SUPREME COURT OF INDIA

J. P. Jani, Income Tax Officer, Circle IV, Ward-G, Ahmedabad

Vs.

Induprasad Deveshanker Bhatt

C.A.No.972 of 1967

(J. C. Shah, V. Ramaswami and A. N. Grover, JJ.)

20.08.1968

JUDGEMENT

RAMASWAMI, J.:-

1. This appeal is brought by certificate against the judgment of the Gujarat High Court dated 14th/15th December, 1964 in Special Civil Application No. 54 of 1964 whereby a writ of mandamus was issued to quash the notices issued under Sections 147, 148 and 142 (1) of the Income Tax Act, 1961 against the respondent.

2. The respondent was assessed by the Income Tax Officer, Ward E, Circle II, Ahmedabad for the assessment year 1947-48 by an assessment order dated 31-1-1952. The Income Tax Officer thereafter received information that a certain profit made by the assessee it the name of Natwarlal Manilal Pandit who was a benamidar of the respondent had escaped assessment by reason of the respondent not having disclosed it at the time of the original assessment. The Income Tax Officer, therefore, after obtaining the approval of the Commissioner of Income Tax issued a notice dated 27th March, 1956 under Section 34 (1) (a) of the Income-tax Act, 1922 (hereinafter referred to as

the old Act). The notice could not be served personally, and, therefore, was served by affixing on a conspicuous part of the respondents house. The respondent objected to the service of the notice and did not file a return stating that there had been no valid service. When the Income Tax Officer threatened to proceed ex parte, a return was filed under protest on 16-1-l957 and in that return the respondent showed the same amount of income which was determined in the original assessment. Despite the objection of the respondent that there was no proper service of notice under S. 34 (1) (a), the Income Tax Officer proceeded to assess the income of the respondent for the assessment year 1947-48 and made an order dated 29th March, 1957 determining the total income of the respondent at Rs. 89,000 by including the profit alleged to have been earned by Natwarlal Manilal Pandit. The respondent preferred an appeal to the Appellate Assistant Commissioner who allowed the appeal and set aside the order of assessment on the found that there was no valid service of the notice. The decision of the Appellate Assistant Commissioner was given on 5-1-1963 by which time the Income Tax Act, 1922 had been repealed and the Income Tax Act 1961 (hereinafter called the new Act) had come into force with effect from lst April, 1962. The time for taking action for assessment or re-assessment in case of escaped income exceeding Rs. 50,000 but less than Rs. 1,00,000 was enlarged from 8 years to 16 years under the new Act. On 4-1-l963 the Income Tax Officer, Circle IV, Ward G, Ahmedabad issued a notice calling upon the respondent to show cause why proceedings should not be taken under Section 147 (a) of the new Act for bringing to tax the escaped profit of the respondent. The respondent protested against the new notice on the ground that action under the old Act had become time barred and the new Act had no application to his case, subsequently, a notice under Section 148 of the new Act was issued on 13-11-1963 and this notice was followed by another notice dated 9-1-l964 issued under Section 142 (1).

3. The respondent, therefore, preferred Special Civil Application No. 54 of 1964 in the Gujarat High Court praying for a writ of certiorari to quash the notices dated 13-11-1963 and 9-1-1964 by the first appellant. The High Court took the view that on a true construction of S. 297 (2) (d) (ii) of the new Act the Income Tax Officer could not issue a notice under Section 148 in order to reopen the assessment in a case where the right to reopen the assessment was barred under the old Act at the date when the new Act came into force. The High Court observed that the right of the Income Tax Officer to reopen the assessment of the respondent in the present case was admittedly barred under Section 34 (1) (a) of the old Act at the commencement of the new Act and it was, therefore, not competent to the Income Tax Officer to issue a notice under Section 148 of the new Act in order to reopen the assessment of the respondent and to re-assess the income of the respondent relying on the provisions enacted under Section 297 (2) (d) (ii) of the new Act. The High Court accordingly allowed the Special Civil Application preferred by the respondent and set aside the notices dated 13-11-1963 and 9-1-1964.

4. It is necessary at this stage to set out the relevant provisions of the two statutes. Section 34 of the Income Tax Act, 1922 (No. 11 of 1922) as it stood immediately prior to its amendment by the Finance Act, 1956 is in the following terms:

"34. (1) If

(a) the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section it for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable for that year or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed, he may in cases falling under Clause (a) at any time within eight years in cases falling under Cl.(b) at any time within four years of the end of that year, serve on the assessee, or if the assessee is 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) of Section 22 and may proceed to assess or re-assess such income, profits or gains or recompute the loss or depreciation allowance 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:

(I) the Income Tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice.

* * * * * * * *

* * * * * * * *

Provided further that nothing in this Section limiting the time within which any action may be taken, or any order, assessment or re-assessment may be made shall apply to a reassessment made under Section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A". By the Finance Act, 1956 certain amendments were made in Section 34 with effect from 1st April, 1956. The time limit of 8 years in sub-section (1) in respect of cases falling within Clause (a) was removed and the following provisos were substituted for the existing proviso in subsection (1):-

"Provided that the Income Tax Officer shall not issue a notice under Clause (a) of sub-section (1)-

(i) for any year prior to thc year ending on the 31st day of March, 1941;

(ii) for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains chargeable to income-tax which have escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or the loss or depreciation allowance which has been computed in excess, amount to, or are likely to amount to, one lakh of rupees, or more in the aggregate, either for that year, or for that year and any other year or years after ,which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of which 1941;

(iii) for any year, unless he has recorded his reasons for doing so, and, in any case falling under Clause (ii), unless the Central Board of Revenue, and, in any other case, the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

* * * * * * * *

The Income Tax Act, 1961 (No. 43 of 1961) came into force from lst April, 1962. Sub-section (1) of Section 297 of the new Act retreated the old Act and by subsection (2) of that Section the new Act enacted certain saving provisions consequent upon the repeal of the old Act, The material provision is set out in Cl. (d):

"297. Repeals and savings:

(1) * * * * *

(2) notwithstanding the repeal of the Indian Income Tax Act 11 of 1922 (hereinafter referred to as the repealed Act):-

* * * * * * *

(d) Where in respect of any assessment year after the year ending on the 31st day of March, 1940

(i) a notice under Section 34 of the repealed Act had been issued before the commencement of this Act, the proceedings in pursuance of such notice may be continued and disposed of as if this Act had not been passed;

(ii) any income chargeable to tax had escaped assessment within the meaning of that expression, in Section 147 and no proceedings under Section 34 of the repealed Act in respect of any such income are pending at the commencement of this Act, a notice under Section 148 may, subject to the provisions contained in Section 149 or Section 150, be issued with respect to that assessment year and all the provisions of this Act shall apply accordingly." Sections 147 to 150 referred to in Section 297 (2) (d) (ii) and sections 151 to 153 were the provisions of the new Act corresponding to Section 34 of the old Act. In the new Act, Section 34 of the old Act was split up into Sections 147 to 153. Section 147 empowered the Income Tax Officer to assess or re-assess escaped income in the same kind of cases in which he could do so under Section 34 but that right could be exercised subject to the provisions of Sections 148 to 153. Sub-section (1) of Section 148 provided that before making any assessment or reassessment under Section 147, the Income Tax Officer shall serve on the assessee a notice containing it or any of the requirements which may be included in a notice under Section 139 (2) and sub-section (2) of that Section imposed an obligation on the Income Tax Officer before issuing such notice, to record his reasons for doing so. Section 149 laid down different time limits for issuing notices and in cases falling within clause (a) of Section 147 corresponding to clause (a) of sub-sec. (1) of Section 34 time limits were prescribed as follows:-

"149. Time limit for notice:-(a) No notice under Section 148 shall be issued,

(a) in cases falling under clause (a) of section 147-

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under sub-clause (ii);

(ii) for the relevant assessment year, where eight years but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;

* * * * *"

Section 150 (1) makes an exception in cases where assessment or reassessment is sought to be made in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision and provided that in such cases there should be no time limit and notice under S. 148 may be issued at any time unless of course the case fell within sub-section (2) of Section precedent to the issue of the notice under Section 148 that the Income Tax Officer should obtain the previous sanction of the Central Board of Revenue or the Commissioner of Income Tax according as the notice is proposed to be issued after the expiry of 8 years from the end of the relevant assessment year or after the expiry of 4 years from the end of the relevant assessment year.

5. On behalf of the appellants Mr. Narasaraju stressed the argument that the High Court was in error in holding that the provisions of the new Act of 1961 were not applicable in cases where the time limit fixed in the old Act had expired before the coming into force of the new Act. It was contended that Section 297 (2) (d) (ii) of the new Act was wide in its sweep and it took in all assessment years after the year ending on 31st March, 1940 irrespective of the question whether the right to reopen the assessment in respect of any such assessment years was barred or not under the old Act at the date when the new Act came into force. According to Mr. Narasaraju the legislative intention was that once the new Act came into force, the question whether the assessment in respect of any assessment year after the year ending on 31st March, 1940 was liable to be reopened or not should be decided with reference to the provisions of the new Act. It was argued that the new Act authorised such assessment to be reopened whatever might be the position in regard to the right to re-open such assessment under the old Act. In our opinion, the argument put forward by Mr. Narasaraju is not warranted. It is admitted in this case that the right of the Income Tax Officer to re-open the assessment for the year 1947-48 was barred under the old Act before the new Act came into force. In our opinion it is not permissible to construe Section 297 (2) (d) (ii) of the Act as reviving the right of the Income Tax Officer to re-open the assessment which was already barred under the old Act. The reason is that such a construction of Section 297 (2) (d) (ii) would be tantamount to giving of retrospective operation to that Section which is not warranted either by the express language of the Section or by necessary implication. The principle is based on the well-known rule of interpretation that unless the terms of the statute expressly so provide or unless there is a necessary implication, retrospective operation should not be given to the statute so as to affect, alter or destroy any right already acquired or to revive any remedy already lost by efflux of time. On behalf of the appellants reference was made to the opening phrase "Where in respect of any assessment year after the year ending on the 31st day of March, 1940" occurring in S. 297 (2) (d) (ii) of the new Act, but these general words cannot take in their sweep all assessment years subsequent to the year ending on 31st March, 1940 without regard to the question whether the right to re-open the assessment in respect of any assessment year was or was not barred under the repealed Act. We consider that the language of the new Section must be read as applicable only to those cases where the right of the Income Tax Officer to reopen the assessment was not barred under the repealed Section. In our view the new statute does not disclose in express terms or by necessary implication that there was a revival of the right of the Income Tax Officer to re-open an assessment which was already barred under the old Act. This view is borne out by the decision of this court in S. S. Gadgil v. Lal and Co., 1964-53 ITR 231= (AIR 1965 SC 171). In that case, a notice was issued against the assessee as an agent of a non-resident on 27th March, 1957 and that notice related to the assessment year 1954-55. Under clause (iii) of the proviso to Section 34 (1) as it stood prior to its amendment by the Finance Act, 1956, a notice of assessment or reassessment could not be issued against a person deemed to be an agent of a non-resident after the expiry of one year from the end of

the year of assessment. The right to commence a proceeding for assessment against the assessee as agent of a non-resident for the assessment year 1954-55 therefore ended on 31st March, 1956 under the new Act before its amendment in 1956. This provision was, however, amended by the Finance Act, 1956 and under the amended provision the period of limitation was extended to two years from the end of the assessment year. The amendment was made on 8th September, 1958 but was given effect from 1st April, 1956. Since the time within which notice could be issued against a person deemed to be an agent of a non-resident was extended to two years from the end of the assessment year, it was contended on behalf of the Income Tax Officer that the notice issued by him was within the terms of the amended provision and was, therefore, a valid notice. Now the notice issued on 27th March, 1957 was clearly within a period of two years from the end of the assessment year 1954-55 and if the amended provision applied, the notice would be a valid notice. It was, however, held by this Court that notice was not a valid notice inasmuch as the right of the Income Tax Officer to re-open the assessment of the assessee under the unamended provision became barred on 31st March 1956 and the amended provision did not operate against him so as to authorise the Income Tax Officer to commence proceedings for re-opening the assessment of the assessee in a case where before the amended provision came into force, the proceedings had become barred under the unamended provision. At page 240 of the Report (ITR) = (at p. 177 of AIR), Shah, J. speaking or the Court observed as follows:-

"As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income Tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party under Section 43 within two years from the end of the year of assessment.But authority of the Income Tax Officer under the Act before it was amended by the Finance Act of 1956, having already come to an end the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The legislature has given to Section 18 of the Finance Act 1956, only a limited retrospective operation, i. e. up to April 1, 1956 only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income Tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided become barred".

6. In our opinion, the principle of this decision applies in the present case and it must be held that on a proper construction of Section 297 (2) (d) (ii) of the new Act, the Income Tax Officer cannot issue a notice under Section 148 in order to re-open the assessment of an assessee in a case where the right to re-open the assessment was barred under the old Act at the date when the new Act came into force. It follows therefore that the notices dated 13-11-1963 and 9-1-1964 issued by the Income Tax Officer, Ahmedabad were illegal and ultra vires and were rightly quashed by the Gujarat High Court by the grant of a writ.

7. For the reasons expressed, we hold that the judgment of the High Court of Gujarat dated 14th/15th December, 1964 is correct and this appeal must be dismissed with costs.

Appeal dismissed.