

Commissioner of Income-Tax, U. P.

Vs

Gurbux Rai Harbux Rai

Civil Appeals Nos. 1225 and 1226 of 1967

(CJI J. C. Shah, S. K. Hegde, A. N. Grover JJ)

21.01.1971

JUDGMENT

SHAH C.J. -

Gurbux Rai Harbux Rai, hereinafter called "the assessee", is a registered firm carrying on business in piece-goods and commission agents. It has its head office at Kanpur and a branch office at Farrukhabad. During the chargeable accounting periods July 4, 1943, to June 21, 1944, and June 22, 1944, to July 10, 1945, Gurbux Rai and Harbux Rai (each representing his joint family) were the two partners of the assessee with equal shares in the profit and loss. In proceedings for assessment of tax under the Excess Profits Tax Act, 1940, for the two chargeable accounting periods, the assessee informed the tax officer that the joint family of Gurbux Rai had been dissolved and there was a reconstitution of the business of partnership with effect from July 4, 1943. According to the assessee, the constitution of the firm after partition was that in the firm at Kanpur the former two partners were interested, their share being equal, but in the business of the firm at Farrukhabad there were three partners - Harbux Rai with 8 as. shares, Chameli Devi with 4 as. share and Gopaldas with 4 as. share.

In assessing tax under the Indian Income-tax Act, 1922, for the assessment year 1944-45 relevant to the account year ending June 21, 1944, the Income-tax Officer held that the case set up by the assessee that there was partition amongst the members of the family of Gurbux Rai could not be accepted. In the view of the Income-tax Officer, an attempt was made "to avoid proper incidence of taxation as a after- thought to create evidence for camouflaging the Farrukhabad business as a separate unit of assessment". The Income-tax Officer directed that the income be assessed as the income of the assessee and not as the income of a separate firm. The excess profits tax assessment being consequential upon the income-tax assessment, the Excess Profits Tax Officer assessed the entire income of the two business at Kanpur and at Farrukhabad, in the hands of the assessee- firm.

Against the order passed by the income-tax Officer the assessee appealed to the Appellate Assistant Commissioner who by his order dated October 10, 1947, observed :

".... that partial partition in respect of movable property of Gurbux Rai was effected on a date somewhere near Asadh Samvat 2000, from which date Farrukhabad business was conducted by a separate firm consisting of Harbux Rai, Mst. Chameli and Gopaldas".

Pursuant to this order the Income-tax Officer modified the assessment with respect to the income-

tax assessment of the assessee for the assessment years 1944-45 and 1945-46. The Excess Profits Tax Officer however started proceedings under section 10A by notice dated February 6, 1951, calling upon the assessee to show cause why appropriate adjustments should not be made in the assessment, and passed orders in that behalf for both the chargeable accounting periods holding that the main purpose of the partial partition of the family business of Gurbux Rai was avoidance of excess profits tax liability. By order dated February 21, 1951, passed under section 15 of the Excess Profits Tax Act, the Excess Profits Tax Officer modified the original excess profits tax assessment. In the revised assessment in pursuance of orders under section 10A he included the income of the branch shop at Farrukhabad in the total income of the assessee for purposes of excess profits tax assessment. The assessee appealed against the order of additional assessment contending that the Excess Profits Tax Officer was not competent to reopen the case under section 15 as he had no definite information coming into his possession to enable him to discover that the profits of the chargeable accounting period had escaped assessment. The assessee contended that all the materials in the case were before the Excess Profits Tax Officer at the time of his original assessment and no new information came into his possession thereafter. The assessee also contended that the Excess Profits Tax Officer was not competent to pass any order under section 10A merely to make an adjustment in the revised assessment under section 15. The Income-tax Appellate Tribunal held that the Excess Profits Tax Officer had received definite information regarding the state of the law in pursuance of the appellate order of the Appellate Assistant Commissioner who had held that the family of Gurbux Rai was partially partitioned. The Tribunal also held that the Excess Profits Tax Officer was competent to pass an order under section 10A of the Excess Profits Tax Act.

The Tribunal, thereafter, referred the following questions to the High Court of Allahabad under section 21 of the Excess Profits Tax Act read with section 66(1) of the Income-tax Act, 1922 :

"(1) Whether, on the facts and in the circumstances of this case, there was any definite information within the meaning of section 15 by virtue of which the excess profits Tax Officer was competent to reopen the excess profits tax assessment ?

(2) Whether, in the circumstances of this case, the Excess Profits Tax Officer was competent to apply the provisions of section 10A and make necessary adjustments in pursuance thereto in the revised assessment under section 15 ?"

The High Court of Allahabad held that since the Excess Profits Tax Officer purported to reopen the assessment under section 15 of the Excess Profits Tax Act "only because of the order of the Appellate Assistant Commissioner of Income-tax holding that the Farrukhabad business was no longer the business of the assessee and that the family of Gurbux Rai had partitioned its movable property, all of which proceeded upon material which was already initially before the Excess Profits Tax Officer and to which he had applied his mind when he made the original assessment, it was not a case where the Excess Profits Tax Officer can be said to have discovered," in consequence of definite information which had come into his possession, that profits chargeable to excess profits tax had escaped assessment. The High Court accordingly answered the first question in the negative.

The High Court then observed that if the Excess Profits Tax Officer was not competent to take proceedings under section 15 of the Excess Profits Tax Act, it was not open to him to apply the provisions of section 10A in the proceedings upon reopening the assessment under section 15, for, in the view of the High Court an order under section 10A may be passed only where the Excess Profits Tax Officer is seized of jurisdiction in a pending assessment proceeding. As the proceedings initiated by the Excess Profits Tax Officer under section 15 were void, he had no power in him to

make an order under section 10A of the Act. The High Court, accordingly, answered the second question also in the negative.

Against the order passed by the High Court, with certificate granted by the High Court these two appeals were preferred.

A parallel proceeding which had come before this court in Civil Appeals Nos. 741-743 of 1966 - Gurbux Rai Harbux Rai v. Commissioner of Income-tax - decided on August 2, 1968, may also be referred to. It may be recalled that the Excess Profits Tax Officer at Kanpur had served a notice under section 10A of the Excess Profits Tax Act requiring the assessee to show cause why appropriate adjustments as respects liability to excess profits tax should not be made so as to counteract the avoidance or reduction of liability to excess profits tax by converting the business in the name of Pussulal Jangalal - the Farrukhabad firm - into a separate business. The contention of the assessee that the disruption of the family was a genuine an bona fide transaction was rejected by the Excess Profits Tax Officer. The case was then taken to the Income-tax Appellate Tribunal. The Tribunal confirmed the order of the Excess Profits Tax Officer. But at the instance of the assessee the Tribunal referred the following question to the High Court of Allahabad :

"Whether, on the facts and circumstances of this case, the transaction in question was one which could be avoided under section 10A of the Excess Profits Tax Act ?"

The High Court by order dated July 31, 1969, answered the question in the affirmative. Against the order passed by the High Court no further proceedings has been taken by the assessee challenging the conclusion the High Court and that order has become final.

The High Court had held in the judgment under appeal that action taken section 15 of the Excess Profits Tax Act was not competent and on that account the Excess Profits Tax Officer had no jurisdiction in the matter. But in the judgment of the High Court in Income-tax Reference No. 118 of 1962 decided on July 31, 1969, no question of jurisdiction arose. The court had only answered the question whether the transaction of partial partition was one which could be avoided under section 10A of the Excess Profits Tax Act. The decision of the High Court (which had become final) about the authority of the Excess Profits Tax Officer to take action under section 10A does not affect the maintainability of the present appeal.

Section 10A of the Excess Profits Act, in so far as it is relevant, provides :

"(1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction... was effected... was the avoidance or reduction of liability to excess profits tax, he may,... make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be affected by the transaction...."

Section 15, in so far as it is relevant, provides :

"If in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time.... serve on the person liable to such tax a notice containing all or any of the requirements which

may be included in a notice under section 13, and may proceed to assess or reassess the amount of such profits liable to excess profits tax..."

The High Court in the judgment under appeal held that proceeding under section 10A may be commenced only if there be a valid proceeding under the Excess Profits Tax Officer which was pending for assessment or reassessment of excess profits which had escaped assessment and not otherwise. In our opinion the High Court was right in so holding. Section 10A does not contemplate an independent proceeding. Section 10A merely confers power upon the Excess Profits Tax Officer to make adjustments with respect to liability of excess profits tax : it confers power which the Excess Profits Tax Officer may exercise in the course of the original assessment or in the course of reassessment.

It is necessary, therefore, to determine whether an order was made under section 10A in a pending proceeding for assessment of excess profits tax. But the question whether there was a pending proceeding under section 15 in the course of which an order under section 10A could be made cannot be ascertained on the materials available before us. The High Court has decided that the proceeding under section 15 was not valid, because there was no definite information with the Excess Profits Tax Officer and on that account proceeding under section 10A was not valid. It has been assumed that there was a pending proceeding under section 15 in the course of which an order under section 10A was made. Expression of that opinion of the High Court is challenged. We are of view that, in the interests of justice, it is necessary that a supplementary statement of the case should be called for on the question whether there was any proceeding pending under section 15. On the question whether the proceeding under section 15, if pending, was valid, we express no opinion at this stage.

We direct the Tribunal to submit a supplementary statement of the case on the question whether the proceeding under section 10A was started in the course of assessment or reassessment proceeding commenced under section 15. The supplementary statement is to be submitted to this court within three months from the date on which the papers reach the Tribunal.

At this stage we express no opinion on the question whether the High Court was right in holding that the proceeding under section 15 was not competent.

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