

(1938) 02 CAL CK 0043
In the Calcutta High Court

MAHALIRAM RAMJEEDAS, IN RE.

Date of Decision : 24-02-1938

Acts Referred:

Income Tax Act, 1922 — Section 33, 66

Citation : (1938) 6 ITR 265

Hon'ble Judges : Derbyshire, C.J; Mukherjea, J; Khundkar, J

Bench : Full Bench

Judgement

DERBYSHIRE, C.J. - This Reference u/s 66 of the Indian income tax Act, 1922, comes before us with an unusual history. The assessee is a registered partnership firm carrying on business as general merchants in Calcutta. In the year of assessment in question from April 1, 1932, to March 31, 1933, the due date for a return to be made by the firm was July 25, 1932. The return was actually made on December 21, 1932, and it was based on the period from October 1930 to October 1931 (Dewali to Dewali). Nothing turns on the actual period. With the return was sent a copy of the Profit and loss account of the year which showed a loss of about eight lakhs of rupees. Between December 21 and December 23, Mr. Kanailal Jatia, a partner in the firm, in response to a notice from the income tax officer apparently u/s 22 of the Act appeared before the income tax officer and produced the firms Rokar, Nakal, and Khata and explained such items as the income tax Officer asked questions upon. Thereupon on December 23, 1932, the income tax officer assessed the firm as nil and renewed the firms registration u/s 26A of the Act.

The next return was made in November 1933, for the assessment year April 1, 1933, to March 31, 1934, in respect of the period November 1931 to October 1932 (Dewali to Dewali). This particular return showed a loss of two to three lakhs of rupees. No assessment was made in respect of the year April 1, 1933, to March 31, 1934, because of an attempt made by the Income tax Officer to reopen the assessment of the previous year the year now in question. This came about in this way.

The income tax Officer, apparently at the beginning of January 1934, received

information which made him suspicious as to the correctness of the previous return and thereupon he issued to the assesseees on February 8, 1934, the following notice purporting to be given under sections 34 and 22(2) of the Act :-

"Whereas I have reason to believe that your income from business and other sources which should have been assessed in the financial year ending the 31st March 1923 has wholly escaped assessment, and I therefore propose to assess the said income that has escaped assessment, I hereby require you to deliver to me, not later than the 9th March 1934, or within 30 days of the receipt of this notice a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March 1933."

He also called for a fresh return of income. The income tax officer gave the assesseees no indication as to the nature of the alleged escape from tax. Nor did he at that time indicate what were the grounds of his belief that income had escaped assessment; apparently the first mention this grounds of belief in the case now stated. On March 22, 1934, the assesseees filed a fresh return showing exactly the same loss as before. The Income tax officer thereafter on May 21, 1934, issued notices u/s 22(4) and 22(2) calling for accounts for the three back years and for other evidence. The income tax Officer alleges that the assesseees have only complied in part with these notices. The assesseees allege that they have afforded the income tax officer all the information that he has called for on numbers occasions, but that he unnecessarily called for the books and accounts time after time so as to harass them in carrying on their business. They also allege that the income tax Commissioner had a grudge against them and has acted on allegations made by one Sharma, the Manager of Segormull Rajgoria who had brought a suit against a deceased partner of the assesseees firm, Gazanand Jatia and Thereafter was the instance of this court prosecuted and convicted for perjury and forgery committed doing the courts of those proceedings. Whilst Segormull was in gaol Sharma brought criminal proceedings against the assesseees alleging that they had falsified their accounts. These proceedings were dismissed by the Chief Presidency Magistrate and on appeal this court upheld the dismissal. With a view to putting an end to what they alleged to be unreasonable treatment by the income tax Commissioner assesseees brought proceedings before Mr. Justice McNair sitting singly on the Original side of this court in January 9, 1935.

In those proceeding the assesseees asked for a writ of certiorari addressed to the Commissioner of income tax direction him to bring up record of the assessment proceedings in question before the court and also for the issue of a writ of prohibition in respect of further proceedings u/s 34 of the Act. There were further prayers for an injunction. Mr. Justice McNair heard that matter on March 6, 1925, when the assesseees dropped their claims to relief other than the claim to writ of prohibition their claims to relief other than the claim to writ of prohibition. The case is reported in I.L. R. 62 Cal. 1011 (In re Ramjidas Mahaliram). McNair, J., held that he had power in a proper case to issue a writ was discretionary and

that unless the want of jurisdiction complained of was based upon a breach of a fundamental principal of justice the writ ought not to issue. He also was of opinion that the income tax act provided other remedies for the assessee. Accordingly he dismissed the application and there was no appeal from his decision. In the course of his judgment McNair J. said with reference to the words in Section 34 "If income has escaped assessment....." "The Legislature in my view has provided that if a certain state of facts exists and is shown to the income tax officer to exist before he proceeds to reopen the assessment u/s 34 he shall have jurisdiction to take proceedings but not otherwise. It is not for him to decide whether the state of facts exists and if he reopens the assessment without its existence he is acting without jurisdiction."

The assessees say that that is a correct statement of the law and that the income tax officer is bound by it on the principle enunciated in *R. v. Speyer* 1916 1 K.B. 210 by Lord Reading C.J. "It is proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown." McNair J. also said in the same judgment.

"The Commissioner stated in his order of the 3rd November 1934 that he was not willing at that date to interfere or take any action u/s 33 or Section 66 of the Act. In view of my decision that the proceedings by the income tax officer in revision were irregular the learned Commissioner may feel called upon now to look further into the matter".

By this McNair, J. indicated that the Incomes-tax Commissioner could, u/s 33, call for the record of the assessment from his subordinates and then state a case for this court u/s 66.

After this decision there was correspondence between the assessees and the income tax authorities and the outcome of it was that the income tax authorities refused to look into the matter further or to stay their hands with regard to re assessment. The assessee thereupon commenced fresh proceedings on the Original Side of this court before Mr. Justice Panckridge for the purpose, apparently, of compelling the income tax authorities to act in accordance with the observations, just quoted, of Mr. Justice McNair. When the matter was about to come on before Mr. Justice Panckridge the proceedings were compromised upon the basis that a case should be stated by the Commissioner to the court u/s 66 of the Act. Such a case was stated and it is now before us as question No. 2. When that question came up on reference, the assessees alleged that the question had not been stated in accordance with the compromise arrived at in the proceedings before Mr. Justice Panckridge and after hearing the matter for some time an order was made by the Bench dealing with it (Panckridge, J., and myself] as follows :

"That the further hearing of the said reference do stand adjourned until after the hearing of the reference with the said Commissioner of Income tax, Bengal, agrees to make raising the question of law whether the Income tax officer is

precluded from proceeding with the re assessment by reason of the judgment delivered by the Honble Mr. Justice McNair on the sixth day of March one thousand nine hundred and thirty-five, the parties appearing as aforesaid hereby agreeing that all questions of res judicata and estoppel be decided by the reference so to be made as aforesaid by the commissioner of income tax Bengal".

Accordingly a further question was formulated by the income tax Officer as follows :-

Question (1) : "Whether the income tax officer is precluded from proceeding with the re assessment by reason of the judgment delivered by the Honble Mr. Justice McNair on the sixth day of March one thousand nine hundred and thirty-five."

When the reference upon the one question No. 2 came before Panckridge, J., and myself the assesseees stated they had acted honestly throughout and were willing to give the income tax authorities any information they desired if they would be specific. The income tax authorities said they had no desire to harass the assesseees. Accordingly I suggested that the income tax authorities should be specific in their requests and should be given the information they asked for. I hoped that this would dispose of the whole matter. However nothing came of the suggestion and the parties now ask for a decision from the court upon their rights according to law.

It is to be noted that no proceedings have been brought by the income tax Commissioner against the assesseees u/s 52 of the income tax Act.

It will be convenient to set out here question No. (2) which is as follows :

"Where the income tax Officer has, on such materials and information as are available to him, reason to believe the income from any of the heads of income described u/s 6 of the Indian income tax act in the present instance, from business and other sources which should have been assessed in the year of assessment has escaped assessment and as a result of such enquiries and investigations as are possible at that stage has been satisfied as stated in paragraph 3 of the statement that a prima facie case has been made out against the assessee for assessment u/s 34 of the act whether on a true construction of Section 34 of the Act, it is not open for the income tax Officer to initiate proceedings u/s 34 affording at the same time ample opportunities to the assessee to produce such evidence to the contrary as he likes, in the course of the proceedings thus initiated, or on the other hand, does the section contemplate that the factum of such escarpment should have been first proved and definitely found and determined by an independent enquiry, before the income tax Officer can assume jurisdiction to reopen the assessment u/s 34."

We have heard the Reference with regard to both the questions at the same time. It has been contended by the assessee that the income tax Officer is bound by the observations of Mr. Justice McNair which were in favour of the assesseees, that he should have given effect to them and that he was estopped from putting

question No. 2 for the opinion of the Court. Further, it has been contended that the matter was res judicata under the decision of Mr. Justice McNair.

I will proceed to deal with these arguments, Mr. Justice McNair in considering whether he should grant a writ of prohibition had of necessity to consider several sections of the income tax Act, but his decision not to grant the writ was not based upon any consideration of Section 34. It was based upon other and quite general grounds which I have set out above.

His views upon Section 34 were not necessary for his decision. In fact his decision against the assessee on the question of the issue of the writ was given in spite of his views on Section 34 which were favorable to them. The legal effect of views so given is, I believe, correctly stated in Halsbury's laws of England, 2nd Edition. Vol. 19 page 252; "Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand have no binding authority on another Court, though they may have some merely persuasive efficacy." Consequently, I hold that the views of Mr. Justice McNair upon Section 34 of the income tax act do not operate as res judicata nor are they binding upon the income tax authorities on the dictum of Lord Reading in *R. v. Speyer* quoted above. I treat McNair, J.'s views on Section 34 which were arrived at after considerable thought, with the respect they are undoubtedly entitled to, but arrived at a somewhat different conclusion which I state hereafter.

The act itself by Sec. 66 and 66A gives the Commissioner a clear and unqualified right to state a case for the opinion of this court and to have it decided by a Bench of at least two Judges. The income tax Commissioner is an official charged with certain duties as to the collection of income tax and if in the course of these duties he deems it necessary to ascertain the views of the court upon the meaning of a section of the Act (other than one under chapter VIII) he is entitled to set a case for the opinion of a bench of at least two judges of this Court. I do not see how he can be estopped from exercising that statutory right. Moreover when he has received the judgment of such a bench of this court upon the case he is required by section 66(5) to dispose of the case accordingly. I am, therefore, of the opinion and hold that Mr. McNair's view on Sec. 34 were not binding upon the income tax Commissioner and that the assessee's contention as to res judicata and estoppel fail. Therefore, the answer to question No. 1 Strictly speaking, would be in the negative.

As regards question No. 2 this is not in proper form. It is made up of several involved questions connected with each other. The answers to these questions and to question No. 1 and the legal position on the whole matter, is, I believe, given hereafter. When once the income tax officer has made the assessment under Sec. 23(1) that assessment is settled. See per Lord Parker in *Inland Revenue v. Brooks* (1915 Appeal Cases 478 at page 491). It was further suggested that, on the general principles of law governing estoppels, neither the subject nor the crown ought to be at liberty to go behind the amount of profits

and gains when once determined by any competent authority. I do not dispute these general principle etc."

The assessment once made according to the provisions of the income tax Act can only be reopened in accordance with the provisions of the Act. Sec. 34 says :-

"If for any reason income, profits or gains chargeable to income tax has escaped assessment, in any year, or has been assessed at too low a rate, the income tax officer may etc."

We are dealing only with the case where it is alleged that income chargeable to tax has escaped assessment. In my view it is in this case a condition precedent to the income tax Officer acting under Sec. 34 and proceeding to serve notice under Sec. 22(2) that the income, profits and gains chargeable to income tax has escaped assessment.

Who is to decide whether such is the case? Some person or tribunal must decide the question. In my view, it is the income tax officer he is the person charged with the duty of taking action under Sec. 34 where such action ought to be taken. Apart from the assessee, at this stage no person other than the income tax officer can, by reason of Sec. 54 of the Act have any knowledge of the first assessment and upon what data it was based, and no one else is in a position to decide whether income has escaped assessment or not.

In *Harmukhrai Dunichands* case ILR 56 Cal. 39 Rankin C.J., said :

"Fundamentally, no doubt the income tax officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts, though I would point out that the income tax officer is not a Court, has not the proceeding of a court, and he is, to some extent, a party or Judge in his own case".

In deciding whether income has escaped assessment the income tax Officer must not act on suspicion or conjecture; he must decide the question upon a fair and reasonable consideration of such information and materials as are available to him. He need not hold a formal inquiry, but he should indicate to the assessee the nature of the alleged escapement so as to enable him to identify it and explain it if he can. In other words he should give the assessee an opportunity of being heard before he decides against him that income has escaped assessment and proceeds to upset the settled assessment. If the income tax Officer is satisfied with the assessee's explanation there is an end of the matter. On the other hand, if after a fair consideration of all the information and materials before him, including the explanation the assessee has given, or the failure of the assessee to give any explanation, of the alleged escapement, the Income tax officer acting as a reasonable man comes to the conclusion that income has escaped assessment he comes to the conclusion that income has escaped assessment he may say so, and once he has so decided he may proceed u/s 34.

In the present case the income tax officer stated that he "had reason to believe" that income that escaped assessment and proceeded to act u/s 34. The English

income tax Act of 1918, Section 125 which deals with re assessment when there has been escapement from tax authorises an additional assessment if the surveyor "discovers" that income has been omitted from the first assessment. It has been held in England under the English Act that "discovers" may mean "has reason to deliver". There the condition precedent to making another assessment is that the surveyor shall do something - "discovers". A discovery may be made anywhere, in the absence of, without the knowledge of, and without reference to the assessee. In the Indian Act the condition precedent is that income has escaped". This implies a decision by someone (the income tax Officer in my view) that income has escaped". That in my view can only be a quasi-judicial decision by the income tax officer on the lines indicated above, which involves giving the assessee an opportunity of his being heard before the decision is made.

In my opinion, in this case, the condition precedent was not fulfilled since there was no paper nor indeed, any, decision by the income tax officer that income has escaped assessment before he purported to put Sec. 34 into operation. For that reason, in my opinion the subsequent proceedings in this case were invalid.

There will be no order as to costs.

KHUNDKAR, J. - I agree.

MUKHERJEA, J. - I agree.