

(1956) 11 CAL CK 0008
In the Calcutta High Court
Case No : A.F.O.O. No. 118 of 1954

Sriram Jhaburmull

APPELLANT

Vs

S.C. Das Gupta and Others

RESPONDENT

Date of Decision : 29-11-1956

Acts Referred:

Excess Profits Tax Act, 1940 — Section 14A, 14A(6), 14A(7)
Income Tax Act, 1961 — Section 23B

Citation : AIR 1957 Cal 254

Hon'ble Judges : Chakravartti, C.J;Mallick, J

Bench : Division Bench

Advocate : Jyotish Chandra Pal, for the Appellant;Jajneswar Majumdar, for Nos. 1 and 4, E. Meyer and Balai Pal for Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Chakravartti, C.J.—This is an appeal from an order of Sinha J., dated 27-1-1954, by which he discharged a Rule issued by himself under Article 226 of the Constitution, requiring the respondents to show cause why the records of a certificate proceeding started against the appellant should not be brought up to this Court in order that the said proceeding and all orders passed therein might be quashed by a writ of certiorari. There were prayers for other reliefs as well, but it is not necessary to refer to them.

2. Broadly stated, the facts are as follows: The assessee is a Hindu undivided family. For the chargeable accounting period 26-3-1942, up to 13-4-1943 it filed a return and showed profits below Rs. 25,000/-. On what date the return was filed does not appear. On 10-9-1947, the Excess Profits Tax Officer made a provisional assessment u/s 14A, Excess Profits Tax Act and determined the tax payable by the assessee at Rs. 6,00,000/-. On what profits that tax was computed does not appear, in pursuance of the provisional assessment thus made, a demand notice was issued on the assessee on 10-10-1947, but It defaulted to make any payment. On 10-3-1948, a requisition u/s 46(2), Income Tax Act, was sent to

the collector of 24-Parganas and on the 5th of May following, the Oeruncate Omcer med a certificate-under Section 4, Public Demands Recovery Act. That case, we are informed, was Case no. 2003 I. T.747-48. Execution proceedings on the basis of the certificate were commenced on 17-12-1948, but whether any amount was realised, does not appear. On 31-1-1949, the Excess Profits Tax Officer made a final assessment whereby he determined the excess profits of the assessee at Rs. 13,58,338/- & the tax payable thereon at Rs. 10,86,670-11-0. This amount was made up of two sums, namely Rs. 9,05,558-11-0 which was the tax proper and Rs. 1,81,112-0-0 which was the compulsory deposit. A requisition u/s 46 (2), Income Tax Act, on the basis of the regular assessment was made on-14-2-1950, and on the 10th of March following a certificate was filed for the recovery of Rs. 4,86,670-11-0. This sum, it will be noticed, was the balance of the sum of Rs. 10,86,670-11-0 determined as the tax payable at the final assessment, upon the deduction therefrom the amount of Rs. 6,00,000/- which was the tax determined payable at the provisional assessment. The execution case filed on the basis of the second certificate was No. 502, I. T./49-50.

3. On 26-12-1950, the first certificate, that is to say, the certificate filed on the basis of the provisional assessment, was put to execution a second time. It would seem that various claims by third parties were made before the Certificate officer in the course of the first execution proceeding and it was found unprofitable to pursue it any further. We are informed that the last order made in the first execution case was made on 18-5-1949, and thereafter nothing else happened.

4. On 17-12-1950, the assessee preferred an appeal against the regular assessment. It was Appeal No. 57/EPT/CC-IV/51-52. The appeal came to be heard by the Appellate Assistant Commissioner, Range D, Calcutta, who, by his order dated 15-1-1952, set aside the regular assessment and remanded the case to the Excess Profits Tax Officer in order that a fresh assessment might be made. Upon such disposal of the appeal, the second certificate case based on the regular assessment was withdrawn. The second execution case based on the first certificate continued, however, to be proceeded with.

5. It was at that stage that the assessee moved this Court under Article 226 of the Constitution and obtained a Rule, The points canvassed before the learned Judge below were two in number. It was contended that Section 46(2), Income Tax Act, was ultra vires, or, to put it more accurately, had ceased to be valid, being repugnant to the Constitution and secondly that, in any event, after a regular assessment had been made on 31-1-1949 the provisional assessment ceased to exist and there was no surviving assessment on which any certificate proceeding could be had against the assessee. The execution case proceeding on the basis of the first certificate was impugned as a proceeding based on assessment which had itself been extinguished by the regular assessment. The learned Judge overruled both the contentions of the assessee and discharged the

Rule. Thereupon the present Appeal was preferred.

6. The grounds urged before the learned Judge below were repeated in the memorandum of appeal, although the second ground was taken in too broad and vague a form. Mr. Pal who appears for the assessee has however, made up for the irregularity by serving upon the respondents a more detailed and precisely-worded ground relating to his second point.

7. Since the appeal was preferred, the Supreme Court has had occasion to pronounce on the validity of Section 46 (2) and has declared it to be intra vires. Mr. Pal wished to contend before us that while the judgment of their Lordships must be accepted as declaring the law and binding on all Courts and parties in India, he could properly advance certain other considerations which, according to him had a clear bearing on the question and which, if considered, might, according to him, have led to a different decision. We did not hear Mr. Pal on those further considerations, because the decision of the Supreme Court which is that Section 46 (2), Income Tax Act, is not ultra vires, nor void is binding upon us and we could not possibly hear any argument directed against the validity of the section to any useful purpose. If I am referring to Mr. Pal's contention at all, it was only because he wished us to place it on record that he had certain further considerations to urge and would have urged them, if liberty to do so were given to him,

8. I may now proceed to the second of Mr. Pal's points which was the only point on which we heard him. Briefly stated, Mr. Pal's contention was that the words "regular assessment" as used in Sub-sections (5), (6) and (7) of Section 14A, Excess Profits Tax Act, meant the regular assessment first made and not the assessment finally made at the end., of such appeals or other proceedings as might be preferred or taken in a case. If that was the true meaning of the words "regular assessment", it followed that as soon as the regular assessment was made in the present case on 31-1-1949, the provisional assessment ceased to exist, because under Sub-section (5) of Section 14A, a provisional assessment determined the amount of excess profits tax due from an assessee only "until a regular assessment is made in due course u/s 14."

9. I am unable to accept Mr. pal's contention, but it is due to him that I should state in greater detail the steps of his reasoning. Subsection (5) of Section 14A provides "that

"a provisional" assessment * * * shall, until a regular assessment is made in due course u/s 14, determine the amount of excess profits tax due from the assessee."

Sub-section (6) provides that

"if, when a regular assessment is made in due course u/s 14, the amount of excess profits tax payable thereunder is found to exceed that determined as payable by the provisional assessment, it shall be reduced by the amount

determined as payable by the provisional assessment." So, far as "this sub-section is concerned no difficulty of construction is experienced, if the words "regular assessment" are taken to mean the regular assessment as finally made. But Mr. Pal's contention is that such construction of the words will be found to be unworkable and inappropriate, if it is sought to read them in the same sense in Sub-section (7). That sub-section-provides that

"if, when a regular assessment is made in due course u/s 14, the amount of excess profits tax payable thereunder is found to be less than that determined as payable by the provisional assessment, any excess of tax paid as a result of the provisional assessment shall be refunded to the assessee."

I need not quote the rest of the sub-section. Mr. Pal pointed out that by Section 21, Excess Profits Tax Act, Section 48, Income Tax Act, had been made applicable to assessments to excess profits tax. u/s 48, an assessee could ask for and insist on the refund of any amount paid or paid in excess under an assessment wholly or partially set aside, as soon as it was set aside. It is not open to the Income Tax Officer to say that he will not make a refund till a further appeal preferred by him is disposed of or that the assessee must give security that in the event of the original assessment being restored or a higher sum being found payable by the assessee, he will pay the amount so due. Mr. Pal's contention was that if Section 48 applied to proceedings under the Excess Profits Tax Act, as it did, an assessee would be entitled in a case where an appeal from the regular assessment resulted in the determination of a tax liability lower than that determined at the provisional assessment, to ask for an instant refund of the difference. If an assessee was entitled in such a case to ask for an immediate refund, it was obvious, according to Mr. Pal, that the provisional assessment no longer continued to determine the amount of the excess profits tax due from him, although the regular assessment had not yet been finally made, because the assessment first made had been set aside and an appeal might be taken or might be pending. Proceeding further, Mr. Pal contended that since the construction that the words "regular assessment" meant the regular assessment as finally made would break down if applied to Sub-section (7), the only other construction which would fit in with all the three sub-sections where the words occur and which would be workable, was that they meant the regular assessment as first made. His final contention, therefore, was that as soon as a regular assessment was made in this case on 31-1-1949, the provisional assessment ceased to determine the amount of excess profits tax due from his client and, in fact, ceased to exist. From that, the argument that the execution case then pending against the assessee had come to be based on nothing was but the next logical step forward.

10. Ingenious as Mr. Pal's argument undoubtedly is, I am of opinion that it is not warranted by the terms of the statute. The scheme of Section 14A, Excess Profits Tax Act, appears to be noticeably different from that of Section 23B, Income- -: tax Act. Both deal with provisional assessments, but whereas under the Income

Tax Act, after a final assessment has been made," that is the only assessment to be regarded & any payment made or deemed to have been made towards the provisional assessment counts as payment towards the regular assessment, the position is very different under the Excess Profits Tax Act. I have already read the terms of Sub-section (6) of Section 14A. Under that subsection, what happens where the regular assessment results in the determination of a tax higher than the tax determined at the provisional assessment, is not that the regular assessment is, thereafter, taken as the only relevant assessment, but both the provisional and regular assessments survive, standing side by side, the amount of tax payable under the regular assessment being adjusted to that payable under the provisional assessment and not vice versa. It is not as under the Income Tax Act, that the tax liability is taken as determined under the regular assessment and any payment made or deemed to have been made under the provisional assessment counts as payment towards the regular assessment; hut the amount determined as payable by the regular assessment is reduced by the amount determined as payable by the provisional assessment. In other words, the regular assessment is taken as an effective assessment only for the difference between the two assessments, whereas the provisional assessment is maintained as the valid assessment for the amount found due by and under it. It is, therefore, impossible to say, so far at least as Sub-section (6) of Section 14A is concerned, that immediately upon a regular assessment being made, the provisional assessment ceases to exist. On the other hand, the statute intends and expressly says that the provisional assessment shall survive.

11. There remains, however, the textual argument of Mr. Pal to which I have already referred, I can't say that no difficulty or construction is at all presented by the words "regular assessment", if they are applied in the same sense in Sub-section (7), but the answer to Mr. Pal's contention, I conceive, is furnished by what happens when an amount lower than the amount found due under the provisional assessment is determined as payable under the regular assessment, whether initially or upon appeal. Mr. Pal instanced a case where the amount payable under the provisional assessment might be Rs. 5,00,000/-, that determined as payable under the regular assessment, when first made, might be Rs. 6,00,000/- and the amount determined as payable by the appellate Court on appeal from the regular assessment might be Rs. 4,00,000/-. He said that in such a case, the assessee would be entitled to apply at once for a refund of Rs. 1,00,000/-, if the sum of Rs 5,00,000/- determined as payable under the provisional assessment had already been recovered from him and, therefore, it could no longer be said that the provisional assessment still determined the amount of tax payable by him. It is true that in such a case the provisional assessment, as originally made, no longer continues to determine the amount of excess profits tax payable by the assessee, but that is because the provisional assessment itself ceases to exist in its original form, because of the effect upon it of the regular assessment, as finalised -- it might be for the time being -- by the Appellate Assistant Commissioner. In the case of Sub-section (8), the provisional

assessment is not disturbed by the final assessment, but is, on the other hand, maintained for the amount it declares payable. In the case of Sub-section (7), the provisional assessment itself is reversed, as it were, by the final assessment, whether as originally made or as modified by an Appellate Assistant Commissioner or the Tribunal or other authority and, therefore, in the case of Sub-section (7), no question of the provisional assessment, as originally made, still continuing to determine the liability of tax payable by the assessee can possibly arise. I am (accordingly of opinion that it is not correct to say that the use of the phrase "when a regular assessment is made" in both Sub-sections (6) and (7) and the different consequences resulting from the final assessment warrant an argument that even in a case where the provisional I assessment is not deduced by the regular assessment but is, on the other hand, increased, the provisional assessment ceases even to exist and "merges in the regular assessment, with the result that if the regular assessment is thereafter set aside, there is no longer any provisional assessment to be enforced in execution. In my view, the provisional assessment, so long as it is not disturbed by the regular assessment, stands for the purpose of recovery, not only till the regular assessment is made but also thereafter, because where the final assessment is for a larger sum, only the balance is realised under that assessment, the provisional assessment being followed up for the recovery of the amount due under it. If, on the other hand, the provisional assessment is itself disturbed by the final assessment, either as first made or in appeal or some other proceeding, necessarily the provisional assessment, as first made, cannot continue to determine the amount of the excess profits tax due from the assessee because, being actually reversed by the final assessment, it can no longer be said to exist in its original form,

12. For the reasons given above, I do not think I can assent to the construction proposed by Mr. Pal. Like the learned Judge below, I am of opinion that neither the scheme of Section 14A, nor its obvious object, nor the language used warrants it, although I am bound to say that some kind Of a basis for a technical argument is furnished by the words "regular assessment", to which I have so often referred.

13. The only point with which we are con- cerned in this appeal being the second one and that one being decided against the appellant, the appeal is dismissed. There will be no order as to costs.

Mallick, J.

14. I agree.