

# **BOMBAY HIGH COURT**

Commissioner of Income-tax

Vs.

Ellis C. Reid

(Beaumont, C.J.)

03.10.1930

## **JUDGMENT**

### **Beaumont, C.J.**

1. This is a reference Under Section 66(1), Income Tax Act, in which the Commissioner asks two questions, first, the assessee having failed to make a return of income Under Section 22(2) of the Act, was it legal for the senior. Income Tax Officer to make an assessment Under Section 23(4) of the Act after the assessee's death, and, secondly, in case the above assessment was legal, could the demand notice Under Section 29 of the Act in, respect of the assessment made be served on the administrator of the estate of the deceased and the tax recovered from the estate by coercive process Under Section 46 of the Act?

2. The facts are not in dispute, and can be stated quite shortly. On 13th April 1928, a notice was issued Under Section 22(2) of the Act requiring Sir Henry Proctor to make a return for Income Tax. Sir Henry was in England and the notice reached him on 25th May 1928, and he had 30 days from that date in which to comply with the notice. On 11th July, i.e., after the expiration of, the 30 days, he died. Mr. Reid was subsequently given a power of attorney in India by the executors or administrators of the estate, and on 27th November, Mr. Reid, under his power of attorney, made a return for Income Tax. On 28th December letters of administration in India were taken out by Mr. Reid. On 5th January 1929, the Income Tax Officer made an assessment on Mr. Reid as administrator. The officer then had some correspondence and an interview with Messrs. Little and Company, who were acting as solicitors for the estate, and as a result of that correspondence and the interview, the Income Tax Officer annulled his original assessment Under Section 23(1) of the Act and proceeded to make an assessment on the deceased Under Section 23(4). From that order there was an appeal to the Assistant Commissioner and the appeal was dismissed. The matter then came before the Income Tax Commissioner who took the view that the proceedings had been somewhat irregular. He pointed out that there was no appeal from an assessment Under Section 23(4) and therefore the proceedings before the Assistant Commissioner were irregular; he also took the view that the Income Tax Officer could not vary

his own order and was bound by his first assessment which was made on the estate, and the Income Tax Commissioner thereupon, under the powers conferred upon him by Section 33 of the Act, quashed the appellate proceedings and the second order made by the Income Tax Officer and varied the first order by treating it as an assessment Under Section 23(4). So that the position is that the deceased, and not in terms his administrator, has been assessed Under Section 23(4) and the question is whether the assessment is legal.

3. The question mainly turns, I think, on the construction of Sections 23 and 29, Income Tax Act, but one has to look at certain other provisions of the Act in order to understand those sections.

4. The first thing to notice is the definition of assessee" contained in Section 2(2) of the Act. That definition reads: "Assessee means a person by whom Income Tax is payable." It is clear that that definition in terms only applies to a living person, the words being" a person by whom Income Tax is payable" and not a person by whom or by whose estate Income Tax is payable."

5. Then Section 3 is the charging section and provides:

Where any act of the Indian legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals.

6. There appears to be nothing in that charging section to suggest that a man who has once become liable to tax can avoid payment by dying, and I must confess that I do not myself see any intelligible reason why when tax is once charged upon a subject in respect of a period during which he was alive and enjoying the benefits of the proceeds of taxation, he should escape liability by dying before the tax has been assessed or paid. But one has to look at the rest of the Act to see whether there are any appropriate provisions for collecting tax from the estate of a deceased person. I think there is nothing else material in the Act till one comes to Sections 22 and 23 which are the sections dealing with the procedure for assessment. Section 22(2) provides:

In the case of any person other than a company whose total income is, in the Income Tax Officer's opinion, of such an amount as to render such person liable to Income Tax, the Income Tax Officer shall serve a notice upon him requiring him to furnish, within such period, not being less than 30 days, as may be specified in the notice, a return in the prescribed form.

7. That is the section under which notice was served on Sir Henry Proctor. Then Sub-section (4) provides:

The Income Tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under Sub-section (2) a notice requiring him to produce, or cause to be produced, such accounts or documents as the Income Tax Officer may require.

8. Then comes Section 23 which is the section under which the assessment has to be made. The first subsection provides:

If the Income Tax Officer is satisfied that a return made Under Section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return.

9. Then Sub-section (2) enables the Income Tax Officer to require the person who has made the return to produce evidence in support of his figures. And Sub-section (3) provides for an assessment in a case falling within Sub-section (2), and enables the Income Tax Officer when he has accepted the figures of the assessee upon such evidence as may be produced to assess the total income of the assessee.

10. Then Sub-section (4) contains the provision under which, it is suggested, an assessment can be made in this case. That provides that, if the person who is liable for the tax fails to make a return Under Section 22(2), or fails to comply with a notice Under Section 22(4) to produce his accounts and documents, or fails to comply, with the terms of a notice Under Section 23(2) to produce further evidence, in all of which cases the person liable is in default, then the Income Tax Officer shall make the assessment to the best of his judgment.

11. Now it is to be noted that the words there are "shall make the assessment and not "shall make an assessment" and the use of the definite pronoun seems to me to refer back to Sub-sections (1) and (3), Section 23, that is to say, the assessment must be on the total income, of the assessee. Having regard to the definition of "assessee" as being a person who is liable to pay Income Tax, the word is not appropriate to a dead man, so that if an assessment is to be made on a dead man, as was done here, Under Section 23(4), some violence must be done to the language of the section.

12. Then the next material section is Section 27 which confers on the person upon whom an assessment is made Under Section 23(4), i.e., a person who is in default either in making his original return or in supplying the officer with the documents or evidence which he has required, the right to satisfy the Income Tax Officer that he had a reasonable cause for the default, and in that case the Income Tax Officer may make a fresh assessment.

13. Now that the section confers a very valuable privilege upon a person assessed Under Section 23(4), because that assessment is an ex parte assessment, from which there is no appeal: see Section 30. Sir Din shah Mulla points out that if a dead person can be assessed Under Section

23(4), it is difficult to see how his estate can get the benefit of Section 27 because the section in terms only deals with the person upon whom the assessment has been made.

14. Then you come to Section 29, which is a very material section under which payment can be demanded and it provides:

When the Income Tax Officer has determined a sum to be payable by an assessee Under Section 23, or when an order has been passed under Sub-section (2), Section 25 or Section 28 for the payment of a penalty, the Income Tax Officer shall, serve on the assessee a notice of demand in the prescribed form specifying the sum so payable.

15. Well, it is quite clear that in this case if the Government is right the word "assessee" as used in the first part of that section a sum to be payable by an assessee Under Section 23 " must be the deceased person Sir H. Proctor, and it is equally clear that the second use o f the word "assessee" in the sentence, "the Income Tax Officer shall serve on the assessee a notice of demand," must refer to the administrator or personal representative of the deceased person, so that one is compelled to give to the word "assessee" different meanings in different parts of the same section.

16. Then the only other section one has to notice is Section 45, which provides that any amount specified as payable in a notice of demand shall be paid within the time, and at the place mentioned in the notice; so that the demand for payment is limited by the notice.

17. These are, I think, the only material provisions, of the Act. It is to be noticed that there is throughout the Act no reference to the decease of a person on whom the tax has been originally charged, and it is very difficult to suppose the omission to have been unintentional. It must have been present to the mind of the legislature that whatever privileges the payment of Income Tax may confer, the privilege of immortality is not amongst them. Every person liable to pay tax must necessarily die and in practically every case, before the last installment has been collected, and the legislature has riot chosen to make any provisions expressly dealing with assessment of, or recovering payment from, the estate of a deceased person. In order that the Government may succeed and the assessment made in this case may be held legal I think, one must do a certain amount of violence to the language of Section 23(4); I think one must either do a certain amount of violence I should say a considerable amount of violence Mo the language of Section 27, or else hold that the privilege conferred on a living person assessed Under Section 23(4) of getting the assessment set aside is not to be enjoyed by the estate of a deceased person a distinction for which I can see no logical reason. One must also construe Section 29 so as to give to the word "assessee" one meaning in one place and another meaning in another place.

18. In my judgment, in construing a taxing Act the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper

machinery and not leave it to the Court to endeavor to extract the appropriate machinery out of the very unsuitable language of the statute. We are not concerned with the case which may arise of the death of a person after assessment but before payment.

19. In my judgment therefore the first question must be answered in the negative, and in that case the second question does not arise.

**Barlee, J.**

20. I agree with his Lordship the Chief Justice that the answer to the questions propounded by the Income tax Commissioner must be in the negative.

21. It is quite clear that the Act does not in express terms provide for the collection of Income Tax, due on the income of a deceased person, from his estate in the hands of his legal representatives. The word used in all the operative sections is "assessee," the person by whom the Income Tax is payable, and Section 3 shows that the assessee is the person who has earned the income. Section 23(1) speaks of the "total income of the assessee" and Sub-section (4) empowers the Income Tax Officer to make the assessment, i.e., an assessment on the total income of the assessee. Section 27 gives the assessee power to ask for a review of assessment in case it has been made ex parte Under Section 23(4) and Section 29 speaks of the sum payable by an assessee.

22. In fact it seems perfectly clear that the situation which has arisen in this case was not provided for by the legislature in express terms.

23. We are asked to hold, in fact, that when the legislature speaks of an assessee it impliedly meant an assessee or in the case of his death his legal representative. We have to find some principle by which this interpretation can be justified. The Commissioner relies on Section 23(4). His argument is that inasmuch as this subsection imposes a duty on the Income Tax Officer to make an assessment in the case of anyone who has failed within a specified time to furnish the statutory return, the Income Tax Officer was in this case justified in assessing the Income Tax on the income of the deceased. This argument, I think, runs in a circle. Assuming that it is his duty to prepare a document showing what Income Tax is recoverable on the basis of his enquiries, that "assessment" cannot have any legal effect unless it is one on the income of the assessee, who, under the strict interpretation of the act, is a living person. So even in cases Under Section 23(4) it has to be decided whether an assessee includes his legal representative. It must be remembered, too, that Section 23(4) has to be read with Section 27. In the present case it is possible that Sir Henry Proctor, had he lived, would have had a good excuse for not furnishing the return which he was required to make, and in that case he would have been entitled to ask the Income Tax Officer to review the assessment. The question then arises whether his legal representatives had or had not that right. In a word, if the word "assessee" is to be interpreted widely to include a

legal representative in Section 23(4), it must be interpreted in the same way throughout.

24. What we have to find is a rule which is applicable to all cases of this nature. It does not seem to make any difference whether the assessee dies on 1st January before he has been served with a notice or after he has been served with a notice and has failed to furnish a return. It is not likely that the legislature has impliedly authorized the determination of this question on the basis of the stage at which the proceedings have reached. All persons who lived till 1st October are in the same category. They are persons who have earned income in the previous 12 months and should be treated alike. Practically we have to decide whether we can read into the Income Tax Act by implication the rule which is expressed in the English Act and Section 146, Civil Procedure Code, that, where any proceedings may be taken or application made by or against any person, then the proceeding may be taken, or the application may be made by or against any person claiming under him, i.e., by his legal representative.

25. The best that can be said for the Crown is, as I have said, that of 1st April every subject is potentially liable to pay Income Tax on his income on the previous 12 months, or to show that his income is below taxable limits. The claim of the Crown is a money one against his estate and does not resemble damages in a personal action; and it may be argued that in equity there can be no reason why the well known rule of interpretation, which has been adopted, as I have said, in special Acts, should not be use on behalf of the Crown to enable them to recover what may be called just dues. There is a good deal to be said for this view but I do not think it can be adopted in this case. It is stated in Maxwell's Interpretation of Statutes that fiscal statutes must be interpreted strictly in favor of the subject, and I take that to mean that the treasury cannot tax without the express permission of the legislature. This being so, the Commissioner must fail in this case, since undoubtedly there is no express permission in the Act to recover the tax from the estate of the deceased. Further, the rules of this Act are not rules of procedure to be interpreted by civil Courts, but are more in the nature of rules for the guidance of fiscal officers land it seems to me that such rules are intended by the legislature to be interpreted according to their plain meaning and that they must not be stretched by judicial interpretation.

Per Curiam.

26. No order as to costs.

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