BOMBAY HIGH COURT

The Commissioner of Income-Tax

Vs

D.R. Naik

(John Beaumont, Kt., C.J. B Wadia, J.)

20.03.1939

JUDGMENT

John Beaumont, Kt., C.J.

1. This is a reference by the Commissioner of Income-tax under Section 66(2) of the Indian Income-tax Act, raising two questions :

(1) Whether on the facts of the case, the Income-tax Officer was entitled to take action under Section 34 of the Act with a view to re-assess the assessee to super-tax as an individual?

(2) Whether the assessee is entitled to a deduction of Rs. 7,200 from the total income on account of maintenance allowances paid under a decree of a High Court to certain female members of the Hindu family to which he belongs?The learned Commissioner answered the first question in the affirmative and the second in the negative,

2. So far as the first question is concerned, the facts are that the assessee was assessed for the year 1936-37 on July 1, 1936, the assessment being based on the income of the preceding year, which expired on March 31, 1936. Then, in February, 1937, there was a supplementary assessment, because it was found that the income of a house had been omitted from the original assessment, and the final assessment was at a sum of Rs. 1,67,260, which was duly paid. That assessment was based on the view that the assessee was the last surviving coparcener of a Hindu joint family, which still existed and was assessable as such. On September 27, 1937, the assessee was served with a notice under Section 34, alleging that he had been assessed at too low a rate for the purposes of super-tax, because in assessing the super-tax the assessee had been allowed a deduction of Rs. 75,000 as a member of a Hindu joint family, whereas as an individual he would only have been allowed a deduction of Rs. 30,000. The object, therefore, of the notice under Section 34 was to assess to super-tax the sum of Rs. 45,000. Section 34 provides, so far as material, that if for any reason income, profits or gains chargeable to income-tax has been assessed at too low a rate, the Income-tax Officer may, at any times within one year of the end of

that year, serve a notice and proceed to correct the mistake. Super-tax is chargeable under Section 55, and, by virtue of the provisions of Section 58, Section 34 is applicable to assessments to super-tax. The reason why the assessee was assessed as a member of a Hindu joint family, although he was the sole surviving coparcener, was because this Court had held that in such a case he was entitled to be so assessed, but subsequently, the Privy Council took a different view. So that the mistake, which resulted in the original assessment, was a mistake of law, for which the learned Commissioner of Income-tax had some justification. The words of Section 34 are very wide and say that " if for any reason the assessment is too low." I think those words are wide enough to cover such a mistake as existed in the present case, and I see no reason, therefore, why a fresh assessment should not be made under Section 34.

3. It is suggested by Sir Jamshedji Kanga for the assessee that the assessment to income-tax had become final and conclusive for the purposes of income-tax by payment of the tax and, therefore, under Section 56 it was also final and conclusive for the purposes of super-tax. But the fallacy of that argument lies in saying that the assessment had become final and conclusive for the purposes of income-tax, because the assessment might have been corrected under Section 34 in a proper case for the purposes of income-tax, and until the time limited for altering the assessment under Section 34 or Section 35 has expired, I think it cannot be said that the assessment has become final and conclusive.

4. It is also suggested that this is really a mistake, which ought to have been remedied under Section 35, but even if that be so, the fact, that a mistake might be remedied under Section 35, is no reason why the! assessment should not be altered under Section 34, if the case falls within that section. I see no reason for supposing that Sections 34 and 35 are mutually exclusive.

5. In my judgment, therefore, the learned Commissioner was right in answering the first question in the affirmative.

6. With regard to the second question, the whole of the income of the assessee is derived from immoveable property. But under a decree of this Court made on December 22, 1914, the income is subject to certain maintenance allowances in favour of widows, who are members of a joint family, and, in my opinion, those maintenance allowances are a charge on the property, because the decree of the Court declares that the immoveable property belongs to the residuary legatee subject to the abovementioned payments, that is, payments for maintenance. The learned Commissioner took the view that as the income is derived from immoveable property, the only deductions which can be allowed are those specified in Section 9, and he is of opinion, rightly, I think that charges of this sort do not fall within the language of Section 9. But, in my opinion, the answer to the learned Commissioner's view is to be found in the decision of the Privy Council in *Bejoy Singh Dudhuria v. Commissioner of Income-tax, Calcutta*[1] Their Lordships there were

dealing with a very similar case, in which the aseessee's income, derivable in part from immoveable property, was subject to charges in favour of a widow, and their Lordships held that although those charges could not be deducted under Section 9, the question really was whether the income of the assessee was the whole income of the immoveable property, or the income of the immoveable property less the deduction, and they held that the real income, which was liable to tax, was the income subject to the deductions in respect of the charges. I think that that reasoning applies in this case and that the assessee ought to have been assessed not to the full amount of the income derivable from the immoveable property, but to that income less the Rs. 7,200 payable for maintenance allowances.

7. In my opinion the second question also should be answered in the affirmative.

8. Both questions will be answered in the affirmative. No order as to costs on either side.

B.J. Wadia, J.

9. I agree.

Cases Referred.

1(1933) 35 Bom. L.R. 811 P.C