BOMBAY HIGH COURT

Madanlal Dharnidharka

Vs

Commissioner of Income-Tax

(M Chagla, C.J. Tendolkar, J.)

22.03.1948

JUDGMENT

M.C. Chagla, C.J.

1. This is a reference in respect of the assessment year 1944-45. The assessee was held to be a resident for that year. The previous year or the accounting year in respect of this assessment year was the Maru year 1999-2000 beginning with November 9, 1942. The assessee commenced doing business in Bombay from that date and there was a credit entry in his books of account on that very day for a sum of Rs. 51,000. On January 8, 1943, there was another credit entry for a sum of Rs. 1,50,000. In that year the assessee suffered a loss of Rs. 73,779 in his business which he was carrying on at Indore. The two questions which are submitted for our determination are concerned with these two sums of Rs. 2,01,000 and Rs. 73,779. With regard to the sum of Rs. 2,01,000 the assessee's case before the Department was that he was adopted by his uncle many years ago, that his uncle left a large fortune, and it was out of this large fortune that this amount was brought into British India. The Appellate Assistant Commissioner taxed this amount of Rs. 2,01,000 under Section 4(1)(b)(iii) of the Indian Income-tax Act. It was found by him that after the death of his adoptive uncle the assessee did business at Indore and he failed to produce his books of account relating to that business. The Tribunal to which an appeal was preferred from the decision of the Appellate Assistant Commissioner also held that the sum of Rs. 2,01,000 represented remittances and profits received in British India by the assessee during the year and they were rightly taxed under Section 4(1)(b)(iii). With regard to the sum of Rs. 73,779 the Tribunal held that that loss could not be set off against the sum of Rs. 2,01,000. The first question that we have to consider is whether the remittance of Rs. 2,01,000 out of profits made by the assessee in the years preceding the Maru year 1999-2000 as a non-resident could be included under Section 4(1)(b)(iii) of the Indian Income-tax Act in his total income of the year of account in which he was a resident in British India. It will be noticed that the point sought to be taken up by the assessee in this question is that he was a non-resident during the year when the profits and the income of the business arose in the Indian State. Now this particular question was included in

the grounds of appeal before the Appellate Tribunal, but it was not argued before them, and a question of considerable importance affecting the jurisdiction of this Court has been raised by the Advocate General that, as this question was not dealt with by the Tribunal, it was not open to the Tribunal to raise it and it is not open to us to decide it. In my opinion it is necessary clearly to re-state the jurisdiction of this Court. This is not a Court of Appeal. This Court merely exercises an advisory jurisdiction. Its judgments are in the nature of advice given on the questions submitted to it by the Tribunal. Its advice must be confined to questions referred by the Tribunal to this Court and those questions must be questions of law which must arise out of the order made by the Tribunal. Now, looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression "arising out of such order" in a manner unwarranted by the ordinary grammatical construction of that expression. This Court has no jurisdiction to decide questions which have not been referred by the Tribunal. If the Tribunal does not refer a question of law under Section 66(1) which arises out of the order, then the only jurisdiction of the Court is to require the Tribunal to refer the same under Section 66(2). It is true that the Court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties, but it is not open to the Court to raise new questions which have not been referred to it by the Tribunal.

2. The Advocate General has strongly relied on two decisions, one of the Madras High Court and the other of the Lahore High Court, in support of his contention that inasmuch as although this particular question with regard to Section 44(1)(b) was raised in the grounds of appeal but was not dealt with by the Tribunal, the Tribunal was wrong in referring it to the High Court. The first decision is of the Lahore High Court (*Jamna Dhar Potdar v. Commr. of Income-tax*[1]*).* That was a ease under the old Act and an application was made under Section 66(2) asking the Commissioner of Income-tax to state a case on certain points. With regard to the second question the Lahore High Court took the view that although a question of law might be involved, as the question was not raised in the appeal to the Assistant Commissioner, the question did not arise out of the order under Section 31 of the Act and the petitioner had no right to demand that the Commissioner should refer that question. The Madras High Court dealt with the question under the present Act in A. *Abboy Chetty & Co. v. Commr. of Income-tax, Madras*[2] and took the view that a question of law can be said to arise out of an order of the Appellate Tribunal only if such order discloses that the question was raised before the Tribunal. It will be noticed that what this means is that not only the question should be raised before the Tribunal but also that the order itself should disclose that the question was so raised. With great respect if the view taken by the

Madras High Court were right, it would amount to this that if an assessee appearing in person or an assessee who was wrongly advised did not think fit to raise a question of law or argue it before the Tribunal, then although such a point of law was apparent on the face of the order or arose on the facts already found by the Tribunal, the assessee would be debarred from raising that question before the Court, The decision of the Madras High Court would also result in this extraordinary situation. An assessee may raise a question and argue it before the Tribunal, but if the Tribunal thought fit to ignore that argument and not to refer to that point of law in its order, then the Court would have no jurisdiction to call upon the Tribunal to refer that question of law to the High Court, It is true that the Income-tax Act is a very technical statute, but I see no reason why when the plain grammatical construction of the section does not make it necessary to come to that conclusion it is necessary to do so and arrive at such an anomalous result. It is not as if it would be open to one party or the other to raise any question before this Court merely because such a question arose out of the order of the Tribunal. The proper safeguard is that this Court cannot advise on any question unless it has been referred to it by the Tribunal or unless we require the Tribunal to state a question of law for our consideration. A similar attempt was made to restrict the jurisdiction of this Court under the old Act and it was repelled by this Court, and the case is reported in *Vadilal Lallubhai v. The Commissioner of Income-tax*[3] Under the old Act it was for the Commissioner of Income-tax to formulate the questions of law arising out of the order made by the Assistant Commissioner, and in the case which came before Beaumont C.J. and Rangnekar J. the Commissioner refused to state a case taking the view that the question of law as formulated by the assessee did not arise out of the order, and, therefore, no question arose of stating the case. The assessee then made an application under Section 66(3) asking this Court to require the Commissioner to state the case. It was then argued that this Court had no jurisdiction to direct the Commissioner to state the case arising on a question of law not formulated before him. Various decisions of other High Courts were cited in support of that view. Beaumont C.J., in delivering the judgment, refused to agree with the views of the other High Courts on this point, and he expressly disagreed from the view of the full bench of the Rangoon High Court, taking the view that their view seemed to restrict the powers of the High Court in a manner not authorised by the Act. In my opinion the present attempt of the Advocate General is also to restrict the powers of the High Court in a manner not authorised by the Act; and to confine the questions of law arising out of the order merely to those questions of law which have been raised before the Tribunal or dealt with by the Tribunal is in my opinion restricting unauthorisedly the advisory jurisdiction of this Court. Kania J. had to consider a similar question in *New Piecegoods Bazar Co., Ltd. v. Comr. Income-tax*[4]. The question before the Court (Stone C.J. and Kania J.) was whether certain deductions were permissible in respect of the assessees' income from property. Now in the assessees' appeal to the Appellate Tribunal one of the grounds taken was that on the proper construction of Section 9 the amount paid for the municipal taxes and Urban

Immoveable Property Tax should be allowed as a deduction in computing the income from property. Kania J. pointed out that that contention could cover two grounds : one, that the taxes should be deducted in the first instance before arriving at the bona fide annual value within the meaning of Section 9, and the other, that the annual value of the property being ascertained those were permissible deductions under heads (iv) and (v) of Sub-section (1). The Commissioner argued that the first aspect was never contemplated or urged by the assessee and was, therefore, not dealt with. Kania J. stated in his judgment that there appeared force in that contention although he took the view that the assessee was in a position to raise that contention by the ground of appeal formulated by him. Therefore, Kania J. took the view that, although the contention was put toward as a ground of appeal, it had not been dealt with by the Tribunal. If the Advocate General were right, this Court had no jurisdiction to consider that contention at all. But what the Court there did was to send the reference back to the Tribunal and invited it to rexpress its opinion on that aspect of the contention and raise a proper question of law on that point.

3. I may point out that in the case before us the position is more simplified because although the point was not dealt with by the Tribunal the Tribunal has actually raised a question of law and has referred it to us for our opinion. Under Section 66(5) we have to decide the questions of law raised and submitted to us. I do not see how it is open to the Advocate General once a question of law has been raised by the Tribunal to ask us not to give our opinion on it in view of Section 66(5). It may be that a particular question may be irrelevant or unnecessary, and we may refuse to give our opinion on such a question, but I do not think that it is competent to a party to challenge the jurisdiction of this Court to answer a question which has been raised by the Tribunal. The Tribunal wants our advice on a particular question of law and it is our statutory duty to give that advice to the Tribunal.

4. Now coming to the questions themselves, with regard to the first question Mr. Kolah's contention is that under Section 4(1)(b)(ii) only such remittances are taxable which represent income which was earned by a resident in British India. According to him if a resident in British India earns income outside British India and then brings that income into British India, the income having been earned after April 1, 1938, such a remittance into British India is taxable under Section 4(1)(b), Sub-clause (iii). Mr. Kolah contends that inasmuch as this particular income of Rs. 2,01,000 was earned by the assessee as a non-resident outside British India, it cannot be taxed at all. Mr. Kolah, therefore, asks us to give the word "him" occurring in that sub-clause a particular connotation. He wants us to read that word to mean "provided that he was a resident in British India." I see no reason why these words should be interpolated in Section 4(1)(b)(iii). It is also important to note that Section 4(1)(b)(ii) deals with income of a resident in British India which accrues or arises without British India. Therefore, in any particular year the total income of a resident in India would also include all income which accrued or arose to him

without British India. As that was already taxed if he brought that income into British India subsequently, it could not possibly be taxed again and, therefore, if Mr. Kolah's contention was right it was unnecessary and superfluous to enact Sub-clause (iii) at all. Sub-clause (iii) is enacted, amongst other things, to deal with this particular case which we have before us which would not have fallen under Sub-clause (ii). It is a case of a non-resident receiving income, then coming to British India and becoming a resident here and bringing his income into British India, and as this income was not taxed before, it becomes liable to tax as remittance in the year in which it is brought into British India. It is necessary to note that under this sub-clause what is being taxed is not income but remittances and the Legislature is only concerned with the fact that the person who remits it is a resident in British India and that the remittance takes place in the year of accounting. The fact that the remittance represents income earned by a non-resident is entirely irrelevant.

5. With regard to the second question, namely, whether the assessee is entitled to set off Rs. 73,779 against the sum of Rs. 2,01,000 it is conceded by Mr. Kolah that he can only succeed if he can satisfy us that both these amounts fell under the same head of income, because otherwise the proviso to Section 24 would clearly come in his way. Now it is true that Rs. 73,779 is a loss in business of the assessee carried on in Indore and the question is whether the amount of Rs. 2,01,000 can be considered to be falling under the head of profits and gains of the assessee's business. Mr. Kolah says that this amount was earned in his business, but we are not concerned with how this income arose to the assessee. The relevant point of time is when this amount was brought into India. It is the remittance that has to be taxed and it is clear that this remittance cannot fall under Section 10 as income from business but it must fall under Section 12 as income from other sources. If that be so, then it is clear that the assessee cannot set off Rs. 73,779 which is a loss falling under the head business against Rs. 2,01,000 which is income falling under the head "Other sources" under Section 12. I would, therefore, answer the first question in the affirmative, and the second question in the negative. The assessee must pay the costs of this reference.

Tendolkar, J.

6. This reference arises out of an assessment for the year 1944-45 the accounting year being Section 1999-2000 (Maru) beginning from November 9, 1942. The assessee was a resident during that year but was held to be a non-resident in preceding years. Upon the commencement of his business in Bombay on November 9, 1942, a sum of Rs. 51,000 was credited in the personal account of the assessee. Another sum of Rs. 1,50,000 was similarly credited on January 8, 1943. These two sums aggregate to Rs. 2,01,000; and it was the case of the assessee before the Income-tax Officer that his rich uncle had died leaving him a large fortune and this amount represented a part of that fortune brought by him into British India. On this he was disbelieved,

and it was held that these sums represented remittance of profits received in British India by the assessee through business carried on in previous years in the Indore State. They were, therefore, assessed under Section 4(1)(b)(iii), and the first question of law that has been referred to us is whether they were so rightly assessed. During the accounting year the assessee suffered a loss in his business at Indore to the extent of Rs. 73,779. The assessee claims that he is entitled to set off this amount against the remittance of Rs. 2,01,000, and the second question referred to us is whether he is so entitled.

7. Upon this reference having been called on before us, the Advocate General for the Commissioner raised a preliminary objection that the first question of law was wrongly referred to us by the Tribunal inasmuch as it does not arise out of the order of the Tribunal, and that, therefore, we should not determine it. To this preliminary objection there is to my mind a very short answer for the purposes of this reference. The scheme of Section 66 of the Income-tax Act is that under Sub-section (1) either the assessee or the Commissioner may apply to the Tribunal to refer to the High Court any question of law arising out of such order and the Tribunal may draw up a statement of the case and refer it to the High Court. If they do so, and they have done so in the present reference, then it is the duty of the High Court under Sub-section (5) thereof to decide the question of law raised by the case stated. The section does not confer power either on the assessee or the Commissioner to go to Court and urge that the case should not have been stated or no question of law should have been raised. It is only if the Tribunal takes the view that no question of law arises and refuses to state a case that either party is entitled to apply to Court under Sub-section (2) for an order requiring the Tribunal to state a case. That is not the position before us. Since the Tribunal has, although the question was not argued before it, raised the question of law and deferred it to us, we are bound to determine it under Sub-section (5). In this view of the ease I do not consider it necessary to express any opinion on the wider question as to the correct meaning placed on the words "question of law arising out of such order". There has been a wide divergence of judicial opinion on the interpretation of these words and the various High Courts have taken various views which are difficult to reconcile. These words would, in my opinion, fall to be determined only when an application under Section 66(2) is made requiring the Tribunal to state a case. I, therefore, refrain from expressing any opinion on the correct interpretation to be placed on these words.

8. With regard to the first question of law that has been referred to us, the language of Section 4(1)(b)(iii) is plain and simple. It provides that the total income of an assessee, resident in British India, shall include income profits and gains which have accrued or arisen to him without British India before the beginning of the accounting year and after April 1, 1933, and are brought into or received in British India during the accounting year. There is no doubt that in this case, on the facts found, Rs. 2,01,000 represented income profits or gains which accrued to the assessee

without British India prior to the accounting year and after April 1, 1933, and, therefore, in terms the sub-clause applies. But it is contended by Mr. Kolah for the assessee that this sub-clause does not relate to the income which accrued or arose to a person who was a non-resident at the time when the income accrued or arose. To my mind, there is no justification for restricting the meaning of the sub-clause in this manner. It would amount to interpolating into the plain words of this sub-clause words which are not there. Moreover, if such was the true intention of the Legislature, it is difficult to understand why Sub-clauses (ii) and (iii) should have existed side by side in respect of any year subsequent to the year when these sub-clauses were inserted in the Income-tax Act by the amendment of 1939. Income which accrues or arises to a resident in British India during any year is a part of his total income under Section 4(1)(b)(ii). It could not have been intended that this particular part of the total income should again be included in his total income in a subsequent year when it is received in British India. I am, therefore, not prepared to restrict Section 4(2)(b)(iii) in the manner suggested by Mr. Kolah, and I agree that the first question must be answered in the affirmative.

9. With regard to the second question, Mr. Kolah claims that he is entitled to set off the loss of Rs. 73,779 against the amount of Rs. 2,01,000, because he says that the amount of Rs. 2,01,000 is profits and gains of a business within the meaning of Section 10, and, therefore, the loss made in that business must be set off against that sum. I cannot agree that this amount represents profits of a business or that it has been taxed as such. This amount is included in the total income of the assessee by reason of the fact that it was remitted to British India during the accounting year and, therefore, it has been quite rightly taxed by the Income-tax Officer under the head "Income from other sources." The amount of Rs. 73,779 which represents business loss cannot, therefore, be set off against it under Section 10 of the Act. Reliance was next placed on Section 24 of the Act. No doubt under that section where an assessee sustains loss of profits or gains in any year under any of the heads mentioned in Section 6 he shall be entitled to have the amount of the loss set off against his income profits or gains under any other head in that year. Now the sum of Rs. 2,01,000 falls within the fifth head in Section 6, viz. "Any other sources," and the loss of business falls under a different head, viz., the fourth head of "Profits or gains of business." So that Section 24(1) applies. But the proviso to that section puts the assessee out of Court. That proviso provides that in so far as the loss sustained is a loss incurred in a Native State, such loss shall not be set off against profits or gains in British India, but can only be set off against profits and gains in an Indian state. The result, therefore, is that even under Section 24 the assesses is not entitled to have the amount of Rs. 73,779 set off against the sum of Rs. 2,01,000. The second question referred to us must, therefore, be answered in the negative.

Cases Referred.

1(1935) 3 I.T.R. 112

2(1947) 15 I.T.R. 442
3(1934) 37 Bom. L.R. 89 : S.C. 3 I.T.R. 152
4(1947) 49 Bom. L.R. 620 : S.C. 15 I.T.R. 319, F.B