

(1951) 03 PAT CK 0003

In the Patna High Court

Case No : Misc. Judicial Case No. 230 of 1949

In Re: Chhaturam Horilram Ltd.

Date of Decision : 14-03-1951

Acts Referred:

Income Tax Act, 1922 — Section 22(2), 34, 66

Citation : AIR 1951 Patna 174

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

Bench : Division Bench

Advocate : Baldeo Sahay and R.J. Bahadur, for the Appellant; S.N. Dutta, for the Respondent

Judgement

Ramaswami, J.—This reference is made by the Income Tax Appellate Tribunal u/s 66(1), Income Tax Act.

2. The assessee Chaturam Horilram Limited of Kodarma is a private limited company which is composed of two Hindu undivided families of which Chaturam & Darshanram are the kartas. The assessee carried on the business of exporting mica for sale to foreign countries. On 22-12-1939 the Income Tax officer made assessment for the year 1939-40 & determined the total income to be Rs. 1,09,200. In appeal the Appellate Tribunal set aside the assessment on the ground that the Indian Finance Act of 1939 was not in force in Chotanagpur which was a partially excluded area. At the instance of the Commissioner of the 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 1939-40 in the absence of a notification u/s 92(1), Govt. of India Act, by the Governor extending the Finance Act of 1939 to the excluded area?"

On 30-9-1943, the High Court answered the question in the negative.

3. 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 30-6-1942. The notification was published in the Bihar Gazette on 7-7-1942. As a result, the Indian Finance

Act of 1939 was brought into force in Chotanagpur Division & the Santal Parganas District with retrospective effect from 30-3-1939.

4. On 8-7-1941 the Income Tax Officer had issued notice to the assessee u/s 34, Income Tax Act. At the instance of the assessee the proceedings were stayed for some time but on 8-2-1944 the Income Tax officer made the following order:

"Due to recent judgment of the High Court the assessment u/s 23(3) stands cancelled & with it the notice u/s 34 issued in this case becomes ineffective & is withdrawn. Assessee derives income from mica mining & dealing, money-lending, mining rents & non-agricultural sources of zamindari, & 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 & within the prescribed time, & inform the assessee that the original notice u/s 34 has been cancelled."

A fresh notice u/s 34 was issued on 12-2-1944 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 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 & that the Income Tax Officer had rightly held that the cash credits were secret profits of the assessee.

5. At the instance of the assessee 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 12-2-1944 u/s 34, Income Tax Act, was validly issued for the assessment of the year 1939-40?"

6. 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 existent & 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 8-2-1944 the Income Tax Officer cancelled the original notice which had been issued u/s 34 on 8-7-1941. 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 8-2-1944 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 12-2-1944 was issued on the strength of Regulation IV of 1942. The circumstances that the Income Tax Officer came to know that Regulation IV of 1942 had 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 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 & 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. Grundu" (1934) 1 KB 524, 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. Finlay J. held "discovers" means only "has reason to believe" or "finds out" & he followed the same view in a later case "British Sugar Manufacturer Ltd. v. Harris (1938) 2 KB 220. In a Scotch case, "Commissioners of Inland Revenue v. Mackinlay Trustees" (1938) 22 Tax Cas 305, the Judges adopted the same view as that taken by Finlay J. holding that "discovery" might include a mere discovery of the state of law, & that it was not necessary that any new fact should be discovered. On behalf of the assessee Sahay J. contended that the assessee had made a due return of his income in 1939-40 & such income cannot be said to have escaped assessment within the meaning of Section 34 of the Act. Learned Counsel referred to "Rajendranath Mukherjee v. Commissioner of Income Tax, Bengal" (1934) 2 ITR 71, 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, 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 & a return was duly made in 1928. Meanwhile the Income Tax authorities thought that Martin & Co. had purchased Burn & Co. & made an assessment on Martin & Co. in respect of the joint income to Burn & Co. & Martin & Co. Martin & Co. appealed & the High Court ultimately held on 16-5-1930, that the two companies should have been separately assessed. The assessment of Martin & Co. was accordingly amended by eliminating the income of Burn & Co. & the Income Tax officer assessed Burn & Co. on 8-11-1930 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 8-11-1930 was a legal assessment. Lord Mac-millan 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, 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 p. 77 he observed :

"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 in agreement with the view expressed in "Lachhiram Basantlal v. Commissioner of Income Tax, Bengal", by the learned Chief Justice (Bankin) at p. 118: "income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's" 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."

7. It is patent that the Judicial Committee proceeded on the assumption that the assessment of Burn & Co. was pending all along & 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) & there was no valid proceeding u/s 34 before the Bihar. Regulation IV of 1942 was enacted. As the Indian Finance Act of 1939 had not been extended to Chotanagpore, all proceedings initiated by the Income Tax officer before 30-6-1942 were illegal & the ratio of the Privy Council case will not therefore be applicable.

8. Mr. Baldeva Sahay learned counsel for the assessee further pointed out that on 22-12-1939 the Income Tax officer assessed total income to be Rs. 1,09,200 but on 29-3-1944 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 & issuing fresh notice of demand. In support of his argument reference was made to (1938) 6 ITR 414 (Privy Council) , in which on 17-1-1927, the assessee who were registered as a firm were assessed u/s 23(4) of 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 13-2-1928, the Commissioner, in exercise of his power u/s 33, cancelled the order registering the assessee as a firm & directed the Income Tax officer to take necessary action. On 4-5-1929, 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 17-1-1927, was final and conclusive, that fresh action taken by the Income Tax Officer on 4-5-1929, was hopelessly out of time; that the order of 4-5-1929, 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 u/s 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 the Indian Finance Act of 1939 was not in force in Chotanagpore on the material date & the principle of the Privy Council case cannot therefore be applied. On behalf of the Commissioner of the Income Tax Mr. Dutta relied upon KUNWAR BISHWANTH SINGH Vs. COMMISSIONER OF Income Tax, C. P. AND U. P., , in which the facts are almost parallel to those of the present case. The assessee, the late Maharaja of Benares, was a non-resident & he was assessed to Income Tax for the assessment year 1936-37 without appointing an agent u/s 43 of the Act. The High Court, therefore, set aside the assessment on 14-2-1938. Nine days later the Income Tax officer made an order appointing an agent of the Maharaja & notice u/s 34 read with Section 22 was served upon the agent. Return was subsequently filed by the agent & 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 & therefore the notice issued on the agent on 23-2-1938 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) & the assessment proceedings were illegal & were void from start to finish. Consequently the income had escaped assessment within the meaning of Section 34 of the Act & the notice dated 23-2-1938 issued on the agent was legally valid. In the present case too the assessment made by the Income Tax Officer on 22-12-1939 was illegal & void since the Indian Finance Act 1939 was not operative in Chotanagpore on that date. The proceedings u/s 34 initiated by the Income Tax Officer on 8-7-1941 were wholly without jurisdiction for the same reason. In the eye of law the assessment proceedings (previous to 7-7-1942) were non-existent. In my opinion, the second notice u/s 34 of the Act dated 8-2-1944 was therefore validly issued for assessment of the year 1939-40.

9. On behalf of the assessee Mr. Baldeva Sahay contended 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; 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 & upon which there is statement of the case. The view that I have expressed of Section 66 finds support from The Anglo French Textile Co. Ltd. Vs. The Income Tax Appellate Tribunal, Madras Bench and Another, , in , which an assessee applied to the Income Tax Appellate Tribunal u/s 66(1), Indian Income Tax Act, to refer certain questions to the High Court. The Tribunal referred only some of them & 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, Specific Relief Act, for a writ of mandamus requiring the Tribunal to refer the other questions. The application was rejected

by the High Court & it was held that no mandamus could be issued for the reasons that Section 66 was self contained & 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 observation of Lord Macmillan when delivering judgment of the Board in "Commissioner of Income Tax Bihar & Orissa v. Maharajadhiraja of Darbhanga" 60 I. A. 146:

"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 & 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 proceedings, but in the circumstances have not thought it proper to 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" 57 IA 152, 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 & 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 question u/s 66, 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 & 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."

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

11. 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.

12. I entirely agree and have nothing to add.