BOMBAY HIGH COURT

Ranchhoddas Karsondas

Vs.

Commissioner of Income Tax

I.T. Ref. No. 35 of 1953

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

18.03.1954

JUDGMENT

Chagla, C.J.

1. The answer which we have to give to the questions submitted to us on this reference is both simple and obvious. A public notice was issued under Section 22(1) and the period fixed under that section was 65 days. The notice was issued in respect of the assessment year 1945-46 and that was on 1-5-1945. The assessee made a return on 5-1-1950, and in the return he showed his assessable income as Rs. 1,935. He added a foot-note to his return to the following effect :

> "My wife has sold her old ornaments and deposited the sum of Rs. 59,026 in the firm of Assar Syndicate in which I am a partner."

On 27-2-1950, the Income-tax Officer issued a notice upon the assessee under Section 34 and he made an assessment order on 26-2-1951, holding that the sum of Rs. 59,026 constituted the income of the assessee and assessing him to tax on that income. Now, it is this assessment order that was challenged before the Tribunal by the assessee and the Tribunal upheld that order.

2. Now, the order is challenged, firstly, on the ground that the proceedings which were initiated under Section 34 were not valid proceedings, and inasmuch as the proceedings were not valid, the order was an invalid order. The scheme of Section 22 is fairly clear.

Sub-Section (1) of Section 22 provides for a public notice, Sub-Section (2) provides for a notice by the Income-tax Officer upon individual assessees, and Sub-Section (3), which is the material sub-section, provides that if any person has not furnished a return within the time allowed by or under Sub-Section (1) or Sub-Section (2), "to quote the material words, "he may furnish a return at any time before the assessment is made." Therefore, there is a time limit under Sub-Section (1) of Section 22 to make a return, there is a time limit also under Sub-Section (2) to make a return, but notwithstanding the fact that the time so limited has passed, a person is entitled to make a return, provided before he makes a return no assessment is made. Now, this is exactly what the

assessee did in this case. Although the time limited by the public notice under Sub-Section (1) of Section 22 had long passed, no assessment was made upon him. Therefore, availing himself of the provisions of Sub-Section (3) of Section 22, he made a voluntary return on 5-1-1950.

3. Now, the question is, whether it is open to the Taxing Department to avail itself of Section 34 once a return is made under Sub-Section (3) of Section 22. Section 34 can be availed of in one of two eventualities, If no return is made by the assessee, the Department can proceed under Section 34, or if a return is made and the return results in an assessment and it is found that certain income has escaped assessment or has been under-assessed, then proceedings can be taken under Section 34. But it is clear on a plain reading of Section 34 that action cannot be taken under Section 34 once a return has been made. Then the Department must proceed to assess the assessee on the return made by him.

4. Mr. Joshi contends that in this case the return was made by the assessee on 5-1-1950, and within the period of limitation laid down under Section 34(3) the assessment had to be made by 31-3-1950. It seems that the Department was not in a position to complete the assessment of the assessee within the period of limitation, and by in resorting to Section 34 it wanted the period of limitation to be extended by one year because Section 34 extends the period by one year if notice is issued under that section. Mr. Joshi says that it is not open to the assessee to wait for any length of time and then to make a return practically towards the end of the period of limitation and thereby prevent a proper assessment. Now, it is entirely the fault of the Department if there is delay in the making of the return. Two clear options are open to the Department. It is open to the Department to issue a notice under Sub-Section (2) of Section 22, and if no return is made within the time fixed by that notice, they can proceed under Section 23(4) to a best judgment assessment, or if the time for making a return under Sub-Section (1) of Section 22 has expired and no return has been made, it is open to the Department to proceed under Section 34 on the basis that no return has been made, and the assessee is liable to be taxed under Section 34. But if the Department takes no action at all either one or the other, allows time to pass and permits the assessee to make a voluntary return which he is entitled to do under Sub-Section (3) of Section 22, then it is not open to the Department to proceed under Section 34. The return having been made, it must be disposed of and the income of the assessee must be assessed as laic down in Section 23. Now, it is difficult to understand why the Department could not have proceeded under Section 23 and why it should have resorted to Section 34. Even assuming that it took the view that the sum of Rs. 59,026 was the income of the assessee, it was open to the Department to assess him to that income under Section 23, but, as we pointed out earlier, the sole reason, it seems, for the Department to proceed under Section 34 was to extend the period of limitation. Now, it is not open to the Taxing Department by availing itself of a wrong procedure to extend the period of limitation laid down in a statute.

5. Now, Mr. Joshi's further contention is that the return which the assesses made was not a return at all under Sub-Section (3) of Section 22. Mr. Joshi says what Section 23(3) requires is that the

return must be made if a person has an assessable income, and Mr. Joshi says that on his own showing the assesses has no assessable income, and therefore the return that he made was not a retain contemplated by Sub-Section (3) of Section 22.
We are not prepared to accept that contention. There is an obligation cast by Section 22 to make a return of assessable income if a notice is served. But that does not mean that it is not open to the assessee to make a return even though the income he may show is not an assessable income. We do not understand why the assessee should take the risk of not making a return merely because he himself takes the view that his income is not an assessable income. The Department may take a different view. Take this very case. The view of the assessee was that his income was only Rs. 1,935. He showed Rs. 59,026 as an income belonging to his wife and yet the Department took the view that Rs. 59,026 did constitute the income of the assessee. Therefore, even from that point of view the return made by the assessee, when all the figures were taken into consideration, was a return, in the opinion of the Department, of an assessable income.

6. The other contention put forward by Mr. Joshi is that in a case like this it is not possible to make an order of assessment and therefore it was open to the Department to proceed under Section 34(1) when no return was made within the time limited by Section 22(1). Now, Sub-Section (3) of Section 22 provides as the terminus of the period of limitation the making of the assessment, and we do not understand why an assessment could not be made in this case which would have prevented the assessee from making a return under Sub-Section (3) of Section 22. As already pointed out, if the assessee did not make a return within the time limit prescribed by Sub-Section (1) of Section 22, it was open to the Department to initiate proceedings under Section 34 on the ground that no return was made. But it does not choose to initiate proceedings under Section 34 and only resorts to those proceedings under Section 34 after a return has been made under Sub-Section (3). That the law docs not permit.

7. Now, there is a decision of this Court very much in point reported in - *'Harakchand Makanji and Co. v. Commissioner of Income Tax, Bombay City[1]',* In that case we held that :

> "Notice under Section 34 is only necessary if at the end of the assessment year no return has been made by the assessee, but where the assessee himself chooses voluntarily to make a return, no question can arise under Section 34 of assessment escaping, and therefore there is no necessity to serve any notice under Section 34."

8. Mr. Joshi has relied on a decision of the Calcutta High Court reported in - ***'Commissioner of Agri. Inc.-tax v. Sultan Ali, 1951-20 ITR 432 (Cal) .*** The Calcutta High Court was not considering the Income-tax Act but it was considering provisions analogous to those contained in the Income-tax Act, and Mr. Justice Chakravarti who delivered the judgment in that case has taken the view that the return was not a return within the meaning of Section 22(3) unless it is a return of assessable income. Now with very great respect, we are unable to accept that view.

At p. 442 the learned Judge says :

> "It is true that there is nothing to prevent a person from filing a return showing an income below the assessable limit, in response to a notice under Section 24(1) (which corresponds to Section 22(1), Income-tax Act) but the question we are considering is whether a particular return, not filed in fact under Section 24(1) or Section 24(3) (which corresponds to Section 22(3) of the Act), is yet having regard

[1] AIR 1948 Bom 401

> to its contents capable of being treated as a return under the one or the other section. In my opinion the return in the present case is not so capable."

It is difficult to understand if it is open to a person to file a return which shows an income below the assessable limit under what other section would such a return be made except under Section 22(3); and it must also be said that this opinion of the learned Judge is 'obiter' because in that particular case after a notice under Section 24(1) was issued there was also a notice under Section 24(2) corresponding to our S, 22(2). Notice under Section 24(2) was held bad, but the view taken by the learned Judge was that although notice under Section 24(2) was bad, it was impossible to hold on the facts of the case that the return was made in response to the public notice. Therefore, on the facts of the particular case the decision reached at by the Calcutta High Court may be understandable. But to take the view that a voluntary return made is not a return under Section 22(3) merely because the return is of an income which is not assessable is, in our opinion with great respect, unacceptable and contrary to the scheme of the Income-tax Act. Therefore, in our opinion, the notice issued under Section 34 was not a valid notice.

9. With regard to the assessment order made on 26-2-1951, apart from the fact that the order is made as a result of proceedings under Section 34(1), it is also bad on the ground that it is made after the period of limitation. The period of limitation under Section 34(3) is four years from the last date of the year in which the income became first assessable,' and as that year ended on 31-3-1946, the assessment order was made four years beyond the period of limitation.

10. The result, therefore, is that we must answer the questions submitted to us (1) in the negative and (2) also in the negative. The Commissioner to pay the costs.
Questions answered in negative.