
(1963) 03 P&H CK 0041

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ No. 857-D of 1962

MADHAVNAGAR COTTON MILLS LTD.

APPELLANT

Vs

UNION OF INDIA AND ANOTHER

RESPONDENT

Date of Decision : 06-03-1963

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148

Citation : (1963) 50 ITR 144

Judgement

The petitioner is a private limited company, which was registered in the erstwhile Miraj (Jr.) State on 25th March, 1944, with a capital of Rs. 11,00,000. It manufactures textile goods. It was converted into a public limited company in September, 1952. The petitioner set up a textile mill in the erstwhile Miraj (Jr.) State at Madhavnagar and was granted some special concessions by the then ruler of the State. During the assessment years 1946-1947 and 1947-1948 it is alleged by the petitioner that no part of its income arose or was received in the erstwhile British India which was subjected to tax under the Indian Income Tax Act, 1922 (hereinafter to be referred to as the Act of 1922). In or about February, 1948, the erstwhile State of Miraj acceded to the then Dominion Government, as a result of which it became a part of the Province of Bombay. By the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, the Act of 1922, along with other statutes was extended to the merged States including the State of Miraj. The Income Tax Officer, Satara South, Sangli, started making certain enquiries from the petitioner and actually two notices were issued dated 1st February, 1952, u/s 34 of the Act of 1922 with regard to the aforesaid years. The petitioner filed the returns of income on 8th March, 1952, showing that no income had accrued or arisen or been received in the then British India. The petitioner also addressed a letter dated 3rd March, 1952, giving a detailed explanation of the amounts deposited by the petitioner with various banks and another firm, a copy of which is annexure "A". The Income Tax Officer, Sangli, supplied to the petitioner a statement of the reasons for which the proceedings were started. The relevant parts have been set out in paragraph 7 of the petition

and need not be referred to. In a letter dated 15th November, 1952, the Income Tax Officer, Sangli, wrote to the petitioner as follows (annexure "B") :

"On further consideration of the various contentions put forth by you, I have since passed orders cancelling the notices issued for the assessment year 1947-48."

In the petition it is stated that this letter referred to cancellation of the notice with regard to the assessment year 1946-47 also, but annexure "G" shows that notices u/s 22(2) read with section 34 were cancelled with regard to both the assessment years. A second set of notices was issued dated 11th December, 1954, u/s 34 of the Sangli Income Tax Act by the Income Tax Officer, B-Ward, Sangli, but these notices were also cancelled : vide annexure "C", by orders dated 1st February, 1955, and 7th February, 1955. Then the Income Tax Officer of the same place issued notices u/s 34 of the Act of 1922, pursuant to which the petitioner submitted its return on 21st April, 1955, under protest. By a letter dated 25th November, 1955, the Additional Income Tax Officer, Section 1 (Central), Bombay (to be referred to as the Income Tax Officer, Bombay), informed the petitioner that its case had been transferred to him by the Central Board of Revenue u/s 5(7A) of the Act of 1922. The petitioner appeared before him, who, by his orders dated 24th February, 1956, and 22nd March, 1956, completed the assessment for the two years in question determining the total income of the petitioner in the taxable territories at Rs. 12,23,988 and Rs. 13,40,500 respectively. The petitioner appealed to the Appellate Assistant Commissioner of Income Tax who, by his order dated 13th February, 1961, annulled the orders of the Income Tax Officer on the ground that the Income Tax Officer, B-Ward, Sangli, had no jurisdiction to issue notices u/s 34 of the Act of 1922 and, accordingly, the Income Tax Officer, Bombay, could not act on the notices issued by the Income Tax Officer, Sangli. A letter dated 6th January, 1962, was sent by respondent No. 2 who is the Income Tax Officer, Central Circle IV, New Delhi, saying that he proposed to initiate proceedings u/s 34(1) in respect of the assessment years 1946-47 and 1947-48. It was mentioned in that communication that in view of item No. 78A of Notification No. 44 dated 1st July, 1952, as amended by Notification No. 9 dated 16th February, 1955, the jurisdiction rested with him. The petitioner filed objections in writing. The Act of 1922 was repealed by the Income Tax Act, 1961 (to be referred to as the Act of 1961), and on 5th December, 1962, respondent No. 2 served notices dated 30th November, 1962, u/s 148 of the Act of 1961 for the aforesaid assessment years after obtaining the necessary permission of the Central Board of Revenue. In the present petition, which is under article 226 of the Constitution, it is the validity and legality of these notices which have been challenged, principally on the ground of absence or excess of jurisdiction.

Although a number of grounds have been raised in paragraph 19 of the petition, Mr. Palkhivala, learned counsel for the petitioner, confined his arguments mainly to certain questions only which shall be presently examined. It is contended that

after the Central Board of Revenue had transferred the case from the Income Tax Officer, Sangli, to the Income Tax Officer, Bombay, u/s 5(7A) of the Act of 1922, the assessment were completed and final orders were made by him and if the latter was competent to make those orders, no fresh notices could be issued u/s 34 of the Act of 1922 or section 148 of the Act of 1961, in respect of escapement of the same items of income. This broad proposition is not seriously contested by Mr. Hardy, who appears for the respondents, but according to him the Income Tax Officer, B-Ward, Sangli, had no jurisdiction nor was he competent to take any proceedings under the Act 1922 and issue notices u/s 34 of that Act to the petitioner and that the order of transfer made by the Central Board of Revenue related not to the proceedings for the assessment years 1946-47 and 1947-48 but to the assessment for the subsequent years and, therefore, his submission is that the Income Tax Officer, Bombay, could not have validly and legally exercised any functions or powers so as to make valid assessment orders. Moreover, these orders were annulled by the Appellate Assistant Commissioner and for that reason also it was open to respondent No. 2 to take action and direct the issue of notices u/s 34 of the Act of 1922 and section 148 of the Act of 1961, in respect of the assessment years in question with regard to which he alone had jurisdiction and competence by virtue of the notification issued by the Central Board of Revenue u/s 5(6) of the Act of 1922. Mr. Palkhivala does not dispute that respondent No. 2 would have had jurisdiction under the aforesaid notification but his contention is that the order made u/s 5(7A) dated 15th November, 1955, which related particularly to the case of the present petitioner apart from the cases of certain other assesseees had the effect of transferring all the assessment proceedings to the Income Tax Officer, Bombay, in respect of the petitioner including the proceedings for the years 1946-47 and 1947-48. He further says that the entire scheme of the Income Tax Acts is such that there can be no question of lack of inherent jurisdiction and so long as the petitioner raised no objection to the jurisdiction of the Income Tax Officer, Bombay, to complete the assessment proceedings pursuant to the notices issued by the Income Tax Officer, Sangli, u/s 34, the orders made by the Income Tax Officer, Bombay, would be perfectly valid and legal as also binding not only on the petitioner but also on the respondents. The position taken up on behalf of the petitioner is that in the appeal filed to the Appellate Assistant Commissioner against the orders of the Income Tax Officer, Bombay, the petitioner never raised any objection on the question of jurisdiction of that officer to make the assessments and it was the Appellate Assistant Commissioner who himself took the view that the Income Tax Officer, Sangli, had no jurisdiction to issue a notice u/s 34, with the result that he held that the assessment made by the Income Tax Officer, Bombay, were without jurisdiction and he annulled them. It were the respondents who were aggrieved parties in respect of the orders of the Appellate Assistant Commissioner and they should have gone up in appeal or taken other appropriate proceedings for getting the order of Appellate Assistant Commissioner corrected or set aside. As they failed to do so, it must be accepted that the orders of the Income Tax Officer, Bombay, were never validly set aside and they would constitute an effective bar

to the issue of fresh notices by the respondents based on the same material.

The first aspect of the matter requiring determination is whether the order of transfer made by the Central Board of Revenue on 15th November, 1955, u/s 5(7A) had the effect of validly transferring proceedings pending before Income Tax Officer, Sangli, pursuant to the notice issued by him u/s 34 of the Act of 1922, it being common ground that under the earlier notification made u/s 5(6) of the same Act it was respondent No. 2 who would have had jurisdiction to assess the petitioner and not the Income Tax Officer at Sangli. That provision together with the explanation is as follows :

"5. (7A) The Commissioner of Income Tax may transfer any case from one Income Tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income Tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the reissue of any notice already issued by the Income Tax Officer from whom the case is transferred.

Explanation. - In this sub-section case in relation to any person whose name is specified in the order of transfer means all proceedings under this Act in respect of any year which may be pending on the date of the transfer, and includes all proceedings under this Act which may be commenced after the date of the transfer in respect of any year."

Now, the Explanation makes it quite clear that all the proceedings under the Act in respect of any year pending on the date of the transfer would be covered by the word "case". In *Bidi Supply Company v. Union of India*, an order made u/s 5(7A) was struck down on the ground that it was expressed in general terms without any reference to any particular case, i.e., assessment year, and without any limitation as to time and that such a transfer was not contemplated by the aforesaid provision. It was to get over that judgment that the Explanation was added to the sub-section by the Indian Income Tax (Amendment) Act, 1956. In the later decision in *Pannalal Binjraj v. Union of India*, the effect of the newly introduced Explanation was considered. The following observations at page 591 are noteworthy :

"Reading section 5(7A) and the Explanation thereto, it is clear that when any case of a particular assessee which is pending before an Income Tax Officer is transferred from that officer to another Income Tax Officer whether within the State or without it, all proceedings which are pending against him under the Act in respect of the same year as also previous years are meant to be transferred simultaneously and all proceedings under the Act which may be commenced after the date of such transfer in respect of any year whatever are also included therein so that the Income Tax Officer to whom such case is transferred would be in a position to continue the pending proceedings and also institute further proceedings against the assessee in respect of any year. The proceedings pending at the date of transfer can be thus continued but in the case of such

proceedings the provision in regard to the issue of notices contained in the main body of section 5(7A) would apply and it would not be necessary to reissue any notice already issued by the Income Tax Officer from whom the case is transferred."

In the present case there can be little doubt that all the proceedings pending before the Income Tax Officer, Sangli, with regard to the assessments of the petitioner stood transferred to the Income Tax Officer, Bombay. This result will flow not only from the fact that the order u/s 5(7A) related in particular to the petitioner but also because the previous notification which had the effect of conferring jurisdiction on respondent No. 2 with regard to the assessments for the years 1946-47 and 1947-48 was general, the rule being that specific must prevail over the general. I find it difficult to accede to the submission of Mr. Hardy that the Central Board of Revenue could never have intended that even those proceedings which stood transferred to respondent No. 2 should be covered by the subsequent order made on 15th November, 1955. No affidavit on this point has been filed in clear and cogent terms and in the ordinary way it must be presumed that the Central Board of Revenue was well aware of the previous notification and when no exception was made in the order made u/s 5(7A) with regard to the proceedings relating to the aforesaid two years, the Central Board of Revenue intended to make an order and in fact made an order in exercise of the full amplitude of powers conferred by section 5(7A) read with the Explanation.

The question still remains whether the notices which were issued by the Income Tax Officer, Sangli, u/s 34 of the Act of 1922 were good and valid notices, inasmuch as that officer did not have the power or the jurisdiction to issue them at the time when they were served on the petitioner. If he acted without any legal or valid authority, then it cannot be said that the Income Tax Officer, Bombay, made good and binding orders when he completed the assessments after the transfer was ordered u/s 5(7A). Mr. Palkhivala has stoutly maintained that there could be no lack of inherent jurisdiction in the Income Tax Officer, Sangli, as all Income Tax Officers have the power and jurisdiction to make assessments everywhere and anywhere subject to the statutory provision in section 64 and section 5 but according to him those provisions are meant merely for administrative convenience and do not involve the fundamental question of jurisdiction. Section 64 is as follows :

"64. Place of assessment. - (1) Where an assessee carries on a business, profession or vocation at any place, he shall be assessed by the Income Tax Officer of the area in which that place is situate or, where the business, profession or vocation is carried on in more places than one, by the Income Tax Officer of the area in which the principal place of his business, profession or vocation is situate.

(2) In all other cases, an assessee shall be assessed by the Income Tax Officer of the area in which he resides.

(3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner, or, where the question is between places in more States than one, by the Commissioners concerned, or, if they are not in agreement, by the Central Board of Revenue :

Provided that, before any such question is determined, the assessee shall have had an opportunity of representing his views :

Provided further that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of section 22 and has stated therein the principal place wherein he carries on his business, profession or vocation, or if he has not made such a return shall not be called in question after the expiry of the time allowed by the notice under sub-section (2) Of section 22 or u/s 34 for the making of a return :

Provided further that if the place of assessment is called in question by an assessee the Income Tax Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under this sub-section before assessment is made.

(4) Notwithstanding anything contained in this section, every Income Tax Officer shall have all the powers conferred by or under this Act on an Income Tax Officer in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed.

(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee -

(a) on whom an assessment or reassessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income Tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income Tax, or

(b) Where by any direction given or any distribution or allocation of work made by the Commissioner of Income Tax under sub-section (5) of section 5, or in consequences of any transfer made under sub-section (7A) of section 5, a particular Income Tax Officer has been charged with the function of assessing that assessee, or

(c) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5,

but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income Tax Officer for the time being charged with the function of making such assessment by the Central Board Revenue or by the Commissioner of Income Tax to whom he is subordinate, as the case may be."

Out of the provisions contained in section 5, sub-section (6) may alone be

referred to at this stage :

(6) The Central Board of Revenue may, by notification in the Official Gazette, empower Commissioners of Income Tax, Appellate or Inspecting Assistant Commissioners of Income Tax and Income Tax Officers to perform such functions in respect of such classes of persons or such classes of income or such area as may be specified in the notification, and thereupon the functions so specified shall cease to be performed in respect of the specified classes of persons or classes of income or area by the other authorities appointed under sub-sections (2) and (3)."

In *Wallace Brothers & Company Limited v. Commissioner of Income Tax*, the Federal Court had to deal with the question whether an assessment made by the Income Tax Officer, Company Circle, Bombay, on the total income including certain income which arose in England and having its central management and control in England had been validly made. In that case the Tribunal had held that the assessment was in conformity with both clauses (1) and (2) of section 64 because the assessee company was carrying on the business in Bombay as a partner of Messrs. Wallace and Company. After referring to clause (3) of section 64 and the third proviso to that clause it was observed that the matter was more one of administrative convenience than of jurisdiction and that in any event it was not one for adjudication by the court. The following observations at page 45 may be referred to with advantage :

"The second proviso to clause (3) further enacts that the place of assessment shall not be called in question by an assessee if he has made a return in response to the notice under sub-section (1) of section 22, or if he has not made such a return, it shall not be called in question after the expiry of the time allowed by the notice for the making of a return. This confirms us in the view that the scheme of the Act does not contemplate an objection as to the place of assessment being raised on an appeal against the assessment after the assessment has been made."

In *Bidi Supply Company's case*, their Lordships observed that it was clear from the provisions of section 64 that the legislature considered the question of the place of assessment to be of some importance to the assessee. After referring to the decision of the Bombay High Court in *Dayaldas Khushiram v. Commissioner of Income Tax*, it was pointed out that the learned Bombay judges treated the provisions of section 64 more as a question of right than as a matter of convenience only. It was on account of the Bombay decision that the Act of 1922 was amended by the Indian Income Tax (Amendment) Act, 1940, by adding to clause (b) of sub-section (5) of section 64 the words "in consequences of any transfer made under sub-section (7A) of section 5" and by adding sub-section (7A) to section 5. It was thus clear from this amendment that the benefit conferred by the provisions of sub-section (1) and sub-section (2) was taken away and was to be deemed not to have existed at any time as regards the assessee with regard to whom a transfer order was made under sub-section (7A)

of section 5. In their Lordships view, in order to deprive a particular assessee of the benefits of sub-section (1) and sub-section (2) of section 64, there must be a valid order u/s 5(7A) and he would lose the benefit only to the extent to which that right was taken away by such an order made under sub-section (7A) of section 5. In the later decision of their Lordships in Pannalal Binjrajs case, while discussing the question of constitutionality of section 5(7A) it was considered necessary to determine whether any right was conferred upon the assessee by section 64(1) and (2) or whether it was only a matter of convenience. According to their Lordships, prima facie it would appear that an assessee is entitled under these provisions to be assessed by the Income Tax Officer of the particular area where he resides or carries on business. Even so, the exigencies of tax collection have got to be considered. After referring to certain observations of Beaumont C.J. in Dayaldas Khushiram v. Commissioner of Income Tax, it has been laid down that the section does not give a right to the assessee to have his assessments at a particular place but determines the Income Tax Officer who is to have power to assess him. Reference may be made to the following observations at page 581 :

"It may be noted, however, that in the passage at page 719 of the majority judgment in Bidi Supply Co. v. Union of India this court regarded the benefit conferred on the assessee by these provisions of section 64(1) and (2) of the Act as a right and it is too late in the day for us to say that no such right to be assessed by the Income Tax Officer of the particular area where he resides or carries on his business is conferred on the assessee. This right, however, according to the authorities above referred to, is hedged in with the limitation that it has to yield to the exigencies of tax collection."

Mr. Palkhivala has relied on the view expressed at page 584 that the hierarchy of officers entrusted with work under the Act is an administrative machinery which is set up for assessing the income of the assessee which is chargeable to Income Tax, but at the same time it has been observed that all officers and persons employed in the execution of the Act are to follow the orders, instructions and directions of the Central Board of Revenue which is the highest authority in the hierarchy and, even though normally in accordance with the provisions of section 64(1) and (2) the work of assessment is to be done by the Income Tax Officers of the area within which the assessee resides or carry on business, power is given by section 5(7A) to the Commissioner of Income Tax to transfer any case from one Income Tax Officer to another and the Central Board of Revenue to transfer any case from any one Income Tax Officer to another. Even though the concept of lack of inherent jurisdiction may not be applicable in Income Tax law, it is a matter which is by no means clear and settled by judicial decisions - the machinery set up does envisage and provide for assessment being made and functions in respect thereof being exercised in the manner provided by the provisions under consideration. Section 5(8) lays down that all officers and persons employed in execution of the Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue and section 5(6) says

in clear and unequivocal terms that where the Central Board of Revenue directs by notification certain Income Tax Officers to perform such functions in respect of such classes of persons or such classes of income as may be specified in the notification, the functions so specified will cease to be performed in respect of the specified classes of persons or classes of income by the other authorities appointed under sub-sections (2) and (3). Such a notification was admittedly made in the present case by which it was respondent No. 2 alone who was empowered to perform the functions of the Income Tax Officer in respect of the assessments for the years 1946-47 and 1947-1948 of the petitioners income and those functions could not be performed by the Income Tax Officer, Sangli, who had issued the notices u/s 34 of the Act of 1922 before the order of transfer u/s 5(7A) was made by the Central Board of Revenue. If the Income Tax Officer, Sangli, was debarred under the statute from performing the functions of an Income Tax Officer with regard to the assessment of the petitioners income, he was certainly not empowered to take any proceedings whatsoever including the issuing of notices u/s 34, with the result that the assessments made by the Income Tax Officer, Bombay, pursuant to those notices were rendered illegal and ineffective for the simple reason that if the notices had been issued by an officer who had no authority in that behalf, the subsequent proceedings could not be valid and legal. It is true that no objection was raised by the petitioner before the Income Tax Officer, Bombay, but apart from the fact that those assessments were set aside by the Appellate Assistant Commissioner, they suffered from the infirmities referred to before and could be of no avail to the petitioner in the sense of constituting a bar to fresh proceedings being initiated u/s 34 of the Act of 1922 or section 148 of the Act of 1961. In this view of the matter it is unnecessary to decide what would be the effect of no appeal having been taken against the order of the Appellate Assistant Commissioner which according to Mr. Palkhivala was patently erroneous.

The next question which requires determination and which has been canvassed is whether respondent No. 2 could validly issue the impugned notices and, if so, whether this court can or ought to interfere under article 226 of the Constitution. As has been found by me, respondent No. 2 cannot function as an Income Tax Officer in respect of the assessments of the petitioners income owing to the order made by the Central Board of Revenue on 15th November, 1955, u/s 5(7A) but the difficulty in the way of the petitioner is that according to the view of a Division Bench of this court in *U. C. Rekhi v. Income Tax Officer, New Delhi*, the place of assessment of an assessee is a matter which, u/s 64 of the Act of 1922, is to be decided by the Income Tax Commissioner and not by the courts. Consequently, as observed at page 634, "the extraordinary remedy by a writ of certiorari or prohibition would not be available to the assessee." In *Rai Bahadur Seth Teomal v. Commissioner of Income Tax* the Supreme Court had to decide whether sub-section (7A) of section 5 in any way modified or cut down the power given to the Central Board of Revenue under sub-section (2) of that section. Their Lordships have held that the two sub-sections are complementary and

operate in two different spheres. They have also laid down that u/s 64(3) the question of determination as to the place of assessment only arises if an objection is taken by the assessee and the Income Tax Officer has any doubts as to the matter but the determination is to be made by the Commissioner of Income Tax or the Central Board of Revenue; the Act does not contemplate any other authority. Even though the question before their Lordships was not one of the scope of interference in such matters under article 226 of the Constitution, but the law as laid down is that it is for the Income Tax authorities to decide this question in accordance with the provisions contained in section 64(3) of the Act of 1922 and not for the courts.

In the result, the petition is dismissed but owing to the nature of the points involved I leave the parties to bear their own costs.