

BOMBAY HIGH COURT

Scindia Steam Navigation Co. Ltd

Vs.

Commissioner of Income Tax

I.T. Ref. No. 13 of 1954

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

13.09.1954

JUDGMENT

Chagla, C.J.

1. The assessee before us is the Scindia Steam Navigation Co., Ltd., and the assessment year is 1946-47.

2. The company had a ship by the name of "El Madina" which was purchased at the cost of Rs. 24,95,016. It was lost as a result of enemy action on 16-3-1944. Government paid compensation of Rs. 20,00,000 on 17-7-1944, and Rs. 23,00,000 on 22-12-1944, for the loss of this ship. Depreciation of this ship was allowed from time to time and its written-down value in the assessment year was Rs. 15,68,484. The Income-tax Officer included the difference between these two amounts, viz. Rs. 9,26,532, in the total income of the company for the assessment year 1946-47. The assessee contended that it was not liable to pay tax on this amount and the Tribunal upheld the decision of the Income-tax Officer and has referred the following question of law to us:-

"Whether the sum of Rs. 9,26,532 was properly included in the assessee company's total income computed for the assessment year 1946-47?"

Now, this inclusion is justified by reason of the provisions of proviso 4 to Section 10(2)(vii), and it is not disputed by the Department that if this proviso has no application, then the said amount cannot be included in his income. Therefore the main question that arises for our consideration is whether this proviso applies to the assessment of the assessee.

3. A preliminary point was raised by Mr. Joshi that this question does not arise because it was not argued before the Tribunal, and Mr. Joshi says that this question does not arise out of the order

made by the Tribunal. In our opinion it is open to the assessee, looking to the form in which the question has been raised, to contend before us that it is not liable to pay tax on the sum of Rs. 9,26,532 having regard to any provision of the Income-tax Act. The Tribunal has taken the view that the sum of Rs. 9,26,532 must be included in the total income of the assessee. It does not follow that because a particular aspect of the question was not urged before the Tribunal that it is not open to the assessee to urge that aspect before us. If all the facts necessary to decide a question from a particular aspect are before the Court, then the assessee is entitled to justify its contention that it is not liable to pay tax having regard to the provisions of the Indian Income-tax Act. It is not incumbent upon the assessee in order to put forward a particular point of law before this Court that it should necessarily have urged that very point of law before the Tribunal. If that point of law is implicit in the question raised by the Tribunal and if no additional facts are necessary to support that point, then it is open to the assessee to urge it notwithstanding the fact that it was not considered by the Tribunal. It would be throwing an intolerable burden upon the assessee if we were to hold that although the assessee is not liable to tax under the provision of the Indian Income-tax Act merely because it did not point out to the Tribunal the specific provision of the law or it was ignorant of the specific provision of the law therefore it should be debarred from urging that aspect of the case before us. The only question that we have to decide is whether this sum was properly included in the assessee's total income, and if the assessee satisfies us that this sum was not properly included by reference to any provision of the Indian Income-tax Act, then the question raised must be answered in its favor.

4. Now, turning to the merits of the case, it appears that this proviso which is relied upon by the Department was incorporated in the Indian Income-tax Act by Act 8 of 1946 which came into force on 4-5-1946. Therefore, this proviso was not in operation on 1-4-1946, when the assessment year of the assessee, viz. 1946-47, commenced; and Mr. Palkhivala's contention on behalf of the assessee is that the liability of the assessee to pay tax depends upon the provisions of the Indian Income-tax Act as they were in force on 1-4-1946, and inasmuch as on 1-4-1946, there was no liability upon the assessee to pay tax on this amount of Rs. 9,26,532, it could not be made liable by reason of a subsequent amendment of the Income-tax Act which was brought about on 4-5-1946.

5. In order to appreciate this contention one must bear in mind two basic facts about the Indian Income-tax Act. The first is that the Indian Income-tax Act subjects to tax not the income of the assessee in the year of assessment but in the previous year, and the other basic fact is that the liability to tax arises not by reason of the provisions of the Indian Income-tax Act but by reason of the fact that a Central Act fixes the rate at which the assessee is liable to pay tax and it is by reason of the Central Act that the income of the previous year of the assessee becomes liable to tax. If these two basic facts are borne in mind, then the position in law becomes very clear and very simple. Now, the income of the previous year of the assessee is for the year 1945-46 which ended on 31-3-1946, and it was the Finance Act of 1946 that imposed a liability upon the assessee to pay tax on this income at the rate mentioned in that Act. When we turn to the Finance

Act of 1946, Sub-Section (9) of Section 11 makes this provision:

"For the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922, and the expression "earned income" has the meaning assigned to it in clause (6AA) of Section 2 of that Act."

Therefore, the total income that has to be computed is in accordance with the provisions of the Indian Income-tax Act and it is clear that as this provision is being made on 1-4-1946, the provisions of the Indian Income-tax Act are the provisions as they obtained on that date.

6. The contention, on the other hand, put forward by Mr. Joshi on behalf of the Department is that once an amendment is introduced in the Indian Income-tax Act, that amendment comes into force immediately and is applicable to all assessments which are made after the amendment is effected. In other words, the submission of Mr. Joshi is that every assessment made after 4-5-1946, must take into consideration the amendments introduced in the Indian Income-tax Act, and inasmuch as the assessee was assessed after 4-5-1946, its assessment must be governed by the Indian Income-tax Act as it was amended up to that date.

7. A very startling result would follow if Mr. Joshi's contention were to be accepted. Different provisions of the Indian Income-tax Act would apply according to when the assessment was made. Although the assessment would be for the income of the previous year, yet the liability to tax with regard to that income would not be a uniform and consistent liability but it would vary with the time when the Income-tax Officer chose to assess the income to tax. It would, therefore, depend entirely upon the Income-tax Officer by taking up an assessment of an assessee when he pleases to determine what law should be made applicable to his assessment. There are many anomalies and perhaps absurdities in the Indian Income-tax Act, but unless we are compelled to take this view of the Indian Income-tax law we should be very reluctant to be driven to a conclusion which is not only so startling but so opposed to all principles of taxing law. Fortunately, in this case we have not to decide the matter as a matter of first impression. There is a clear decision of the Privy Council which has dealt with the very matter and has come to a conclusion which, in our opinion, is opposed to the contention put forward by Mr. Joshi. The case that went to the Privy Council was a decision given by the Madras High Court and that decision is reported in - '*Commr. of Inc. Tax, Madras v. Maharajah of Pithapuram*¹', In that case the assessee had executed four trust deeds settling certain immoveable properties on each of his four daughters. Under the provisions of these deeds the assessee reserved to himself a power to revoke the settlement. The Indian Income-tax Act was amended by an Act of 1939 and the provisions of Section 16(1) (c) were incorporated in the Act, and by the provisions of this section the assessee was liable to be taxed in respect of the income received by his daughters from the properties settled under these trust deeds. The income received by the daughters was in the year

of account 1938-39. The assessee objected to this income being assessed to tax on the ground that the Income-tax Officer was giving retrospective effect to Section 16(1)(c). His contention was that in the year in which the income was received Section 16(1)(c) was not in force. This contention was rejected by the Madras High Court and the learned Chief Justice points out (p.192):

".. When the Income-tax Officer made the assessment in this case the amending Act had come into force. The Income-tax Act says that an assessee shall pay the tax in respect of an assessment year based on the income received by him in the previous year. The assessee's income which the Income-tax Officer had to assess for the year 1939-40 included the income received from the properties which were covered by these revocable deeds of transfer. The income had actually been received by the daughters but as a result of the amending Act that income in trust

¹ AIR 1942 Mad 191 (SB)

must be deemed to be the income of their father. Therefore we agree with the Commissioner of Income-tax in his opinion that it was the law in force at the time of assessment which governs the assessment in this case and not the law as it was during the year in which the income was earned."

Strong reliance is placed by Mr. Joshi on the expression used by the learned Chief Justice that "it is the law in force at the time of assessment which governs the assessment." With respect to the learned Chief Justice, this expression has been rather loosely used as in that particular case the Act came into force on 1-4-1939, and, therefore, the attention of the learned Chief Justice was not directed to the point which we have to decide in this reference, because in the case before us the amendment has taken place after April 1 and therefore the question has arisen in the direct form in which it has been raised. But fortunately the Privy Council has delivered a judgment which with the precision for which the Privy Council was noted, has not left the matter in any doubt or dispute. While upholding the judgment of the Madras High Court the Privy Council has enunciated the law in very clear and precise language. The judgment of the Privy Council is reported in - '*Maharajah of Pithapuram v. Commr. of Inc. Tax, Madras*²', At pp.90-91 this is what their Lordships say:

"In the second place, it should be remembered that the Indian Income-tax Act, 1922, as amended from time to time, forms a code, which has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act. This may be illustrated by pointing out that there was no charge on the 1938-39 income either of the appellant or his daughters, nor assessment of such income, until the passing of the Indian Finance Act of 1939, which imposed the tax for 1939-40 on the 1938-39 income and authorised the present assessment. By Sub-Section (1) of Section 6, Indian Finance Act, 1939, income-tax for the year beginning on 1-4-1939, is directed to be charged at the rates specified in Part I of Schedule II, and rates of super-tax

are also provided for, and by Sub-Section (3) it is provided that 'for the purpose of this section and of Schedule II, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.' This can only refer to the Indian Income-tax Act, 1922, as it stood amended at the date of the Indian Finance Act, 1939, and necessarily includes the alterations made by the Amending Act, which had already come into force on 1-4-1939."

Therefore, what the Privy Council says is that not only the liability to pay tax but the authority to make the assessment order arose from the Finance Act. The language of the Finance Act which the Privy Council was considering is identical with the Finance Act which we are considering and the Privy Council construed that language to mean that the computation of the total income in accordance with the provisions of the Indian Income-tax Act means the Income-tax Act as it stood amended at the date of the coming into force of the Finance Act. Now, it will be noticed that the case the Privy Council was considering was a converse case to the one which we are considering. There the assessee was seeking to escape tax on the ground that the amending Act did not apply when the income was earned. The Privy Council rejected that contention holding that the material

² AIR 1945 PC 89

date was not the previous year but the first of April of the assessment year, and the liability to tax depended upon the provisions of the Indian Income-tax Act as it was in force on that date. Here the amendment has come into force after 1-4-1946, and the attempt of the Department is to tax the assessee on his total income for the previous year, not according to the Act as it stood on 1-4-1946, but according to the Act as it was subsequently amended. In our opinion the decision of the Privy Council is clear and emphatic and it is not open to the Department to give retrospective effect to the amending Act which only came into force on 4-5-1946. In effect and in substance what the Department is Contending for is that although the Act 8 of 1946 came into force on 4-5-1946, we should deem it to be in force on 1-4-1946. Now, this decision has been considered and applied by the Allahabad High Court in - 'Mishrimal Gulabchand of Beawar, In re', AIR 1950 Allahabad 270. In that case the assessee, who was a resident and ordinary resident in British India, made a profit from its business in British India and suffered a loss from its business in Indian State in the previous year relevant to the assessment year 1944-45. The question was whether the loss incurred in the Indian State should be deducted from the assessee's income from the business and the Allahabad High Court held that proviso 1 to Section 24 (1) was not applicable to the assessment year 1944-45, because it was not in force on 1-4-1944. That proviso came into force on 12-4-1944. Therefore, the facts that the Allahabad High Court had to consider were practically identical with those which we have to consider here, and the Allahabad High Court applied the decision of the Privy Council and came to the conclusion to which reference has just been made.

8. Mr. Joshi has relied on a decision of the Calcutta High Court reported in - *'Income-tax Officer*

*v. Calcutta Discount Co. Ltd.*³, There the Calcutta High Court was considering an application for a writ under Article 226 to prevent the Income-tax Officer from assessing income under the amended Section 34, Indian Income-tax Act. The new Section 34 came into force from 30-3-1948, and the Income-tax Officer was seeking to assess escaped income of the assessee for the years 1942-43, 1943-44 and 1944-45 and the contention of the assessee was that Section 34 did not have retrospective effect and the provisions of the new Section 34 did not apply to the assessment years prior to 1-4-1948. This contention was rejected by the Calcutta High Court. Now, in the first place it should be noted that the Calcutta High Court took the view that Section 34 in express terms permitted the Income-tax Officer to assess escaped income for eight years previous to the amending section came into force and therefore the learned Chief Justice in his judgment at p.726 points out that in the view he has taken of Section 34 no question of retrospective operation as a question of interpretation arises in that case. But reliance is placed on certain observations of the learned Chief Justice and the view taken by the learned Chief Justice is that the decision of the Privy Council could not apply to the procedural provisions of the Indian Income-tax Act. In other words, the view taken by him is that if an amendment is made to the procedural part of the Indian Income-tax Act, it would have a retrospective effect and the principle enunciated by the Privy Council would not apply to such amendment. We express no opinion with respect, as to whether the learned Chief Justice is right in the view that he has taken, but it is clear that the provision that we have to consider is not a procedural amendment. The amendment seeks to make a part of the income of the assessee liable to tax, which but for the amendment would not have been so liable, and the learned Chief Justice does not feel any doubt that the principle of the Privy

³ AIR 1953 Cal 721

Council case would certainly apply where a new provision was incorporated which increased the taxable quantum of the income of the assessee; and there is no doubt that in this case the effect of the amendment is to increase the taxable quantum of the income of the assessee. Therefore, far from this judgment helping Mr. Joshi whilst emphasizing the distinction between procedural amendment and a substantial amendment to the extent that an amendment is a substantive amendment the Calcutta High Court has accepted the principle laid down by the Privy Council.

9. It is then urged by Mr. Joshi that this interpretation would make it impossible for the Parliament to bring into force an amendment of the Income-tax Act immediately. Mr. Joshi says that even though the Parliament might have brought this Act into force on 4-5-1946, if its intention was that it should come into force immediately, by the interpretation that we are placing upon the provisions of the Indian Income-tax Act we are making it impossible for the Parliament to carry out its intention. Now, there are two fallacies underlying this argument. In the first place it is not correct to say that because the Act 8 of 1946 did not apply to the income of the previous year, therefore it did not come into force or was not effective in May, 1946. It was clearly effective in the sense that it did apply and would apply to the income earned in that year, which income undoubtedly would be assessed to tax in the assessment year 1947-48. The other fallacy underlying this argument is that there is nothing to prevent the Parliament from making it clear

that it wishes to give retrospective effect to an Act which amends the Indian Income-tax Act. It is always open to the Parliament whenever it amends the Indian Income-tax Act to provide that that amendment shall be operative as from the beginning of the assessment year, and our attention has been drawn to various amending Acts passed by the Central Legislature where that intention has been made perfectly clear by a language which is both simple and clear.

10. There was an Ordinance passed in 1949, being Ordinance 21 of 1949, and that Ordinance introduced various amendments in the Indian Income-tax Act. Now, by clause (5) of that Ordinance it was provided that the amendments specified in Schedule I shall be made in the Indian Income-tax Act, 1922, and shall be deemed to have been made therein with effect from 1-4-1949, and in clause (6) there is a similar provision with regard to the amendment of Act 21 of 1947. Therefore, by this Ordinance the Governor General made it clear that he wanted the amendments introduced into the Indian Income-tax Act to have a retrospective effect and to apply to income earned in the previous year to the assessment year 1949-50. We may look at the recent Act passed by the Parliament which is Act 25 of 1953, and Sub-Section (2) of Section 1 provides:

"Subject to any special provision made in this behalf in this Act, it shall be deemed to have come into force on 1-4-1952."

Therefore, although the Act was passed in 1953, the Parliament gave a retrospective effect to it and made it applicable to assessments made for the assessment year 1952-53.

11. Now, the difficulty of Mr. Joshi is that there is no such provision whatsoever in Act 8 of 1946, and there is no reason why we should assume against the assessee that the Parliament intended, although it did not say so, that Act 8 of 1946 should have a retrospective effect and should be deemed to have come into force on 1-4-1946. The Department has proceeded to assess the assessee on the assumption for which there is no warrant. It has attempted to give retrospective effect to an Act when the Central Legislature itself did not do so; and, therefore, in our opinion, the assessee is not liable to pay tax on the income of Rs. 9,26,532 because proviso 4 to Section 10(2)(vii) under which this income is sought to be taxed was not in force in respect of the assessment year 1946-47 and in respect of the total income of the assessee for the year 1945-46.

12. Mr. Palkhivala wanted to argue that apart from this aspect of the matter he was entitled to exemption on other grounds as well. But as this point that has been raised goes to the root of the matter, we did not think it necessary to hear Mr. Palkhivala on his other contentions.

13. We, therefore, answer the question raised in the negative. No order as to costs.
Answered in negative.