Tax Officer did not mention in so many words that Regulation IV had not been promulgated. But as observed in the judgment of the Appellate Tribunal there can hardly be any doubt that the fresh notice dated February 12, 1944, was issued on the strength of Regulation IV of 1942. The circumstance that the Income Tax Officer came to know that Regulation IV of 1942 has been promulgated constitutes in my opinion "definite information", in consequence of which the Income Tax Officer discovered that the income which was chargeable in 1939-40 had escaped assessment. No universal meaning can be given to the meaning of the phrase "definite information" for it is

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obvious that the application of Section 34 must depend upon the particular circumstances of each case. It is not, however, necessary that the "definite information" should relate to a pure question of fact. Even definite information with respect to the state of the law will bring the section into operation. The section cannot be invoked merely because the Income Tax Officer changed his mind about the interpretation of the law but the section will doubtless operate if the Income Tax Officer is informed that a case has been overruled or that a statute or a regulation had been passed which has not been brought to his attention before. Upon the admitted facts of the present case it is manifest that the Income Tax Officer had definite information with respect to the promulgation of Bihar Regulation IV of 1942 and as a result of this definite information the Income Tax Officer made discovery that income had escaped assessment. The word "discovery" which occurs in Section 34 must in my opinion be construed to mean no more than "finds out" or "has reason to believe" or "satisfies himself". This view is supported by Williams v. Trustees of W. W. Grundy, in which case the discovery was that an interest supposed to be vested was in fact contingent; that is to say, it was as to a pure point of law. Mr. Justice Finlay held "discovers" means only "has reson to believe" or "finds out" and he follwed the same view in a later case, British Sugar Manufacturers Ltd. v. Harris. In a Scotch case, Commissioners of Inland Revenue v. Mackinlays Trustees, the Judges adopted the same view as that taken by Mr. Justice Finlay holding that "discovery" might include a mere discovery of the state of law, and that it was not necessary that any new fact should be discovered. On behalf of the assessee Mr. Baldeva Sahay contended that the assessee had made a due return of his income in 1939-40 and such income cannot be said to have escaped assessment within the meaning of Section 34 of the Act. Learned counsel referred to Sir Rajendranath Mukherjee v. Commissioner of Income Tax, Bengal, in which the question was whether the Income Tax Officer could proceed u/s 23(1) or that he should have proceeded u/s 34 of the Income Tax Act. It appears that in April, 1927, notice was issued to Burn & Co. calling for a return of their income for the year 1926-27 and a return was duly made in 1928. Meanwhile the Income Tax authorities thought that Martin & Co., had purchased Burn & Co. and made an assessment on Martin & Co., in respect of the joint income of Burn & Co. and Martin & Co. Martin & Co., appealed and the High Court ultimately held on May 16, 1930, that the two companies should have been separately assessed. The assessment of Martin & Co., was accordingly amended by eliminating the income of Burn & Co. and the Income Tax Officer assessed Burn & Co., on November 8, 1930, on their income as returned in 1928. It was held by the Judicial Committee that the assessment made u/s 23(1) on Burn & Co., on November 8, 1930, was a legal assessment. Lord Macmillan who pronounced the opinion of the Judicial Committee observed that the income of Burn & Co., did not "escape assessment" within the meaning of Section 34 of the Income Tax Act; that income which has been duly returned for assessment cannot be said to have escaped assessment within Section 34 though it has not been taxed within the assessment year. At page 77 he observed :-

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"The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have escaped assessment within the statutory meaning. Their Lordships find themselves with the view expressed in Lachhiram Basantlal v. Commissioner of Income Tax, Bengal, by the learned Chief Justice (Rankin) at page 118 : income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees income which have not yet terminated in a final assessment thereof. It may be that if no notice calling for a return u/s 22 is issued within the tax year then Section 34 provides the only means available to the Crown of remedying the omission, but that is a different matter".

It is patent that the Judicial Committee proceeded on the assumption that the assessment of Burn & Co., was pending all along and there was no necessity to issue notice u/s 34. The facts of the present case are widely different. There was no valid notice served u/s 23(2) and there was no valid proceeding u/s 34 before Bihar Regulation IV of 1942 was enacted. As the Indian Finance Act of 1939 had not been extended to Chota Nagpur, all proceedings initiated by the Income Tax Officer before June 30, 1942, were illegal and the ratio of the Privy Council case will not therefore be applicable.

Mr. Baldeva Sahay further pointed out that on December 22, 1939, the Income Tax Officer assessed total income to be Rs. 1,09,200 but on March 29, 1944, after the notice u/s 34 was served the Income Tax Officer determined the total income of the assessee to be Rs. 4,86,351. The contention was raised on behalf of the assessee that it was not open to the Income Tax Officer to go on making fresh computation and issuing fresh notice of demand. In support of his argument reference was made to Commissioner of Income Tax, Bombay Presidency and Aden v. Khemchand Ramdas, in which on January 17, 1927, the assessees who were registered as a firm were assessed u/s 23(4) on an income of Rs. 1,25,000 at the maximum rate. Being a registered firm no super tax was levied. A notice of demand was also made before March, 1927. On February 13, 1928, the Commissioner, in exercise of his power u/s 33, cancelled the order registering the assessees as a firm and directed the Income Tax Officer to take necessary action. On May 4, 1929, the Income Tax Officer assessed the firm to super tax. Upon these facts it was held by the Judicial Committee that the assessment made on January 17, 1927, was final and conclusive; that fresh action taken by the Income Tax Officer on May 4, 1929, was hopelessly out of time; that the order of May 4, 1929, was therefore one which the Income Tax Officer had no power to make. The Judicial Committee held that it was a debatable question whether the circumstances in the case were such as to bring it within the provisions of Section 34; but the case clearly would have fallen within the provisions of Section 35 had the Income Tax Officer exercised his power under the section within one year from the date on which earlier demand was served upon the respondents. The facts of the present case are manifestly different, for the assessment made by the Income Tax Officer was illegal since

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the Indian Finance Act of 1939 was not in force in Chota Nagpur on the material date and the principle of the Privy Council case cannot therefore be applied. On behalf of the Commissioner of Income Tax Mr. Dutt relied upon Kunwar Bishwanath Singh v. Commissioner of Income Tax in which the facts are almost parallel to those of the present case. The assessee, the late Maharaja of Benares, was a non-resident and he was assessed to Income Tax for assessment year 1936-37 without appointing an agent u/s 43 of the Act. The High Court, therefore, set aside the assessment on Februaray 14, 1938. Nine days later the Income Tax Officer made an order appointing an agent of the Maharaja and notice u/s 34 read with Section 22 was served upon the agent. Return was subsequently field by the agent and he was assessed to Income Tax. The assessee contended that the income had not escaped assessment within the meaning of Section 34 of the Act and therefore the notice issued on the agent on February 23, 1938, was not valid. Upon these facts it was held that the former notice issued to the Maharaja was not a notice within the meaning of Section 22(2) and the assessment proceedings were illegal and were void from start to finish. Consequently the income had escaped assessment within the meaning of Section 34 of the Act and the notice dated February 23, 1938, issued on the agent was legally valid. In the present case too the assessment made by the Income Tax Officer on December 22, 1939, was illegal and void since the Indian Finance Act, 1939, was not operative in Chota Nagpur on that date. The proceedings u/s 34 initiated by the Income Tax Officer on July 8, 1941, were wholly without jurisdiction for the same reason. In the eye of law the assessment proceedings (previous to July 7, 1942) were non-existent. In my opinion, the second notice u/s 34 of the Act dated February 8, 1944, was therefore validly issued for assessment of the year 1939-40.

On behalf of the assessee Mr. Baldeva Sahay addressed the argument that there was no evidence on which the Tribunal could have held that the cash credits were secret profits of the assessee. But this question has not been formulated by the Appellate Tribunal and no statement of the case has been made thereon. It is therefore not open for the High Court to examine this question in this case. It is of importance to state that the jurisdiction with which the High Court is invested under the Income Tax Act is of an exceptional nature and in hearing the reference the High Court has seisin only of such question of law as has been duly raised before the Appellate Tribunal and upon which there is statement of the case. The view that I have expressed of Section 66 finds support from Anglo French Textile Co., Ltd. v. Income Tax Appellate Tribunal in which an assessee applied to the Income Tax Appellate Tribunal u/s 66(1) of the Indian Income Tax Act to refer certain questions to the High Court. The Tribunal referred only some of them and refused to refer the others on the ground that they did not arise. The assessee thereupon filed an application in the Original Side of the High Court u/s 45 of the Specific Relief Act for a writ of mandamus requiring the Tribunal to refer the other questions. The application was rejected by the High Court and it was held that no mandamus could be issued for the reason that Section 66 was

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self-contained and did provide for the contingency when the statement of the case was incomplete as well as when no reference had been made at all. The principle finds support in the following observations of Lord Macmillan when delivering judgment of the Board in Commissioner of Income Tax, Bihar and Orissa v. Maharajadhiraja of Darbhanga : "The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court u/s 66, sub-section (5), is to decide the question of law raised by the case referred to them by the Commissioner, and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the questions to be decided... Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it decline to express their view on the question thus informally presented". Reference should also be made to Trustees Corporation (India) Ltd. v. Commissioner of Income Tax, Bombay in which Lord Blanesburgh said : "Their Lordships are fully alive to the circumstances in which the High Court was constrained to direct that these further questions should be referred to it for consideration, and the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court will, in future cases, be well advised to require, before they seek to entertain any questions u/s 66 of the Income Tax Act that the preliminary requirements of the section are strictly complied with. The stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The object is salutary and in their Lordships judgment the High Court will be well advised, before they entertain any question under the section, always to see that the preliminary statutory conditions have been fully observed."

It is necessary to state that the provisions of the corresponding section of the English Income Tax Act (8 and 9 Geo. 5 Ch. 40, Section 149) are different from those contained in Section 66 of the Indian Income Tax Act and the interpretation of Section 66 must depend upon a consideration of the language in which that section is couched and a reference to English practice is not apposite.

In the result I hold that the question referred to the High Court should be answered in the affirmative. The assessee must pay the cost of this reference. Hearing fee Rs. 250.

SARJOO PROSAD, J. - I entirely agree and have nothing to add.

Reference answered accordingly.

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