

(1972) 09 MAD CK 0062

In the Madras High Court

Case No : Writ Petition No's. 3079 to 3082 of 1967

S. Chattanatha Karayalar

APPELLANT

Vs

Excess Profits Tax Officer

RESPONDENT

Date of Decision : 12-09-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 25, 25A
Travancore Excess Profits Tax Act, 1120 — Section 15, 21

Citation : (1973) 92 ITR 384

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : V. Vedantachari, for K. Hariharan, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

Ramanujam, J.—The petitioner is the same in all these writ petitions and he has prayed for the issue of writs of certiorari to quash the four assessment orders of the same date, December 31, 1963, passed under the Travancore Excess Profits Tax Act, 1120 (hereinafter referred to as "the Travancore Act ") for the period from 19-8-1118 to 18-8-1121. The assessments in question are attacked by the petitioner on the following grounds: (1) the Travancore Excess Profits Tax Act of 1120 had been repealed in the year 1946 and that, therefore, the assessments made under the provisions of that repealed Act were without jurisdiction, (2) Section 13 of the Finance Act of 1950 cannot have the effect of saving the Travancore Excess Profits Tax Act of 1120, (3) even if the Travancore Excess Profits Tax Act of 1120 can be put in force for the period anterior to 19⁴⁶, the competent authorities to levy the tax are not the Union authorities but only those authorities constituted under the Travancore Act, and (4) there has been a partition between the petitioner and the other members of his family even in the year 1950 and that therefore the impugned assessments made on December 31, 1963, on the petitioner as the karta of the Hindu undivided family are not valid.

2. The respondent is the same in all these petitions, and in the counter-affidavit

filed by him he contends :

(1) that the Travancore Act was not repealed with effect from 18-8-1121 as alleged by the petitioner and that it was only provided that there was to be no chargeable accounting period under the Act subsequent to 18-8-1121;

(2) with the commencement of the Finance Act of 1950 (Central Act 25 of 1950) on April 1, 1950, the Travancore Act ceased to have effect, except for the remaining purposes of levy, assessment and collection of excess profits tax for the chargeable accounting periods ending on or before April 1, 1950, and that the accounting periods for which the assessments have been made clearly come within the operation of Section 13 of the Finance Act of 1950 so as to enable the respondent to invoke the provisions of the Travancore Act;

(3) according to the proviso to Section 13 of the Finance Act of 1950 on and from April 1, 1960, any reference to the appropriate officer, authority or tribunal, as the case may be, under the Travancore Act should be taken to refer to the corresponding officer, authority or tribunal under the Indian Income Tax Act of 1922, and that the respondent functioning as an Income Tax Officer under the Indian Income Tax Act of 1922 was, therefore, entitled to levy and collect the excess profits tax from the petitioner under the Travancore Act; and

(4) the assessments made on the petitioner as the karta of the Hindu undivided family was not invalid for the reason that the Hindu undivided family has ceased to exist after the year 1950, that the excess profits tax is a charge on the business, and that charge does not cease merely because a partition has taken place subsequent to the assessment year, that the tax liability as quantified in the assessment is enforceable against the assets of the family in the hands of the separate members and that the liability is not sought to be enforced personally against the petitioner but against the family properties in his hands.

3. The respondent also contended that the returns for the assessment years in question had been filed by the petitioner as the accredited karta of the Hindu undivided family and that, therefore, he is entitled to act on those returns, and proceed to make the assessment without making the quondam coparceners as eo nomine parties to the assessment proceedings.

4. Apart from the above contentions the respondent also raised a contention as to the maintainability of these writ petitions. According to him every ground that has been urged in these writ petitions could have been urged in an appeal against the assessments and that the petitioner has no justification for bypassing the effective and statutory remedy by, way of appeal provided under the Travancore Act of 1120.

5. We will first take the question of maintainability of the writ petitions. It is true that the extraordinary remedy under Article 226 of the Constitution of India should not normally be resorted to when there are effective statutory remedies, and this court will be reluctant to entertain a petition under the said article

against an order passed under a statute and to consider questions which could be effectively raised before the authorities constituted under the same statute. But where the statutory authority has purported to act without jurisdiction or where the order impugned is a nullity, this court can grant relief to the petitioner without driving him to have a resort to the statutory remedies. In this case the petitioner has questioned the jurisdiction of the respondent to act under the provisions of the Travancore Act and the same objection could be raised by him even in respect of the appellate authorities who are acting under the provisions of the Indian Income Tax Act. Therefore, in the special circumstances of these cases, we are not inclined to reject the writ petitions on the ground that the petitioner should have resorted to the remedy by way of appeals against the order of assessment under the Travancore Act.

6. We next take up the contention as to whether the petitioner can be assessed as a karta of the Hindu undivided family under the Travancore Act for the periods in question after the Hindu undivided family has become divided in the year 1950. Mr. Balasubrahmanyam, learned counsel for the respondent, contends that the petitioner should not be allowed to raise the above contention as such a contention was not raised before the assessing authority, the respondent herein. He places reliance on the decision in *Karamchand v. Commissioner of Income Tax* [1931] 5 I.T.C. 313 ; AIR 1931 Lab. 601, where the Lahore High Court had expressed the view that an assessee served with a notice u/s 22(2) of the Income Tax Act, as a head of the Hindu family and assessed as such is not entitled to raise a plea before the appellate authority that the joint family had become disrupted long earlier and that the assessment made on the Hindu undivided family is invalid if he has not raised such a point before the Income Tax Officer, u/s 25A of the Income Tax Act. However, in this case, the petitioner has submitted a return as karta of the Hindu undivided family on 21-6-1122 and the respondent has not given any notice to the petitioner before assessment but has proceeded to complete the assessment on the basis of the return already filed. Therefore, the petitioner had no opportunity to put forward the plea that the joint family has become disrupted and that, therefore, there could not be any assessment on the Hindu undivided family in the name of the petitioner as karta. It is only in cases where the assessee had an opportunity to put forward a plea but fails to avail of that opportunity it could be said that he cannot raise such a plea before the appellate authority for the first time. In this case the disruption of the joint family has taken place after the submission of the return by the then karta but before the assessments were made, and the petitioner had no notice of the proposed assessment on the joint family as such. We are, therefore, of the view that the petitioner is entitled to raise the plea that the joint family has become divided and that the assessment made on such a joint family after its disruption is bad.

7. We then proceed to consider the merits of the aforesaid contention. Mr. Vedantachari, learned counsel for the petitioner, contends that the joint family of which the petitioner was the karta having become divided after the submission of

the return, an assessment cannot be made on the joint family and that there is no provision like Section 25 of the Indian Income Tax Act, 1922, in the Travancore Act, nor the provision in Section 25A is attracted by Section 21 of the Travancore Act. According to him unless the joint family is existing, no assessment could be made thereon and he strongly relies on the decision of this court in *The Commissioner of Excess Profits Tax Vs. Jivaraj Topun and Sons*, which was a case arising under the Excess Profits Tax Act, 1940. There the assessee was a Hindu undivided family. There was a partition in the family early in October, 1941, and the partition was accepted by the Income Tax authorities in March, 1943. However, a notice u/s 13 of the Excess Profits Tax Act, 1940, was served on one of the erstwhile members of the family in August, 1944, to file a return of income of the family in respect of three chargeable accounting periods which ended on the date of the partition and thereafter the family was assessed to excess profits tax. That assessment was challenged on the ground that the notice has been served on a person who was not a member of the family on the date on which the notice was served, the family having ceased to exist on that date, and that Section 25A of the Income Tax Act which enabled the service of a notice on a defunct family not having been made applicable to the Excess Profits Tax Act by Section 21, there cannot be a valid assessment under the Excess Profits Tax Act on a joint family which has become defunct on the date of the assessment. This court upheld the said contention of the assessee and expressed the view that:

"If the business was once a business owned by the joint family and it is the profits of that business during the chargeable accounting periods that are sought to be charged and assessed under the Excess Profits Tax Act, and if by the time the notice is issued the joint family ceased to exist there is no provision under the Act to assess that undivided family which has become defunct and there is no procedure by which service of notice requiring the undivided family to submit a return can be effected. It is no doubt a lacuna in the Act and the result may be unfortunate from the point of view of the department. But, it cannot be helped as we have to construe the language of the section as it stands and it is not open to us to fill up the gaps in the legislation with a view to catch the profits of an assessee like the present, who taking advantage of the omission in the Act escapes assessment."

8. According to the learned judges in that case, the provisions of Section 14 of the Excess Profits Tax Act placed the matter beyond doubt that the assessment of tax is on the person in the same manner as under the Income Tax Act, and though under the Income Tax Act the computation of tax is on the basis of income derived by a person from various sources, under the Excess Profits Tax Act it is on the profits of the business of the person. The learned judges did not accept the contention put forward on behalf of the revenue that the business was a continuous one and the profits of that business were taken as the basis for assessing the tax under the Excess Profits Tax Act and, therefore, the assessee was the business and not the person owning it. The decision of the Supreme

Court in *Lakshminarain Bhadani Vs. Commr. of Income Tax, Bihar and Orissa*, is referred to by the petitioner's learned counsel for showing that the provision like Section 25A of the Income Tax Act, 1922, is necessary to enable the Excess Profits Tax Officer to make an assessment under the Travancore Act on the family as if no partition had taken place and calculate the amount of tax payable by the family as a unit and apportion the amount payable by the unit amongst the members of the family according to the portion of the joint family property allotted to each of them. In that case a joint Hindu family, of which the assessee was the karta, was assessed to Income Tax for the year 1939-40. In the year 1944 the Income Tax Officer considered that certain income of the family taxable in 1939-40 had escaped assessment. In the meanwhile, the family had become divided and an order had been passed u/s 25A(1) of the Act. Notwithstanding that order, the Income Tax Officer issued a notice in the name of the joint family and served it on the assessee, the erstwhile karta, u/s 34 read with Section 22 calling upon him to make a return in respect of the escaped income, and the assessee sent a return in response to that notice. Thereafter, the Income Tax Officer made an assessment and issued a notice of demand on the assessee and to other members of the family without apportioning the liability amongst the three members of the family. The assessee challenged those proceedings on the ground that the reassessment proceedings were irregular and that he was not liable to pay anything. In those circumstances, the Supreme Court held that the reassessment proceedings were validly initiated and it was not necessary to issue the notice u/s 34 to every member of the family, that u/s 25A the Income Tax Officer can make the assessment of the total income of the family as if no partition had taken place and calculate the amount of tax payable thereon as if it was payable by one unit and apportion the amounts payable by the unit amongst the members of the family in proportion to their share in the joint family properties.

9. Mr. Balasubrahmanyam, learned counsel for the revenue, however, submits that the decision in *Commissioner of Excess Profits Tax v. Jivaraj Topun and Sons* required reconsideration as the basis of the judgment has been considerably shaken by certain observations in the subsequent decisions of the Supreme Court. According to him the entire basis for the decision is that the entity which is taken as the unit of assessment under the Excess Profits Tax Act is not the business as such, but the person owning or carrying on the business, but this basis has not been accepted as correct in the subsequent decisions. He draws our attention to the decision of the Supreme Court in *Sohan Pathak and Sons Vs. Commissioner of Income Tax, U.P.*, . In that case the Supreme Court observed:

"It is now well-settled that, for the purpose of the Act (Excess Profits Tax Act, 1940) a business is a unit of assessment."

10. Reference also has been invited to the decisions in *R.N. Bose Vs. Manindra Lal Goswami*, and *E.M. Muthappa Chettiar Vs. The Income Tax Officer, Special Circle, Coimbatore*, . In *R. N. Bose v. Manindra Lal Goswami* it was observed :

" The excess profits tax is a tax on a business taken as a whole and it is not a tax on the individuals who own the business. As the business is taken to be the unit which earned the profits, the Act does not provide for assessing the tax on the individual members of a firm carrying on a business. But the method of assessment when a business is being carried on by two or more persons is laid down in Section 14(3)."

11. In *E. M. Muthappa Chettiar v. Income Tax officer* * a firm consisting of two partners was the managing agent of a textile mill. One of the two partners issued a notice of dissolution on March 4, 1943, which the other partner was questioning. Ultimately, the matter went to court and the court fixed 10th March, 1949, as the date of dissolution. In 1951 the Excess Profits Tax Officer served a notice on the erstwhile managing partner of the firm and assessed the profits of the business of the firm for the calendar year 1942 and for a portion of the calendar year 1943, and took proceedings for recovery of the tax against him. The erstwhile managing partner contended that he could no longer represent the firm nor the other partner after the dissolution has taken place, and that, therefore, both the proceedings for assessment and recovery were not valid and that he was not an "assessee in default". The Supreme Court upheld the assessment holding that the dissolution did not affect the validity of the assessment order passed after notice to the person in management of the business during the chargeable accounting periods as it was not the firm but the business that was the unit of assessment, that as Section 21 of the Excess Profits Tax Act attracts Sections 44 and 63 of the Income Tax Act, the procedure applicable to an undissolved firm was attracted to a dissolved firm, and that the partners continued to be liable jointly and severally even after the dissolution as they were liable before dissolution. The decision of this court in *A.G. Pandu Rao and Another Vs. Collector of Madras and Another*, is also to the same effect. In that case proceedings u/s 13 of the Excess Profits Tax Act were commenced against the firm after its dissolution and a notice was served on the erstwhile managing partner of the firm. Assessment was also completed and a demand was also made on him. Subsequently, the revenue started proceedings for recovery of the tax from the other quondam partners. When those recovery proceedings were challenged, this court held that the notice served on the erstwhile partner under Sections 13 and 29 of the Act was valid, that as the liability of the partners was joint and several u/s 44 of the Act all the partners of the defunct firm were defaulters, that Section 44 of the Indian Income Tax Act had been made applicable to proceedings under the Excess Profits Tax Act so as to attract the procedure applicable to an undissolved firm to a dissolved firm.

12. The petitioner's learned counsel places strong reliance on the decision in *COMMISSIONER OF Income Tax, U. P. Vs. NEEKELAL JAINARAIN*, . In that case an identical question as to whether a Hindu undivided family can be validly assessed to excess profits tax after dissolution of the family was considered, and the court had expressed the view that the Excess Profits Tax Act contains no provision for assessment of the excess profits in respect of a business carried on

by a Hindu undivided family after there was a disruption of the family, on the expiry of the assessment year and before the making of an assessment order, that unlike the Indian Income Tax Act under which it is a person that is assessed, under the Excess Profits Tax Act it was the business that was charged to tax and the tax was payable by the person who was carrying on the business during the chargeable accounting period, that as the subject-matter of taxation was business, if the business was discontinued, the subject-matter of taxation disappeared and that the principle of Hindu law that a debt due from a Hindu undivided family could be realised from its members after disruption could not apply as there was no liability towards the excess profits tax due from the family before its disruption.

13. The learned counsel for the revenue seeks to get over this decision in *Commissioner of Income Tax v. Neekelal Jainarain* on the ground that the court has proceeded on the basis that the amount of tax due under the Excess Profits Tax Act was not a debt due from a Hindu undivided family before its disruption and that the tax became due only when an assessment is made, but that basis is no longer tenable in view of the decision in *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth-tax* wherein the Supreme Court has ruled that the charge under the Income- tax Act arises as soon as income is earned and that the liability to pay income tax was a present liability though the tax became payable after an order of assessment was made and that it was not a contingent liability but a perfected debt at any rate on the last day of the accounting year. It is true, in *Commissioner of Income Tax v, Neekelal Jainarain*, the court proceeded on the basis that the excess profits tax is not a debt owed by the family before partition and that only a debt due by the family could be realised after its disruption from its members, and the decision in *Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta*, clearly supports the contrary proposition that excess profits tax became a debt on the last day of the accounting period though the quantum has to be ascertained later. But even accepting the contention of the revenue that excess profits tax was a debt owed by the joint Hindu family which carried on the business, that the charge for the excess profits tax is only on the business which had been carried on by the joint family and not on the family as such, and that once there is a charge, that charge has to be enforced against the family which carried on the business during the accounting period, still the question is whether the provisions of the Travancore Excess Profits Tax Act, 1120, enabled the revenue to assess a family which had become divided as a unit to realise such a debt. A few sections of the Travancore Act have to be looked into for the purpose of deciding that question. The long title of the said Act shows that the object of the Act is to impose a tax on excess profits arising out of certain businesses. "Business" has been defined in Section 2(3). Section 2(14) defines a "person" as including a Hindu undivided family. Section 4 provides for a charge, levy and payment of tax on the amount by which the profits during any chargeable accounting period exceed the standard profits. Section 4 does not, however, say on whom the tax

has to be levied. Section 14 provides for the issue of a notice for assessment by the Excess Profits Tax Officer to any person whom he believes to be engaged in any business to which, this Act applies, for to have been so engaged during any chargeable accounting period or to, be otherwise liable to pay excess profits tax, calling upon him to furnish a return in the prescribed form and in the prescribed manner. Section 15 enables the Excess Profits Tax Officer to assess to excess profits tax such persons as are referred to in Section 14, and such an order of assessment has to be served on the person on whom the assessment has been made. Sub-clause (2) of Section 15 says that in respect of any chargeable accounting period excess profits tax shall be payable by the person carrying on the business in that period and Sub-clause (3) says that where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name. Sub-clause (4) provides that if any person who carried on the business during the chargeable accounting period had died, the assessment may be made on his legal representative. Section 21 refers to certain sections of the Travancore Income Tax Act, 1096, as being applicable to the assessment made under this Act. It is not in dispute that none of the sections referred to therein contained a power similar to the one in Section 25A or Section 44 of the Indian Income Tax Act. Therefore, it has to be seen whether the provisions of Section 15 of the Travancore Act would enable the Excess Profits Tax Officer to treat the Hindu undivided family which carried on the business during the chargeable accounting period in question as continuing even after its disruption for the purpose of assessment.

14. As per Section 15(2) a person who carried on the business during the chargeable accounting period can be made liable to pay the excess profits tax and the word "person" under the definition includes a Hindu undivided family. But Section 15(2) naturally contemplates the existence of the person who carried on the business during the chargeable accounting period and that is why Section 15(4) states that if the person who carried on the business is not alive, his legal representatives are to be proceeded against. Therefore, the joint family which carried on the business during the chargeable accounting period must continue to exist at the time of assessment so as to invoke the said provision. If the joint family has become disrupted and there is no joint family subsisting on the date of the assessment, the person who carried on the business does not exist. Hence there cannot be an assessment on the Hindu undivided family as a unit after its disruption especially when there is no provision like Section 25A of the Indian Income Tax Act in the Travancore Act deeming the joint family to continue for purposes of assessment. In this case the assessment has been made on the erstwhile karta after the disruption of the family, that is, after the representative character of the karta is taken away as a result of the partition. Even though the liability to pay the excess profits tax was a debt owe by the family which did the business during the chargeable accounting period and liability could be enforced under the Act only by making a valid assessment, such a valid assessment

cannot be made on the joint family as a unit as it is no longer in existence. The learned counsel for the revenue may be correct in contending that if the liability to pay the excess profits tax is a debt owed by the Hindu joint family, it could be recovered under the general law from the quondam members of the family. But for making an assessment for the excess profits tax and for recovery thereof under the Act, a valid assessment should be made u/s 15 and that section in our view contemplates the Hindu joint family which carried on the business during the chargeable accounting period continuing up to the date of the assessment. We are thus inclined to agree with the conclusion arrived at in Commissioner of Income Tax v. Neekelal Jainarain. We, therefore, hold that the assessments made on the petitioner for the excess profits tax payable by the Hindu undivided family for the chargeable accounting periods in question cannot be sustained in law.

15. In view of the fact that the assessments have been held to be without jurisdiction, it is not necessary for us to go into the other contentions raised by the petitioner.

16. The result is that the writ petitions are allowed and rules nisi are made absolute. There will be no order as to costs.