Commissioner of Income Tax, Central Calcutta

Vs

National Taj Traders

Civil Appeals Nos. 171-172 of 1973

(V.D. Tulzapurkar, E.S. Venkataramiah JJ)

27.11.1979

JUDGMENT

TULZAPURKAR, J. –

1. These two appeals by certificate raise an important question as regards the proper construction of Section 33-B of the Indian Income Tax Act, 1922 with particular bearing on the scope of sub-section (4) thereof and the effect of sub-section (2)(b) on the sub-section (4)

2. The facts giving rise to the aforesaid question may briefly be stated : The assessment years involved are 1957-58 and 1958-59 corresponding to the accounting years ending March 31, 1957 and March 31, 1958 respectively. On or about August 5, 1960, the respondent-assessee submitted voluntary returns, inter alia, for the said two assessment years along with a declaration dated August 3, 1960. The assessment for these years were completed on August 12, 1960 by the Income Tax Officer. 'E' Ward, District II(1), Calcutta on total income of Rs. 7000 and Rs. 7500 respectively, the same having been made in the status of unregistered firm consisting of three partners, namely, Asha Devi Vaid, Santosh Devi Vaid and Sugni Devi Vaid with equal shares.

3. On August 2, 1962. The Commissioner of Income Tax issued a notice to show cause why the said assessments should not be cancelled under Section 33-B of the Act as he felt that the completed assessments were erroneous as being prejudicial to the interest of the revenue and that the Income Tax Officer, 'E' Ward, District II(1), Calcutta, had no territorial jurisdiction over the case of the assessee. The notice was served on the assessee on August 3, 1962 and the hearing was fixed by the Commissioner for August 6, 1962. On the ground that none appeared and that there was no application for adjournment, the Commissioner passed his order under Section 33-B ex parte on that date. By his said order the Commissioner cancelled the assessments made by the Income Tax Officer on August 12, 1960 on three grounds : (a) that some of the partners were minors and were not competent to enter into any partnership agreement with the result that the status of unregistered firm assigned to the assessee by the Income Tax Officer was clearly wrong and as such the assessments deserved to be cancelled, (b) that the books of account were unreliable and they were not properly examined by the Income Tax Officer with the result that the assessments made were prejudicial to the interests of the revenue, and (c) that the Income Tax Officer concerned had no territorial jurisdiction over the case which fell within the jurisdiction of Income Tax Officer, District III(II), Calcutta, and directed the ITO having proper jurisdiction to make fresh assessments after examining the record of the assessee in accordance with law.

4. In the appeals preferred to the Appellate Tribunal under Section 33-B(3) the respondent-assessee challenged the said order of the Commissioner on various grounds. The Tribunal, negativing all

other contentions of the respondent-assessee, came to the conclusion that on merits the facts justified the assumption of jurisdiction under Section 33-B by the Commissioner but held that the Commissioner had not conformed to the requirements of natural justice by putting to the respondent-assessee what case it had to meet and by giving due opportunity for explaining the same. The Tribunal noted that the Commissioner had disposed of the matter at 11.30 a.m. when none appeared on behalf of the respondent-assessee while the notice served upon the latter permitted filing of objections at any time during the course of August 6, 1962 and objections had been filed by the respondent-assessee later in the day. The Tribunal, therefore, allowed the appeals, vacated the Commissioner's order dated August 6, 1962 and remanded the case to him with the direction to dispose it of afresh after giving due opportunity to the respondent-assessee.

5. Feeling aggrieved by the Tribunal's aforesaid order dated July 5, 1965, the respondent sought to refer a set of six questions of law said to arise out of the said order to the Calcutta High Court but the Tribunal referred the following two questions only for the opinion of the High Court :

> 1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assumption of jurisdiction by the Commissioner under Section 33-B of the Income Tax Act was valid in law ?
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> 2. Whether, on the facts and in the circumstances of the case, the Tribunal acted properly by vacating the order of the Commissioner under Section 33-B of the said Act and in directing him to dispose of the proceedings under the said section afresh after giving due opportunity to the assessee ?

6. The High Court disposed of the Reference (I.T. Reference No. 117 of 1967) by its judgment dated March 9, 1972 whereby it answered the first question in the affirmative against the assessee, that is to say, on merits it held that the assessments made by the Income Tax Officer required revision at the hands by the Commissioner. As regards the second question the High Court was of the view that it comprised two aspects, one relating to the vacating of the Commissioner's order and the other relating to the giving of a direction to him to dispose of the case under Section 33-B afresh after giving due opportunity to the assessee and the High Court held that in exercise of its appellate powers the Tribunal acted properly in vacating or cancelling the Commissioner's order but did not act properly in directing him to dispose of the case afresh under Section 33-(1) because the period of limitation of two years prescribed under Section 33-B(2)(b) for him to act under Section 33-B(1) had expired and answered the question accordingly (i.e. in the affirmative on the first aspect and in the negative on the second aspect). In doing so the High Court held that the provision of sub-section (2)(b) was absolute and covered even a revisional order of the Commissioner passed in pursuance of a direction given by any appellate authority and relied in that behalf on the aspect that, unlike second proviso to Section 34(3) there was no provision removing or relaxing the bar of limitation on the power of the Commissioner under Section 33-B(2)(b). The High Court preferred the view of the Assam High Court in CIT v. Sabitri Debi Agarwalla ((1970) 77 ITR 934 (Assam)) to the view of the Bombay High Court in CIT v. Kishoresingh Kalyansingh Solanki ((1960) 39 ITR 522 (Bom)). The Revenue has come up in appeal to this Court challenging the aforesaid view of the High Court.

7. Since the question relates to the proper construction of Section 33-B of the Act with particular bearing on the scope of the appellate powers of the Tribunal under sub-section (4) thereof and the effect of sub-section (2)(b) thereon it will be desirable to note the material provisions of Section 33-B. Under sub-section (1) power has been conferred upon the Commissioner to revise Income Tax Officer's orders but the exercise of such power is regulated by the two conditions mentioned therein,

namely, (a) he must consider the order sought to be revised to be erroneous as being prejudicial to the interests of the revenue, and (b) he must give an opportunity to the assessee of being heard before revising it. Sub-section (2)(b) prescribes a period of limitation in negative words by providing that "no order shall be made under sub-section (1) after the expiry of two years from the date of the order sought to be revised". Sub-Section (3) confers on the assessee a right to prefer an appeal to the Appellate Tribunal against the Commissioner's order made under sub-section (1) while sub-section (4) indicates the powers of the Appellate Tribunal in dealing with such appeal by providing that "such appeal shall be dealt with in the same manner as if it were an appeal under sub-section (1) of Section 33". Two things stand out clearly on a fair reading of the two concerned provisions, namely, sub-section (2)(b) and sub-section (4). The bar of limination contained in sub-section (2)(b) is on the Commissioner's power to pass revisional orders under sub-section (1) and the same appears to be absolute in the sense that it applies to every order to be made under sub-section (1). At the same time sub-section (4) confers on the Appellate Tribunal very wide powers which it has while dealing with an appeal under Section 33(1). In other words, the Appellate Tribunal has power "to pass such orders thereon (i.e. on the appeal) as it thinks fit". In Hukumchand Mills case (Hukum Chand Mills Ltd. v. C. I. T., 63 ITR 232 : (1967) 1 SCR 463 : AIR 1967 SC 455) this Court has explained that the word "thereon" restricts the jurisdiction of the Appellate Tribunal to the subject-matter of the appeal which merely means that the Tribunal cannot adjudicate or give a finding on a question which is not in dispute and which does not form the subject-matter of the appeal but the words "pass such orders thereon as it thinks fit" include all the powers (except possibly the power of enhancement) which are conferred on the Assistant Appellate Commissioner by Section 31 and consequently the Tribunal has authority in exercise of its appellate powers to set aside the order appealed against and direct fresh assessment in the light of the observations made by it in its judgment. In other words, similar power is possessed by the Appellant Tribunal while dealing with the appeal under sub-section (4) of Section 33-B. The question that arises for our consideration is whether such a direction to dispose of the case afresh can be given to the Commissioner by the Appellate Tribunal when the period of limitation prescribed under sub-section (2)(b) has expired ? In other words, whether sub-section (2) (b) of Section 33-B has the effect of attenuating or curtailing the appellate powers of the Tribunal under sub-section (4) ?

8. Counsel for the Revenue contended that it was a well settled principle that all the parts of a section or statute should be construed together and that every clause of a section should be construed with reference to the context and other clauses thereof so that the construction put on a particular provision makes a consistent enactment of the whole statute. He further urged that the object of conferring revisional power upon the Commissioner under Section 33-B(1) obviously was to correct erroneous orders of Income Tax Officer insofar as they were prejudicial to the interests of the revenue and such object would be defeated if the bar of limitation contained in sub-section (2)(b) is held applicable to revisional orders passed by the Commissioner in pursuance of or in obedience to a direction given or order made by the Appellate Tribunal in appeal under Section 33-B(4) or for that matter by the High Court or supreme Court in case the matter is carried to those Courts. According to him it would be proper to construe the provision in sub-section (2)(b) as being applicable to suo motu revisional orders passed by the Commissioner under sub-section (1) and not to orders passed by him in pursuance of a direction issued to him by the Tribunal in appeal. He urged that there was no reason why sub-section (2)(b) should be regarded as having the effect of attenuating or curtailing the very wide appellate powers conferred upon the Tribunal. He further urged that no argument could be based on the absence of a provision, similar to the second proviso to Section 34(3), in Section 33-B of the Act. In support of his contention strong reliance was placed by him upon the Bombay High Court's decision in Solanki case ((1960) 39 ITR 522 (Bom).

9. On the other hand, counsel for the assessee canvassed the High Court's view for our acceptance by pointing out that both Sections 33-b and 34(3) together with the second proviso were introduced in the Act by the same amending Act, 1948, but in Section 33-B no provision for removing or relaxing the bar of limitation contained in sub-section (2)(b) was made and hence it was not for the Court to supply a casus omissus. He also relied on the fact that in the 1961 Act the necessary provision has been enacted in Section 263(3) which also showed that in the absence of such provision in Section 33-B of the 1922 Act the bar of sub-section (2)(b) was applicable to every order of the Commissioner irrespective of whether it was made suo motu or in pursuance of a direction issued by the appellate authority. According to him since the bar of limitation as contained in sub-section (2)(b) of Section 33-B always operated for the benefit of the assessee as the same accorded finality to the assessment orders, the appellate powers of the Tribunal under sub-section (4) must be regarded as having been curtailed to the extent that the Tribunal cannot remand the case to the Commissioner for making fresh assessment if by then the limitation has expired.

10. Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole-appear to be well settled. In regard to the former the following statement of law appears in Maxwell on Interpretation of Statutes (12th Edn.) at p. 33 :

> Omissions not to be inferred - It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Morsey said : 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'. 'We are not entitled', said Lord Loreburn L.C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself'. A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional.

In regard to the latter principle the following statement of law appears in Maxwell at page 47 :

> A statute is to be read as a whole - It was resolved in the case of Lincoln College [(1595) 3 Co. Rep. 58b at p. 56b] that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself'. Every clause of a statute is to 'be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute'. (Per Lord Davey in Canada Sugar Refining Co. Ltd. v. r., 1898 AC 735.)

In other word, under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J., in Artemiou v. Procopiou (166 1 QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the

obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produces a rational construction. [Per Lord Reid in Luke v. I. R. C. (1966 AC 557) where at p. 577 he also observed : "this is not a new problem, though our standard of drafting is such that it rarely emerges".] In the light of these principles we will have to construe sub-section (2)(b) with reference to the context and other clauses of Section 33-B.

11. Section 33-B was introduced in the Indian Income Tax Act, 1922, by the Income Tax and Business Profit Tax (Amendment) Act, 1948 with effect from March 30, 1948 and the object of introducing the same was obviously to confer revisional powers upon the Commissioner to correct the erroneous orders of an Income Tax Officer insofar as they were prejudicial to the interests of the revenue. The language of the sub-section (1) clearly suggests that the said power was contemplated to be exercised suo motu by the Commissioner inasmuch as the opening words show that it was up to the Commissioner to call for and examine the record of any proceedings under the Act and on examination of the record if he were satisfied that any order passed by an Income Tax Officer was erroneous as being prejudicial to the interests of the revenue he could revise the same after giving an opportunity to the assessee of being heard. It is true that sub-section (2)(b) thereof prescribed a period of limitation on his power by providing that no order shall be made under sub-section (1) after the expiry of two years from the date of the order sought to be revised by the Commissioner and a literal construction of sub-section (2)(b) also suggests that the bar of limitation imposed thereby was absolute in the sense that it applied to every kind of order to be made under sub-section (1) and no distinction was made between a suo motu order and an order that might be made by him pursuant to a direction given by any appellate or other higher authority but the question is whether such a literal construction should be accorded to that provision ? As stated earlier sub-section (3) conferred on an assessee a right to prefer an appeal to the Appellate Tribunal against the Commissioner's order made under sub-section (1) and under sub-section (4) the Tribunal had authority to deal with the impugned order of the Commissioner in such manner as it deemed fit in exercise of its appellate powers; for instance, it could confirm the impugned order, it could annul that order, it could after vacating it remand the case back to the Commissioner for making a fresh assessment in the light of the observations made by it in its judgment or it could, after calling for a remand report, rectify the erroneous order of the Income Tax Officer. Further there was no period prescribed within which an appeal against the impugned order of the Commissioner had to be disposed of by the Tribunal and in the normal course or rare occasions such appeals would have been heard and disposed of before the expiry of two years from the date of the Income Tax Officer's order which was regarded as erroneous by the Commissioner. More often than not such appeals would come up for hearing after the expiry of the said period of two years - a fact fully known and within the contemplation of the Legislature when it introduced the section in the Act in 1948. In these circumstances did the Legislature intend to attenuate or curtail the appellate powers which it conferred on the Appellate Tribunal in very wide terms under sub-section (4) by enacting sub-section (2)(b) prescribing a time-limit on the Commissioner's power to revise an erroneous order of the Income Tax Officer when the Commissioner was seeking to exercise the same not suo motu but in pursuance of or obedience to a direction from the Appellate Authority ? According to the construction contended for by the assessee and which found favour with the High Court the answer was in the affirmative because sub-section (2)(b), on its literal construction, was absolute. In our view such literal constructuon would lead to a manifestly absurd result, because in a given case, like the present one, where the appellate authority (Tribunal) has found (a) the Income Tax Officer's order to be clearly erroneous as being prejudicial to the interests of the revenue, and (b) the Commissioner's order unsustainable as being in violation of principles of natural justice, how should

the appellate authority exercise its appellate powers ? Obviously it could not withhold its hands and refuse to interfere with Commissioner's order altogether, for, that would amount to perpetuating the Commissioner's erroneous order, nor could it merely cancel or set aside the Commissioner's wrong order without doing anything about the Income Tax Officer's order, that would result in perpetuating the Income Tax Officer's order which had been found to be manifestly erroneous as being prejudicial to the revenue. But such result would flow from the view taken by the High Court which has held that the Tribunal acted properly in vacating the Commissioner's order but did not act properly in directing him to dispose of the proceedings afresh after giving opportunity to the assessee. Such manifestly absurd result could never have been intended by the Legislature, Moreover, it was fairly conceded by the counsel for the assessee before us that in exercise of its appellate powers it was open to the Tribunal itself to call for a remand report from either the Commissioner or the Income Tax Officer and rectify the Income Tax Officer's erroneous order after giving opportunity to the assessee and in doing so no question of limitation would arise. It was also not disputed by him that it was equally open to the tribunal to set aside the Commissioner's order and remand the case directly to the Income Tax Officer giving the requisite direction to rectify his erroneous order and thereupon the Income Tax Officer could carry out the Tribunal's direction, for, admittedly, the bar of limitation under sub-section (2)(b) was only on the Commissioner's power to make an assessment afresh and not on the Income Tax Officer. If this be the correct position then it is gravely anomalous that the Tribunal should not be in a position to set aside the Commissioner's order and remand the case back to the Commissioner for making a fresh assessment because in the meantime two years' period of limitation has expired, for, it would mean that the Tribunal was prevented from achieving the desired effect directly through the Commissioner but it could do so indirectly through the Income tax Officer. A literal construction placed on sub-section (2)(b) would lead to such manifestly absurd and anomalous results, which, we do not think, were intended by the Legislature. These considerations compel us to construe the words of sub-section (2)(b) as being applicable to suo motu orders of the Commissioner in revision and not to orders made by him pursuant to a direction or order passed by the Appellate Tribunal under sub-section (4) or by any other higher authority. Such construction will be in consonance with the principle that all parts of the section should be construed together and every clause thereof should be construed with reference to the context and other clauses thereof so that the construction put on that particular provision makes a consistent enactment of the whole statute.

12. Having regard to the above discussion we are clearly of opinion that the view taken by the Bombay High Court in Solanki case ((1960) 39 ITR 522 (Bom) on the construction of sub-section (2)(b) of Section 33-B is correct and we approve of it. In Sabitri Devi Agarwalla case the Assam High Court took a contrary view and held that under Section 33-B(4) of the Act the Tribunal would not be justified in remanding the case to the Commissioner after the two years had expired from the date of the order sought to be revised. The decision seems to rest on three aspects : (a) it being fiscal statute the same must be strictly construed, (b) the bar of limitation contained in sub-section (2)(b) was absolute and unqualified and covered all type of orders, and (c) that unlike the second proviso to Section 43(3), there was no provision for removing or relaxing the bar of limitation on the power of the Commissioner under Section 33-B(2)(b) and that since Section 33-B as well as Section 34(3) with second proviso had been introduced in the Act by the same Amending Act of 1948 there was a deliberate omission to make a provision removing or relaxing the bar of limitation in Section 33-B and for such an omission the remedy lay with the Legislature and not with the Court. The Assam High Court also alluded to the fact that under the 1961 Act the Legislature had made a provision removing or relaxing the bar of limitation in Section 263(3). As regards aspect (b) we have already dealt with it above. As regards aspect (a) it is well settled that the principle that the fiscal statute

should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions and by no stretch could Section 33-B be regarded as a charging provision. As regards aspect (c) we have already pointed out above that a casus omissus has not to be readily inferred and it could not be inferred from the mere fact that both Sections 33-B and 34(3) together with the Second proviso were inserted simultaneously in the Act by the same Amending Act of 1948 and that in the case of former a relaxing provision was not made as was made in the case of the latter provision, firstly because the two provisions operated in distinct fields and secondly it would be improper to do so without comparing the various stages of amendments through which each set of these provisions had undergone since inception. The further aspect that the Legislature has in the 1961 Act made the requisite provision removing or relaxing the bar of limitation in Section 263(3), is, in our view, not of much consequence. Irrespective of the question whether the second proviso to Section 34(3) was enacted ex majore cautella or not (over which conflicting views obtain), it is clear to us that Section 263(3) of the 1961 Act must be regarded as an ex majore cautella provision. Admittedly, at the time when the said provision was enacted in the 1961 Act, the Bombay view held the field and there was no decision to the contrary of any other High Court. Obviously, therefore, the enactment of Section 263(3) must be regarded as declaratory of the law which was already prevailing and this position has been clarified in the notes on clauses of the Income Tax Bill, 1961, where it has been stated that sub-clause (3) of Section 263 was new and had been added to get over the difficulty experienced in (wrongly stated 'caused by') the Bombay High Court's decision in Solanki case ((1960) 39 ITR 522 (Bom)). The enactment of an ex majore cautella provision in the 1961 Act would, therefore, be a legislative recognition of the legal position that obtained as a result of judicial pronouncement qua the 1922 Act. In our view, therefore, the Assam case was wrongly decided.

13. Reference may now be made to a decision of this Court in Pooran Mal case (Director of Inspection of Income Tax v. Pooran Mal and Sons, 96 ITR 390 : (1975) 4 SCC 568, 572 : 1975 SCC (Tax) 346) where in a similar situation arising under Section 132 of the Income Tax Act, 1961, a restricted construction was accorded by this Court to sub-section (5) thereof which prescribed certain period of limitation. In that case pursuant to an authorisation issued under Section 132(1) of the 1961 Act searches were carried out on October 15 and 16, 1971 at the residence and business premises of P, an individual, and at certain office premises of the firms in which he was a partner, and jewellery, cash and account books were seized. There was also a search of two banks and a restraint order was made under Section 132(3) in respect of 114 silver bars pledged with those banks on the ground that they were the property of P. On January 12, 1972, the Income Tax Officer passed a summary order under Section 132(5) on the basis that all the assets seized and 114 silver bars belonged to P. Thereupon, P and Sons, one of the firms in which P was a partner, and P filed a writ petition in the High Court challenging the order dated January 12, 1972 and on April 6, 1972, on the basis of the consent of the parties, the High Court quashed the order and permitted the department to make a fresh enquiry after giving an opportunity to the petitioner and pass a fresh order within two months. After a fresh enquiry the Income Tax Officer passed an order on June 5, 1972, holding that the silver bars belonged to P, the individual, and not the firm, P and Sons. Thereupon, the firm and P again filed a writ petition challenging the second order. The High Court held that the Income Tax Officer had no jurisdiction to pass that order beyond the period prescribed in Section 132(5) and set aside the order and directed the return of the 114 bars of silver. This Court held, inter alia, that the order made in pursuance of a direction given under Section 132(12) or by a Court in writ proceedings, was not subject to the limitations prescribed under Section 132(5). At page 394 this Court has observed thus : (SCC p. 572, para 6)

> Even if the period of time fixed under Section 132(5) is held to be mandatory that

> was satisfied when the first order was made. Thereafter, if any direction is given under Section 132(12) or by a Court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under Section 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-sections (1) and (12) of Section 132 ridiculous and useless.

It may be pointed out that in Section 132 there is no provision removing or relaxing the bar of limitation contained in Section 132(5) enabling the Income Tax Officer to pass an order afresh pursuant to any direction issued to him by a higher authority under Section 132(12) and even then this Court took the view that the limitation prescribed under Section 132(5) will be applicable only to the initial order to be made by the Income Tax Officer and not to an order that would be made by him pursuant to a direction from the Board or notified authority. The concerned provisions were read together and such construction was put on sub-section (5) of Section 132 as made a consistent enactment of the whole statute.

14. In the result, we are of opinion that the answer given by the High Court to the second aspect of the second question referred to it was clearly wrong and, in our view, the Tribunal's order vacating the Commissioner's order and directing the Commissioner to make assessment afresh after giving due opportunity to the respondent-assessee was proper. The appeal is accordingly allowed but in the circumstances, there will be no order as to costs.

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