

Hungerford Investment Trust Ltd.

Vs

Income Tax Officers and Others

Civil Appeals Nos. 474-476 of 1984

(D. P. Wadhwa, Sujata V. Manohar JJ)

17.02.1998

JUDGMENT

SMT. SUJATA V. MANOHAR, J. –

1. The appellant, M/s. Hungerford Investment Trust Ltd. was, at all material times, a non-resident company having its registered office at Singapore. The appellant-Company owned 100% shares in M/s. Turner Morrison and Company Ltd. which was a company incorporated in India. The present appeals are concerned with Assessment Years 1949-50, 1950-51 and 1951-52.
2. An order under Section 23-A of the Income Tax Act, 1922, before its amendment in 1955 was passed by the Income Tax Officer in the case of M/s. Turner Morrison and Company Ltd. As a result of which the undistributed portion of the assessable income of M/s. Turner Morrison and Company Ltd. was deemed to have been distributed as dividends among its shareholders for Assessment Years 1949-50, 1950-51 and 1951-52. The dividend deemed to have been so received by the appellant-Company as shareholder for the Assessment Years 1949-50, 1950-51 and 1951-52 was sought to be subjected to income tax by the Income Tax Officer under Section 34 of the Income Tax Act, 1922. In the past an assessment had been made on M/s. Turner Morrison and Company Ltd. as agents for the appellant-Company on a total income which was returned as nil. In view of the above order under Section 23-A, the Income Tax Officer sought approval of the Commissioner of Income Tax under Section 34 to tax the appellant-Company as an assessee in respect of Assessment Years 1949-50, 1950-51 and 1951-52.
3. After obtaining approval of the Commissioner of Income Tax under Section 34, the Income Tax Officer issued a notice for the Assessment Year 1949-50 to M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company on 24-3-1954. A return was filed pursuant to the notice by M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company for the Assessment Year 1949-50. The status of the company in the return was described as non-resident and the income was the dividend deemed to be received under Section 23-A by the appellant-Company from M/s. Turner Morrison and Company Ltd. On 29-10-1954, the Income Tax Officer made an assessment and issued a demand notice on M/s. Turner Morrison and Company Ltd. as agents of the appellant non-resident company.
4. For the Assessment Years 1950-51 and 1951-52, the Income Tax Officer, after obtaining approval from the Commissioner of Income Tax to issue a notice under Section 34 on the appellant-Company as the assessee, issued notices dated 11-2-1955 on the appellant-Company. On 16-2-1955, returns were filed by the appellant-Company. The residence was shown as at Singapore. The returns were accompanied by a covering letter from M/s. Turner Morrison and Company Ltd. as agents on behalf

of the appellant-Company. On 25-2-1955, the Income Tax Officer made an assessment and issued a demand for Assessment Years 1950-51 and 1951-52 on M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company.

5. Thereupon M/s. Turner Morrison and Company Ltd. challenged the assessment orders so made for the three assessment years before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, a by his order dated 29-11-1960, held that the Income Tax Officer had validly initiated proceedings for Assessment Years 1950-51 and 1951-52 on the appellant-Company. However, he failed to make an assessment on the appellant-Company directly and made an assessment on M/s. Turner Morrison and Company Ltd. as agents of the appellant. He held that such an assessment on the agent of a non-resident company was barred by limitation in the present case under the second proviso to Section 34(1) of the Income Tax Act, 1922. He directed the Income Tax Officer to make a fresh assessment on the appellant-Company on the basis of the valid returns already furnished by the appellant-Company. In respect of Assessment Year 1949-50, the Appellate Assistant Commissioner held that the notice had been issued within the period of limitation. However, the proceedings should have been taken against the appellant-Company directly. He, therefore, directed the Income Tax Officer to make a fresh assessment on the appellant-Company from the stage of notice.

6. Accordingly, on 26-10-1961, three notices were issued on the appellant-Company by the Income Tax Officer for the three assessment years. The appellant-Company challenged these notices by filing a writ petition before the Calcutta High Court being Writ Petition No. 1 of 1962. A learned Single Judge of the Calcutta High Court by his order dated 31-1-1972 dismissed the writ petition, holding that the assessment proceedings against the appellant-Company were validly commenced by notices dated 26-10-1961. The appeal of the appellant-Company before a Division Bench of the Calcutta High Court was also dismissed by its judgment and order dated 13-8-1982. Hence, the present appeals have been filed before us.

7. The appellant-Company contends that the Appellate Assistant Commissioner had no jurisdiction to give directions under Section 31 to the Income Tax Officer to make the assessments on the appellant-Company. Therefore, the notices which have been issued against the appellant-Company on 26-10-1961 are beyond the period prescribed by Section 34 of the Income Tax Act, 1922. According to the appellant-Company, since the direction given by the Appellate Assistant Commissioner is not covered by Section 31, the second proviso to Section 34(3) lifting the embargo of limitation in such cases is not attracted.

8. The Appellate Assistant Commissioner by his order dated 29-11-1960 gave the following directions :

"In view of the various reasons discussed above the assessment for 1949-50 made by the ITO on the resident company M/s. Turner Morrison and Company Ltd. as agents of the non-resident company M/s. Hungerford Investment Trust Ltd. in order to tax the deemed dividend under Section 23-A is set aside and the ITO is directed to make a direct assessment on the non-resident company ... and, therefore, the ITO is directed to make the assessment direct on the non-resident company to a tax the deemed dividend under Section 23-A. In connection with the assessment for 1950-51 and 1951-52 ... the notices under Section 34 were validly issued taking the assessee as non-resident company directly and the returns of income were also submitted showing the assessee as non-resident company and, therefore, the proceedings are set

aside from the stage of issue of notice under Section 23(2) and the ITO is directed to make the assessment on the non-resident company after giving fresh opportunity to the assessee under Section 23(2)."

9. Pursuant to these directions the Income Tax Officer has issued two notices dated 26-10-1961 in respect of Assessment Years 1950-51 and 1951-52 on the appellant-Company under Section 23(2) of the Income Tax Act, 1922. The Income Tax Officer has also issued a notice dated 26-10-1961 on the appellant-Company under Section 34 of the Income Tax Act for the Assessment Year 1949-50.

10. Under Section 34(1)(a) of the Income Tax Act, 1922, if 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 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to income tax has escaped assessment for that year, or has been underassessed etc. as set out therein, the Income Tax Officer can serve on the assessee a notice and proceed to assess or reassess such income. Similarly, under Section 34(1)(b), notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, if the Income Tax Officer has, in consequence of information in his possession, reason to believe that income chargeable to income tax has escaped assessment for any year, or has been underassessed he can serve on the assessee a notice and proceed to assess or reassess such income as specified in that section. The period prescribed at the material time for issuing notice was eight years in the cases falling under Section 34(1)(a) and four years for cases falling under Section 34(1)(b). The second proviso to Section 34(1), at the material time, provided that the Income Tax Officer shall not issue a notice after the expiry of two years from the relevant assessment year if the person on whom the assessment or reassessment is to be made in pursuance of the notice is a person deemed to be the agent of a non-resident person under Section 43.

11. The second proviso to Section 34(3), however, at the material time provided as follows :

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made under Section 27 or to an assessment or reassessment 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 3], Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A."

12. This is how the second proviso to Section 34(3) stood after its amendment in 1953 by the Income Tax (Amendment) Act of 1953 with effect from 1-4-1952. The appellant-Company contends that this proviso has a no application in the present case because the direction given by the Appellate Assistant Commissioner under Section 31 is a direction to assess a stranger to the assessment proceedings against M/s. Turner Morrison and Company Ltd. and hence it is not covered by the second proviso to Section 34(3).

13. Since the impugned notices are dated 26-10-1961, and pertain to Assessment Years 1949-50 to 1951-52, it is clear that but for this proviso, the notices would be beyond the period prescribed under Section 34 of the Income Tax Act, 1922. The second proviso to Section 34(3) lifts the bar of limitation when, inter alia, an assessment or reassessment is made on an assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31.

14. In the present case the original assessment orders were made on M/s. Turner Morrison and

Company Ltd. as agents of the appellant-Company. The order of the Appellate Assistant Commissioner giving directions to assess the appellant-Company was passed in the appeals of M/s. Turner Morrison and Company Ltd. against the orders of assessment for the said three assessment years. Can the appellant-Company on whom the notices have been issued pursuant to the Appellate Assistant Commissioner's order and directions of 29-11-1960, come within the scope of the phrase "the assessee or any person" in respect of whom any direction can be given under Section 31 ?

15. The scope of this second proviso to Section 34(3) was examined by a Constitution Bench of this Court in the case of *S. C. Prashar v. Vasantsen Dwarkadas* ((1963) 49 ITR 1 : AIR 1963 SC 1356). This Court, examining the second proviso to sub-section (3) of Section 34 which came into effect from 1-4-1952, said that it patently introduced an unequal treatment in respect of some out of the same class of persons. Those whose liability to pay tax was discovered by one method would be proceeded against at any time and no limitation would apply in their case and in the case of others the limitation laid down by sub-section (1) of Section 34 would apply. Referring to the distinction made by the High Court in that case on a somewhat narrower ground, this Court observed that so far as the assessee was concerned, there might be a rational ground of distinction because appeal, proceedings etc. might take a long time and the assessee being a party to the appeal could not complain of such delay. Therefore, an assessee did not occupy the same position as strangers. This Court, therefore, held that the proviso, insofar as it affected strangers, must be held to be ultra vires as violating Article 14 of the Constitution.

16. The same Bench delivered another judgment on the same day in *CIT v. Sardar Lakhmir Singh* ((1963) 49 ITR 70 : AIR 1963 SC 1394) in which it affirmed its finding in *S. C. Prashar Case* ((1963) 49 ITR 1 : AIR 1963 SC 1356). In the case of *S. C. Prashar* ((1963) 49 ITR 1 : AIR 1963 SC 1356) the assessee before the Tribunal was Vasantsen Dwarkadas representing his deceased further. The Tribunal in appeal held that the income in question should be deleted from Dwarkadas's income. If the Income Tax Officer can include the same in the income of the firm of Purshottam Laxmidas (of which Dwarkadas was a partner) he is at liberty to do so. He can then apportion the income of Purshottam Laxmidas amongst the partners thereof as provided in Section 23(5) of the Act. Thereupon the Income Tax Officer served a notice under Section 34 on the firm of Purshottam Laxmidas. This Court held that the firm of Purshottam Laxmidas was not before the Tribunal and, therefore, the firm was no better than a stranger who was in some way associated with the assessee. Therefore, the second proviso to Section 34(3) would have no application to the firm and the notice under Section 34 which was issued on the firm of Purshottam Laxmidas was barred by limitation.

17. In the second case of *Sardar Lakhmir Singh* ((1963) 49 ITR 70 : AIR 1963 SC 1394) the assessee and his father had filed separate returns of income in their individual capacity. But the Income Tax Officer amalgamated their income and assessed the total income as the income of the Hindu Undivided Family. He did not make any protective assessment with regard to the separate income shown in the return of the assessee. The Appellate Assistant Commissioner set aside the assessment of the Hindu Undivided Family. Thereafter, the Income Tax Officer made an assessment on the assessee in individual capacity on the basis of the original return filed by him. This was held to be barred by limitation.

18. In the subsequent case, however, of *ITO v. Murlidhar Bhagwan Das* ((1964) 52 ITR 335 : AIR 1965 SC 342) a Constitution Bench of this Court considered the ratio laid down in *S. C. Prashar case* ((1963) 49 ITR 1 : AIR 1963 SC 1356). This Court observed (ITR p. 346) that the expression "any person" in the second proviso to Section 34(3) in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped

assessment; but this construction cannot be accepted. For the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision.

"If so construed, we must turn to Section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of Section 30(1) and Section 31(3) of the Act indicates the cases where persons other than the appealing assessee might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not eo nomine parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal."

Therefore, if the person against whom notices are issued under Section 34 pursuant to a direction given by the Appellate Assistant Commissioner under Section 31, is a person intimately connected with the original assessee, the period of limitation will not apply to a notice issued against him under Section 34. He would be covered by the phrase "assessee or any other person" under the second proviso to Section 34(3).

19. The principle laid down in the above case of Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342) was applied by this Court in the case of CIT v. Ambala Flour Mills ((1970) 2 SCC 96 : (1970) 78 ITR 256). In that case an individual, Debi Prasad, had submitted the returns in various capacities and had appealed against the order of assessment. The income earned by the assessee was assessed to tax as income of an association of persons of which, on the findings of the Income Tax Officer, Debi Prasad was a member. In making a direction against Debi Prasad, the Tribunal did not exercise its power qua a stranger to the assessment proceedings. Therefore, this Court held that the period of limitation would not be applied. The Appellate Assistant Commissioner was competent to set aside the assessment of an association of persons and to direct the Income Tax Officer to assess the members individually.

20. In the case of Estate of Late Rangalal Jajodia v. CIT ((1970) 3 SCC 371 : (1971) 79 ITR 505) the return had been filed by one Rangalal Jajodia who died before the assessment order was made. The assessment order showed the name of the assessee as the estate of late Shri Rangalal Jajodia by legal heirs and representatives (these being the son, the (second) wife and her children. No notice, however, was served on the wife. Therefore, in appeal, a necessary direction was given that notice should be given to her and after hearing her assessment should be made. Interpreting the second proviso to Section 34(3) this Court said that she was not a stranger to the assessment, she was not merely intimately connected with the assessment. She was in fact an assessee. Therefore, the second proviso to Section 34(3) would apply.

21. In the case of CIT v. Mohd. Shakoor Mohd. Bashir ((1973) 4 SCC 107 : 1973 SCC (Tax) 393 : (1973) 89 ITR 57) one Zahur Bux who was the sole owner of the business gifted his business to his

two sons Mohd. Shakoor and Mohd. Bashir. Zahur Bux died thereafter. The two sons submitted their returns of income in respect of the business. The Income Tax Officer, however, rejected their returns and proceeded to assess all the heirs of Zahur Bux as an association of persons. In appeal, the Appellate Assistant Commissioner held that the assessee, namely, the association of persons consisting of all the heirs of Zahur Bux was not liable to be taxed in respect of the business. He held that the business had been gifted to two sons, Mohd. Shakoor and Mohd. Bashir. He set aside the order of the Income Tax Officer but directed him to assess the income from various sources in the hands of the respective persons to whom they arose. The Income Tax Officer thereafter issued notices to the two brothers. This Court held that the directions which were given by the Appellate Assistant Commissioner did not fall within the scope of second proviso to Section 34(3) and, therefore, the subsequent notices which were issued by the Income Tax Officer were barred by limitation. The brothers to whom the business was gifted were strangers to assessment proceedings against the association of persons consisting of the heirs of Zahur Bux.

22. In the present case we have to consider whether the appellant-Company is a stranger to the assessment proceedings against M/s. Turner Morrison and Company Ltd. as laid down in the case of S. C. Prashar ((1963) 49 ITR 1 : AIR 1963 SC 1356) or whether the appellant-Company can be said to be intimately connected with the assessee M/s. Turner Morrison and Company Ltd. as laid down in the case of Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342).

23. The notices for the Assessment Years 1950-51 and 1951-52 were sent to the appellant-Company itself. For the Assessment Year 1949-50, the notice had been sent to M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company. Under Section 42 of the Income Tax Act, 1922, income arising whether directly or indirectly through or from any business in the taxable territories or through or from any asset or source of income in the taxable territories, shall be deemed to be income accruing or arising within the taxable territories; and where the person entitled to the income is not resident in the taxable territories, shall be chargeable to income tax either in his name or in the name of his agent and in the latter case, such agent shall be deemed to be for all the purposes of this Act the assessee in respect of such income. Thus, in view of Section 42, in the present case, there was an option to tax either the appellant-Company or its agent M/s. Turner Morrison and Company Ltd. Therefore, when the initial notices under Section 34 were sent by the Income Tax Officer in 1954 and 1955, what was sought to be taxed was the income arising in taxable territories of the non-resident appellant-Company. For the Assessment Years 1950-51 and 1951-52, the notice was addressed to the appellant-Company. For the Assessment Year 1949-50, the notice was addressed to the agents in India of the appellant-Company. But even in respect of the Assessment Year 1949-50, what was sought to be taxed was the appellant's income or deemed income arising in India. For the Assessment Years 1950-51 and 1951-52, the returns were also filed by the appellant-Company as an assessee. The status of the assessee was shown as non-resident. It was on the basis of these returns that the Income Tax Officer proceeded to make an assessment. For the Assessment Years 1950-51 and 1951-52, however, he made an assessment in the name of M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company. For the Assessment Year 1949-50 the return was filed by M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company. The status of the assessee was shown in the return as non-resident and the income which was shown was deemed dividend accruing to the appellant-Company as provided under Section 23-A. For the Assessment Year 1949-50, the assessment was made on M/s. Turner Morrison and Company Ltd. as agents of the appellant-Company. Whether we look upon M/s. Turner Morrison and Company Ltd. as an independent assessee or otherwise, the assessment was clearly in respect of the income of the appellant-Company deemed to arise by virtue of Section 23-A in India for that assessment year. Therefore, the appellant-Company was directly concerned with the assessment proceedings and the

appeal arising in those assessment proceedings before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner directed, for reasons set out in his order, that the assessments should be made on the appellant-Company itself and not on its agent. This direction cannot be considered as a direction to assess a stranger. In fact as the original assessment proceedings pertain to the income of the appellant-Company, in any view of the matter, the appellant-Company must be considered as intimately connected with the assessment proceedings in which the Appellate Assistant Commissioner gave the impugned directions. The appellant-Company is, therefore, covered by the expression "assessee or any person" in the second proviso to Section 34(3).

24. In the case of Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342) this Court gave illustrations of persons who might be considered as intimately connected with the assessee in the light of Section 30(1) and Section 31 of the Income Tax Act. This Court referred to assessment of a partnership firm which may affect the income of individual partners or the assessment of an association of persons which may affect the income of the individual or the assessment of a joint Hindu family which may affect the assessment of members of the Hindu joint family. It, however, made it clear that these instances were only illustrative and not exhaustive.

25. The appellant-Company, however, contends that "any person" in the said proviso would cover only such persons as were referred to by the Court as illustrations in Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342) because they are also referred to in Section 31(4). We do not see any merit in this contention. Under Section 31(3), in disposing of an appeal the Appellate Assistant Commissioner may, inter alia, set aside the assessments and "direct the Income Tax Officer to take a fresh assessment after making such further inquiry as the Income Tax Officer thinks fit or the Appellate Assistant Commissioner may direct and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment". Under sub-section (4) of Section 31, where as the result of an appeal any changes are made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Assistant Commissioner may authorise the Income Tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association. This provision under Section 31(4) cannot be read as limiting the scope of the words "any person" in the second proviso to Section 34(3) as referring only to those persons who are covered by Section 31 sub-section (4). The words are wide enough to cover all directions under Section 31 including those relating to the assessment of a person intimately connected with the assessee in the sense as laid down by this Court in the case of Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342). Whether the person is so connected will depend on the facts of each case. The illustrations given in the case of Murlidhar Bhagwan Das ((1964) 52 ITR 335 : AIR 1965 SC 342) do not limit the words "any person", but are only illustrative. The only reason why the words "any person" are read down to exclude total strangers, is to prevent infringement of Article 14 of the Constitution.

26. The directions in the present case, therefore, given by the Appellate Assistant Commissioner by his order of 29-11-1960 are directions properly given under Section 31 of the Income Tax Act, 1922 and the notices, therefore, which are issued on 26-10-1961 by the Income Tax Officer pursuant to the directions so given, cannot be considered as notices on total strangers barred by limitation. The High Court was, therefore, right in dismissing the writ petition.

27. The appeals are accordingly dismissed with costs.