CALCUTTA HIGH COURT

Sushil Chandra Ghose

Vs.

Income-tax Officer

Matter Nos. 79, 80 and 190 of 1956

(Sinha, J.)

29.07.1957

ORDER

Sinha, J.

1. These are three applications arising from a common set of facts. There are also two contempt applications arising therefrom. They have been heard together and it will be convenient to dispose of all the five applications by one judgment.

2. The facts in these cases are briefly as follows :

The petitioner's assessment for the year 1945-46 was completed on 18th August, 1945. With regard to the assessment which had been made, he has paid the amount which I am told is Rs. 10,107-7-0. Under Section 2 (11) of the Income-tax Act (hereinafter called the 'Act'), the words 'previous year" have been defined. The relevant part of the definition is as follows: "(11). 'previous year' means

> (i) in respect of any separate source of income, profits and gains,
> (a) the twelve months ending on 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of an order ending on any date other than the said 31st day of March, then, at the option of the assessee, the year ending on the date to which his accounts have been made up."

3. In respect of the assessment concluded as aforesaid, the petitioner had exercised his option and declared his accounting year as beginning from 1st May of every year and ending on 30th April next year. According to this, the assessment year 1945-46 would correspond to the accounting year of the assessee from May 1, 1943 to April 30, 1944.'

4. The petitioner was a director and shareholder of the Amalgamated Jambad Syndicate Ltd. On 28th February, 1945 it was resolved that a sum of Rs. 60,395/- was available in the shape of pre-incorporation assets purchased by the company, against which there was no liability. This amount

was distributed among the shareholders including the petitioner, at the rate of Rs. 230/- per share. According to the petitioner, this is neither dividend nor income but capital assets and he did not disclose it in his income-tax return. On or about 12th March, 1954 Mr. S. N. Sen, the then Income-tax Officer, recommended to the Commissioner of Income-tax that proceedings should be started against the petitioner under Section 34 of the Income-tax Act, because the above income had escaped assessment and was not disclosed by the assessee. The Income-tax Commissioner granted permission. On or about 24th March, 1954 notice was issued under Section 34 upon the petitioner, stating that he had been under-assessed for the year ending 31st March, 1946 and directing him to file a return of total income for the year ending 31st March, 1946. The petitioner thereupon filed a return but contended that the amount above mentioned was not income or dividend and was not liable to payment of income-tax. On 31st January. 1955 the said Mr. S. N. Sen made an assessment order whereby the total income of the petitioner was reassessed at a sum of Rs. 70.818/-. A. copy of the assessment order is Annexure 'E' to the petition (in Matter No. 79) and it will be necessary to refer to it for the purposes of deciding one of the issues raised in this application. On 15th of February, 1956 a notice of demand was issued under Section 29 of the Act, for the sum of Rs. 11,274-7-0. The petitioner applied before the Income-tax Officer for stay, or to be more accurate, tor not being treated as a defaulter, pending the appeal which he preferred shortly afterwards. This application was rejected, it is said that thereafter he made another application before the Inspecting Assistant Commissioner of Income-tax, Range IV, Calcutta for stay and this was also refused. On or about 17th of April, 1956 the Income-tax Officer issued notices under Section 46 (5-A) of the Act, demanding Rs. 20,608-6-0 from three alleged debtors of the assessee. On or about 10th of May, 1956 this Rule was issued but was confined to three grounds as set out in paragraph 18 of the petition, in sub-paragraphs (b), (d) and (e). I shall now deal with ground (b). A reference to Annexure 'E' to the petition (in Matter No. 79) will show that in the assessment order the accounting period has been shown as blank. There are several contradictory statements regarding the reason for keeping it blank, one being that the Income-tax Officer by mistake kept it blank and instead of stating the accounting period, he wrote the words "R. and O. R". It is pointed out on behalf of the petitioner, however, that in the certified copy as supplied, this does not appear at all. Be that as it may, it is now evident that in the assessment order, the accounting period is the year ending 31-3-45 for the alleged income from the Amalgamated Jambad Syndicate and year ending 30-4-44 for other income. I have already stated that the amount of Rs. 17,675/- which was received by the petitioner was received on or about 28th of February, 1945. If the accounting year is calculated according to the special accounting year as declared by the assessee, then this item will not come within the scope of the assessment for the year 1945-46. On the other hand, if if is calculated according to the ordinary financial year, then in that case it has been rightly included. What has been argued on behalf of the petitioner is as follows: It is conceded that so far as the return for the relevant year is concerned, no mention whatever has been made about any income having been derived from the Amalgamated Jambad Syndicate Ltd. One of the sources of income mentioned in the return was "other sources". Since the petitioner had declared that his year of calculation was 1st of May in the year to 30th of April of the following year, it is argued that this item (viz. income from A. J. Syndicate Ltd.), although undisclosed, would fall within the head of income, namely, "other sources" and, therefore, Section 2 (11) would apply to it and the year of assessment would not be the financial year but the year declared by the assessee. It is extremely difficult to see how this can be so. The words used in Section 2 (11) are "separate source" of income. With regard to a separate source of income, the assessee has to declare an option and until he declares the option, the ordinary financial year is applicable. I cannot conceive how an

assessee can be said to have exercised his option in respect of an income which has been wholly undisclosed and not only undisclosed but which is not even referred to in any manner whatsoever in his return. Reference has been made by Mr. Chatterjee to *Commissioner of Income Tax Bombay Presidency and Aden v. Chunilal B. Mehta*[1], where it has been held that heads of income as described in Section 6 of the Act, may be taken to be the same as the sources mentioned in Section 4. In other words, heads may be taken to be sources. Even granting that, I do not think that the problem is solved. In Section 2 (11), the word used is not "source" but the words are "separate sources". It is quite possible to conceive of heads of income being sources, but there is no reason to think that the word "separate" in Section 2 (11) is a mere surplusage. Reference has been made to two cases; In *Commissioner of Income Tax, B. and O. v. Meghu Sao Jhandhu Sao*[2], the assessee had two businesses and he declared his option under Section 2 (11) in respect of these two businesses and it was found later on that there was an undisclosed source of income, which however was to be attributed to one or the other of these businesses, the question arose as to what would be the year of assessment. It was held that inasmuch as the undisclosed income was to be attributed to one or the other business in respect of which an option had already been declared, it could not be said that the undisclosed item was to be considered in any other manner. In a later case, *Commissioner of Income Tax, B. and O. v. P. Darolia and Sons*[3], it was held that where the undisclosed income could not be traced to any particular source, it could not be said that in respect of such an income the assessee had exercised his option under Section 2 (11) and therefore, the Authorities were bound to assess it according to the ordinary financial year. In my opinion, the undisclosed source in this case, cannot be said to belong to any definite source of income in respect of which the petitioner had exercised his option. On the other hand, it is a source which has now been fixed and is not wholly untraced. In my opinion, therefore, the only possible way in which it could have been assessed was to assess it according to the ordinary financial year and that the calculation made by the Income-tax Officer is perfectly correct. With regard to ground (d) it is first of all said that the assessment has been reopened under Section 34 (1) (b) and therefore the time bar was four years. It is quite plain to me that the assessment was reopened under Section 34 (1) (a) and therefore the time bar is 8 years. In this case, the notice under Section 34 was issued on 24th March, 1954 and the assessment order was made on 31st January, 1955. Reliance is placed on the provision of Section 34 (3) which runs as follows :

> "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 sub-section (1) has been issued within the time therein limited, the assessment or reassessment order made in pursuance of such notice may be made before the expiry of one year from the date of service of the notice even if such period exceeds the period of eight years or four years, as the case may be." It will be observed that in the first part oil Section 34 (3) there is reference to the order of assessment, whereas in the proviso, the words used are

[1]65 Ind App 332

[2]1955-27 ITR 371 : AIR 1955 Pat 400

[3]1955-27 ITR 515: AIR 1955 Pat 478

> "assessment " or "reassessment". In this particular case, the matter falling under Section

34 (1) (a), the bar is of eight years from the assessment order and then there is a grace of one year. So far as the order of reassessment is concerned, that is well within the time of grace, but the notice of demand under Section 29 has been served on a date which is outside the limit. What is argued is that the words in the proviso being "assessment" or "reassessment", it will not do merely to make an order of assessment within the time bar and the year of grace, but that even the notice of demand must be made within that time. Reference is made to a Privy Council decision 65 Ind App 332 at p. 347: (AIR 1938 PC 232 at p. 235), to the effect that the word "assessment" includes the notice of demand. In my view, plausible as this argument seems, there is little substance in it. As is well known, the term "assessment" has been used in the Income-tax Act in various senses. From one point of view, an assessment may culminate in the order of assessment, whereas from another point of view and for another purpose, it will culminate in the notice of demand and under a set of different circumstances it may mean something more. In this particular case, the words "assessment" or "reassessment" appear in a proviso. The main provision deals with the order of assessment. It is impossible to hold that the proviso should ignore the main provision and in a sense even curtail its effect. In my view, the words "assessment" or "reassessment" in the proviso, mean no more than an order of assessment or reassessment. I am fortified in this view by a decision of the Bombay High Court in *Commissioner of Income-tax, Bombay South v. G. V. Ghurey,*[4] at p. 687 (Rom) (D). Chagla C.J. says as follows:

"... even so, as already pointed out, the question of the application of the proviso only arises when an assessment order is made. Before a valid assessment order can be made, the initial and preliminary stage is to consider the validity of the notice. As the notice itself is invalid, nothing further survives for consideration. It is only when the notice is validly served that, in order to decide whether an assessment order is valid, we have to consider whether the assessment order was made within the period of one year from the date of the service and whether the notice was issued within the time mentioned in sub-section (1)."

5. It is true that in the Bombay case, the particular point we are considering was not raised or discussed. But it is to be noted that the learned Chief Justice was reading the words "assessment" or "reassessment" as the same as an assessment order. In my view, therefore, the assessment is not barred as contended.

6. The next point taken is that the Income-tax Officer had not determined the sum payable within the meaning of Section 23 (3) of the Act and therefore the notice under Section 29 of the Act is ultra vires, without jurisdiction and null and void. This point has really arisen out of a misapprehension of the documents concerned. As will appear from Annexure 'E' (to the petition in Matter No. 79) the main assessment order has been signed by Mr. S. N. Sen, the Income-tax Officer, District V, Calcutta, but the annexure thereof, which contains the computations has not been signed. It is stated, therefore, that the Income-tax Officer had not made the computations and did not bring his mind to bear upon it and consequently the assessment is not his assessment and not made according to law. Firstly, the very premises are wrong. The Income-tax Act and the

Rules require that the
[4]1957-31 ITR 683
assessment order together with the computation in a particular form be served upon the assessee. In this form, in which it is served on the assessee, the computation has not to be signed. But the original computation, which is in the form known as I. T. 30 requires the signature of the Income-tax Officer and in this case it was duly signed. The petitioner, therefore, has been moving under a misconception, thinking that the assessment order as served upon him contains a true copy of the original computation. Why there should be this discrepancy in these two forms is more than I can say. But I am satisfied that the assessment order has been made in accordance with law. These are the three points taken in this case or allowed to be taken and they all fail.

7. I then come to the next case, namely, Matter No. 80 of 1956. This case also is based upon the same facts and the Rule granted is a limited Rule. It is confined to grounds set out in paragraph 24 (c) and (d). With regard to (c) the point has already been decided above. It is stated that the assessment form has not been signed in accordance with law. As I have pointed out above, this point is based upon a misunderstanding of the facts and that there has been a due compliance with the law. The second point is that after the demand notice had been served the petitioner paid the sum of Rs. 3,000/- and yet when notice had been issued under Section 46 (5-A) there was no fresh notice served for the balance, under Section 29. In my opinion there is nothing in this point. I have nowhere found, nor has any authority been placed before me to the effect that demand notices are to be progressively served if the assessee goes on paying sums in part payment. Incidentally, in respect of Section 46 (5-A) I might also mention a point that was urged, although the Rule had not been issued on this point, namely, that it was not open to the authorities to lump up two demands and give a notice under Section 46 (5-A). In this particular case the demand is against the same assessee for two assessment years and I cannot see anything in the Income-tax Act which precludes the giving of any such compound notice under Section 46 (5-A).

8. The third application, namely, Matter No. 190 of 1956 deals with a purported amendment of the assessment order that was made by the Income-tax Officer, after the issue of the original Rule under Section 35 of the Income-tax Act. As I have pointed out above, the assessment order was kept blank and it is stated that thereafter the Income-tax Officer who succeeded Mr. Sen has made the necessary corrections. It is urged that under Section 35 of the Income-tax Act, it is only the original assessing officer who could make the alteration or amendment. I do not find anything in Section 35 to that effect. In my opinion, the Income-tax Officer who takes up a particular assessment has the power of making the amendment, provided of course it is made in accordance with the provisions of Section 35, that is to say, when the mistake is apparent from the record. In my opinion, the amendment is not against the law. I must however mention here that since the Rule had been issued, the Income-tax Officer might have done well not to have made any such amendment, pending the disposal of this application. However, it has not affected the merits of the question inasmuch as the actual assessment was made on the proper footing. That leaves only the two other applications which had been made for committing the respondents for contempt. I do not see anything which justified these applications, which appear to be misconceived. The respondents are not guilty of any contumacious conduct.

9. Lastly, Mr. Chatterjee has raised the question of stay. He argues that in these Rules he was unable to agitate the merits of his client's case because the same was pending in an appeal and that it was only just that the Income-tax Officer should have stayed his hand pending the disposal

of the appeal. To start with, under Section 45 of the Income-tax Act, the first application has to be made before the Income-tax Officer, praying that the assessee should not be treated as a defaulter, pending the appeal. It appears from the pleadings that the petitioner did so. Thereafter a very curious procedure was adopted. It is stated that the next application was made to the inspecting Assistant Commissioner, because according to Mr. Chatterjee, he had concurrent jurisdiction under Section 5 (5) of the Income-tax Act. It seems to me strange how the petitioner could go to the Inspecting Assistant Commissioner of Income-tax when he has no more than concurrent jurisdiction and an application for stay had already been rejected by the Income-tax Officer. So far as the order of the Income-tax Officer is concerned, rejecting the stay, there is no prayer before me for quashing or setting aside that order. The position seems to be as follows : In the case of *Ladhuram Tapadia v. B.K. Bagchi*[5], Bose J. had held that when an appeal had been preferred there was a duty on the part of the authorities to abstain from enforcing payment of the tax under the notice of demand and to grant extension of time and to stay their hands till the appeal was disposed of by the appellate authority. This was however dissented from in a Divisional Bench judgment *Kashiram Agarwalla v. Collector* of 24 Parganas, an unreported judgment dated 26th May, 1955. This Bench, presided over by K. C. Das Gupta J. differed with the judgment of Bose J. and held that the holding of their hands by the authorities was entirely a matter of discretion and there was no principle by which the proceedings were to be compulsorily stayed upon the filing of an appeal. But, on the other hand, if the discretion was not exercised properly, an application for a high prerogative writ will lie. Thus, if the discretion was not properly exercised by the Income-tax Officer the petitioner ought to have asked for the order to be quashed. But there is no such prayer and the respondents have not been called upon to answer any such issue. Consequently, I do not think that I can make an order for stay. This however will not debar the petitioner from making such application as he may be advised to make in this behalf, in future, on proper materials.

10. The result is that in my view all of these applications fail and the Rules must be discharged and the two applications dismissed. The petitioner will pay the costs of the respondents with regard to the two applications for contempt. With regard to the three Rules, there will be no order as to costs.

11. Certified for counsel.

Rules discharged.

[5]1951-20 ITR 51 Cal