PRIVY COUNCIL

Rajendra Nath Mukerjee

Vs.

Commissioner of Income-tax

P.C.A.No.85 of 1932
(Lord Macmillan, Sir John Wallis and Sir George Lowndes JJ.)

07.12.1933

JUDGMENT

LORD MACMILLAN J.

1. On 8th November 1930, the income-tax officer for District V. Calcutta, made an assessment order on Burn and Co., an unregistered firm carrying on business in Calcutta, assessing them to income-tax and supertax for the year 1927-28, under Section 23(1), Income-tax Act, 1922. The main question in the present appeal, in which the individual partners of Burn and Co. are the appellants, is whether it was competent to make this assessment on the firm after the expiry on 31st March 1928 of the year in respect of which the assessment was made. The explanation of the delay in making the assessment is as follows : It appears that towards the end of the year 1926-27 the partners of the registered firm of Martin and Co., which also carried on business in Calcutta, purchased the business and assets of Burn and Co. The purchase was effected not by or on behalf of the firm of Martin and Co., but by the partners of that firm as individuals who contributed funds for the purpose proportionally to their shares in Martin and Co. and became partners in Burn and Co. with the same shares therein as they held in Martin and Co. In the year 1927-28 Martin and Co. was a registered firm while Burn and Co. was unregistered. Under the Income-tax Act registered and unregistered firms are differently taxed in various important respects.

2. On 7th April 1927 the income-tax officer of District I issued a notice to Burn and Co. under Section 22(2) calling for a return of their total income for the year to 31st March 1927, with a view to assessing them for the year 1927-28. A similar notice was issued to Martin and Co. on 8th April 1927, by the income-tax officer of District II. When they issued these separate notices the income-tax officers were unware that the

business of Burn and Co. had been bought by the partners of Martin and Co. On 24th September 1927, Martin and Co. made a return of their total income in compliance with the notice issued to them in April, and on 13th January 1928, Burn and Co. made their return. Meantime the purchase of the business of Burn and Co. by the partners of Martin and Co. having come to the knowledge of the income-tax authorities, Burn and Co's, file was transferred to the officer dealing with District II, and on 25th February 1928, he made an assessment on Martin and Co. in respect of the combined incomes returned by Martin and Co. and Burn and Co. on the footing that the business of Bum and Co. had become a branch of the business of Martin and Co.

3. Martin and Co. appealed against this assessment, and after sundry procedure, which need not be detailed, the High Court, on 16th May 1930, held that the income of a registered firm cannot for the purposes of the Act be aggregated with the income of an unregistered firm, but that the income of each must be separately assessed, irrespective of the fact that the persons interested in the profits of both concerns are the same. Before pronouncing this decision, the High Court had, by a reference back to the Commissioner, ascertained that the business of Burn and Co. bad been bought, not with any funds belonging to Martin and Co., but with other funds belonging to individuals what were the partners in Martin and Co., and that the intention of the purchasers was to embark on a separate venture unconnected with Martin and Co. In consequence of this decision the assessment which had been made on Martin and Co. was amended by the elimination there from of the income returned by Burn and Co., and on 8th November 1930, an assessment, being the assessment under appeal, was made on Burn and Co., on their income as returned by them on 13th January 1928. The partners of Burn and Co. appealed against this assessment to the Assistant Commissioner, by whom it was confirmed. They then, under Section 66(2), required the commissioner to refer certain questions of law to the High Court. The questions as framed by the Commissioner and referred by him, were as follows:

> " 1. Whether the assessment made under Section 23 (1) on the petitioners on 6th November 1930, for the year 1927-28 in pursuance of the notice under Section 22(2), issued on them on 7th April 1927, was a legal assessment ?
> 2. Whether proceedings can now lie against Messrs. Burn and Co. in view of the fact that final and conclusive assessments have now been made on Messrs. Martin and Co. and on their individual partners ?
> 3. Upon a true construction of the Indian Income Tax Act must not any assessment be completed within the year of assessment or in the event of such

assessment not being so completed, is not the only remedy open to the income-tax authorities to proceed under Section 34 ?"

4. The High Court answered the first and second questions in the affirmative and the third question in the negative, whereupon the present appeal was taken. The argument of the appellants was that on a sound construction of the provisions of the Income-tax Act it is incompetent to make any assessment to tax after the expiry of the year for which the tax is charged except in the cases provided for in Section 34. That section played so important a part in the debate that it may be well to quote it in full:

> " 34. 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, at any time within one year of the end of that year, servo on the person liable to pay tax on such income, profits or gains, or in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-Section (2), Section 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub- section :
>
> Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

5. The appellants were not able to point to any express provision of the Act limiting the time within which an assessment must be made. In particular, Section 23, under which the assessment in question purports to have been made, contains no such limitation. They relied however on inferences which they sought to draw from other sections of the Act, and especially from Section 34. The language of the Act is no doubt naturally suited to the normal case of taxation carried through all its processes within the compass of the tax year, but, their Lordships do not find in any of the sections to which they were referred, apart from Section 34, any provisions which would justify the importation into the Act of an implied prohibition against the making of an assessment after the expiry of the tax year. Nor does Section 34, when it is examined, support the appellants' contention. That section applies to two cases, viz. (1) the case where income has escaped assessment in any year, and (2) the case where income has been assessed at too low a rate in any year. In either of these cases a notice calling for a return may be issued and an assessment or re-assessment may be made of such income as has escaped assessment or has been assessed at too low a rate in the tax year, but such notice may be served only within one year after the expiry of the tax

year. The inferences which the appellants asked their Lordships to draw from those provisions were : (1) that it is only in the cases to which Section 34 applies that an assessment can be made after the expiry of the tax year, and (2) that if a case does fall within either of the cases to which Section 34 applies, no assessment can be made after the expiry of the tax year unless it is made within the year following the tax year, or at least unless a notice calling for a return is made within the year following the tax year.

6. It will be observed that under section 34, if a notice is served within one year after the expiry of the tax year, the subsequent assessment or re-assessment may apparently be made at any time after service of the notice and not necessarily within the year following, the tax year. It would be odd if in this case the assessment could be made more than a year after the expiry of the tax year, while in the normal case, where a return is made within the year, the assessment could not be made a day after the expiry of the tax year. Their Lordships do not accept the inference sought to be drawn from Section 34, that it is only where income has escaped assessment in the tax year, or has been assessed too low in that year, that an assessment may be made after the expiry of the tax year. It may be that in the two cases to which the section applies if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or has been assessed too low, but that is not to say that in no other case can an assessment be made after the expiry of the tax year.

7. The appellants however submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year, and can be subsequently assessed, only under Section 34 with its time limitation. This involves reading the expression "has escaped assessment" as equivalent to "has not been assessed." Their Lordships cannot assent to this reading gives too narrow a meaning the word "assessment" and too wide a moaning to the word ' escaped." That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to "the course of any assessment." To say that the income of Burn and Co. which in January 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin and Co., has escaped" assessment in 1827-28 seems to their Lordships an inadmissible reading. The fact that Section 34

requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have escaped" assessment within the statutory meaning. Their Lordships find themselves in agreement with, the view expressed in *Lachiram Basantlal v. Commissioner of Income tax, Bengal* by the learned Rankin, C.J. at p. 118 (of 5 I. T. C.) :

> " Income has not escaped assessment if there are pending to the time proceedings for the assessment of the assesses' income which have not yet terminated in a final assessment thereof."

8. It may be that if no notice calling for a return under Section 22 is issued within the tax year then Section 34 provides the only means available to the Crown of remedying the omission, but that is a different matter. Their Lordships find it sufficient for the disposal of the appeal to hold, as they do, that the income of Burn and Co. did not "escape assessment" in the year 1927-28 within the meaning of Section 34 and that consequently the serving of a notice within the year 1928-29 was not an essential pre-requisite of a valid assessment of that income. As there is no other time limit prescribed, or necessarily implied, in the Act, the assessment of 8th November 1930 was therefore not out of time, and the first question was correctly answered by the High Court in the affirmative and the third question in the negative.

9. The appellants had another argument against the validity of the assessment. Their Lordships share the difficulty experienced by the learned Chief Justice in appreciating it. It was directed to the second question stated by the Commissioner and appears to turn on the fact that after the judgment of the High Court on Martin and Co.'s appeal final and conclusive assessments were made on Martin and Co. and the individuals composing that partnership without including the income of those individuals as partners of Burn and Co. Their income as partners of Burn and Co. then, it is suggested "escaped assessment" because, as expressed in the sixth and seventh reasons appended to the appellants' case, the partners of Burn and Co. were in (in the absence of an assessment on the firm) liable to be assessed individually on their shares of the firm's profits and while they were so liable they were finally assessed (as partners of Martin and Co.) without any of their shares in the profits of Burn and Co. being included. In their Lordship's opinion the amendment of Martin and Co's assessment by the elimination of Burn and Co's profits, with a view to the separate assessment of the latter cannot in any proper sense be described as an escape from assessment of the income of Burn and Co. or of the firm's partners. The second

question was therefore rightly answered in the affirmative by the High Court. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the respondent's costs.

Appeal dismissed.

Cases Referred.

AIR 1931 Calcutta 545=133 IC 187=5 Cal 909=5 ITC 114,