

Rai Bahadur Seth Teomal

Vs

Commissioner of Income-Tax and Another

Civil Appeals Nos. 384 and 385 of 1957

(B. P. Sinha, J. L. Kapur, M. Hidayatullah JJ)

02.03.1959

JUDGMENT

KAPUR, J. -

These two appeals pursuant to special leave are brought against two orders of the Income-tax Appellate Tribunal (Calcutta Bench) dated November 28, 1952, passed in appeal No. I.T.A. 4067 of 1951-52 in respect of income-tax assessment for the assessment year ending 31st March, 1944, and in appeal No. E.P.T.A. 391 of 1951-52 in respect of excess profits tax assessment of the appellant for the chargeable accounting period ending March 31, 1943. The original assessee was R. B. Seth Teomal who was the manager of a Hindu undivided family. On Seth Teomal's death on May 30, 1944, Seth Ottanmal became the manager. He is now the appellant representing the Hindu undivided family. He will be termed as the appellant in these appeals. Seth Teomal was carrying on the business of a railway contractor at Lalmonirhat in the district of Rangpur which is now in Pakistan. In April, 1943, a notice was served on him under section 22(2) of the Income-tax Act (here in after called the Act). He filed the return of Februar

According to an affidavit which has now been filed in this court the Central Board of Revenue by an order passed under sub-section (2) of section 5 of the Act assigned the appellants' case along with some other assessment cases to the Commissioner of Income-tax (Central), Calcutta. The order contains the following endorsements which give an indication of the reason for the case being assigned to the Commissioner of Income-tax (Central) :

"Copy forwarded to :-

(1).....

(2) Commissioner of Income-tax Central Calcutta. These cases are reported to have E. P. T. liabilities."

Thus the appellants' case which was before an Income-tax Officer within the area in charge of the Commissioner of Income-tax, Bengal (Mofussil), was withdrawn from him and was assigned to the Commissioner of Income-tax (Central), Calcutta. On February 11, 1948, the Income-tax Office, District N-C (I.T. cum. E.P.T.), to whom it appellant's assessment case was assigned, issued notice again under section 22(4) and 23(2) of the Act. That Officer after making the usual enquiries made the assessment order on March 15, 1948. The order for excess profits tax assessment was made on March 30, 1948.

Against these orders two appeals were taken to the Appellate Assistant Commissioner on April 30, 1948. In the appeal against income-tax assessment the appellant inter alia raised the following two grounds in regard to the jurisdiction of the Income-tax Officer, Calcutta :

"5. For that the petitioner is not aware of any order passed for the transfer of the case from Rangpur to Calcutta and it is submitted that without such an order and communication of such order the assessment is challengeable for want of jurisdiction."

"32. For that the appellants challenge the jurisdiction as there was no proper order of transfer and the business was carried on outside Calcutta and assessments had never before been made in Calcutta."

But no such ground was taken in the appeal against excess profits tax assessment. The Appellate Assistant Commissioner dismissed both these appeals. In regard to jurisdiction he held :

"It however appears from records on hand that the principal place of business of the concern was at Rangpur and as the income attracted excess profits tax liability the case was transferred to Calcutta under orders of Central Board of Revenue. Hence there is no substance in the contention of the learned advocate which fails."

The appellant then took two appeals to the Income-tax Appellate Tribunal. In the appeal against income-tax assessment he took two objections in regard to jurisdiction :

"For that the objection taken before the learned Appellate Assistant Commissioner on jurisdiction should not have been summarily disposed by passing reference to an order of transfer of the case from Rangpur to Calcutta without at the same time discussing when the question of jurisdiction was seriously raised and how and under what circumstances and to whom was the case transferred and for what purpose."

"2. For that the appellant begs leave to repeat that transfer was not legal or proper and was not made by any proper authority to legalise such transfer."

In the excess profits tax appeal also this time an objection was taken as to jurisdiction :

"For that the assessment is bad in law having been made without jurisdiction."

The Appellate Tribunal held against the appellant in a short paragraph :

"So far as the first objection is concerned, in our opinion, it is not within our jurisdiction to go into this matter. The objection relates to the place of assessment. As held in *Wallace Brother & Co. Ltd. v. Commissioner of Income-tax* the question as to the proper place of assessment is not one for adjudication by a court or by any appellate authority. Consequently we overrule the first contention of the assessee."

The Tribunal thus held that as the objection related to the place of assessment the Tribunal was not competent to go into that question. Upon this the appellant applied for a reference to be made under section 66(1) of the Act and prayed for five questions to be referred. The two questions relating to jurisdiction were.

"(1) Had the Income-tax Officer (Non-Companies Income-tax-cum-Excess Profits Tax District, Calcutta) jurisdiction to make the assessment ?

(2) Was the Income-tax Appellate Tribunal correct in the circumstance in holding that it has no jurisdiction to determine the competence of the Income-tax Officer in making the assessment ?"

In the "facts of the case" attached to the grounds of appeal it was stated that the accounts were produced before the Income-tax Officer, Calcutta, under Protest because the jurisdiction of that Officer was being challenged. In reply to this the Commissioner after referring to Wallace Brothers' case, stated that it did not appear from the assessment record that the assessee ever raised any objection to the jurisdiction of the Income-tax Officer and if it had been taken the matter would have been referred by the Income-tax Officer to the Commissioner as required by law. This application under section 66(1) was dismissed on the ground that the question of jurisdiction could not arise out of the order of Tribunal and reliance was placed on Wallace Brother case, and Seth Kanhaiyalal v. Commissioner of Income- tax. The appellant applied to the High Court under section 66(2) of the Act and prayed for the following two questions and some others to be referred :

"(i) Had the Income-tax Officer (N.C.I.T. Cum. E.P.T. District, Calcutta) jurisdiction to make the assessment ?

(ii) Was the Income-tax Appellate Tribunal correct in the circumstances in holding that it had no jurisdiction to determine the competence of the Income-tax Officer in making the assessment ?"

The High Court dismissed this application on July 23, 1954. No appeal has been filed in this court against the order of the High Court but an appeal has been filed against the order passed by the Income-tax Appellate Tribunal.

On behalf of the Revenue a preliminary objection was taken that as no appeal had been filed against the order of the High Court that order had become final and this court, therefore, should not entertain the appeal against the order of the Tribunal and reliance was placed on the observations of Venkatarama Aiyar, J., in Govindarajulu Mudaliar v. Commissioner of Income-tax. At page 810 it was observed :

"The present appeal is against the decision of the Tribunal itself. It is no doubt true that this court has decided in Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax, that an appeal lies under article 136 of the Constitution of India to this court against a decision of the Appellate Tribunal under the Indian Income-tax Act. But seeing that in this case the appellant had moved the High Court and a decision has been pronounced adverse to him and this has become final, obviously it would not be open to him to question the correctness of the decision of the Tribunal on grounds which might have been taken in an appeal against the judgment of the High Court. All the points urged before us were taken in the reference under section 66(2) of the Indian Income-tax Act. It would therefore follow that these grounds are not open to the appellant".

But counsel for the appellant relied on Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax, where the scope of appeals under article 136 were set out by the learned Chief Justice. In this

case, however, it is not necessary to go into this question because in our opinion there is little substance in the appeal itself.

Counsel for the appellant has urged two grounds in support of his appeal that his place of business was Lalmonirhat and under Section 64(1) and (2) of the Act he was entitled to be assessed by the Income-tax Officer of that area and (2) that assessment by the Income-tax Officer of Calcutta was an alleged assumption of jurisdiction and therefore he was entitled to have the order of assessment quashed. In order to decide these question reference has to be made to the scheme of the Act. The provisions relevant to the issue of jurisdiction are section 5 and 64. The former is headed "Income-tax authorities" and the latter "Place of assessment". Assessment is made by the Income-tax Officer under section 23(3). Against an order of assessment or the liability to be assessed an appeal lies under section 30 to the Appellate Assistant Commissioner and a further appeal to Income-tax Appellate Tribunal under section 33 of the Act. And then a reference can be made by the Tribunal to the High Court under section 66(1) of t

The heading of section 64 is "Place of assessment". Sub-section (1) of section 64 provides that the assessee shall be assessed by the Income-tax Officer of the area in which he carries on his business. Sub-section (2) lays down that in all other cases an assessee shall he assessed by the Income-tax Officer of the area in which he resides. Under these two sub-sections therefore the appellant, because he was carrying on business at Lalmonirhat, had to be assessed by the Income-tax Officer of that area, i.e., by the Income-tax Officer of Rangpur. Sub-section (3) of that section provides that if a question as to the place of assessment arises, it is to be determined by the Commissioner of Income-tax or by the Central Board of Revenue according as the case may be. Under the first proviso to this sub-section before the question as to the place of assessment is determined the assessee has to have an opportunity of representing his views and under the second proviso the place of assessment connote be called into que

"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 the assessment is made."

Thus under section 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 by the Commissioner of Income-tax or the Central Board of Revenue. The Act does not contemplate any other authority.

It was contended on behalf of the assessee that he produced his accounts before the Income-tax Officer at Calcutta under protest. There is no mention of this protest in the assessment file and that is what was stated by the Commissioner of Income-tax in his reply which he gave on March 3, 1953, before the Income-tax Appellate Tribunal and which has been set out above. If such an objection had been raised the question would have been referred by the Income-tax Officer to the Commissioner as required under section 64(3). That stage when it should have been taken, i.e., before the Income-tax Officer, Calcutta.

But it is contended by counsel for the appellant that in the present case there is an illegal assumption of jurisdiction as the Officer who made the assessment had no jurisdiction at all to make the assessment. It was also contended that if the Central Board of Revenue wanted to transfer the assessment proceedings from the Income-tax Officer, Rangpur, to the Income-tax Officer at Calcutta, it could only exercise that jurisdiction by making an order under section 5(7A) and not

under section 5(2) of the Act. He relied on Taylor v. Taylor where it was held that if a mode of exercise of power is laid down in the statute it has to be exercised in that way and no other. He also relied on Nazir Ahmad v. King Emperor. He further contended that this was not a case which fell under section 5(2) of the Act. Section 5(7A) gives to the Central Board of Revenue the power to transfer any case from one Income-tax Officer to another which can be made at any stage of the proceedings and does not necessitate the reissuing of a

Section 5 although headed "Income-tax authorities" also gives to the Central Board of Revenue and the Commissioners of Income-tax certain powers in regard to withdrawing of cases from one area into another and from one Income-tax Officer to another. Sub-section (2) of this section gives power to the Central Government to appoint as many Commissioners of Income-tax as it thinks fit and they have to perform their functions in respect of different areas, persons and cases or classes thereof. The relevant portion of the sub-section is as follows :

Section 5(2) : "The Central Government may appoint as many Commissioners of Income-tax as it thinks fit and they shall perform their functions in respect of such areas or of such persons or classes of persons or of such incomes or classes of incomes or of such cases or classes of cases as the Central Board of Revenue may direct....."

In the present case there are more than one Commissioner of Income-tax in Bengal and the Central Board of Revenue assigned certain cases including the case of the appellant to the Commissioner of Income-tax (Central) at Calcutta for the exercise of his functions as Commissioner. Now this is a power which the Central Board of Revenue did possess under sub-section (2) of section 5. As to which Income-tax Officer was to deal with that case was for the Commissioner of Income- tax to designate.

Sub-section (7A) of section 5 confers on the Central Board of Revenue the power to transfer any case from one Income-tax Officer to the other which can be done at any stage of the proceedings. This sub- section is not a provision which in any way stage of the proceedings. This sub-section is not a provision which in any way modifies or cuts down the power given to the Central Board of Revenue under section 5(2). The two sub-sections are complementary and operate in two separate spheres. Sub-section (2) is for the purpose of specifying as to which of the Commissioners would perform functions in respect of different areas, persons, incomes or cases or classes thereof.

It was argued that sub-section (7A) is a special provision and it necessarily excludes the operation of sub-section (2) but as we have said above the two sections are not mutually exclusive. They operate in two different spheres, their areas of operation are different and therefore the power which the Central Board of Revenue exercised in the present case cannot be said to be illegal. It was not transferring the appellant's case from the Income-tax Officer, Rangpur, to the Income-tax Officer, Calcutta. It directed the Commissioner of Income- tax, Calcutta (Central), to exercise his functions in respect of certain cases including the case of the appellant and that falls under section 5(2) and not under section 5(7A).

Reference was made to Pannalal Binjraj v. Union of India. But that was a case in which the question raised was of constitutional validity of sub-section (7A) of section 5 and it was held that it was a measure of administrative convenience and was valid and neither infringed the fundamental rights under article 14 nor under article 19(1)(g). There are no observations in that case which militate against the view that sub-section (2) and (7A) operate in different areas nor did that question arise in that case. The contention there raised was that sub- section (7A) conferred arbitrary and

uncontrolled powers of transfer and was discriminatory and violative of the provisions of article 14 and imposed an unreasonable restriction on the right to carry on trade or business in contravention of article 19(1)(g). Counsel referred to *Bidi Supply Co. v. Union of India*. But that case also does not deal with the matter now before us. The simple question to be decided is whether the Income-tax Officer, Calcutta, could make t

"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 re-assessment for 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."

In view of this provision, i.e., section 5(2), no objection can be taken on the ground of sub-sections (1) and (2) of section 64.

Counsel for the appellant relied on a judgment of the Bombay High Court in *Dayaldas Kushiram v. Commissioner of Income-tax* where it was held that section 64 was intended to ensure that as far as practicable the assessee should be assessed locally, i.e., by the Income-tax Officer of the area in which the assessee carries on business, and there must, so far as the exigencies of the case allow, be some reasonable relation to the place where the assessee carries on by business or resides. In that case the assessee was carrying on business in C Ward and the proper Officer under section 64 to assess him was the Income-tax officer of that Ward. As a result of the coming into force of section 5(2) the Commissioner of Income-tax (Central) was created without reference to the area. The case of the assessee on whom the notice had been served but had not been assessed in due course assigned to the Commissioner of Income-tax (Central) who designated an Income-tax Officer for assessment of the assessee. The assessee there

Counsel for the appellant also relied on the judgment of the Allahbad High Court in *Dina Nath Hem Raj v. Commissioner of Income-tax*. In that case the assessee was carrying on business at Calcutta and he was sought to be assessed at Kanpur and an objection was taken to the Income-tax Officer, Kanpur, making the assessment. The Income-tax Officer did not proceed in accordance with section 64(3) and therefore it was held that assessment made by him was without jurisdiction. In the present case no question has been raised as to the jurisdiction of the Income-tax Officer who made the assessment and apart from that the order was made by the Central Board of Revenue under section 5(2) of the Act and section 64(5) becomes operative and sub-sections (1) and (2) of section 64 are inoperative. See also *Seth Kanhaiyalal v. Commissioner of Income-tax*.

The question then arises whether the objection as to the place of assessment, i.e. by the Income-tax Officer of Calcutta, could be challenged in appeal to the Appellate Assistant Commissioner and then before the Appellate Tribunal. In our opinion it could not be. The scheme of the Act shows that no appeal in regard to the objection to the place of assessment is contemplated under the Act. Under proviso (iii) of section 64(3) of the Act a question as to the place of assessment, when it arises, determined by the Commissioner. Any such order cannot be made a ground of appeal to the Appellate Assistant Commissioner under section 30 of the Act which provides for appeals against orders of assessment and other orders enumerated in section 30 but no appeal is there provided against orders made under section 64(3). Similarly appeals to the Appellate Tribunal which lie under section 33 of the Act also do not provide for any appeal on the question of the place of

assessment. In Wallace Brothers' case at page 79 Spens,

"These provisions clearly indicate that the matter is more one of administrative convenience than of jurisdiction and that in any event it is not one for adjudication by the court...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. As we have already pointed out, the objection was not raised in the present case even before the Appellate Income-tax Officer but only before the Appellate Tribunal." There is nothing in the Bidi Supply case which in any ways detracts from the efficacy of the decision of the Federal Court in Wallace brothers' case. We have already said that Bidi Supply case deals with the varies of section 5(7A).

In this view of the matter the question as to the place of assessment does not arise out of the order of the Income-tax Appellate Tribunal and, therefore, no question of law could be referred nor could the High court make such order under section 66(2). In our opinion, the High Court rightly dismissed the appellant's application for directing the case to be stated under section 66(2) of the Act.

The appeals therefore fail and are dismissed with costs.

In the circumstances of the case there will be only one set of costs.

Appeals dismissed.

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