

CALCUTTA HIGH COURT

R.K. Das and Co

Vs.

Commissioner of Income-tax

Income-tax Ref. No. 30 of 1954

(Chakravartti, C.J. and Sarkar, J.)

06.01.1956

JUDGMENT

Chakravartti, C.J.

1. The assessee at whose instance this Reference under Section 66(1) of the Income-tax Act has been made is a firm. In maintaining its accounts, it observes the calendar year. Admittedly during the year 1945, the assessee earned a taxable income, but it did not file any return in response to the general notice issued under Section 22(1) of the Act, nor did the Income-tax Officer issue any notice to the assessee under Section 22(2). By the time he discovered the omission, the assessment year which was the year 1946-47 had already expired. At that stage, therefore, he could issue a notice only under Section 34 of the Act and he did so on 23-8-1948. As Section 34 stood at that time no sanction of the Commissioner For the issue of a notice under the section was required and consequently none was obtained.

2. It appears that the assessee did not file a return in compliance with the notice. Instead, a partner appeared before the Income-tax Officer on 8-11-1948, and asked for time till the end of January, 1949, on the ground that the books of the business For the relevant year had not yet been closed. The Income-tax Officer was not prepared to allow the time prayed for and informed the partner that the return would have to be filed by the 23rd of November following and that if it was not filed on or before that date not only would there be a summary assessment under Section 23(4) of the Act, but a penalty under Section 28 would also be imposed. Even what happened on 8-11-1948, did not elicit a return from the assessee on the 23rd of November and a return was not filed till 24-2-1949. The return showed an income of Rs. 69,738/-. The Income-tax Officer proceeded to make a provisional assessment on the return under Section 23B of the Act and made such an assessment on 28-2-1949. We are informed that thereafter proceedings for realization of the tax under the provisional assessment were commenced.

3. In the meantime, Section 34 of the Income-tax Act had been amended by Act 48 of 1948. Section 8 of the amending Act replaced the whole of the old Section 34 by a new section and directed by Section 1(2) that the amendment "shall be deemed to have come into force on the 30th day of March, 1948." One of the new provisions incorporated in the new Section 34 was

that a notice under the section was not to be issued unless the Income-tax Officer had recorded his reasons for doing so and unless the Commissioner was satisfied on such reasons recorded that it was a fit case For the issue of such a notice.

As this provision was to be deemed to have been the law on and since 30-3-1948, it was necessarily the law on the 23rd of August of that year when the notice under Section 34 in the present case had been issued. Quite naturally, therefore, the Income-tax Officer thought that since the new section, speaking as on 30-3-1948, and at all subsequent times, unless it was again amended, required that before a notice there under could be issued, the Commissioner's sanction was to be obtained, the notice already issued on 23-8-1948, had ceased to be valid and could no longer be proceeded upon For the purposes of making an assessment. In that view, he applied for and obtained the sanction of the Commissioner and issued a fresh notice under Section 34 on 30-3-1951.

4. The notice under Section 34 was followed up by the usual notice under Section 22(4) of the Act which was issued on 9-4-1951. On 16-4-1951, the assessee sent a letter to the Income-tax Officer, asking for a clarification of the notice. That letter has not been referred to either in the Statement of the Case or in the appellate order, but we have referred to it for ourselves and do not find that the assessee was saying anything very particular or intelligible. Be that as it may, on 7-5-1951, which we are informed was not a date fixed For the hearing of the case, the assessee addressed a letter to the Income-tax Officer by which it informed him that the return already filed on 24-2-1949, might be treated as a return filed in compliance with the second notice under Section 34. The actual language of the letter appears from the order of the Assistant Commissioner who set it out in full. It reads as follows :

"We stand by the return already submitted and there is no reason to alter it. In the circumstances please, proceed on the footing that the original return is in order and represents compliance with your above notice and may be deemed to have been filed in compliance with the above notice dated 30-3-51."

Thereafter the Income-tax Officer proceeded on that return and completed the assessment on 29-6-1951. It appears that he determined the assessee's income at Rs. 1,36,468/-.

5. Against that assessment the assessee appealed to the Assistant Commissioner. It was contended that the assessment had been made after the period of limitation for a valid assessment had already expired and that, on the merits too, the assessment was bad, inasmuch as certain deductions had not been allowed. The Appellate Assistant Commissioner overruled the plea of limitation, but gave effect to the plea on the merits. He set aside die assessment and directed the Income-tax Officer to make a fresh assessment in accordance with law.

6. Thereafter the assessee preferred a further appeal before the Appellate Tribunal. It will be noticed that there was no longer any subsisting assessment, but only a direction for re-assessment given by the Appellate Assistant Commissioner. The only argument before the Appellate Tribunal appears to have been that since the assessment had been completed more than four years after the expiry of the assessment year, any assessment made thereafter would be time-barred. It is true that the Tribunal refers to the assessee as contending that any assessment made thereafter would be "equally time-barred", which obviously means that the assessment previously

made and since set aside was also time-barred, but the Tribunal does not seem to have dealt with that question separately.

7. The reason adduced in support of the plea of limitation, as far as it can be understood, was that there was in fact on the file a return filed by the assessee. The first notice under Section 34, it was said, was an invalid notice and the return filed after the issue of that notice could not be treated as filed in compliance therewith, nor had it been filed in compliance with the first notice under Section 34 in fact. It was a return voluntarily filed. If so, and if there was a return voluntarily filed before any assessment had been made, it was neither a case of no return having been filed, nor a case where in spite of a return having been filed, income had escaped assessment and therefore the Income-tax Officer could, and indeed should, have completed the assessment on the basis of that return and he was also required to complete it within the normal period of four years from the end of the year of assessment. Since he had not done so and had made the first assessment only on 29-6-1951, that assessment was clearly barred by time. Necessarily, any further assessment made in pursuance of the Appellate Assistant Commissioner's order would be equally barred.

8. The Tribunal repelled both branches of the assessee's contention. It held that the return filed on 24-2-1949, was not a voluntary return. "On the facts above stated", observed the Tribunal, "it is quite clear that the return was made not voluntarily, but in response to a Notice issued and then a warning administered by the Income-tax Officer on the assessee." Having found as a fact that the return had not actually been filed voluntarily but had been filed in compliance with the first notice under Section 34, the Tribunal proceeded to consider whether nevertheless, it could be held that the return was to be treated in law as a return voluntarily filed and thus a good return for a normal assessment within the normal period. The Tribunal answered the question in the negative and in doing so relied on a decision of S.R. Das Gupta, J., and myself in the case of - '*Commissioner of Agricultural Income-tax v. Sultan Ali-Gharami*¹', The substance of the view taken by the Tribunal was that the initial notice under Section 34 having been an invalid notice, the Income-tax Officer could not possibly have proceeded upon the return filed in compliance therewith simply on the ground that somehow a return had come in and indeed if he had done so, the consequent assessment would have been clearly invalid. If the Income-tax Officer could not make a valid assessment on the basis of that return, the assessee on its part could not be heard to contend that he could have done so and indeed was bound to proceed on that return if he wanted to make an assessment at all. In the result, the Tribunal dismissed the assessee's appeal.

9. Thereafter the assessee required the Tribunal to refer the disputed questions to this Court. In compliance with that requisition, the two following questions have been referred :

(1) "Whether on the facts and in the circumstances of this case the return filed on 24-2-1949 can be regarded as a voluntary one under Section 22(3) on the basis of which an assessment could have been validly made ?"

(2) "Whether on the facts and in the circumstances of this case, the assessment for 1946-47 made on 29-6-1951 or to be made hereafter was or would be barred by limitation ?"

¹(1951) 20 ITR 432 (Cal)

10. The first question asks whether the return filed on 24-2-1949, could be regarded as a voluntary return filed under Section 22(3). It seems to comprise two enquiries, namely, (1) whether there was evidence before the Tribunal on which they could properly hold that the return

had in fact been filed not voluntarily, but in compliance with the first notice under Section 34, and (2) whether assuming that the Tribunal's finding on the question of fact was correct, they were yet right in law in treating the return as a return filed in compliance with the first notice under Section 34 and not voluntarily. Mr. Sinha, who appears on behalf of the assessee, advanced his argument before us on those two lines.

11. A word is necessary in explanation of the phrase "under Section 22 (3)". That sub-section says, to quote only the material part,

"If any person has not furnished a return within the time allowed by or under Sub-Section (1) or Sub-Section (2), * * * he may furnish a return * * * at any time before the assessment is made."

What the sub-section contemplates or provides for is the belated filing of a return required to be filed in compliance with either the general notice issued under Sub-Section (1) or the individual notice issued under Sub-Section (2). In the present case, no notice under Section 22(2) was issued to the assessee. What the expression "under Section 22(3)" means in the context of the facts in the present case is, a return filed in compliance with the general notice under Section 22(1) and filed not within the time limited thereby but subsequently in exercise of the liberty given by Sub-Section (3) of Section 22.

In terms of the fact of the present case, therefore, the question asks whether, when the assessee filed a return on 24-2-1949, it could properly be held to have filed it of its own free will in compliancy with the general notice issued under Section 22(1) and not in compliance with the notice under Section 34.

12. As to the first branch of the first question, the answer appears to me to be plain. I have already read the language in which the Tribunal expressed their finding, I find it wholly impossible to say that they had no evidence before them on which they could rightly arrive as that conclusion of fact. The assessee did not file any return within the time limited by the general notice under Section 22(1), nor did it make any attempt to file any return within the assessment year. It filed a return about two years after the assessment year had expired and after a notice under Section 34 had been served on it. After the issue of such a notice, a representative of the assessee had seen the Income-tax Officer and applied for time for filing the return and the return was actually filed thereafter. I do not see how it can be said that the Tribunal were not entitled in law to conclude from those facts that the return, when it was filed, was filed not voluntarily in compliance with the general notice under Section 22(1), but in pursuance of the notice under Section 34.

There is also the further fact that when a representative of the assessee saw the Income-tax Officer on 8-2-1948, he was given a warning that if no return was filed on or before the 23rd of November, certain harsh and unpleasant consequences would follow. The learned Advocate For the assessee himself admitted that the sequence of events was against his client, but his contention was that since the return had not been filed even on 23-11-1948, which was the last date fixed by the Income-tax Officer but it was filed subsequently, it should be treated as having had no reference to the notice under Section 34 and as having been filed by the assessee of its own free will. The learned Advocate seemed to think that once the time fixed for filing the return was allowed to expire without any return being filed, no link or connection could be found

between the notice under Section 34 and the subsequent filing of the return. I am not prepared to assent to that proposition. I consider it impossible to hold that if a particular order of a tribunal directs a party to do a particular thing by a particular date and he does not do it within that date but does it subsequently, he can no longer be treated as having complied with that direction, but must be treated as having acted independently. In any event, the narrow question which we have to decide on the first branch of the first question is whether the Tribunal had any evidence before them on which they could properly come to their conclusion of fact. To that question only an affirmative answer is possible.

13. Proceeding now to the second branch of the first question, I am clearly of opinion that the view taken by the Tribunal is right. Once it is held that the return was in fact not filed voluntarily but was filed in compliance with a notice under Section 34, it seems to me impossible to hold that, nevertheless, in law it must be treated as having had no connection with the notice, because the notice was invalid. It was the common case of the parties before the Appellate Assistant Commissioner and the Tribunal that the first notice under Section 34 was invalid. Before us Mr. Sinha wanted to contend that the retrospective operation given to the new Section 34 would not have the effect of invalidating the first notice under Section 34, but it is dearly not open to him to advance any such contention in the present Reference. The whole basis of the assessee's argument before the authorities below was that the first notice under Section 34 having been invalid, no compulsion proceeding from that notice and operating on the assessee so as to have elicited from it the return filed on 24-2-1949, could be predicated. It was only on that ground that it was said that the return filed was voluntarily and that if there was already a voluntary return on the file submitted before the expiry of four year's from the end of the year of assessment, the Income-tax Officer was bound to complete the assessment upon that return within the normal Period. But simply because the first notice under Section 34 was invalid or must be taken to have been so, I am unable to see how it can be said the return actually filed in compliance with notice, as properly found, cannot in law be treated as so filed. If it was a voluntary return, it would have been a good return For the purpose of a valid assessment, but the Tribunal has rightly pointed out that if the Income-tax Officer had proceeded to make an assessment on that return, such an assessment would not stand a moment's scrutiny. Conversely, the assessee cannot insist either in law or in common sense that the return in filed in compliance with the invalid notice under Section 34 could and should have been made the basis of a normal assessment. A return which is bad for action to be taken thereon by the Income-tax Officer, must be treated as bar for all purposes. It cannot be bad For the Income-tax Officer but good For the assessee. I am not forgetting the Principle that the validity of an assessment does not depend upon the issue of a notice or a valid notice, but I have already held in the case relied on by the Tribunal that that principle would not apply to a case where the issue of a notice, as prescribed by law, is a condition precedent to the commencement of proceedings in exercise of the jurisdiction to assess. Where the time for making an assessment in the normal way has expired or certain omissions have occurred by reason of which no assessment has taken place or an under assessment has occurred and the statute requires that in such circumstances the Income-tax Officer can assume jurisdiction and commence fresh proceedings only upon and after giving a certain notice of a certain kind, he cannot, in my view, make a valid, assessment at all, unless he issues the prescribed notice and issues it in a valid form. If he has issued any invalid notice and that notice has brought in a return, he cannot then shake off his own irregularity and seize the return and proceed to make an assessment on it in contravention of law and to the disadvantage of the assessee. Conversely, he cannot be held to be bound to proceed on such a return or entitled to

treat such a return as a good return for purposes of valid assessment.

14. In the case of '(1951) 20 ITR 432 (Cal), one of the reasons given for holding that the return filed by the assessee in the absence of a notice under Section 38 of the Bengal Agricultural Income-tax Act (corresponding to Section 34 of the Indian Act) could not be treated as a return under Section 24(1) (corresponding to Section 22(1) of the Indian Act) belatedly filed under Section 24(3) (corresponding to Section 22 (3) of the Indian Act); was that the return showed an income below the taxable limit. In the present case the return showed a taxable income. That circumstance, however, cannot make the return a voluntary return or a return filed in compliance with the notice under Section 22(1), though filed belatedly under the privilege conferred by Section 22(3) when it is found as a fact that actually it was not so filed and, secondly when it is found that having been filed in compliance with an invalid notice under Section 34, it cannot, nevertheless, be treated in law as a return filed under Section 22(1). While on that subject I may observe in passing, with great respect, that in commenting on the decision in the case of - '*Ranchhoddas Karsondas v. Commissioner of Income-tax, Bombay City*²', the Bombay High Court seems to have overlooked the qualification, expressly made. It was not said in general terms that a return, showing an income below the taxable limit, could not be a return filed under Section 24(3). "It should be remembered," I observed, "that the return in the present case is being sought to be treated as a return under Section 24(1), belatedly filed.

"And then I went on to say that a return under Section 24(1) would only be filed by a person who thought that he had a taxable income and, therefore a return showing an income below the taxable limit could not be held, on a construction thereof, to be a return under Section 24(1) and; consequently the return in the case we were then, considering could not be treated as such a return filed under Section 24(3). To say that, was not to say that even a return filed in compliance with a notice under Section 22(2), if filed belatedly under Section 22(3), could not be a return showing an income below the taxable limit.

15. Reverting now to the first question, in my view, the Tribunal had evidence before them on which they could properly hold as a fact that the return was not a voluntary one and they were also right in law in holding that it could not, nevertheless, be treated in law as a voluntary return For the reason that the notice in compliance with which it had been filed was an invalid notice.

16. If the answer to the first question be in the negative, the second question which is really consequential answers itself. If the return, was not a voluntary return and therefore could not be regarded as a return on which a valid assessment could be made, the case was one where no return had been filed. The case was also one where income had

² AIR 1954 Bom 543

escaped assessment. If so, Clause (a) of Section 34(1) clearly applied and the second notice under Section 34 was given within the period allowed by law. The assessment originally made on 29-6-1951, was, therefore, not a time-barred assessment, although it might be bad on the merits, as it was in fact held to be; and since the Appellate Assistant Commissioner, after setting aside that assessment, directed a reassessment to be made under Section 31(3)(c) of the Act, the second proviso to Section 34(3) would apply and, therefore, no reassessment made hereafter would be barred by limitation.

17. For the reasons given above, the answers to the questions should, in my opinion, be as follows :

Question (1) : "No".

Question (2) : "No, as to both parts."

18. The Commissioner of Income-tax, West Bengal, will have his costs of this Reference.

Sarkar, J.

19. I agree.

Answer accordingly.