CALCUTTA HIGH COURT

Sitalpore Colliery Concern Ltd

Vs

Union of India

(Sinha , J.)

15.02.1957

ORDER

Sinha, J.

1. The petitioner in this case is the Sitalpur Coal Concern Ltd. It has a colliery business. The petitioner filed its return for the assessment year 1948-1949 before the Income-tax Officer, Company's District II, Calcutta. There was an item with regard to the quantity of coal consumed under the heading, "Boiler and Colliery consumption account". According to the petitioner it had claimed a total consumption of 21.5 p.c. of the total raisings on this heading. According to the respondents, about 26 p.c. was claimed. On or about the 13th February, 1953, the assessment order was made and only 15 p.c. was allowed under this heading. It is stated on behalf of the respondents that the Company had kept no accounts of daily consumption, but produced a monthly account without any details, and the claim for consumption under this heading was out of proportion to the amounts that were found in the workings of the neighboring collieries. On or about the 14th March, 1953, the petitioner filed an appeal against the assessment order, before the Assistant Commissioner of Income-tax, who fixed a hearing on the 10th February, 1954. Sometime before the hearing of the appeal, the petitioner applied for an adjournment till the 1st week of March, 1954, inter alia on the ground that the petitioner was expecting certain formation and documents from its mines. This application was rejected on the ground that the Company had ample time for nearly a whole year to procure the necessary information from its colliery, and an adjournment was not justified. On the 10th February, 1954, nobody appeared on behalf of the petitioner and the appeal was accordingly heard ex parte and was dismissed. As against this order the petitioner had several courses open to him. Ono was to prefer an appeal under Section 30 of the Indian Income-tax Act, (hereinafter referred to as the 'Act') limitation for which is 30 days. Alternatively, it could proceed under Section 33-A which gives power of revision to the Commissioner. In fact, the petitioner made an application under Section 33-A (2) of the Act. The limitation for such an application is one year. Since this has been the subject-matter of this

application I set out below the relevant part thereof.

> "33-A (2). The Commissioner may, on application by an assessee for revision of an order under this Act, passed by any authority subordinate to the Commissioner, made within one year from the date of "the order (or within such further period as the Commissioner may think fit to allow on being satisfied that the assessee was prevented by sufficient cause from making the application within that period) call for the record of the proceeding in which such order was passed, and on receipt of the record may make such enquiry or cause such enquiry to be made, and subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit....."

2. On the 2nd July, 1955, the Commissioner passed an order declining to interfere. On 29th March, 1956, this rule was issued upon the respondents to show cause why an order in the nature of a Writ of Mandamus should not be made directing the respondent-Commissioner of Income-tax to deal with the revision filed by the petitioner in accordance with law by giving notice to the petitioner before fixing the date of hearing and giving a hearing to the petitioner before passing any order, and/ or why the notice dated 23rd of August, 1955, and the order dated the 2nd September, 1955, should not be set aside or cancelled. The notice dated the 23rd August, 1954, is a notice of demand under Section 29 of the Act and the order dated the 2nd September, 1955, is the order of the Commissioner declining to interfere.

3. The short point in this application is as to whether under Section 33-A (2), the Commissioner can decide a case only after hearing the party. In other words, whether it is incumbent upon the Commissioner to hear the party before making an order. Mr. Dutt appearing on behalf of the petitioner argues that the Commissioner acting under Section 33-A (2) is a Court and, therefore, was bound to hear the party, and in any event a decision without hearing a party is contrary to the rules of natural justice. Mr. Dutt points out Section 37 of the Act, under which the Commissioner has been given the power of a Court under the Code of Civil Procedure when trying a suit in respect of certain matters, e.g., enforcing the attendance of any person and examining him on oath, discovery and inspection, etc. He argues that if the Commissioner is a Court, then it is unthinkable that he can decide an application made by a party without giving a hearing. Mr. Dutt has referred to the Supreme Court decision in *Surajmall Mohta and Co. v. A. V. Visvanatha Sastri,.* There, Mahajan, C. J., was dealing with Section 34 of the Act and he said that under the provisions of Section 37 of the Act, the proceedings before the Income-tax Officer arc judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at.

4. In order to examine the nature of the provisions embodied in Section 33-A (2), it will be necessary to examine the scheme of the Act for the hearing of Appeals and Revisions. The

Indian Income-tax Act is a self-contained Act and is a Code in itself. Where it provides for a particular procedure, that procedure must be followed. In other words, where the Act lays down a particular procedure, that must be followed, and it is not open to this Court to introduce a procedure which is contrary to that laid down in the Act. It follows that if the Act has itself laid down a procedure to be followed in the particular case we are considering, then the principles of natural justice cannot be introduced. The provisions as to appeals and revisions are to be found under Ch. IV of the Act. Section 30 is the general provision for appeals against assessment orders. It is not every order under the Act which is appealable, but an appeal has been provided against an assessment order. It is not disputed that in this particular case an appeal lay against the assessment order dated the 13th February, 1953. The limitation for such appeals is ordinarily 30 days and is to be made to the Appellate Assistant Commissioner. Under Section 33, any assessee objecting to an order passed by an Appellate Assistant Commissioner may appeal to the Appellate Tribunal within 60 days of the date when the order is communicated to him. So far as appeal under Section 30 is concerned, Section 31 expressly lays down how the hearing is to be conducted. So far as Section 33 is concerned, it is expressly laid down that the Appellate Tribunal "may after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit." Thus there is an express provision for hearing the assessee. The power of revision is contained in Sections 33-A and 33-B. Let us first examine the nature of the revision under Section 33-B. Under that section, the Commissioner may call for and examine the record of any proceeding under the Act, and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may "after giving the assessee an opportunity of being heard" and after causing to be made such enquiries as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing fresh assessment. Again, we find that there is an express provision for hearing the assessee. Let us at last come to the provisions of Section 33-A. This section as it originally stood was Section 33, and under it the Commissioner could of his own motion call for the record of any proceeding under the Act, in which an order had been passed by any authority subordinate to him, and had the power of making such enquiry or cause such enquiry to be made and pass such orders thereon, not being an order prejudicial to the assessee, as he thought fit. Originally, this power was given only to the Commissioner acting suo motu. Now however, he can be moved by an assessee under Sub-section (2). It will be observed that while in any proceedings in appeal, or in revision under Section 33-B, the assessment order can be varied in any way that the Appellate or the Revisional authority thinks proper, there is a special limitation in Section 33-A, namely, that an order cannot be, made prejudicial to the assessee. It will also be observed that in this section, as distinguished from the others that I have just mentioned, there is no express provision for hearing the assessee. The original Section 33 of the Act was the subject-matter of

interpretation by the Judicial Committee of the Privy Council: Commissioner of Income-tax, West Punjab v. The Tribune Trust, Lahore . Dealing with Section 33 of the Act, Lord Simonds said as follows:--

"The fallacy implicit in this question has been made clear in the discussion of the first two questions. It assumes that Section 33 creates a right in the assessee. In their Lordships' opinion, it creates no such right. On behalf of the respondent, the well-known principle which was discussed in *Julius v. Bishop of. Oxford*[1], was invoked and it was urged that the section which opens with the words 'The Commissioner may of his own motion', imposed upon him a duty which he was bound to perform upon the application of an assessee. It is possible that there might be a context in which words so inapt for that purpose would create a duty. But in the present case there is no such context. On the contrary, Section 33 follows upon a number of sections which determine the rights of the assessee and is itself, as its language indicates, intended to provide administrative machinery by which a higher Executive Officer may review the acts of his subordinates and take the necessary action upon such review. It appears that as a matter of convenience a practice has grown up under which the Commissioner has been invited to act 'of his own motion' under the section and where this occurs a certain degree of formality has been adopted. But the language of the section does not support the contention which lies at the root of the third question and is vital to the respondent's case that it affords a claim to relief. As has been already pointed out, appropriate relief is specifically given by other sections: it is not possible to interpret Section 33 as conferring general relief".

5. The question is as to whether the re-orientation of the section by giving an additional right in the assessee to move the Commissioner has made a difference. In other words, whether the fact that the assessee has been given a right to apply to the Commissioner to make a revision, has transferred this administrative machinery into a Judicial one. It will be observed that even under Section 33-A (2) the Commissioner may, and not must, grant relief. In my opinion, the introduction of this sub-section has not changed the nature of the revisional powers or the Commissioner, so as to make it compulsory for him to hear the assessee. The scheme of the Act has always been, and still is, that the assessee has his normal rights of appeal under the Act. If he chooses to proceed to take advantage of it, he has the right to a full and complete, hearing. Section 33-A confers upon the Commissioner the power of revision, which is administrative in character, whether he acts of his own motion or at the instance of the assessee. If it was intended to alter the nature of his powers so as to transform the administrative function into a judicial one, then the wordings would have been different Under the section the Commissioner may call for the record, he may make such enquiry as he thinks fit, or he may cause such enquiry to be made as he thinks fit and then pass an order. The only limitation is that he must not do anything which is contrary to the provisions of the Act. If it is to be held that the proceedings are judicial, or that

the Commissioner is acting as a Court, then each step taken would partake of the ordinary procedure of the Courts, that is to say, of judicial proceedings, Every enquiry made or caused to be made must be made upon notice to the party, and in either case it must be done in his presence and after hearing him and/or his lawyers. It does not seem to me that it was intended that this elaborate procedure was intended to be followed in the case of a revision under Section 33-A, whether it is under Sub-section (1) or Sub-section (2). The Scheme has al-ways been and still is that the Commissioner will look into the records and will consider the orders of his subordinate officers, will make or cause to be made such enquiry as he thinks fit, and make an order. It is only because the procedure is summary that it has been explicitly laid down that the order made shall not operate to the prejudice of the assessee. If it was intended to introduce into this section the elaborate procedure of a judicial proceeding, then there is no reason why the order should not be to his prejudice. Similar terms would have been used as used in Section 33 or 33-B. The position is that the assessee has been given an option whereby he can either appeal or move the authorities to take administrative action by looking into the records and proceedings to detect whether an order made by a subordinate officer is defective or erroneous. If ho chooses to take the latter course, he has this advantage that the Commissioner in acting under this section might discover something against the assessee, but he is protected inasmuch as an order cannot be made under this section to his prejudice. As distinguished from the procedure laid down in this section, the other provisions set out above provide expressly for hearing the assessee, and in such cases the result may not be always favourable to the assessee. That being the scheme of the section, and the Act, it is not permissible to introduce notions of natural justice, and the Commissioner, has done no more or no less than the Act provides. So far as the case of Surajmall Mohta (A) (Supra) is concerned it dealt with a different section, namely, Section 34, and all that the learned Judges were deciding was as to whether the provisions of Section 34 were more or less onerous than the Act that was impugned before them. I do not think that the quotation made from the judgment of Mahajan, C. J., can be taken to mean that in every case under the Act we are to treat the actions of the Commissioner as that of a Court. Under Section 34, the entire assessment is re-opened and, therefore, in such a proceeding the assessee must necessarily be heard. I do not think that it throws any light on the question under investigation. Incidentally, it was argued that the appeal which had been filed by the assesses before the Appellate Assistant Commissioner had been dismissed ex parte on a flimsy ground. I am firmly convinced that nothing of the kind has been done. Nearly a year after the assessment order was made, an excuse was put forward that the assessee had not received informations and documents from its Mines. This excuse, the learned Appellate Assistant Commissioner refused to entertain, and I think that he was perfectly justified. On the 10th February, 1954, when the appeal was called on, nobody appeared on behalf of the assessee, a practice which has been condemned by the Judicial Committee. However the dismissal of this appeal is not directly in question before me. The only

point that arises for determination is as to whether the petitioner was entitled to a hearing under the provisions of Section 33-A (2) and whether the order made without hearing him is illegal and should be set aside. A point has been taken that there is an infringement of Article 14. But I fail to see how such an infringement can be established. The Income-tax Act itself gives alternative remedies and lays down alternative procedures. It is the option of the assessee to take advantage of one remedy or another. After having availed himself of the advantage, it is scarcely open to him to turn round and speak of discrimination.

6. For the reasons aforesaid, I am of the opinion that no ground has been made out for my interference and that this application must be dismissed. The Rule is discharged. Interim orders, if any, are vacated. There will, however, be no order as to costs. The operation of the order is stayed for a fortnight.

Cases Referred.

1(1880) 5 AC 214 (C)