

CALCUTTA HIGH COURT

Calcutta Discount Co. Ltd

Vs.

Income Tax Officer

Matter No. 205 of 1951

(Bose, J.)

26.03.1952

ORDER

Bose, J.

1. This is an application under Article 226 of the Constitution for appropriate writs for quashing of certain income-tax assessment proceeding taken against the petitioner under Section 34 of the Income Tax Act, 1922 as amended by Income Tax and Business Profits Tax (Amendment) Act 1948 (Act XLVIII (48) of 1948) and for prohibiting the Respondents from proceeding with the said assessment cases.
2. The petitioner is a private limited company incorporated under the Companies Act. Its registered office is at 8 Clive Row, Calcutta.
3. The petitioners' total income for the years 1942-1943, 1943-1944 and 1944-1945 were assessed to tax under Section 23(3) of the Income Tax Act by Assessment Orders dated January 26, 1944, 12-2-1944 and February 15, 1945 respectively and the taxes demanded in respect of the said assessments were duly paid by the petitioner company.
4. By three notices dated the 28-3-1951 issued under Section 34 of the Income Tax Act as amended by Act XLVIII (48) of 1948, the Income Tax Officer, Companies District I, Calcutta, called upon the petitioner to submit Returns of the petitioner's total income and total world income in respect of the said three previous years of assessment 1942-43, 1943-44 and 1944-45.
5. On the 13th August 1951 the petitioner filed the Returns under protest.
6. The petitioner challenges the jurisdiction of the Income Tax Officer to proceed with the reassessments on the ground that the necessary conditions precedent which must exist before the

Income Tax Officer can assume jurisdiction to proceed under Section 34 of the Income Tax Act are absent in the present case and secondly on the ground that Section 34 as amended in 1948 has no application to the assessments for 1942-43, 1943-44 and 1944-45 as the amendment has no retrospective operation.

7. Section 34 of the Indian Income Tax 1922 as amended by Act XLVIII (48) of 1948 is as follows :

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 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment 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 and in cases falling under clause (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 reassess 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 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;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made in an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

'Explanation' : Production before the Income-tax Officer of account-books or other

evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section,

(2) Where an assessment is re-opened, in circumstances falling under clause (b) of subsection (1), the assessee may, if he has not impugned any part of the original assessment order for that year either under Section 30 or under Section 33A, claim that the proceedings under sub-section (1) of this section shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the items alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made :

Provided that in so doing he shall not be entitled to re-open matters concluded by an order under Section 33B or Section 35, or by a decision of the High Court or of the Privy Council under Section 66 and Section 66A.

(3) No order of assessment under Section 23 to which clause (c) of sub-section (1) of Section 28 applies or of assessment or reassessment in cases falling within clause (a) of sub-section (1) of this section shall be made after the expiry of eight years, and no order of assessment or reassessment in any other case shall be made after the expiry of four years, from the end of the year in which the income, profits or gains were first assessable : Provided that where a notice under subsection (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the period of eight years or four years, as the case may be : Provided further that nothing contained in this sub-section shall apply to a reassessment made under Section 27 or in pursuance of an order under Section 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

8. Now the question is whether in an application under Article 226 of the Constitution it is open to this Court to examine into the sufficiency of the materials or facts which led the Income Tax Officer to believe that there was ground for taking action under Section 34 of the Act.

9. The condition that gives jurisdiction to the Income Tax Officer to exercise his power of reassessment under Section 34 (as amended by Act XLVIII (48) of 1948) is that he has "reason to believe" that certain facts specified in the Section exist in respect of a particular assessment. It is this personal belief or satisfaction of the Income Tax Officer which confers on him jurisdiction to proceed under Section 34 of the Act. It is not necessary that this belief must be based on sufficient legal evidence. So long as he honestly comes to the conclusion that there are materials before him which justify him in moving under Section 34 of the Act the Court has no jurisdiction to interfere even if the belief or conclusion is erroneous. Not only is the Income Tax Officer vested with the absolute jurisdiction to set the machinery of Section 34 into motion but he is vested with the jurisdiction to form an opinion about the existence of the condition precedent which bring the section into operation.

10. In the case of '*Rex V. Kensington Income Tax Commr*¹;', in construing the meaning of the word "discover" in Section 52 of the Taxes Management Act 1880 Bray, J., observed (p. 889) that the word cannot mean

"ascertain by legal evidence. In my opinion, it means comes to the conclusion from the examination he makes and from any information he may choose to receive. There is nothing to prevent him from getting such information as he can."

Avory, J., at page 897 observed "In my opinion, the word means "has reason to believe". Lush, J., construed the word to mean "finds or satisfies himself." (p. 898). It is therefore

¹(1913) 3 Kb 870

clear that although the wordings of Section 34 have undergone changes under the Amending Acts of 1939 and 1948 it is the personal satisfaction of the Income Tax Officer as to the existence of the conditions precedent to the operation of the section, that is necessary for giving the Income Tax Officer the further jurisdiction to reassess under the terms of that Section.

11. But although it is the belief of the Income Tax Officer which gives him jurisdiction to proceed under Section 34 it is clear that there must be information or material before the Income-Tax Officer which would enable him, acting honestly, to come to the conclusion that the conditions precedent to the exercise of jurisdiction under Section 34 in fact exist. If there is some 'prima facie' ground for the belief or opinion of the Income Tax Officer, the Court is precluded from saying that the materials are not sufficient to justify the formation of the belief or the opinion.

12. In the case of '*Rex V. Bloomsbury Income Tax Commr*²;', at p. 798 Lush, J., observed :

"I think this Court could and should interfere to stop further proceedings if it were proved or admitted that the Surveyor never had satisfied himself that a person was chargeable and had acted without any inquiry at all and also if it were proved or admitted that his belief was founded on an obvious and manifest mistake in law. But if the ground is one which requires serious investigation and is not the result of an obvious mistake, I think that the matter must be left to the General Commissioners, who can state a case."

13. In the case of '*Nakkuda Ali V. Jayaratna*³', at p. 77, Lord Radcliffe in construing Regulation 62 of the Defence (Control of Textiles) Regulations, 1945 of Ceylon interpreted the words "has reasonable grounds to believe" as imposing a condition that there must in fact exist such reasonable grounds, known to the person who had to form the belief before he could exercise the power dependent upon such belief.

14. One Kanakendra Nath Banerjee who was the Income Tax Officer, Companies District I,

Calcutta Division, between the period 23-9-1950 and 25-5-1951 has affirmed the affidavit in opposition. It appears from this affidavit that upon some representations made by Messrs. Lovelock and Lewis who were acting for the petitioner, the Income Tax Officer who made the original assessments for the years 1942-43, 1943-44 and 1944-45 was led to believe that certain dealings in shares were casual transactions and were in the nature of mere change in investments and the profits resulting therefrom were not taxable and accordingly such profits were not taxed, but the deponent subsequently had reasons to believe that by reason of failure of the company to disclose fully all material facts there had been an underassessment. The Report of the Income Tax Officer which was made in connection with the starting of proceedings under Section 34 of the Act and was submitted to the Commissioner for his sanction, has been annexed to the affidavit in opposition. This Report records briefly the reasons of the Income Tax Officer as required by Item 7 of Form B. The reasons set out are as follows :

"At the time of the original assessment the then I. T. O. merely accepted the

² (1915) 3 Kb 768

³ (1951) Ac 66

Company's version that the sales of shares were casual transactions and were in the nature of mere change of investments. Now the results of the Company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the share and as such Section 34 (1) (a) may be attracted."

15. Thus it is clear that the deponent had materials before him to show that the Company's trading from year to year disclosed that the Company had been systematically carrying on a trade in the sale of investments. Whether the materials were sufficient or not or whether the belief or opinion is erroneous or not cannot, as I have pointed out before, be enquired into by this Court. The Legislature has given the Income Tax Officer jurisdiction to determine all facts including the existence of the preliminary facts on which the further exercise of his jurisdiction depends and so the contention that the Income tax Officer cannot by wrongly deciding or assuming that certain preliminary facts exist confer on himself jurisdiction has no force and cannot be accepted.

16. It appears to me that the present case falls within the latter part of the formula of Lord Esher laid down in '*Queen V Commr. For The Special Purposes Of The Income Tax*⁴', at pp. 319-320 which is to the following effect :

"But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction on finding that it does exist, to proceed further or do something more."

17. If the Income Tax Officer has made a wrong decision as to the existence of the conditions precedent the remedy is by way of appeal as provided by the Income Tax Act and by stating a

case to the High Court under Section 66 of the Act.

18. This Court has no jurisdiction to interfere by writs of Prohibition or Certiorari.

19. The next contention of Mr. Mitra is that Section 34 as amended by Act XLVIII (48) of 1950 can have no application to the assessments for the years 1942-43, 1943-44 and 1944-45 as the amendment has no retrospective effect.

20. The Judicial Committee of the Privy Council had occasion to construe Section 34 of the Income Tax Act as it was in 1922, in the case of '*Commissioner of Income Tax Bengal V. Mohaliram Ramjidas*⁵', At page 448, Lord Normand made the following observation :

"The Section although it is part of a taxing Act, imposes no charge on the subject and deals merely ,with the machinery of assessment."

The Advocate General therefore contends that the Section being one which deals with only procedure for assessment, it is retrospective in operation.

⁴(1888) 21 Qbd 313

⁵(1940) 8 Itr 442 (Pc)

21. Now it is the accepted rule of interpretation of statutes that a statute is generally prospective in its operation unless it is made retrospective by express words or by necessary intendment.

22. But where a statute or any of its provisions relate only to procedure and practice the general rule against retrospective operation is not applicable and they are held to be retrospective but subject to the usual exception of cases where the language itself clearly excludes such a presumption. It is said that no person has a vested right in procedure. If however the giving of retrospective effect to the right of procedure would have the effect of defeating a vested right the rule against retrospectivity extends to such cases also.

23. Section 34 although described as a machinery section does not, in my view, relate to procedure pure and simple but it affects also the substantive right or protection given to the assessee not to be subjected to reassessment except only under certain conditions and within a certain time. The amending Act of 1948 has introduced a new ground viz., "failure to file the return" in Section 34 for invoking the jurisdiction of reassessment under that Section. Further the amendment has provided an additional year for the Income Tax Officer within which he can complete the assessment or reassessment provided notice under Section 34(1) has been issued before the expiry of the eight years or four years as the case may be. The amendment has also made alterations in the wordings of the Section as it was after the amendment of 1939, and has extended the scope of Section 34. Thus this amendment not only introduces new grounds for subjecting the assessee to reassessment under Section 34 but also extends the period within which the assessment under Section 34 can be completed. As the amendment therefore affects vested or substantive rights, it cannot have retrospective operation unless the words of the Statute

indicate that it was intended to have retrospective effect. See '*S. Girdharilal V. B. Kappini Gowder*⁶', for distinction between procedural law and substantive law.

24. Sub-section (2) of Section 1 of the Amending Act (Act XLVIII (48) of 1948) which came into force on 8th September 1948 provides that Sections 3 to 12 of the Amending Act shall be deemed to have come into force on 30-3-1948. The amendment of Section 34 has been made by Section 8 of the Amending Act. So Section 34 as amended came to be operative retrospectively from 30-3-1948.

25. The amendment is expressly made retrospective, so far as Section 34 is concerned, from 30-3-1948. It has no further retrospective operation.

26. The Amending Act of 1948 not being retrospective in its operation, Section 34 as it stood after the amendment effected in 1939 must govern the assessments in question. Under the said Section 34, the requirements as to the conditions precedent which would bring the Section into operation were a little different, from those of Section 34 as amended by Act XLVIII (48) of 1948. The Report of the Income Tax Officer and the copy of the Notice issued under Section 34 on 28-3-1951 show that the Income Tax Officer has purported to act under Section 34 as amended in 1948. This the Income Tax Officer was not entitled to do. In the circumstances the Notice issued under the amended Section of 1948 and the proceedings taken in consequence thereof must be held to be without jurisdiction. Mr Mitra cited the cases reported in '*Moon V. Durden*⁷',

⁶ AIR 1938 Mad 688

⁷(1848) 2 Ex 22

*'Midland Rly. Co. V. Annie Pye*⁸, '*In Re, Joseph Suche and Co. Ltd*⁹, '*Lauri V Renad*¹⁰', '*Wright V. Hale*¹¹'. '*In Re : Athlumney; Ex Parte Wilson*¹²', '*Krishna Hydraulic Press V. I.T. Commr*¹³.' in support of his contention that the amendment is not retrospective and cannot apply to the assessments in question. It is not necessary to deal with these cases in any detail for the purpose of this case. It may be sufficient to point out that they support the argument put forward by Mr. Mitra against the retrospectivity of the amendment of Section 34 as made in September, 1948.

27. In my view, this petition must succeed. The Rule is made absolute to the extent that the respondents are prohibited from proceeding with the assessment proceedings taken against the petitioner pursuant to the Notices dated 28th March 1951 issued under Section 34, Income Tax Act, as amended by Act XLVIII (48) of 1948. As the question is not free from difficulty the Income Tax Authorities cannot be blamed for taking steps under the amended Section and so I make no order for costs. Rule made absolute.

⁸(1861) 10 Cb (Ns) 179

¹⁰(1892) 3 Ch 402

¹²(1898) 2 Qb 547; (1939) 2 Kb 61'

⁹(1875) 1 Ch D 48

¹¹(1860) 6 H and N 227

¹³1943-11 Itr 504 : AIR 1944 Cal 116