

BOMBAY HIGH COURT

Commissioner of Income Tax

Vs.

Tejaji Parasram

Income-tax Reference No. 29 of 1952

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

05.03.1953

JUDGMENT

Chagla, C. J.

1. A rather important question arises on this reference as regards the power of the Commissioner to revise the orders of an Income-tax Officer under Section 33B.

2. The assessee is a Hindu undivided family, the 'karta' of which is one Tejaji Parasram Kharawala. This Hindu undivided family was the sole-selling agent of dyes and chemicals manufactured by Ciba (India) Ltd. and Imperial Chemical Industries (India), Ltd. On 24-10-1947, this family agreed to transfer this business to a private limited company by the name of Tejaji Parasram Kharawala, Ltd., and the share-holders of this company were the members of the joint family. Under the agreement of sale the goodwill of the business was fixed at Rs. 50,000. The family's income for Samvat Year 2003 was computed at Rs. 3,51,506. This amount included a sum of Rs. 25,000 which was included as representing the goodwill of the business which had been transferred to the private limited company. As the goodwill was transferred for Rs. 50,000, the Income-tax Officer computed the balance of Rs. 25,000 as capital gain under Section 12-B, Income-tax Act.

The Hindu undivided family appealed to the Appellate Assistant Commissioner on 18-4-1949. One of the grounds of appeal was with regard to the computation of the capital gains at Rs. 25,000. The assessee's appeal with regard to the computation of the capital gains was dismissed by the Appellate Assistant Commissioner. Thereafter the Commissioner of Income-tax purporting to act under Section 33B of the Act computed the capital gains at Rs. 10,00,000. The family thereupon appealed to the Appellate Tribunal, and the Appellate Tribunal held that the Commissioner had no jurisdiction to revise the order passed by the Income-tax Officer, and it is with regard to this decision that a question of law has been submitted to us on this reference.

3. Now, in order to appreciate the contentions of the parties it is necessary to look at the scheme of the Act. The Commissioner has been given no right of appeal from an order of assessment passed by the Income-tax Officer. The right of appeal is confined to the assessee; and before Section 33B was enacted, the position, in law was that if the assessee did not appeal from the order of the Income-tax Officer, that order became final and conclusive. But if the assessee appealed from the order of the Income-tax Officer, the widest jurisdiction was given to the Appellate Assistant Commissioner in appeal. He had the power to confirm, reduce, enhance or annul the assessment, he had the power to direct the Income-tax Officer to make a fresh assessment, and the only limitation that was laid down on the exercise of his jurisdiction was that if he wanted to enhance the assessment, he must give the assessee a reasonable opportunity of showing cause against the enhancement. From the decision of the Appellate Assistant Commissioner the right was given both to the Commissioner and to the assessee to appeal to the Appellate Tribunal. Section 33A gave the Commissioner the power of revision, but that power of revision could only be exercised by the Commissioner in favour of the assessee, because that section in terms provided that no order passed by the Commissioner should be prejudicial to the assessee. Section 33B was enacted by Act 48 of 1948 and, to repeat once again, prior to the enactment of that section not only did the order of the Income-tax Officer become final and conclusive if the assessee did not appeal, but even the Commissioner under Section 33A had no power to revise that order. Section 33B gave much wider powers of revision to the Commissioner, and the section provided that :

"The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

Therefore, it was intended that the Commissioner should exercise the power given to him under Section 33B in the interest of the public revenue. Therefore, for the first time by reason of the enactment of Section 33B the orders of the Income-tax Officer became subject to a revision although the assessee might accept those orders and may not appeal from them to the Appellate Assistant Commissioner. But one important distinction between Section 33A and Section 33B may be immediately noticed. Whereas the power of revision conferred upon the Commissioner under Section 33A was against any order passed by any authority subordinate to him, the power of revision conferred upon the Commissioner under Section 33B was restricted to any order passed by the Income-tax Officer. Therefore, in terms Section 33B conferred upon the Commissioner the power to revise only the orders of the Income-tax Officer. The Legislature advisedly did not confer upon the Commissioner the power to revise either the orders of the Appellate Assistant Commissioner or the Appellate Tribunal.

4. Now, in this particular case, the Income-tax Officer passed an order assessing the capital gains of the assessee at Rs. 25,000, and the assessee appealed from that order, and the Appellate Assistant Commissioner confirmed that order by dismissing the appeal of the assessee. The question that arises for our determination is whether when the Commissioner revised this order and enhanced the assessment to Rs. 10,00,000, he was revising the order of the Income-tax Officer, because, as pointed out, it is only his order that he had the jurisdiction to revise under Section 33B. In our opinion, it is clear that by enhancing the assessment to Rs. 10,00,000 he was not revising the order of the Income-tax Officer but he was revising the order of the Appellate Assistant Commissioner who had confirmed the order of the Income-tax Officer and dismissed the appeal of the assessee. Once an appeal was preferred from the order of the Income-tax Officer and an order was passed in that appeal, the order of the Income-tax Officer became merged in the order of the Appellate Assistant Commissioner, and in enhancing the assessment from Rs. 25,000 to Rs. 10,00,000 what the Commissioner was doing was not to revise the order of the Income-tax Officer but to revise the order of the Appellate Assistant Commissioner.

Sir Nusserwauji has attempted to argue that inasmuch as the Appellate Assistant Commissioner did not interfere with the order of the Income-tax Officer, what the Commissioner was in substance revising was the order of the Income-tax Officer and not the order of the Appellate Assistant Commissioner. In our opinion that contention is entirely untenable. It is a well established principle of law that when an appeal is provided from a decision of a tribunal and the appeal Court after hearing the appeal passes an order, the order of the original Court ceases to exist and is merged in the order of the appeal Court, and although the appeal Court may merely confirm the order of the trial Court, the order that stands and is operative is not the order of the trial Court but the order of the appeal Court. In this case although the Appellate Assistant Commissioner may not have disagreed with the Income-tax Officer and may have confirmed the order, the ultimate order of assessment which was in operation was the order of the Appellate Assistant Commissioner confirming the decision of the Income-tax Officer.

5. It is unnecessary to consider the question, because it does not directly arise before us, as to what would have been the position if the appeal preferred by the assessee against the order of the Income-tax Officer was pending before the Appellate Assistant Commissioner and before the order was passed by the Appellate Assistant Commissioner under his powers under Section 33 because here we have a case not of a pending appeal but the case of an appeal which had been decided and disposed of and in which a final order has been passed by the Appellate Assistant Commissioner.

6. With regard to that aspect of the matter, the view taken by the Tribunal is that the Commissioner would be precluded from exercising his jurisdiction under Section 33B only in those cases where the Appellate Assistant Commissioner has actually dealt with the matter in respect of which the Commissioner passes an order under Section 33B and the view taken by the Tribunal in this particular case is that inasmuch as the question of the quantum of the capital gain

was before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner applied his mind to the question of the quantum and confirmed the order of the Income-tax Officer, it was not open to the Commissioner to deal with the same subject-matter. Now, we find it difficult on principle to distinguish a case where an appeal is heard by the Appellate Assistant Commissioner and the particular matter in respect of which the Commissioner makes an order under Section 33B but is not dealt with in that appeal by the Appellate Assistant Commissioner and a case where the matter is dealt with by him. The Tribunal seems to have overlooked with respect, the very wide jurisdiction conferred upon the Appellate Assistant Commissioner to which reference has already been made. It is not disputed by Sir Nusserwanji that once an appeal is preferred by the assessee, it is open to the Commissioner to raise before the Appellate Assistant Commissioner any matter dealing with the assessment of the assessee. It is not as if the power of the Appellate Assistant Commissioner is confined to only those questions which have been raised by the assessee. Once this is conceded, it is difficult to understand why the Commissioner would not be precluded from making an order under Section 33B once an order has been passed by the Appellate Assistant Commissioner even though the Appellate Assistant Commissioner does not deal with the matter with which the Commissioner has dealt. The principle underlying Section 33B is that it is only the order of the Income-tax Officer that can be revised by the Commissioner. Once the assessment is confirmed by the Appellate Assistant Commissioner or any order with regard to the assessment has been made by the Appellate Assistant Commissioner, that becomes a final order of assessment, and the only right that the department has is the right to appeal to the Appellate Tribunal. The right of the Commissioner continues so long as the order of the Income-tax Officer is not merged in the order of the Appellate Assistant Commissioner, but once the order is merged, the Commissioner cannot deal with the assessment of the assessee at all. On appeal the power to deal with the assessment is given to the Appellate Assistant Commissioner, and further the power is given to the Appellate Tribunal in appeal from the order of the Appellate Assistant Commissioner. The Commissioner completely goes out of the picture once the Appellate Assistant Commissioner has passed an order in appeal from the decision of the Income-tax Officer.

7. In our opinion, therefore, though perhaps not for the same reasons as stated in the judgment of the Tribunal, the Tribunal was right in the conclusion it came to that the Commissioner was not competent to pass an order under Section 33B when an appeal against the order of the Income-tax Officer had been decided by the Appellate Assistant Commissioner.

8. We, therefore, answer the question submitted to us in the negative. The Commissioner to pay the costs.

Question answered in negative.