BOMBAY HIGH COURT

Shapoorji Pallonji Mistry

Vs

Commissioner of Income-Tax

(M.C Chagla , C.J. S Desai, J.)

14.03.1958

JUDGMENT

M.C. Chagla, C.J.

1. It may be unfortunate that in this case the assessee may escape payment of tax, but we must give effect to the view we have taken with regard to the powers of the A. A. C. and that view cannot be altered to suit the exigencies of a particular situation. As we have pointed out in the case of Narrondas Manordass Bombay v. Commr. of Income-tax. , the powers of the A. A. C. are very wide, and we have indicated in that judgment what the limitations upon that power are. But it would be wrong, in our opinion, to extend those powers to the prejudice of the assessee because in a particular case revenue may suffer by reason of the fact that the A. A. C. does not possess the necessary powers.

2. The facts giving rise to this reference are very few. The assessee was assessed to tax for the assessment year 1947-48 by the Income-tax Officer. The assessee appealed to the A. A. C., and while the appeal was pending, the I. T. O. wrote to the A. A. C. drawing his attention to the fact that a certain sum of Rs. 40,000/- had not been included in the assessment of the assessee. In consequence of this letter the A. A. C. included the sum of Rs. 40,000/- in the assessment of the assessee and brought it to tax. This sum of Rupees 40,000/- was received by the assessee on 20-7-1946 under the following circumstances. He had entered into an agreement with one Zito on 20-5-1942 and under this agreement he had lent certain monies to Zito on the mortgage of Zito's properties and apart of the consideration for this loan was that the assessee was to receive a certain share in the business of Ritz Hotel for the working of which this loan had been taken by Zito. A suit was filed by the assessee to enforce this claim against Zito and that suit was compromised and in respect of this consideration the assessee received Rs. 40,000/-. This was the amount which the A. A. C. brought to tax as the business receipt of the assessee and the question that the assessee raised before the Tribunal was that it was not competent to the A. A. C.

exercising his appellate powers to bring this amount to tax.

3. Now, it is true that the view taken by he A. A. C. is that this sum of Rs. 40,000/- constitutes the business income of the assessee. It is equally true that this particular head of income was the subject of assessment before the I. T. O. Mr. Joshi's contention is that, if this particular head of income has been considered by the Income-tax Officer, then it is open to the A. A. C., to include in that head any item even though that item might not have been considered by the I. T. O. at all. The question that we have to consider is whether that contention of Mr. Joshi is sound looking to our decision in Narrondas Manordass' case .

4. Now, Narrondas Manordass' case is rather significant from this point of view, that the I. T. O. there subjected to tax an item of Rs. 1,17643/- which was a business income. There was another item of Rs. 4 lakhs with regard to which the I. T. O. and decided in favour of the assessee. This item, if it was liable to pay tax, would fall Under Section 12 "Other Sources". The assessee appealed against the decision of the I. T. O. with regard to the sum of Rs. 1,17,643/-. The A. A. C. allowed the appeal of the assessee, but held that the assessee was liable to tax with regard to Rs. 4/- lakhs; and what was argued before us in that case was that, there being no appeal by the assessee with regard to the head "Other Sources" as far as the particular head of income was concerned the decision of the I. T. O. has become final and conclusive and it was not open to the A. A. C., to reopen that assessment. We rejected that contention and the view we took was that, if a particular source or item of income had been considered by the I. T. O. and had been subjected to the process of assessment, then even though the assessee may not have appealed against that particular source or item, once the appeal was before the A. A. C., his power extended not merely to the subject-matter of the appeal, but to the whole subject-matter of assessment. What gave the power to the A. A. C. was the fact that a particular item or source had been subjected to the process of assessment. Now, the process of assessment would include, not only the subjecting of an item or source to tax, but equally holding that the particular source or item was not subjected to tax; and from that point of view, it would make no difference whether a particular source or item was under one or the other head of income. From that view it would also follow that, if a particular source or item had not been subjected to the process of assessment and even thought the I. T. O., may have subjected to tax a particular head of income in which that item or source fell, then it would not be open to the A. A. C. to take into consideration the particular source or item which had not been considered by the I. T. O. Therefore, from both points of view, the question whether a particular item or source fell under a particular head was held by us to be irrelevant. This is perfectly clear, because in our judgment we considered the case of *Jagarnath Therani v. Commissioner of Income-tax*[1], and with respect, agreed with that judgment. In that case the assessee had three business at Purnea, Jalpaiguri and Calcutta, and the I. T. O. had assessed the assessee only in respect of his income from Purnea. The A. A. C. in appeal assessed

his also with regard to the income from the other two business and the Patna High Court held that the A. A. C. had no power to do so; and the observations of the Patna High Court were that the appellate authority had no authority to travel beyond the subject-matter of the assessment and he was not entitled to assess new sources of income. Therefore, if Mr. Joshi was right, then far from agreeing with the judgment we would heave held that the Patna High Court was in error and the A. A. C. had the power to assess income from the other two branches at Jalpaiguri and Calcutta, because the I. T. O. had brought to assessment the business income of the assessee. Therefore, it is clear that what we meant by "Source" was not source in the sense of head of income as used in the Income-tax Act. By "Source" what we meant was the specific source from which a particular income sprung or arose.

5. The Supreme Court had to consider this Judgment very recently and, with respect, it has approved of our judgment in Narrondas Manordass' case, and it has itself deduced the principle which emerges from this judgment. In Commissioner of Income-tax v. McMillan and Co. , their Lordships say that the language of Section 31 was "wide enough to enable the Appellate Assistant Commissioner to 'correct the Income-tax Officer not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the course of the assessment." Then further on their Lordships quote the following passage from our judgment:

> "It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the I. T. Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deduction which came in for consideration of the Income-tax Officer.
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> So the power of the A. A. C. is confined to considering the matter which has been considered by assessment; and "matter" is used, not in the sense of a head of income but in the sense of a specific source of income. So the question that has to be asked when deciding whether the A. A. C. has the power or not is: "Is this the matter which was considered and decided by the I. T. O.?" If it was, irrespective of the nature of the appeal preferred by the assessee the A. A. C., would have the power to consider that matter. Now, it is clear on the record that the I. T. O. never considered this matter in the

assessment year 1947-48. Strangely enough, as the record shows, he did consider it in the assessment year 1946-47 when it was unnecessary for him to consider it because the receipt did not fall in that assessment year; and the opinion then expressed by him was that this payment could not be treated as a business receipt. Now, if his successor has expressed the same opinion for the assessment year 1947-48 the, undoubtedly the A. A. C. could have refused to accept that opinion and brought this amount to tax. In our opinion, therefore, it is clear that, under the circumstances of this case, the A. A. C. was not competent to enhance the assessment of the assessee for the assessment year 1947-48 by a sum of Rs. 40,000/-.

6. It is always wise to consider the practical effects of one's judgment and especially in matters of tax and revenue. It is not as if a Court should come to a different conclusion if its conclusion was inescapable in law even thought its decision may lead to serious difficulties in the way of the Taxing Department. But when the Court feels that its judgment may lead to loss of revenue or evasion of tax, it should hesitate before it comes to a particular conclusion. Now, in this case, our decision will not in any way put difficulties in the way of the Taxing Department. In this very case two remedies were open to the Department neither of which was resorted to. It was open to the I. T. O. to have proceeded against the assessee under the first part of Section 34; or alteratively, the Commissioner could have exercised his powers of revision under Section 33B. Section 34 expressly deals with a case where an assessee fails to disclose fully and truly all material facts necessary for his assessment; and clearly this is a case where the assessee failed to disclose the sum of Rs. 40,000/-. Now if we were to hold that the A. A. C. has the power -- which Mr. Joshi contends he has -- he in effect would be functioning as the I. T. O. under Section 34; he would be bringing to tax an income which the assessee had failed to disclose and which has never been subjected to the process of assessment. That surely is not the power which Section 31 gives to the A. A. C. when it refers to the power of enhancing an assessment.

7. We must therefore, answer the first question in the negative.

8. An application has been made by Mr. Joshi that we should proceed to answer Question No. (2) which is "Whether on the facts and in the circumstances of the case, the said sum of Rupees 40,000/- is a revenue receipt and assessable to tax in the assessment year 1947-48?" Mr. Joshi says that, once a question has been raised, it is obligatory upon the Court under Section 66(5) to answer the question, and Mr. Joshi very frankly tells us that he has a definite object in asking us to answer this question and that object is that, by reason of the second proviso to Section 34(3) if we were to answer this question it may be open to the Taxing Department to proceed against the assessee under Section 34. Now, unless the law requires the answering of a question and the exercising of the advisory jurisdiction of the Court, the Court should not permit itself to be made

a handle of the Revenue Department. It is perfectly well settled that, even though questions may be raised on a reference, the Court will not decide questions which are academic and the question that we have to consider is whether the 2nd question which mr. Joshi asks us to answer is academic in view of the fact that we have already answered Question No. (1). Mr. Joshi says that the answer is not academic because it has a practical value by reason of the second proviso to Section 34(3) and Mr. Joshi says that, if liability can be fastened upon the tax-payer by reason of our answering this question, we must not look upon the answer to it as academic. Now, in our opinion, that is not the correct meaning of the expression "academic" in this context. The object of a reference and the purpose of the exercise of the advisory jurisdiction of the Court is to make it possible for the Tribunal to carry out the judgment of this Court. That is provided by Section 66(5) itself. When we answer Question No. (1) in favour of the assessee and hold that the Appellate Assistant Commissioner was not competent to enhance the assessment of the appellant for the assessment year 1947-48 by a sum of Rs. 40,000/- from the assessment of the assessee. Now, if we were to answer Question No. (2) in favour of the Taxing Department and hold that Rs. 40,000/- is a revenue receipt and not a capital receipt as contended by the assessee, this direction cannot be carried out by the Tribunal. Having already excluded Rupees 40,000/- from the assessment by reason of our answer to Question No. (1), the Tribunal Cannot include this Rs. 40,000/- in the assessment of the assessee. It is in this sense that Question No. (2) becomes academic. If the reference can be disposed of on Question No. (1) and if the answer given by us to Question No. (1) is sufficient to enable the Tribunal to dispose of the matter before it, then it would serve no purpose by our proceeding to answer Question No. (2), which answer under the circumstances would become academic.

9. We, therefore, answer Question No. 2, as unnecessary.

10. The Commissioner by pay the costs.

11. Reference answered.

Cases Referred.

1(1925) 2 ITC 4: (AIR 1925 Pat 408)