
(1981) 07 BOM CK 0029

In the Bombay High Court

Case No : Special Civil Application No. 1309 of 1978

Laherchand Dhanji

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-07-1981

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 21
Income Tax Act, 1961 — Section 139, 148

Citation : (1981) 7 TAXMAN 419

Hon'ble Judges : Kanade, J

Bench : Single Bench

Advocate : V.H. Patil, N.R. Jagtap and N.V. Ganu for the Assessee, for the Appellant; P.M. Pradhan and Miss S.G. Shah, for the Respondent

Judgement

Kanade, J.—By this application under article 226 of the Constitution of India, the petitioners challenge the legality and correctness of the order dated March 23, 1978, passed by the Commissioner of income tax, Pune-II, Pune.

The petitioners is a partnership firm. The petitioners carry on business as cotton and grain merchants and commission agents at Shirpur in Dhulia District. The firm is assessed under the provisions of the income tax Act, 1961. For the assessment year 1969-70, the petitioners' assessment was completed on March 18, 1970, by the third respondent, namely, the ITO, A Ward, Dhulia, by assessing the income at Rs. 12,140. Subsequently, a notice was issued by the ITO u/s 148 of the income tax Act. In response to that notice the petitioners filed a return for a total income of Rs. 52,140. The additional income of Rs. 40,000 was to cover certain cash credits appearing in the books of account of the petitioners. The said amount of Rs. 40,000 was included in the said return after the notice u/s 148 of the income tax Act was given. It is the contention of the petitioners that the said amount of Rs. 40,000 was included in the return with a view to enter into a settlement with the department by surrendering the said amount of Rs. 40,000 for assessment, praying for non-levy of penalty in respect

of the same. The negotiations between the petitioners and the ITO were going on. Meanwhile the Voluntary Disclosure Scheme, 1975, was introduced under an Ordinance known as the Voluntary Disclosure of Income and Wealth Ordinance, 1975 (XV of 1975). The said Ordinance of 1975 was repealed and replaced by the Voluntary Disclosure of Income and Wealth Act, 1976 (Act No. VIII of 1976) (hereinafter referred to as "the said Act"). During the course of settlement between the petitioners and the ITO, it is contended by the petitioners that the ITO suggested to take the benefit of the said Voluntary Disclosure Scheme, 1975, and, accordingly, the petitioners accepted the said suggestion, and initially they filed a declaration u/s 3(1) of the said Act for a total income of Rs. 45,000. The said declaration was made on October 30, 1975. In the said declaration it was specifically stated by the petitioners as under:

In response to notice u/s 148 of the income tax Act, 1961, for the assessment year 1969-70, income tax return was filed on June 30, 1972, for the income of Rs. 52,140 which included Rs. 40,000 on account of first four hundis of Rs. 10,000 each as above. However, the income tax assessment is still pending.

2. It is further contended by the petitioners that the ITO, who was authorised to assess the petitioners' income orally, told the petitioners that in spite of the notice u/s 148 of the income tax Act, the benefit of the provisions of the said Act can be made available to the petitioners. It further appears that the matter was referred to the second respondent, namely, the Commissioner of income tax, Pune-II, Pune. On a consideration of the papers placed before the Commissioner, the Commissioner opined that the petitioners could make a disclosure under the said Act in spite of the pending reassessment proceedings, and accordingly, a revised declaration was made by the petitioners disclosing an income of Rs. 49,000. The said declaration was made on December 15, 1975, and the same was accepted by the department. It appears that the second declaration with necessary papers was sent to the Commissioner. The Commissioner, having perused the declaration made by the petitioners and other documents produced before him and after consideration of the same, accepted the declaration made by the petitioners, after being satisfied that the petitioners were entitled to make a declaration under the provisions of the said Act. The said declaration made by the petitioners is annexed to the petition as exhibit "A" (collectively). In pursuance of the said declaration, the petitioners paid the tax of Rs. 15,850 on December 10, 1975, being the amount of income tax payable on the said declared amount. It further appears that a sum of Rs. 2,450 was also invested in securities as contemplated under the provisions of section 3(3) of the said Act on December 11, 1975. The Commissioner accepted the said declaration made by the petitioners, and a certificate dated January 28, 1976, was issued as provided by section 8(2) of the said Act. The said certificate is annexed to the petition as exhibit "B".

3. The ITO in the course of assessment for the assessment years 1967-68, 1968-69 and 1969-70, and other years was investigating in respect of certain

cash credits and sales appearing in the books of account of the petitioners. The petitioners explained to the ITO that these cash credits and sales were in respect of the income which was disclosed in the disclosure made by the petitioners and as per the provisions of the said Act the same could not be taken into account for the purpose of assessment, the same being assessed under the provisions of the said Act. The ITO, however, was of the opinion that the disclosure made by the petitioners was not made in accordance with law and, therefore, he was entitled to ignore the said disclosure made by the petitioners. In spite of the submission made by the petitioners that the said disclosure could not be taken into account for the purpose of assessment for the said assessment years, the ITO proceeded to assess the petitioners' income, ignoring the certificate issued by the Commissioner. Ignoring the contention of the petitioners, the ITO completed the assessment for the relevant assessment years, ignoring the said certificate, and passed orders of assessment. The said orders of assessment are annexed to the petition as ex. "C". It appears that the petitioners, feeling aggrieved by the said orders of assessment, had preferred appeals before the AAC of income tax.

4. In the meanwhile, the Commissioner of income tax issued a notice dated November 15, 1977, to the petitioners stating therein that prior to the declaration made by the petitioners u/s 3(1) of the said Act the petitioners had already filed a return of income for the assessment year 1969-70 disclosing an income of Rs. 52,140 and further that an amount of Rs. 40,000 declared under the said Voluntary Disclosure Scheme, 1975, had already been covered by the said income of Rs. 52,140 declared in the return of income" filled for that year. It was further stated in the said notice that the petitioners were, therefore, not entitled to the benefit of the said Scheme and the declaration was wrongly admitted by the office. It was further stated in the said notice as under :

In view of the above, it is proposed to withdraw the certificate issued to you u/s 8(2) of the Scheme. You are, however, given a chance to attend this office on 24-11-77 at 11.30 a.m. and state your objection, if any, to the proposed cancellation of the certificate.

5. The petitioners in pursuance of the said notice submitted their reply dated November 25, 1977. In the said reply, the petitioners, inter alia, contended that under the Scheme and the provisions of the said Act there was no provision whatsoever for a withdrawal of the certificate once issued u/s 8(2) of the said Act. The certificate once issued in favour of the petitioners is conclusive proof for acceptance of the declaration by the Commissioner, and the certificate so issued cannot be ignored. After giving a hearing to the petitioners, the Commissioner by his order dated March 23. 1978, held that the certificate issued u/s 8(2) of the said Act should stand cancelled, and the petitioners were restrained from using it as evidence in any proceeding, and the petitioners were directed to return the said certificate to the office forthwith. The legality and correctness of the said order is challenged in this petition.

6. Mr. Patil, the learned counsel in support of the petition, contended that the

impugned order dated March 23, 1978, passed by the Commissioner was without jurisdiction inasmuch as there was no provision in the said Act to withdraw the certificate once granted or issued in favour of the petitioners by the competent authority. Secondly, it is submitted that there was no right of review or to rectify any mistake contained in any of the provisions of the said Act. Thirdly, it is argued that the disclosure made by the petitioners, which was disclosed under the said Act, fell u/s 3(1)(b) and 3(1)(c) of the said Act.

7. Before we proceed to consider the submissions made by Mr. Patil, it is necessary to set out the material provisions of the said Act. Sub-section (1) of section 3 of the said Act lays down as under :

3. Charge of income tax on voluntarily disclosed income. -(1) Subject to the provisions of this Act, where any person makes, on or after the date of commencement of this Act but before the 1st day of January, 1976, a declaration in accordance with the provisions of section 4 in respect of any income chargeable to tax under the Indian income tax Act, 1922 (XI of 1922), or the income tax Act for any assessment year-

(a) for which he has failed to furnish a return u/s 139 of the income tax Act, or

(b) which he has failed to disclose in a return of income furnished by him under the income tax Act before the date of commencement of this Act, or

(c) which has escaped assessment by reason of the omission or failure on the part of such person to make a return under the Indian income tax Act, 1922 (XI of 1922), or the income tax Act or to disclose fully and truly all material facts necessary for his assessment or otherwise,

then, notwithstanding anything contained in the Indian income tax Act, 1922 (XI of 1922), or the income tax Act or in any Finance Act, income tax shall be charged in respect of the income so declared (such income being hereinafter referred to as the voluntarily disclosed income) at the rate or rates specified in the Schedule.

8. Sub-section (2) of section 3 of the said Act lays down as under:

(2) Nothing contained in sub-section (1) shall apply in relation to-

(i) the income assessable for any assessment year for which a notice u/s 139 or section 148 of the income tax Act has been served upon such person and the return has not been furnished before the commencement of this Act....

9. Section 4 of the said Act contemplates that the declaration under sub-section (1) of section 3 shall be made to the Commissioner and shall be in such form, and shall be verified in such manner, as may be prescribed by rules made by the Board (CBDT). Sub-section (3) of section 4 puts some restriction to make such a declaration. Sub-section (3) of section 4 lays down as under:

(3) Any person, who has made a declaration under sub-section (1) of section 3 in

respect of his income, or as a representative assessee in respect of the income of any other person, shall not be entitled to make any other declaration under that sub-section in respect of his income or, as the case may be, the income of such other person, and any such other declaration, if made, shall be deemed to be void.

10. Section 8 of the said Act lays down as under:

8. Voluntarily disclosed income not to be included in the total income. -(1) The amount of the voluntarily disclosed income shall not be included in the total income of the declarant for any assessment year under the Indian income tax Act, 1922,...if the following conditions are fulfilled, namely:-

(i) the declarant credits such amount in the books of account, if any, maintained by him for any source of income or in any other record, and intimates the credit so made to the income tax Officer;

(ii) the income tax in respect of the voluntarily disclosed income is paid by the declarant; and

(iii) the amount required to be invested in the securities referred to in sub-section (3) of section 3 is so invested by the declarant.

(2) The Commissioner shall on an application made by the declarant, grant a certificate to him setting forth the particulars of the voluntarily disclosed income, the amount of income tax paid in respect of the same, the amount of investment made in the securities referred to in sub-section (3) of section 3 and the date of payment and investment.

11. Section 10 of the said Act provides as under :

10. income tax in respect of voluntarily disclosed income not refundable. -Any amount of income tax paid in pursuance of a declaration made under sub-section (1) of section 3 shall not be refundable under any circumstances.

12. Having regard to the provisions of the said Act, it appears that the petitioners have made such a declaration u/s 3 of the said Act and also paid a tax of Rs. 15,850 on October 12, 1975, and also invested an amount of Rs. 2,450 on December 11, 1975, as provided in the said Act which the petitioners are not entitled to refund in any circumstances.

13. A short question that falls for our consideration in this petition is as to whether the Commissioner had authority in law or jurisdiction to withdraw the certificate issued under sub-section (2) of section 8 of the said Act. It is an admitted position that there is no provision in the said Act empowering the Commissioner to review the said order or rectify a mistake. This right of review or to rectify the mistake, if any, is a creation of statute, and if statute does not provide such a right or authority under any of the provisions of the said Act, then the Commissioner will have no right to review or rectify any mistake in an order previously passed by him.

14. Mr. Pradhan, the learned counsel appearing on behalf of the respondents, contended that although there is no provision in the said Act empowering the Commissioner to review his own order or correct a mistake, if any, still the Commissioner could withdraw the certificate issued u/s 8(2) of the said Act, as per the provisions of section 21 of the General Clauses Act, 1897. It is urged that the Commissioner had an authority to issue a certificate, and a right to withdraw the said certificate should be considered as an implied authority of the Commissioner u/s 21 of the General Clauses Act. It is further argued by Mr. Pradhan that the certificate issued by the Commissioner could not have been issued having regard to the provisions of section 3 of the said Act. According to Mr. Pradhan, the disclosure made by the petitioners was made before the coming into operation of the Ordinance referred to above, and, therefore, such a disclosure made by the petitioners could not have been entertained by the Commissioner. It is further submitted that the petitioners had already furnished the return in response to the notice u/s 148 of the income tax Act before the coming into operation of the Scheme, and the petitioners' case could not have been covered by section 3(2)(i) of the said Act, and, in view of the aforesaid position, the declaration made by the petitioners was not a valid declaration. Lastly, it is argued that the Commissioner was entitled to withdraw the certificate issued and to find out as to whether the certificate issued in favour of the petitioners was an invalid or a void certificate.

15. It is not possible to accept any of the submissions made by Mr. Pradhan. It is well settled that the right of review is a statutory right, and, in the absence of any provision to that effect in the said Act, it was not open to the Commissioner to reconsider the same material, placed before him at the time of issuing such certificate u/s 8(2) of the said Act. It is also not open to the Commissioner to reconsider his own opinion once a valid certificate u/s 8(2) of the said Act has been issued. A mere change of opinion would not give a right to the Commissioner to withdraw such a certificate once issued. The legal consequences of issuing such a certificate are very well stated in the said Act itself. The petitioners were assessed on a disclosure of income under the said Act. They also paid a tax of Rs. 15,850 and also deposited in securities an amount of Rs. 2,450 on December 11, 1975. Having complied with the conditions, a certificate came to be issued in favour of the petitioners. Section 10 of the said Act specifically lays down that any amount of income tax paid in pursuance of a declaration made under sub-section (1) of section 3 shall not be refundable under any circumstances. The provisions of the said section 10 give an indication of the finality attached to the certificate, once issued, after a due consideration of the material placed before the Commissioner. A restriction has been imposed on the petitioners that the petitioners, who have made a declaration under sub-section (1) of section 3 in respect of their income, or as a representative assessee in respect of the income of any other person, shall not be entitled to make any other declaration under that sub-section in respect of their income or, as the case may be, the income of such other person, and any such other declaration, if

made, shall be deemed to be void. Therefore, we need not go into the details and niceties as to whether the disclosure falls in any of the sub-clauses of section 3 of the said Act. If once it is held that the Commissioner had no jurisdiction to review his own order under the provisions of the said Act, and, if he had reviewed his own earlier order, then such an order will be deemed to be an order without jurisdiction. Whether the disclosure made by the petitioners falls in any of the clauses of section 3 of the said Act has no consequence or has no relevance, because the Commissioner was required by law to satisfy himself as to whether the petitioners could be given the benefit of the said Scheme of the said Act. And once having held that the petitioners were entitled to the benefit of the said Scheme under the provisions of the said Act, it is not open now to the Commissioner to reconsider the same material and hold an opinion different from the opinion he held at the time of issuing the certificate u/s 8(2) of the said Act. Now, once an assessment is completed, in the absence of any provisions of the statute, it is not open to an authority to reopen the assessment in respect of the disclosed amount.

16. Reliance placed by Mr. Pradhan on section 21 of the General Clauses Act is also not well founded. It is rather difficult to accept this submission of Mr. Pradhan that the Commissioner can amend, vary or rescind his own order so issued. It is well settled that section 21 of the General Clauses Act embodies a rule of construction, and whether or not it applies to the provisions of a particular statute would depend upon the subject-matter, the context and the effect of the relevant provisions of the said statute. In other words, it would be necessary to examine the scheme of the said Act, its object and all its relevance and material provisions before deciding whether the application of the rule of construction laid down by the said section 21 would be justified in the circumstances of the case. We have already set out above the provisions setting out the scheme under the said Act. Suffice it to say that the scheme under the said Act does not vest such implied power in the Commissioner of income tax. If Mr. Pradhan's argument that u/s 21 of the General Clauses Act the Commissioner shall have the power to withdraw the certificate issued by him is accepted, and the Commissioner withdraws the same, even then the petitioners will not be entitled to the refund of Rs. 15,850 paid by them on October 10, 1975, under any circumstances. The issuance of the certificate is not an administrative order but a quasi-judicial order passed by the Commissioner in exercise of the powers vested in him under an enactment. Unless the statute gives such a right to review or rectify the mistake, it is not open to the authority to bypass the provisions of the said Act and the Scheme and nullify an order which has been passed earlier while exercising the powers under the statute. The circumstances that may follow by the application of section 21 of the General Clauses Act are not justified by the Scheme and the provisions of the said Act. This submission of Mr. Pradhan is, therefore, devoid of any merit and cannot be accepted.

17. In the circumstances stated above, the order of March 23, 1978, passed by the Commissioner is without an authority of law and the same is without

jurisdiction and hence liable to be quashed.

18. The impugned order of the Commissioner further suffers from an error apparent on the face of the record. To go behind the certificate issued by the Commissioner himself and to consider as to whether the petitioners' case falls under any of the sub-sections of section 3 of the said Act, in our judgment, is not permissible. It is clearly an error apparent on the face of the record to go behind the certificate. Accordingly, the order passed by the Commissioner withdrawing the certificate deserves to be quashed. In the result, the rule is made absolute with costs. The judgment and order dated March 23, 1978, passed by the Commissioner of income tax, Pune-II, Pune, in Case No. Pn/V.D.S./A/16-9/75-76 are quashed and set aside.