CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Assam Oil Company Ltd

(P.B. Mukharji, C.J. T Basu, J.)

03.02.1970

JUDGMENT

P.B. Mukharji, Actg. C.J.

1. This is an application by the Commissioner of Income-tax under Section 66(3) of the Income-tax Act, 1922, asking for a rule to show cause why the Income-tax Appellate Tribunal, Calcutta, should not be required to treat the reference application as made within the time allowed under Section 66(1) of the Income-tax Act, 1922, after condoning the delay of one day in filing the same on 24th December, 1968.

2. The facts giving rise to this application may be briefly stated at the outset. The respondent is the Assam Oil Co. Ltd., Digboi, Assam. For the assessment year in question, the royalties were paid to the Assam Railways to the extent of Rs. 8,54,503 under the lease which was allowed by the Income-tax Officer by his order dated 22nd January, 1963, as revenue expenditure. The Commissioner of Income-tax (Central), being aggrieved, issued a notice to the assessee-company on 14th December, 1964, proposing to take action under Section 33B of the said Income-tax Act. Thereafter, by his order dated 20th January, 1965, the Commissioner, inter alia, held that the royalty of Rs. 8,54,503 debited to the profit and loss account for the year ending 31st December, 1960, and allowed in the assessment year in question by the Income-tax Officer was of a capital nature and ought not to have been allowed by the said officer. Against that order, the assessee preferred an appeal to the Tribunal. The Tribunal by its order dated 14th October, 1968, set aside that order of the Commissioner of Income-tax and allowed the appeal of the respondent-assessee. Therefore, the Commissioner of Income-tax filed a reference application on 24th December, 1968, on the following question of law and in that application the date of service of the relevant order of the Tribunal under Section 33(4) of the Income-tax Act was shown as 26th October, 1968 :

> " Whether, on the facts and the circumstances of the case and on a proper construction of the deed of lease dated September 6, 1943, the Tribunal was right in holding that the sum of Rs. 8,54,503 paid by the assessee was allowable as a revenue expenditure ? "

3. The trouble, so far as this application is concerned, started from time to time.
4. After the filing of that application it was discovered and detected in the office of the Commissioner of Income-tax that the date of receipt shown as 26th October, 1968, in the reference application was not correct and that the correct date should be 24th October, 1968. After counting the period of limitation from that date, viz., 24th October, 1968, it was found that the reference application aforesaid filed on 24th December, 1968, was barred by one day only under the special law of limitation under Section 66(3) of the Income-tax Act, providing the time " two months from the date on which he is served with notice of the rejection." On 22nd April, 1969, the Tribunal made the following order rejecting the Commissioner's application :

> "The relevant order of the Tribunal under Section 33(4) for the assessment year 1961-62 was served on the Commissioner of Income-tax (Central), Calcutta, on October 24, 1968. The date given in the reference application as if the order was served on him on October 26, 1968, is not correct. Computed from the date of actual service, viz., October 24, 1968, this reference application which has been filed on December 24, 1968, is out of time by a day. There is no power under the 1922 Act enabling the Tribunal to condone the delay in the filing of reference application. The application is rejected as time-barred."

5. It is against this order of the Tribunal that the Commissioner of Income-tax has come up under Section 66(3) of the Income-tax Act which reads as follows:

> " If on any application being made under Sub-section (1) the Appellate Tribunal rejects it on the ground that it is time-barred, the assessee or the Commissioner, as the ease may be, may within two months from the date on which he is served with notice of the rejection apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Appellate Tribunal's decision, may require the Appellate Tribunal to treat the application as made within the time allowed under Sub-section (1)."

6. Appearing in support of this application, Mr. B.L. Pal, for the Commissioner, submits that the Income-tax Tribunal should have applied Section 5 of the Limitation Act and condoned the delay of only one day. The ground put forward for such condonation by itself is reasonable enough. That ground is that the Income-tax Office was being shifted from No. 4, Hastings Street, Calcutta, to No. 18, Rabindra Sarani, Calcutta, with all records, files and bundles, during the relevant period of time, and that is how the mistake occurred. In fact, by an affidavit of the Income-tax Officer it is stated:

> " The clerk concerned who took delivery of the abovementioned order of the Tribunal placed it before me on October 26, 1968, and I duly put up my dated initials on the order."

7. Normally, one day's delay in such circumstances certainly would be condoned.
8. But the difficulty here is not on the reasonableness and the merits of the application but on grounds of law which raise the question that the Tribunal has no legal power to condone delay in the time fixed by the statute.
9. The main argument of the learned counsel for the Commissioner may be briefly summarized as follows :

10. Admittedly, the new Limitation Act, 1963, applies in this case, if at all. It is the provisions of

the new and not the old Act which are relevant for deciding the present application. Mr. Pal first relies on Section 29(2) of the Limitation Act, 1963, which reads as follows:

> " Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

11. Mr. Pal for the Commissioner then takes the help of Section 5 of the Limitation Act, 1963, because that is expressly made applicable by Section 29(2) of the Act quoted above. Section 5 of the Limitation Act, 1963, provides as follows:

> " Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

12. Reading Section 29(2) with Section 5 of the Limitation Act, 1963, Mr. Pal for the Commissioner submits that this reference application comes within the operation of Section 5 of the Limitation Act. His next submission is that the extended definition of the word "application" as including a petition in Section 2(B) of the Limitation Act, 1963, helps to include this present application before the Tribunal for the condonation of the delay in filing it within the time prescribed by Section 66(3) of the Income-tax Act, 1922. In support of this argument, Mr. Pal for the Commissioner has mainly relied on a recent decision of the Bombay High Court in *Vasanji Ghela v. State of Maharashtra*[1], There a Division Bench of the Bombay High Court expressed the view that where any special law prescribed for any application a period of limitation, Sections 4 to 21 of the Indian Limitation Act, 1963, should apply to the extent to which they were not expressly excluded by such special law and that the provisions in Section 5 of the Limitation Act, 1963, were applicable to an application for reference made under Section 23 of the Bombay Sales Tax Act, 1946. There also the Tribunal came to the view that there was no power in the Tribunal to condone the delay under the Bombay Act. The Division Bench of the Bombay High Court set aside that order of the Tribunal. Be it noted here that the Bombay case was not a proceeding for reference under the taxing statute but an application under articles 226 and 227 of the Constitution of India. The learned judges of the Bombay High Court in that case did not adduce independent reasons for coming to that conclusion but support ed their conclusion by relying on two decisions, one of the Supreme Court, Vidya Charan Shukla v. Khubchand Baghel, and a Division Bench decision of this Court, Imperal Bucket Co. v. Smt. Bhagwati Basak, . These authorities are clearly distinguishable from the present case. The two decisions, one of the Supreme Court and the other of this court, on which the Bombay High Court relied, did not relate to Section 5 of the Limitation Act at all but Section 12 of the Limitation Act, which, in our view, is a distinction of vital importance for the decision in this case. We shall indicate that importance presently.

13. Section 5 of the Limitation Act uses the significant word " the court ". The Supreme Court

decision and the Calcutta High Court decision had no occasion to discuss the expression "the court" of Section 5 of the Limitation Act, but were only dealing within Section 12 of the Limitation Act which did not and does not use the word "the court". The point of significance is who and what authority have the power to condone delay or breach of limitation under Section 5 of the Limitation Act, 1963. The language of Section 5 of the Limitation Act, 1963, which we have quoted above, does not leave any doubt that the applicant has to satisfy " the court " that he has sufficient cause and it is the "court" which can after such satisfaction admit an application even after the prescribed period of limitation. On the terms and the words of Section 5 of the Limitation Act, it is plain that the Income-tax Tribunal is not the court intended within the meaning of Section 5 of the Limitation Act, 1963, nor even many other administrative officers who are clothed with quasi-judicial powers.

14. This view is further reinforced by an examination and analysis of the scheme of the Income-tax Act itself and the various provisions in its different sections. This may be illustrated by reference to Sections 30, 33A(2) and 66(7A) of the Income-tax Act, 1922. A glance at these sections will show at once that wherever the Income-tax Act intended to grant the power of condoning breach of the prescribed period of time, it expressly has said so. Section 30(2) gives expressly the power to the Appellate Assistant Commissioner to admit an appeal after the expiration of the period if he is satisfied that the appellant has sufficient cause for not presenting it within the period. Such a provision would not have been necessary if Section 5 read with Section 29(2) of the Limitation Act, 1963, operated. Then again Section 33(2A) of the Income-tax Act, 1922, expressly lays down that the Tribunal may admit an appeal even after the expiry of 60 days mentioned in sub-sections, (1) and (2) of Section 33 if it is satisfied that there was Sufficient cause for not presenting it within that period. This express provision would not have been necessary if the Tribunal as a court would otherwise have the power to condone under Section 5 of the Limitation Act. It may be emphasised here that these provisions were inserted by specific amendments of the Income-tax Act in specific cases and did not give a general power of condonation of delay which is available to the courts under Section 5 of the Limitation Act. Finally, Section 33A(2) of the Income-tax Act, 1922, gives the Commissioner power to condone delay for sufficient cause in making the application within the prescribed period thereunder. There is, therefore, sufficient internal evidence within the Income-tax Act itself as illustrated by its different sections that the Tribunal as such has no general power to condone delay as available to courts under Section 5 of the Limitation Act. The language of Section 66(7A) of the Income-tax Act, 1922, which was again introduced by an amending Act in 1939 made the provision expressly stating that Section 5 of the Limitation Act applied to an application to the High Court by an assessee under Section 66(2) or Section 66(3). The expression " to an application to the High Court by an assessee" is significant to show that Section 5 of the Limitation Act was made applicable to the High Court and not to the Tribunal which therefore remained excluded from the operation of Section 5 of the Limitation Act. This analysis of the Indian Income-tax Act, 1922, confirms the view that there is no power in the Tribunal to condone breach of the time prescribed under the Act.

15. It is possible that there was a lacuna in this respect and that view is supported by the fact that under the recent Income-tax Act, 1961, special provision has been introduced by the proviso to Section 256(2) saying " provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding 30 days". This is a recognition by the recent statute of the lacuna in the previous Act on this point and the

need for making provision to meet it. Reference may also be made to such other provisions like Section 249(3) of the Income-tax Act, 1961, expressly giving the power to the Appellate Assistant Commissioner to admit an appeal after the expiration of the period if he is satisfied that there was sufficient cause and Section 253(5) giving expressly the power to the Appellate Tribunal to admit an appeal or permit filing of cross-objections even after the expiry of the relevant period provided it is satisfied that there was sufficient cause.

16. Dr. Pal appearing for the assessee drew our attention to the decision of the Supreme Court in Anglo-American Direct Tea Trading Co. Ltd. v. Their Workmen, where the Supreme Court made a distinction between the Tribunal and the courts and observed at page 875 :

> "A domestic tribunal appointed in departmental proceedings for instance, or instituted by an industrial employer cannot claim to be a tribunal under Article 136(1) of the Constitution. Purely administrative tribunals are also outside the scope of the said article. The tribunals which are contemplated by Article 136(1) are clothed with some of the powers of the courts."

17. No doubt, this was a question which arose on Article 136 of the Constitution and no doubt it was a point under the Industrial Disputes Act, but the principle that is emphasised is the distinction between a court and a tribunal and the concept of a court as distinguished from the concept of a tribunal although there may be many common judicial and quasi-judicial features between the two. A Division Bench of this court, to which I was a party, dealing with an income-tax reference, also came to the view that the tribunal was not a regular or a full-fledged court and is to be distinguished from an ordinary court, in the Income-tax Reference No. 44 of 1967 (Commissioner of Income-tax v. A.K. Das, the judgment (unreported as yet) was delivered in August, 1969.

18. Dr. Pal has also supported his argument by reference to a number of decisions to which we shall make a brief reference. In Hazi Mahboob Bux Ekhan Illahi v. Commissioner of Income-tax, [1950] 18 I.T.R. 72 (All.) a Division Bench of the Allahabad High Court came to the view that under Section 66(3) of the Income-tax Act, an application can only be entertained when the Appellate Tribunal had wrongly decided that the application under Section 66(1) is time-barred while, as a matter of fact, the application was within time. It made it clear that the High Court had not been given any power under Section 8 to consider whether there was sufficient cause for delay, nor has the court any power similar to the power under Section 5 of the Limitation Act to condone the delay. The language of Section 66(3) of the Income-tax Act, 1922, in using the expression " and the High Court is not satisfied of the correctness of the Appellate Tribunal's decision ", appears to indicate without doubt that when the Appellate Tribunal's decision is not correct, it is only then that the High Court's jurisdiction under Section 66(3) operates. Now, the decision of the Appellate Tribunal in the instant case before us is correct in so far as it held that it was barred by time. That is the view which the Allahabad High Court took in the case just mentioned. No doubt, the power to condone delay may be argued to be a part of the submission that the decision is incorrect in so far as the Tribunal did not exercise, if it had the power to condone the delay (sic). The next case on which Dr. Pal relied is *Bansilal Gidabchand v. Commissioner of Income-tax*[2], This is also a direct authority of the Bombay High Court Division Bench that the High Court has no power to excuse the delay under Section 66(3) of the Income-tax Act. In fact, there the learned Chief Justice suggested that the legislature should suitably

amend the Act in the near future to remove this lacuna in the Act. The next case on which reliance was placed for the assessee is *Hiranand Ramsukh v. State of Hyderabad*[3], There the Hyderabad High Court came to the view that the Tribunal had no power to condone any delay in the presentation of an application under Section 66(1) of the Income-tax Act, and, when the assessee applied to the High Court under Section 66(3), it was. impossible for the High Court to say that in dismissing the application the Tribunal acted otherwise than correctly. In fact, the Hyderabad High Court also came to the view that the High Court was given no power to consider whether there was any sufficient cause for the delay, nor has it any power similar to the power under Section 5 of the Limitation' Act to condone such delay. The observations of Jaganmohan Reddy J., at page 611, may be seen. Finally, reference for the assessee was made to the case of *Shanta Bai Devarao v. Commissioner of Income-tax*[4], holding the same view and the observations of Hegde J., at page 277 of that report, may be seen.

19. We should like to conclude our review of the case law on the point by making a reference to the Supreme Court decision in Commissioner of Income-tax v. National Finance Ltd., where Hidayatullah J. (as he then was) observed, at page 791, as follows:

> " By a mischance, which is easy to appreciate, the date stamp of the receipt of the papers was affixed on the 16th, and bore that date instead of the real date, viz., the 15th, on which the papers had actually been received. Relying upon the date stamp, everybody took it for granted that limitation would expire on the 60th day, counting time from July 16, 1957. The application was filed on the last day of limitation on that supposition. Actually, the application was barred by a day. The Income-tax Tribunal, therefore, dismissed the application on December 4, 1957. The decision of the Tribunal was unsuccessfully challenged before the High Court. It is evident that the decision of the Tribunal was quite correct and the Tribunal had no option but to dismiss the application, since the law gives no jurisdiction to the Tribunal to extend limitation, as is done under Section 5 of the Indian Limitation Act."

20. Even this was not sufficient to deter the boldness of Mr. Pal for the Commissioner to suggest a point of distinction from the present case by the submission that the said decision related to a matter of 1957 before the new Limitation Act, 1963, came into force. That distinction is not relevant for the present case because the new and the old Limitation Acts on this point of the expression " the court " make no difference.

21. In that view of the matter, it is not necessary to discuss the Bombay case in Purshottamdas H. Sabnai v. Impex (India) Ltd., to which reference was made by Dr. Pal.

22. For these reasons, this application must fail. The rule is discharged with costs.

T.K. Basu, J.

23. I agree.

Cases Referred.

1[1967] 69 Bom. L.R. 598
2[1948] 16 I.T.R. 251 (Bom.)
3[1954] 26 I.T.R. 608 (Hyd.)
4[1962] 46 I.T.R. 272 (Mys.)