

BOMBAY HIGH COURT

Dayaldas Kushiram

Vs

Commissioner of Income Tax

(Beaumont, C.J.)

15.12.1939

JUDGMENT

Beaumont, C.J.

1. This is an application under Section 45 of the Specific Relief Act, 1877, asking the Court (a) to direct the Commissioner of Income-tax, Central, to forbear from exercising jurisdiction and passing orders in the assessment of the petitioner for the years 1937-38 and 1938-39 and (b) to direct the Income-tax Officer, Central, Section II, to forbear from exercising jurisdiction, passing orders and continuing assessment proceedings for the assessment of the petitioner for the years 1937-38, and 1938-39 and 1939-40. The relevant facts, which give rise to the application, can be stated shortly. In respect of the year 1937-38 the applicant who carries on business in Bombay, received a notice under section 22 of the Income-tax Act directing him to make a return to the Income-tax Officer appointed by the Commissioner of Income-tax for Bombay Presidency, Sind and Baluchistan, that is to say, the Local Commissioner of Income-tax, and in respect of that year an assessment was made. In the year 1938-39 the assessee received a notice to make a return, but no assessment has actually been made, nor has assessment been made, for the year 1939-40 to which the amended Income-tax Act applies. In respect of the year 1937-38 the assessee has been served with a notice under section 34 alleging that the certain income had escaped assessment. It is not, I think, necessary to deal with the vicissitudes affecting the proceeding before the 1st of April 1939, when the amended Income-tax Act came into operation. Under that Act, the relevant provisions of which I will refer to in a moment, a Commissioner of Income-tax, Central, was appointed, and the case of the assessee in respect of the three years in question was assigned to him by the Central Board of Revenue. That Commissioner, Mr. Bird, subsequently passed orders which are exhibited to his affidavit, the relevant exhibits being Exs. 8 to 12 inclusive. By the order of the 14th April 1939, Ex. 8, Mr. Bird ordered that six sections, styled Sections I to VI (Central), be created with headquarters at Bombay with effect from April 1st, 1939, and those Sections were to deal with the cases assigned to Mr. Bird under sub-section (2) of Section 5 of the Income-tax Act. Then by Ex. 9 Mr. Bird directed that the powers conferred on an Income-tax Officer under the said Act should with effect from April 1st, 1939, in respect of cases allotted to

Section II (Central), be exercised by Mr. V. T. Shah, Income-tax Officer. Then by Ex. 11 Mr. Bird assigned to the Officer, Section II, (Central), various cases, including the case of the present assessee. Then by Ex. 12, which is dated the 9th of June 1939, Mr. Bird passed an order under sub-section (5) of Section 5 of the amended Income-tax Act directing that each of the Officers appointed to Sections I to VI (Central), should perform their functions only in respect of the area consisting of the Bombay Presidency, Sind and Baluchistan. Now, the question is whether under those various orders the Officer of Section II (Central) is entitled to assess the applicant for the years 1937-38, 1938-39 and 1939-40. In respect of all years it is contended that the Income-tax Officer, Section 2 (Central), has no jurisdiction, having regard to the provisions of Section 64, sub-section (1), of the Income-tax Act. If that point is decided in favour of the assessee, further question, which arises in respect of the two earlier years, has no great relevance; that question being whether, in any case earlier assessment which started before the amending Act of 1939 came into operation can be transferred to the Commissioner (Central). In order to determine the questions which arise, one has to look at Section 5, read with Section 64, of the Income-tax Act. Now, under Section 5 as it existed prior to the 1st of April 1939, when the amending Act came into operation, it was provided that there should be the following classes of Income-tax authorities for the purposes of the Act, namely, (a) the Central Board of Revenue, (b) Commissioners of Income-tax, (c) Assistant Commissioners of Income-tax and (d) Income-tax Officers. Under sub-section (3) of Section 5 it was provided that the Central Government might appoint a Commissioner of Income-tax for any area specified in the order of appointment, and for the purposes of the present case it is to be noticed that a Commissioner has been appointed for the Presidency of Bombay, Sind and Baluchistan. Then under sub-section (4) it is provided that the Central Government may appoint for any area as many Assistant Commissioner of Income-tax and Income-tax Officers as it thinks fit. They shall perform their functions in respect of such persons or classes of persons and of such incomes or classes of income and in respect of such areas as the Commissioner of Income-tax may direct and, where two or more Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same area, in accordance with any orders which the Commissioner of Income-tax may make for the distribution and allocation of the work to be performed. So that the effect of those provisions appears to be that the Central Government appoints a Commissioner and Income-tax Officers (we are not concerned with Assistant Commissioner in this case) and the Central Government appoints them for any area it may think fit. Then the Commissioner can specify the functions to be performed by any Income-tax Officer in respect of certain incomes or classes of incomes and in respect of such areas as he may direct, and "area" there would seem normally to be a different area to the area referred to in sub-section (3) relating to the appointment of a Commissioner. Normally the Commissioner would be appointment for a large area, a Province, or possibly two or more Provinces, and the Income-tax Officer would be appointed by the Commissioner to act in sub-areas, although no doubt it would be legal for the Commissioner to appoint an Income-tax Officer for the whole area over which his own jurisdiction extended. But normally the area referred to in sub-section (4) and the area referred to in sub-section (3) would be different. In connection with those provisions one has to look at Section 64, which provides that : "(1) Where

an assessee carries on business at any place, he shall be assessed by the Income-tax Officer of the area in which his principal place of business is situate. (2) In all other cases, an assessee shall be assessed by the Income-tax Officer of the area in which he resides. (3) Where any question arises under this section as to the place of assessment, such question shall be determined by the Commissioner." The "area" under that section would normally be the sub-area to which the Income-tax Officer had been appointed under Section 5 (4). Now, it is not disputed that under the provisions of the Act prior to the 1st of April 1939 the Commissioner for Bombay had divided Bombay City for Income-tax purposes into various wards and the present applicant was carrying on business in C. Ward, Section II, for which an Income-tax Officer had been appointed, and therefore, under Section 64 it would be the Officer of C. Ward, Section II, would be required (sic) to assess him under the Act before amendment.

By the amending Act of 1939 there was one very material amendment in Section 5, material for the purposes of the present case. The Section has been re-written, but substantially it is in the same terms as the old Section so far as this case is concerned, except in respect of this particular amendment in sub-section (2) which provided that : "The Central Government may appoint a Commissioner of Income-tax for any area specified in the order of appointment, and may appoint Commissioners of Income-tax, not more than three in all, each to discharge, without reference to area and to the exclusion of any Commissioners appointed for any area, the functions of a Commissioner in respect of any cases or classes of cases assigned to him by the Central Board of Revenue. Then under sub-section (7) it is provided that : "Assistant Commissioners of Income-tax and Income-tax Officers shall, for the purposes of this Act, be subordinate to the Commissioner of Income-tax for the area in which they perform their functions, or where they perform functions assigned to them by a Commissioners of Income-tax appointed without reference to area, to that Commissioners." So that under the new Act you may have two Commissioner functioning in the same place, - (1) the Local Commissioner and (2) the Commissioner (Central), appointed without reference to area, to whom specific cases have been assigned. As I have mentioned, the Central Government in April 1939 appointed Mr. Bird to be the Commissioner of Income-tax (Central), without reference to area, and in due course assigned to him the case of the present applicant and it was under authority so derived from the Government of India that Mr. Bird appointed Income-tax Officers, including the Income-tax Officer, Section II (Central), and directed him to deal with the assessment of the present applicant. Now, Section 64 of the Act was not amended to meet the amendment of Section 5 (4). You still have, therefore, a direction in Section 64 that the assessee is to be assessed by the Income-tax Officer of the area in which his place of business is situate, and the argument of the applicant is that as his place of business is situate in Ward C, and as there is an Income-tax Officer for Ward C, he is entitled to be assessed by that Officer, and is not liable to be assessed by any other officer. The answer made by the learned Advocate-General on behalf of the Commissioner of Income-tax (Central) is that there are really two areas in which the applicant

carries on his business for each of which an Income-tax Officer has been appointed, namely, Ward C in Bombay City and the Bombay Presidency, Sind and Baluchistan, and that it is for the Commissioner of Income-tax under Section 5 to say which of those two officers is to deal with the applicants assessment. I think myself that there might be an arguable case on the lines suggested by the learned Advocate-General, if the area assigned to the Central Officer, Section II, had been one in which it could fairly be said that the applicant was carrying on his business. I can imagine a case in which an Income-tax Officer is appointed by the Local Commissioner for a restricted area, such as Ward C, and another Income-tax Officer is Bombay City, in which case it might be argued that there were two areas to which Section 64 applied, Bombay City and Ward C, and that it was for the Commissioner who had season of the assessee's case to determine under Section 64 (3) in which area the applicant must be taken to be for the purposes of assessment. But that question does not arise because to my mind an area comprising the Bombay Presidency, Sind and Baluchistan is too wide in relation to the place where the assessee carries on business, and cannot fairly be said to be a place in which he carries on his business. If it be permissible to say that the area in which an assessee in Bombay carries on business for the purposes of assessment under Section 64 is the whole Presidency of Bombay, Sind and Baluchistan, it would be difficult to hold as too wide an area comprising the whole world. In my opinion, Section 64 was intended to ensure that as far as practicable an assessee should be assessed locally, and the area to which an Income-tax Officer is appointed must, so far as the exigencies of tax collection allow, bear some reasonable relation to the place where the assessee carries on business or resides. There is no evidence that there was any difficulty in restricting the area to which the Income-tax Officer, Section II (Central), was appointed to something much narrower than the Bombay Presidency, Sind and Baluchistan. Therefore, in my opinion, the Income-tax Officer, Section II (Central), is not the Income-tax Officer of the area in which the applicants place of business is situate, and as there is such an Officer in existence, namely, the Officer of Ward C, Section II, in my opinion, it is only the latter Officer who can assess the assessee. The second point argued was that if the Income-tax Officer, Section II (Central), can assess the assessee in respect of the year 1939-40, at any rate he cannot assess him in respect of the two previous years, because it is said that pending assessments cannot be transferred under Section 5, sub-section (2) of the amending Act. This point is only of importance if I am wrong in thinking that the last mentioned Officer cannot assess the applicant at all, but as the learned Advocate General invited us to express our prayer (a) of the petition, I would say shortly that to my mind the right to transfer cases or classes of cases under Section 5, sub-section (2), covers pending assessments but does not cover a case in which an assessment has been completed. In such a case the assessee has acquired certain rights, e.g., of appealing to a particular Assistant Commissioner and applying for review to a particular Commissioner, and I think that those rights are not taken away by the amending Act (cf. *Haji Bibi v. H. H. Sir Sultan Mahomed Shah*¹). But so far as pending

assessments are concerned, it seems to me that no right other than of a purely procedural character has accrued, and such assessments can be transferred, and, therefore, I should say that the assessment for 1938-39 was properly transferred and, so far as 1937-38 is concerned, the proceeding under the notice for further assessment under Section 34 were properly transferred but the assessment for that year must stand. I ought to notice two preliminary objections which were taken to this petition. The first is under Section 226 of the Government of India Act, 1935, which provides that : "(1) Until otherwise provided by Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force." It is argued that this application concerns the revenue or the collection thereof. But in *Alcock Ashdown & Co. v. Chief Revenue Authority, Bombay*², their Lordships the Privy Council dealt with this point in connection with an application to the Commissioner of Income-tax to state a case, and in the judgment appears this passage at page 234 : "In their Lordships view, the order of a High Court to a revenue officer to do his statutory duty would not be exercise of original jurisdiction in any matter concerning the revenue, and the latter part of the clause need not be considered, for the proceedings in this case had not to do with the collection of the revenue, but with the preliminary assessment to ascertain what that revenue was." It seems to me that passage really covers this case. If an order directing a revenue officer to do his statutory duty does not fall within the prohibition of the section, an order directing him to forbear from doing something, which he believes wrongly to be his statutory duty, cannot fall within the section. Relying, therefore, on that decision, I think we have jurisdiction to entertain the matter notwithstanding Section 226 of the Government India Act. The other preliminary objection arises under Section 45 of the Specific Relief Act under, which the application is made. In order to confer jurisdiction we must be satisfied, amongst other things, that the application is made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the specific act, and further that the applicant has no other specific and adequate legal remedy. It is argued by the learned Advocate General that the applicant has no right to be assessee. I agree that he has no right to be assessed by a particular officer, and that seems to me to be a personal right within Section 45. Nor am I aware of any method apart from the Section by which he can enforce that right and prevent what he considers to be an illegal assessment from taking place. If he proceeds under the Income-tax Act, Section 66, he must wait until the assessment has been made, and then appeal against it. What he seeks to do is to avoid the expenses and trouble of being assessed by an officer, other than the officer of the area in which his place of business is situate. In my opinion, neither of the preliminary objections is sound, and we are bound to deal with the case on merits. We make an order in terms of prayer (a) adding the words at the end "otherwise than in respect of proceedings started by an officer duly complying with the provisions of Section 64 of the Income-tax Act,"

and we also make an order in terms of prayer (b).The assessee to get his costs taxed as a long cause on the original side scale.Kania, J. This application is for the two reliefs asked for at the end of the petition. The relevant facts and section of the Income-tax Act, the Government of India Act and the Specific Relief Act have been summarised in the judgment of the learned Chief Justice.As regards the two preliminary objection raised on behalf of the taxing authorities I agree with the judgment just delivered and have nothing more to add.The principal question is about the interpretation of Section 64 of the Income-tax Act. A plain reading of the section shows that the same is imperative in terms. It also gives to the assessee a valuable right. He is entitled to tell the taxing authorities that he shall not be called upon to attend at different places and thus upset his business. Section 5 in terms defines income-tax authorities, deals with the appointment of various principal and subordinate officers and the distribution of work among them. That Section has nothing to do with the assessee directly and does not prescribe the powers of the officers as regards the assessee. There is thus no apparent conflict between the two sections. The question is whether Section 64 is controlled by Section 5 so as to be read with a proviso that Section 64 is applicable, except to cases which are transferred to the Commissioner, Central, or the Officers appointed by the Commissioner, Central, under him. In my opinion Section 64 is not so controlled. The two sections can stand together without encroaching on each other and that natural construction should be adopted.The words of Section 64, Income-tax Act, clearly provide that the assessee shall be assessed by the Income-tax Officer of the area in which his place of business or residence is situate. On a perusal of Section 5 it is clear that the term "area" has different meaning as used in the different sub-sections of Section 5 itself. We are not concerned here with a case, where there is no officer who will answer the description mentioned in Section 64 nor am I prepared to define what the term "area" as used in Section 64 exactly means or excludes. Proceeding on the footing that in the present case an Income-tax Officer of the area in which the applicants place of business is situate exists and existed before 1st April 1939 the question is whether the officer appointed by Mr. Bird, and described as Income-tax Officer, Central, Section II, in this particular case, has jurisdiction to assessee the assessee. It is material in this connection to bear in mind that in the notification issued by the taxing authorities under the Income-tax Act of 1939 calling upon all persons liable to pay income-tax to send their returns (a copy of which notification is annexed to Ex. D to the affidavit in reply) the appropriate officer who has jurisdiction in respect of C Ward, Section II, has been with his name and office address clearly mentioned. If that Officer is expressly specified in the notification it appears clear that he is the man who complies with the qualifications found in Section 64 and he is the man to deal with the assessment of the applicant. The subsequent order of the Commissioner, Central, stating that the Officers appointed to Sections I to VI, Central, shall perform their functions only in respect of the whole area consisting of the Bombay Presidency, Sind and Baluchistan, does not meet the situation. In my opinion, that notification or order does not make, under the

circumstances of this case, the officers appointed to Section I to VI, Central, answer the description of the officer mentioned in Section 64 of the Income-tax Act. As I have stated I do not anticipate and do not propose to state what would be the proper position if by another notification jurisdiction is given to particular persons in respect of defined areas. It is sufficient to decide this application to hold that the Income-tax Officer, Central, Section II, viz., Mr. Shah does not meet with the description of the officer required by Section 64 to assessee. I therefore agree with the order stated in the judgment of the learned Chief Justice.

Order accordingly.

Cases Referred.

110 B.L.R. 327

2(1923) L.R. 50 I.A. 227