Sarupchand Hukamchand & Co.

Vs

Union of India and Others

Civil Appeal No. 172 of 1955

(CJI S. R. Dass, N. H. Bhagwati, M. Hidayatullah JJ)

05.05.1959

JUDGMENT

HIDAYATULLAH, J. -

This appeal, by special leave of this court, is directed against the judgment and order of the High Court of Judicature at Bombay dated February 26, 1953, in Appeal No. 108 of 1952. By that judgment, the Divisional Bench (Chagla, C.J., and Shah, J.) declined to interfere, in Letters Patent Appeal, with the judgment of Tendolkar, J., dated July 8, 1952, in Miscellaneous Application No. 48 of 1952. In the petition which was originally filed in the High Court under article 226 of the Constitution, a writ of mandamus was asked against the Union of India and two Income-tax Officers to compel them to give effect to the appellate order of the Appellate Assistant Commissioner of Income-tax, F. Range, Bombay, dated April 29, 1949. The High Court in both the judgment declined the writ.

The facts of the case are as follows : The appellant, Messrs. Sarupchand and Hukamchand and Co., (hereinafter referred to as the assessee firm) was carrying on business, inter alia, as shroffs, merchants and commission agents at Bombay, Indore, Ujjain and Calcutta. It had, in the relevant account years, two partners, Sir Sarupchand Hukamchand and Sri Hiralal Kalyanmal. The two partners were also separately liable to income-tax, the former as a Hindu undivided family and the latter as an individual. We are concerned here with the assessment years 1940-41, 1941-1942, and 1942-43. These correspond to the account years, 1995-1996 (Samvat) to 1997-1998 (Samvat). When the assessment of the assessee firm was made, the Income-tax Officer, Section VIII (Central), Bombay, treated the firm as "resident and ordinarily resident". For the assessment year 1940-41 the Income-tax Officer found a profit of Rs. 80,358, and applying section 23(5) (b) of the Indian Income-tax Act (hereafter called the Act), he proceeded to treat the firm which was unregistered as registered for the purpose of assessment. On March 15, 1945, he therefore assessed the two partners carrying the profit into their individual returns and made no demand upon the firm. It appears that an application for registration had already been filed under section 26A of the Act before the Income- tax Officer, but it was rejected - and quite correctly - because no instrument of partnership was disclosed. That order was also passed on the same date.

For the assessment years 1941-42 and 1942-43, the Income-tax Officer by his orders dated July 31, 1945, and October 31, 1945, respectively, treated the firm as "resident and ordinarily resident" and as an unregistered firm. For the first of the two assessment years, he assessed the firm on a total income of Rs. 2,30,798 to income-tax and super-tax, and for the second year, its British Indian income was taken at Rs. 2,62,827 and the total income at Rs. 7,00,116 and was also treated accordingly.

The assessee firm appealed against these assessments. The Appellate Assistant Commissioner by his order passed in the consolidated appeals on April 29, 1949, held that the assessee firm was non-resident and excluded the income of the firm outside British India, though it was included in the total world income for the purpose of computing the rate of tax. He also found error in the computation of income made by the Income-tax Officer, and held that in the assessment year 1940-41 there was a loss of Rs. 1,61,084 in the total world income of the assessee firm. For the subsequent years also there were slight variations in the amounts determined by the Income-tax Officer, but it was held that the assessee firm had made profits in those years. The following is the summary of the findings of the Appellate Assistant Commissioner, as given by him in his order :

#Assessment Income in Income outside Totalyear British India British India world income.1940-41 Loss Rs. 2,26,028 Rs. 74,944 Loss Rs. 1,61,0841941-42 Rs. 1,27,062 Rs. 1,08,236 Rs. 2,35,2981942-43 Rs. 2,62,827 Rs. 4,41,789 Rs. 7,04,616##

In addition to these findings, the Appellate Assistant Commissioner added a direction to the following effect :

"The Income-tax Officer is directed to modify the assessments accordingly."

When the matter reached the Income-tax Officer, he gave effect to the order of the Appellate Assistant Commissioner under section 31 of the Act and carried the loss to the partners in their assessments for the year 1940-41, and granted a refund of Rs. 16,977-11-0 to Sir Sarupchand Hukamchand and Rs. 68,339 to Sri Hiralal Kalyanmal. The assessee firm, however, was not satisfied, and embarked upon voluminous correspondence beginning with a letter dated September 10, 1949, by which it claimed that inasmuch as it had been shown to have incurred a loss in the first of the three assessment years, it could not for that year be treated as a registered firm, and that as an unregistered firm it was entitled therefore to carry forward the loss to the subsequent years. In addition to the correspondence, the assessee firm moved in turn the Income-tax Officer as well as the Appellate Assistant Commissioner respectively under section 35 of the Department at both levels declined to interfere, and stated that the direction of the Income-tax Officer under section 23(5) (b) was not appealable, and had become final. They also pointed out that the period during which the original order of the Income-tax Officer could be rectified (viz. 4 years) had already run out, and that the petitions were accordingly out of time. The assessee firm moved the Commissioner as well as the Central Board of Revenue, but failed to get the desired order.

Finally, after the receipt of the order of the Central Board of Revenue, the assessee firm applied on July 16, 1951, to the Additional Income-tax Officer, Section VIII (Central), to give effect to an order which the assessee firm had secured from the Appellate Assistant Commissioner earlier. By that order, the Appellate Assistant Commissioner had, at the request of the assessee firm, directed the Income-tax Officer to take the losses of the first assessment year into the accounts of the partners, which direction, in the opinion of the Appellate Assistant Commissioner, his predecessor had omitted to make in the first instance. It was after this that fresh assessment forms were drawn up, and the refund was determined. It may be pointed out here that the partners withdraw the amount of refund, though in making the request to the Additional Income-tax Officer the assessee firm had reserved its right "to move further in the matter as may be advised", and had pointed out that the action was without prejudice to such rights.

Having failed to obtain relief from the Department, the appellate authorities and the Central Board of Revenue, the assessee firm filed the petition under article 226 of Constitution in the High Court

of Judicature at Bombay. That petition was heard by Tendolkar, J., and he declined to interfere mainly on the ground that it was possible to take two views of the matter whether after a profit assessment was turned into a loss assessment by the Appellate Assistant Commissioner, the original order of the Income-tax Officer under section 23(5) (b) remained outstanding or not. He thought that this was not a fit case for the issuance of a writ of mandamus by the High Court. In appeal which was taken from this decision, Chagla, C.J., looked at proviso (d) to section 24(2), and also came to the view that there was a possibility of two views being taken in the matter, and that the learned single Judge was right in not interfering. Shah, J., in a concurring judgment, explained what he considered was the meaning of section 23(5) (b) read with section 24(2), proviso (d), but he also felt this was not a case in which a writ could be claimed against the Union Of Indian or the Income-tax Officers. Chagla, C.J., however, expressed the hope that the taxing authorities would not deny the assessee firm its rights under the Act on any technical ground, such as limitation, or failure to pursue a particular procedure. In the result, the Divisional Bench sustained the order of Tendolkar, J., who had dismissed the petition earlier. This court on May 3, 1954, granted special leave to appeal against the judgment of the Divisional Bench.

Before arguing on merits of the appeal, the learned Additional Solicitor-General and subsequently Mr. Rajagopala Sastri who took over the argument, raised three objections to the present appeal. According to them, the petition in the High Court was directed against the Union of India and the two Income-tax Officers who had dealt with this matter, and the relief which was claimed could be granted by none of them. They further argued that mandamus was an inappropriate writ to issue in this matter, when the order passed by the Income-tax Officer under section 23(5) (b) was not appealable and the Appellate Assistant Commissioner could do nothing about it in the appeal the quantum of assessment. They also stated that the relief asked for in the petition could not be granted by the High Court, and that the powers of this court were accordingly limited.

We shall deal with these objections, when we have determined the essence of the matter. Under section 23(5) (b), a power is conferred on the Income-tax Officer to treat an unregistered firm as a registered firm, if by adopting that method more tax and super-tax would be realisable from the individual partners in their own assessments than in assessing the firm. The clause may be quoted in extenso for ready reference here :

> "23. (5) Notwithstanding anything contained in the foregoing sub- sections, when the assessee is a firm and the total income of the firm had been assessed under sub-section (1), sub-section (3) or sub- section (4), as the case may be, -...
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> (b) in the case of an unregistered firm, the Income-tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super- tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm."

The contention of the assessee firm is that the action of the Income- tax Officer in treating an unregistered firm as a registered firm is mainly in the interests of the Revenue and he can act if more revenue would be available and not otherwise. When an unregistered firm makes a loss, it is entitled to carry forward the loss for a certain number of years till it is absorbed in the profits, if any, of subsequent years. By carrying the loss to the account of the individual partners, relief is afforded to them in their own income-tax payment, and there is presently a loss of revenue to the

State. This, according to the assessee firm, is outside the jurisdiction of the Income-tax Officer, because his action is conditioned upon realisation of more revenue and not creating loss for the State. Learned counsel for the Department agree that there would be in the assessment year in which there is a loss by an unregistered firm, a loss to the Revenue if it is carried into the accounts of the partners; but they contend that there is no inhibition against the action and refer to proviso (d) to section 24(2) as indicating that such a course is perfectly valid. The assessee firm also contends that the moment loss was determined by the Appellate Assistant Commissioner, the previous order made by the Income-tax Officer under section 23(5) (b) of the Act automatically fell to the ground and the loss could only be carried forward in the future assessments of the unregistered assessee firm and not in the account of the partners. The assessee firm contends that the direction by the Appellate Assistant Commissioner to modify the assessments of the three years accordingly implied the re-opening of the entire question whether this unregistered firm could be treated as a registered firm for purposes of assessment in the first year. The Department, on the other hand, refers to the provisions of section 30 of the Act to show that an appeal lies to the Appellate Assistant Commissioner on the grounds expressly mentioned there and none other. It further points out that this is not one of the grounds on which the appeal could have been taken, and the Act cannot by implication be deemed to have conferred on the Appellate Assistant Commissioner a power which he ordinarily did not possess under the Act. The order of the Income-tax Officer to treat the unregistered firm as registered must, therefore, be held to be outstanding, and all that had happened in the case is to take that order to its logical conclusion in the light of the assessed loss of the firm, in the three years under assessment.

This question was argued before us in great detail, as apparently it had also been in the court below. There is no doubt that the matter is one of some complexity, which is not unusual in a statute of the type we are considering, but, in our opinion, only one correct view of the matter was possible, and with all due respect, the High Court made but little attempt to determine it. We shall now attempt to lay down the interpretation of the various sections bearing upon the matter. Section 23 (5) (b) had already been quoted. It will appear from it that the Income-tax Officer is given the option to apply the procedure laid down in clause (a) to an unregistered firm, if in his opinion, the aggregate amount of tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount of tax which would be payable by the firm and the partners individually, if the firm was assessed as an unregistered firm. Clause (a) provides that the sum payable by the firm shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined. To put it simply in the case of a registered firm its assessable income is first determined, but is not processed further to determine the tax. Instead, the shares of the partners in the assessable income are determined in accordance with the particulars furnished by them, and the resultant amounts are respectively carried to each partner's return and included in his income, and the tax on the total is determined. In the case of an unregistered firm, the assessable income is found out, and then the tax payable by the unregistered firm is determined and a demand issued. If there is a loss, then the loss is carried forward to the succeeding years till it is absorbed or for six (now, eight) years but no further. Previously, the number of years ranged from one to six, but there is no need to refer to the provision in detail.

What happened in this case was that for the assessment year 1940-41, the Income-tax Officer determined the assessable income at Rs. 80,358. He felt that more tax was likely to be realised if the partners were assessed instead of the firm and he accordingly decided to apply the procedure laid down in section 23(5) (b) to the firm. In passing his order, the Income-tax Officer observed as follows :

> "The firm is an unregistered one but the aggregate amount of tax payable by the partners would be greater by applying the procedure laid down in section 23 (5) (a) of the Act than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered one. I therefore order under section 23(5) (b) of the Act that the procedure laid down in section 23 (5) (a) should be applied and the firm declared N. D. for the assessment year 1940-41."

It is no doubt true that if the Income-tax Officer had determined a loss, he could not and probably would not have passed this order, which would have had the immediate effect of loss to the Revenue of the sums which have now been ordered to be refunded to the partners of this unregistered firm. The Department, however, says that the assessment for 1940-41 except in so for as profit was converted into loss has become final and cannot be set aside now. It relies on Commissioner of Income-tax v. Khemchand Ramdas and Commissioner of Income-tax v. Tribune Trust. There is no doubt that an assessment which has once been made does become final, subject only to the powers exercisable under sections 34 and 35 of the Act. The position, however, is different when the assessment itself is subject to appeal, and the Appellate Assistant Commissioner passes an order converting the profit into a loss, and gives a direction to the Income-tax Officer to modify the assessment accordingly.

The position then was that the Income-tax Officer had exercised his powers under section 23 (5) (b) as there was a profit. When the Appellate Assistant Commissioner found a loss it became clear that the Income-tax Officer had by an erroneous finding of profit assumed jurisdiction to act under section 23 (5) (b). The reversal of the finding of profit destroyed the substratum of the jurisdiction of the Income-tax Officer to act under that clause and his order automatically fell through.

The Department's contention that such an order is referable to clause (a) of section 31(3) and does not involve the setting aside of the order under section 23(5) (b) passed earlier by the Income-tax Officer is not correct. No doubt, the right of appeal given to the assessee under section 30 is limited to the matters therein contained, but the relief which the appellate authority can give is to be found in section 31(3). The assessment order having come before the Appellate Assistant Commissioner, he can, under clause (a), confirm, reduce, enhance or annual the assessment. Under clause (b) he can set aside the assessment and direct the Income-tax Officer thinks fit or the Appellate Assistant Commissioner directs, and the Income-tax Officer must thereupon proceed to make fresh assessment and determine the amount of tax payable on the basis of such fresh assessment. It is contended by the Department that the order of the Appellate Assistant Commissioner was passed under clause (a) and not clause (b), and there being no fresh assessment ordered, the only thing that the Income-tax Officer could do was to re-determine the tax within the limits of his won order under section 23(5) (b) of the Act, which applied clause (a) of that sub-section to this case.

In our opinion, this is not a correct approach. Even if the order be referred to clause (a) of section 31(3), the effect, in law, was the annulment of the assessment which had been made in the case, and the necessary consequence of the determination of the loss in the assessable income remained to be worked out. The Income-tax Officer worked it out by carrying the losses to the return of the partners. Under what section could he do so except under section 23 (5) (b) ? There was no authorisation under section 31(4) of the Act and the second proviso to section 24 was clear. In such a case, the Income-tax Officer was required once again to apply his mind to determine whether it would be in the interests of Revenue to proceed, as he had done before. It is manifest that if he had done this duty in the interests of the Revenue, as the law indeed contemplates, he would never have

passed the order that the loss of the firm should be carried to the accounts of the partners immediately in that year of assessment. Learned counsel for the Department admits that no Income-tax Officer would have, with a loss by the firm, given relief on the basis of that loss to the partners, but he contends that this is not illegal in view of the special provisions of proviso (d) to section 24(2) of the Act. We accordingly proceed to consider the effect of that proviso, which reads as follows :

> "Provided that -
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> (d) where an unregistered firm is assessed as a registered firm under clause (b) of sub-section (5) of section 23, during any year, its losses shall also be carried forward and set off under this section as if it were a registered firm."

From this, it is argued, as it was argued in the High Court, that even the losses of an unregistered firm can be carried to the partners' account, as if the firm were registered. No doubt, if the proviso is read in an extended manner, the result asked for would follow; but a careful reading of it would show that it was not designed to enable the Income-tax Officer to forego the obligation laid on him by clause (b) of section 23(5), to find out the interests of the revenue. To read this proviso as enabling the Income-tax Officer to overlook the said clause is to give no meaning to the words "during any year". Those words form a material part of the proviso, because the proviso with or without those words makes an entirely different sense. Without those words, it gives a general power to carry the losses to the partners' account. With those words, it only provides for a contingency in which an unregistered firm treated as such in the previous years, is sought in any particular year to be treated as a registered firm, and by reason of its carrying some business losses in the past, arrangement for the carrying forward and absorption of those losses has to be made for the year in which it is to be treated as a registered firm. In that event, the proviso provides that its losses shall be carried to the partners' account, as if it were a registered firm. It is inconceivable that if the firm was carrying heavy business losses, it would suddenly be treated in a year of assessment as a registered firm, so that its losses might give relief to the partners and not give revenue to the State. This proviso would only be resorted to, when in spite of taking the losses to the account of the partners, more revenue would be available to the State. The proviso is an enabling one. An unregistered firm, treated as such in previous years, may, during any year, be treated as a registered firm provided the Revenue would benefit. It may be that the firm may have made a loss in that year or was carrying a loss from the previous years but, if by treating the firm as registered, the Revenue would be benefited, the proviso can be used. But, there is no general power to act this way to the detriment of the Revenue. To give any other interpretation to this proviso will mean that the words "during any year" have not received any meaning and that the proviso is interpreted to make it not incumbent on the Income-tax Officer to consider the interests of the Revenue, as required by clause (b) of section 23(5). The two provisions must be read in harmony, and when so read, yield the only result that proviso (d) is to be invoked, subject to the conditions under section 23(5) (b) to obtain more revenue for the State by applying section 23(5) (b).

It would appear, therefore, that the Income-tax Officer in then light of the losses determined by the Appellate Assistant Commissioner, was under a duty to apply his mind de novo to the problem which he had undertaken, when he resorted to section 23(5) (b). It is admitted that if the matter had been so plain to him, he would not have, if he did his duty correctly under that provision, carried the losses to the partners' account.

The only question, therefore, which survives for determination is whether the order of the Appellate

Assistant Commissioner left the Income-tax Officer free of his order, and whether he was under a duty to reconsider the position under section 23(5) (b). When the basis for assessing a profit was gone, it is manifest that there was nothing but loss to carry forward to the partners' account. With the fall of the assessment in this manner, fell the need for applying the special provisions of clause (b) of section 23(5) to the case. Indeed, the duty of the Income-tax Officer indicated a contrary course, if he was to act under section 23(5) (b) at all. The order of the Appellate Assistant Commissioner was passed in respect of three years' assessment, and was a consolidated order. He set out in parallel columns the income and losses of the firm and not of the partners and directed the Income-tax Officer to modify the assessment accordingly. The intention obviously underlying that order was to put the matter at the stage at which the assessable income of the assessee firm was determined before computing the tax thereupon. To compute the tax, the Income-tax Officer had to determine whether the loss occasioned in the first year should be carried forward to the assessee firm in the subsequent year, and he could not give effect to the order of the Appellate Assistant Commissioner fully, unless he determined once again the question under section 23(5) (b). In other words, the implication of the appellate order was to take the matter prior to the order regarding the treatment of the unregistered firm as a registered firm, and of necessity, that order fell to the ground as being passed beyond that stage.

It is contended on the strength of the ruling of the Privy Council in Commissioner of Income-tax v. Tribune Trust that once the assessment is final and valid, it remains so until it is set aside, but once it has become final, it cannot be altered except under sections 34 and 35. No exception can be taken to the statement of the law by the Privy Council, which, with all due respect, is absolutely correct, but it is impossible to hold, on analogy, that the order determining that this unregistered firm should be treated as registered, had equally become final and open to further consideration. Learned counsel for the Department also urged on the strength of Commissioner of Income-tax v. McMillan & Co. and Commissioner of Income-tax v. Amritlal Bhogilal & Co., that if the powers of the Appellate Assistant Commissioner did not involve a review of the determination by the Income-tax Officer under section 23(5) (b), this result could not indirectly follow. No doubt, the Appellate Assistant Commissioner could not, if the matter had gone before him in appeal against the order under that section, have interfered. But the Appellate Assistant Commissioner was exercising his powers under section 31 of the Act and annulling the assessment of the first year and converting a profit in that year into a loss. None can deny that he had that power in the appeal which was before him. Section 31(4) of the Act enjoins that where as the result of an appeal any change is made in the assessment of a firm, the Appellate Assistant Commissioner may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm. This power was implicit in the order which the Appellate Assistant Commissioner passed, namely, that there was a loss in the assessment year in question and the assessments for the three years had to be modified. The Income-tax Officer, therefore, was under a duty to modify the assessments of the partners accordingly, and to take the matter up again from the point at which the order of the Appellate Assistant Commissioner had placed it. He had once again to determine whether he would, in the altered circumstances apply section 23(5) (b) to this case or not.

In our opinion, the Income-tax Officers in question did not do their duty as required by law, and we should, therefore, by a writ compel them to do so.

As regards the argument that the petition is directed against wrong persons and for a wrong relief, we do not think that it is so. The petition sought relief against the Union of India, which, in any event, was not concerned with this matter, and was wrongly joined. But the two Income-tax Officers who dealt with this matter, were required under the statute to do their duty once again in the matter

of the application of section 23(5) (b) of the Act. That they failed to apply their mind to this matter under a wrong apprehension of the law in manifest and they did not give effect to the orders of the Appellate Assistant Commissioner. The assessee firm having failed to secure this relief from all the authorities superior to the Income-tax Officers, it was open to the High Court by a writ to order the Income-tax Officer concerned to hear and determine this matter in accordance with law. This is precisely the relief which was claimed in the High Court and is now claimed in the present appeal. We think, with due respect, that the High Court should have, on a correct appraisal of the legal situation ordered this relief, and we accordingly, after explaining the law applicable to the case, order the appropriate Income-tax Officer to hear and determine this matter in the light of our observations.

We may set down here that the two partners of the firm to whom relief has been given by way of refund after the Appellate Assistant Commissioner's order undertook unconditionally to refund the amounts, before the matter is considered by the Income-tax Officer. We order that the two partners shall return the amounts in the manner to be ordered by the Income-tax Officer, before action is taken to determine the matter.

In the result, the appeal is allowed with costs throughout to be paid by respondents Nos. 2 and 3. The Union of India shall, however, bear its own costs. It may be noted that no separate costs were incurred by it either in this court or in the court below. It joined respondents Nos. 2 and 3 in the statement of the case filed in this court and also appeared through the same counsel in both the courts.

Appeal allowed.

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