BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Sir Mohamed Yusuf Ismail

(J Beaumont, Kt. C.J. Chagla, J.)

24.09.1943

JUDGMENT

John Beaumont Kt., C.J.

1. This is a reference made by the Income-tax Commissioner under Section 66(2) of the Indian Income-tax Act, 1922.

2. The facts giving rise to the questions raised are simple. In 1929 a wakf was executed, and under the terms of that wakf the trustees had to pay twenty-one per cent of the income of the property transferred to the wife of the settlor. Down to the year 1939 the share of the wife in the income was not added to the income of the settlor for the purposes of income-tax, and in the assessment year 1939-40 again the income of the wife was not included in that of the husband, but after the assessment had been made, the superior Officer of the Income-tax Officer took the view that the amended Section 16, Sub-section (3), had been misconstrued, and that the income of the wife ought to have been included in that of the husband. Thereupon the Income-tax authorities proceeded to re-open the assessment under Section 34, alleging that part of the income of the assessee-husband had escaped assessment.

3. Section 34 under the Act, before the amendment of 1939, provided that if for any reason income, profits or gains chargeable to income-tax had escaped assessment in any year, or had been assessed at too low a rate, the Income-tax Officer might make a fresh assessment. Under that section all that had to be shown was that income had escaped assessment, or had been assessed at too low a rate, and the cases show that that position might arise by a mere error on the part of the Income-tax Officer. He might change his opinion, and thereupon make a fresh assessment, having to do no more than assert that owing to his mistake income had escaped assessment. Presumably it was desired to curtail the powers of the Income-tax authorities in that respect. Income-tax is a serious item in the expenditure of most people, and an assessee is entitled to know what his liability is, and it certainly seems unreasonable that, if his liability has been fixed at a certain figure, and he has based his future budget on that figure, he should

subsequently be told that, owing to some mistake of the Income-tax Officer, he ought to have been charged at a heavier figure, with the result that he may cause considerable1 embarrassment. Presumably considerations of that nature led to the amendment of Section 34. The amended section reads :If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, action may be taken. So that, under the new section, with which we have to deal, the Income-tax Officer has to discover that income has escaped assessment, and that discovery must be based on definite information having come into his possession.

4. Mr. Setalvad for the Commissioner has divided his argument into two parts. First of all, he says we must ascertain what is the meaning of " discovers and then we must consider whether the discovery has been based on definite information. Upon the question as to the meaning of "discovers," he has referred us to certain English cases dealing with a somewhat analogous section, the actual words in the English section being " if the surveyor discovers " something in connection with property.

5. In the first case referred to, Rex v. Kensington Income-tax Commissioners [1934] 3 K. B. 870, all the three Judges discussed the meaning of "discovers," and pointed out that that word may have different meanings according to the context, and they considered that in the statute with which they were dealing it meant no more than " finds out" or " has reason to believe" or " satisfies himself." The actual argument addressed to them was " discovers " meant " ascertains by legal evidence," and they rejected that contention'. In Anderton and *Halstead Ltd. v. Birrell*[1] the section was construed by Mr. Justice Rowlatt, and he expressed the view that "discovers" does not include a mere change of opinion on the same facts and figures. That view was not accepted by Mr. Justice Finlay *in Williams v. Trustees of W.W. Grundy*[2] In that case the discovery was that an interest supposed to be vested was in fact contingent; that is to say it was as to a general point of law. Mr. Justice Finlay was inclined to accept the view of the earlier case that " discovers" means only " has reason to believe " or " finds out," and he followed the same view in a later case of British Sugar *Manufacturers, Ld. v. Harris*[3] That case went to the Court of Appeal, and the decision was reversed on another point, but the question as to the meaning of " discovers " was argued, and the Court of Appeal were about to express an opinion, apparently in favour of the appellants, but they were asked not to do so, because it might embarrass parties in the event of the Commissioner wanting to take that portion of the deci-sion to the House of Lords. Accordingly they refrained from expressing an opinion ; but it is clear from the observation of Lord Justice Romer at p. 238 that they were in favour of allowing the appeal on that point. But as to the grounds on which they could have based their decision, and as to the exact meaning they were prepared to put on " discovers" we have no information.

6. Then there is a Scotch case, *Commissioner of Inland Revenue v. Mack-inlay's Trustees*[4] *a* decision of the Court of Session, in which the Judges adopted the same view as that taken by Mr. Justice Finlay in Williams v. Trustees of W.W, Grundy (supra), and held that "discovery" included a mere discovery of the state of law, and that it was not necessary that any new fact should be discovered, or any fact should be brought to the attention of the Income-tax Officer which he had previously overlooked. Discovery of a mistake in law, in their view., would be sufficient, and Mr. Setalvad asks us to adopt the same view on the construction of the amended Section 34. Having got to that point, he then says that " definite information " may just as well be information as to the state of the law as information as to the state of facts, and, therefore, it is enough if the Income-tax Officer discovers that he has made a mistake in law, because somebody tells him so. Here there was no new fact discovered at all, and, indeed, there was nothing discovered by the Income-tax Officer, except the fact that his superior Officer, rightly or wrongly, disagreed with him. In my opinion, it is quite impossible to accept the view that that is a discovery based on definite information.

7. It is an error, in my opinion, to divide the expressions in the amended section into two parts. We have to take the whole section. There must be definite information which has come into the possession of the Income-tax Officer, which results in his discovering that income has escaped assessment, or has been under-assessed, and, to my mind, the expression " definite information denotes that there must be some information as to a fact. No doubt, one can imagine cases near the line. The fact may be as to the state of the law, for instance, that a case has been overruled, or that a statute has been passed which had not been brought to the attention of the Income-tax Officer. It is quite impossible to lay down all the implications of the expression in Section 34, but I have no doubt that there must be some information as to a fact which leads the Income-tax Officer to discover that income has escaped assessment, or has been under-assessed, and in this case there was no fact discovered.

8. That disposes of the first question raised, which is : " Whether in the circumstances of the case the Income-tax Officer was entitled to re-open the assessment under Section 34 of the Act," and the answer is in the negative.

9. The second question raised is :Whether the income received by Lady Khatun Mariam has been rightly included inthe income of the assessee under Section 16(3) (b) of the Act ?In the view we take of the first question, it is not necessary to decide that question. But Mr. Setalvad has asked us to express an opinion upon it, because it may be that the Commissioner will appeal to the Privy Council against our decision on the first question, and therefore, it is desirable to note the argument on the second question.

10. Section 16(5) (b) provides :In computing the total income of any individual for the purpose

of assessment, there shall be included so much of the income of any person or association of persons as arises from assets transferred otherwise than for adequate consideration to the person or association by such individual for the benefit of his wife or a minor child or both.That sub-section was added in 1937, and it is no doubt directed to income of which the wife gets the benefit through the medium of trustees. Under the earlier sub-sections, there is included in the income of the assessee so much of the income of a wife or a minor child as arises from assets transferred direct- iy or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart, or from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration. The amended sub-section is evidently; intended to deal with the case of an indirect transfer of assets through the medium of trustees for the benefit of the wife or the minor child or both. The argument advanced for the assessee is that one must find specific assets transferred to the trustees for the benefit of the wife or minor child or both. The person or association of persons referred to in the section will be the trustees. So that the sub-section reads " so much of the income of trustees as arises from assets transferred to the trustees by such individual," that is the assessee, " for the benefit of his wife or a minor child or both." The argument is that one has not got here any assets transferred for the benefit of the wife; she is only entitled to a share of the income of the assets transferred. But the answer of the Commissioner is that the terms of the sub-section are complied with, because there has been a transfer of assets by the assessee to the trustees for the benefit of his wife, although not for the exclusive benefit of the wife. But undoubtedly assets have been transferred, and the transfer is beneficial to the wife, who gets twenty-one per cent, of the income and, therefore, the case falls within the sub-section. If the argument of the assessee is right, the Commissioner submits that really he might have included the whole of the income arising from assets transferred, and not merely that portion of the income which went to the wife. It is not necessary formally, I think, to answer the question ; but as it has been argued, I would say, in case the matter goes further, that, in my view, the contention of the Commissioner on that question is right. There has been a transfer of assets for the benefit of the wife, and, therefore, the section applies. But I do not think it is necessary, or proper formally to answer the question, which does not arise.

11. The Commissioner to pay costs, and to refund the Rs. 100 deposited by the assessee.

Chagla, J.

12. The main question that arises on this reference is whether the Income-tax Officer was entiled to re-open the assessment under Section 34 of the Indian Income-tax Act (XI of 1922). It seems that in the first instance the income which Lady Khatun Mariam, the wife of the assessee, received under the deed of wakf was not included in the income of the assessee. The assessment was subsequently re-opened and that income was included inthe income of the assessee. It is,

therefore, clear that the re-opening of the assessment was) not due to any new fact that had come to the knowledge of the Income-tax Officer but was the result of a mistake in law in applying the amended Section 17(2) of the Indian Income-tax Act to the facts of the case. Now in considering whether the Income-tax Officer was entitled under these circumstances to re-open the assessment, one has first to consider and compare the amended Section 34 with the section as it stood before the amendment was enacted, and one cannot help noticing the striking difference between the old and the new section, Under the old section all that was required was the fact that income had escaped assessment or income had been assessed at too low a rate. If these two facts were present, then the Income-tax Officer was entitled to re-open the assessment for any reason whatsoever. Under the section as it now stands the Income-tax Officer has to discover that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed or have been assessed at too low a rate, or have been the subject of excessive relief under this Act. But the discovery of the Income-tax Officer must be the result of definite information which has come into his possession. Therefore the information which must come into the possession of the Income-tax Officer must be information which was not in his possession at the time the old assessment was closed and came into his possession before the assessment was re-opened under Section 34 of the Indian Income-tax Act. In my opinion correcting a mistaken view of the law is not definite information which comes into the possession of the Income-tax Officer within the meaning of the section. Every one is presumed to know the law, and certainly the Income-tax Officer is presumed to know the provisions of the Income-tax Act. A mistake of law or misunderstanding of the provisions of the law is not covered by the language of the amended section. The mere discovery of an error of law is not a definite information which comes into the possession of the Income-tax Officer.

13. Two cases have been cited at the bar-both decisions of our own Court, Commissioner of Income-tax, *Bombay v. D. R. Naik*[5] and Chimanram Motilal (Gold & Silver), *Bombay v. Commissioner of Income-tax (Central), Bombay*[6],-on the construction of Section 34 as it stood before the amendment. I do not think that those decisions are of much assistance in construing the present section, because, as I have pointed out, the old section was very wide in its terms. All that was required was the fact of the assessment escaping and that fact discovered by the Income-tax Officer due to any reason whatsoever.

14. The expression " discovers " has been judicially interpreted in various decisions and Sir Jamshedji Kanga, arguing for the assessee, has drawn our attention to two or three decisions where this expression was construed by the English Courts. The first is a decision reported in Anderton and *Hal-stead, Ltd. v. Birrell*[7] I migh point out that in the corresponding English section the language used is :If the surveyor discovers. that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption,

abatement, or relief not authorised by this Act, then and in every such case... the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment....In the English Statute the word "discovers" is not qualified by any expression as it is in our Section 3.4. Therefore the discovery under the English statute ' may be the result of anything that comes to the knowledge of the Surveyor whereas under our Statute the discovery must be the result of definite information coming into the possession of the Income-tax Officer. As I was pointing out, in the case reported in Anderton and Halstead, Ltd. v. Birrell the facts were that the assessees were assessed upon the basis of a writing down in two years successively of a doubtful debt and subsequently, by additional first assessments, the writing down of the doubtful debt was disallowed, on the ground that since the writing down of the debt was allowed, it had come to the surveyor's knowledge that the assessees had permitted the debtors to increase their indebtedness to them. Mr. Justice Rowlatt considered whether under Section 125 of the English Act the General Commissioners were entitled to re-assessees the assessees on these two doubtful debts; and Mr. Justice Rowlatt specifically states (p. 281) :-

The word ' discover' does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion.Mr. Justice Rowlatt expresses the opinion that the discovery contemplated by that section did not mean a mere change of opinion without any new information at all.

15. There is another decision reported in *Williams v. Trustees of W. W. Grundy*[8] where under a will a trust was created under which the whole of the residuary estate of the testator was to be held in trust for the benefit of his grandson, Robert Wilson Appleton, who was a resident of New York. The trustees in good faith took the view, on the construction of the trust deed, that the interest of Appleton was a vested interest, and on that construction they were not assessed to income-tax on the income under the trust deed. It was then discovered that the interest that Appleton had was not a vested interest but a contingent interest and the assessment was re-opened. Mr. Justice Finlay took the view that even though discovery might involve nothing more than a mere change of opinion on the part of the Inspector of Taxes still it would be a discovery within the meaning of the section. This case was further considered in British Sugar Manufactures, Ld. v. Harris [1938] 2 K. B. 220(Supra); and, as the learned Chief Justice has pointed out, although no reasons were given by the Court of Appeal, it is clear from the judgment of Lord Justice Romer at p. 238 that the Court was not inclined to accept the view taken by Mr. Justice Finlay as to the construction of the word " discovered " reported in Williams v. Trustees of W. W. Grundy.

16. Mr. Setalvad for the Income-tax Commissioner has referred us to two further cases in which the word " discovered " was also construed. The first is the case reported in Rex v. Kensington Income-Tax Commissioners [1913] 3 K. B. 870(Supra). In that case the real controversy was

whether the word "discovers" as con-tended by the assesses meant " ascertains by legal evidence," and Mr. Justice Bray at p. 889 took the view that " discovers " did not mean " ascertains by legal evidence." As a matter of fact, if one looks at the facts of that case, the surveyor of taxes had discovered a fact which was not present to his mind when the original assessment was made. The original assessment] was made in 1906, and in 1909 the Income-tax authorities ascertained the existence of a company which made a considerable difference to the return made by the assessee in 1906.

17. The other case is the case of Commissioners of Inland Revenue v. Mackin-lay's Trustees (1931) 22 T. C. 305(Supra), There the Lord President Normand at p. 312 construed the word " discover" to mean " find out". But if one turns to his judgment, the Lord President makes it clear that if there were any reason in the context, for restricting the word "discover" to the discovery of an error in fact, that restriction would necessarily receive effect, but in his opinion the context did not point to any such restriction. If one looks to our section, as I have already pointed out, the context undoubtedly points to a restriction which must be placed on the construction of the word " discover " and that restriction and a very important restriction is that the discovery must be the result of definite information which must come into the possession of the Income-tax Officer.

18. In my opinion, with respect, the opinion of Mr. Justice Rowlatt on the construction of the word " discover " was the correct one. But even assuming that Mr. Setalvad is right and the word " discover " has been construed more widely under the English law, the difference in the language between Section 125 of the English Act and our Section 34 is very significant. Even though it may be possible to take the view, as contended for by Mr. Setalvad on the construction of the English section, I fail to see how such a view is possible on the much more stringent words of our own section. I am therefore of the opinion that the word " discover" in our section does not mean a mere change of opinion on the same facts, nor does it mean a change of opinion on a question of law, nor does it mean the mere discovery of a mistake of law. The discovery contemplated by Section 34 must be the result of information about some fact or facts which were not present to the mind of the Income-tax Officer when he made the assessment and which came to light between the date of the making of the first assessment and the re-opening of the assessment under Section 34 of the Indian Income-tax Act.

19. As regards the second question, I must frankly confess that the construction of s., 16, Sub-section (3), Sub-clause (b), of the Act, is not free from difficulty. But as we are not answering the question, on the whole I prefer the construction put upon it by the Commissioner of Income-tax; and I agree with the learned Chief Justice that the income of Lady Khatun Mariam, the wife of the assessee, could be included in the income of the assessee as the income arising from the assets transferred to the trustees by the assessee for the benefit of his wife.

Cases Referred.

1[1932] I K. B. 271
2[1934] 1 K.B. 524
3[1938] 2 K.B. 220
4(1931) 22 T.C. 305
5(1939) 41 Bom. L.R. 652 : s.c. [1939] Bom.445
6(1942) 45 Bom. L.R. 125 : s.c. [1943] Bom. 206
7[1932] 1 K.B. 271
8[1934] 1 K. B. 524