BOMBAY HIGH COURT

Commissioner Of Income Tax

Vs.

D.V. Ghurye

Income Tax Ref. No. 13 of 1956

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

04.02.1957

JUDGMENT

Chagla, C.J.

1. A very short question in regard to the construction of Section 34, Sub-Section (1) and the proviso to Section 34, Sub-Section (3) arises on this reference. The assessee made his return of his income for the assessment year 1943-44 and the assessment was completed on the 17th of July 1944. it was then discovered that the assessee had not shown a certain income. Under the circumstances the Income-tax Officer issued a notice on the 20th of March 1952 and this notice was served on the 16th of April 1952. This assessment was completed on the 28th of March 1953. The assessment was challenged on the ground that the notice pursuant to which this assessment was made was not valid, and the Tribunal held that the challenge was justified and held that the assessment could not be sustained.

2. Now Section 34 (1) deals with the notice and it provides that in cases falling under Clause (a) with which we are concerned in this case, he may serve a notice within eight years of the end of that year, which in this case would be the 31st of March 1944. The notice, as I have already pointed out, was actually served on the 16th of April 1952, and, therefore, if we were not to look at any other provision of the Act, it is clear that the notice was not served within eight years as required by Section 34. We have already held that a notice under Section 34 is a condition precedent to the assessment to be made under this section, and as the notice was not served as required by Section 34, any assessment made pursuant to that notice must be invalid. But what is relied upon by the Commissioner is the proviso to Sub-Section (3) of Section 34. Now Sub-Section (3) of Section 34 provides that no assessment under Section 34 shall be made after the expiry of eight years from the end of the year. in which the income, profits or gains were first assessable. As the year in which the income, profits or gains were first assessable ended on the 31st of March 1944, the order of assessment would have to be made under this sub-section by the

31st of March 1952. But there is a proviso to this sub-section and that proviso lays down that, where a notice under Sub-Section (1) has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the period of eight years or four years, as the case may be. Therefore, if the conditions laid down in the proviso are satisfied, a further period of one year is given to the taxing authorities to make the assessment and the assessment may be made one year from the date of the service of the notice even though such period may go beyond the period of right years laid down in Sub-Section (3) itself. In other words, if the proviso is applicable, the notice having been served on the 16th of April 1952, the assessment could have been made on or before the 16th of April 1953; and the contention of the Department is that this proviso applies and inasmuch as the assessment was completed on the 28th of March 1953 the assessment is valid. Now the clear fallacy underlying the contention of the Department is that we do not come to the stage of considering the assessment order until the notice under Section 34 is validly served. If the notice is served beyond the time limited by Section 34, then the notice is bad and any proceedings taken pursuant to that notice are also bad. What is relied upon in the proviso is the language used in the first part of it, namely, "where a notice under subsection (1) has been issued within the time therein limited", and what is urged is that we must read in Section 34, instead of the language used by the Legislature, namely, that the notice must be "served", the language used by the Legislature in the proviso to Sub-Section (3), namely, that the notice has been "issued". In other words, the attempt is to equate the expression "served" used in Section 34 with the expression "issued" used in the proviso to Sub-Section (3). Now we must frankly confess that we find it difficult to understand why the Legislature has used in the proviso the expression "where a notice under Sub-Section (1) has been issued within the time therein limited". In Sub-Section (1) no time is limited for the issue of the notice; time is only limited for the service of the notice; and therefore it is more appropriate that the expression "issued" used in the proviso to Sub-Section (3) should be equated with the expression "served" rather than that the expression "served" used in Sub-Section (1) should be equated with the expression "issued" used in the proviso to subsection (3). But assuming we are prepared to concede the Advocate General's contention that we must construe the expression "limited" as "mentioned" and all that the proviso refers to is the actual quantum of time mentioned in Section 34 (1), and that for the purpose of that proviso we must consider as the material or relevant date the issue of the notice and not the service of the notice, even so, as already pointed out, the question of the application of the proviso only arises when an assessment order is made. Before a valid assessment order can be made, the initial and preliminary stage is to consider the validity of the notice. As the notice itself is invalid, nothing further survives for consideration. It is only when the notice is validly served that, in order to decide whether an assessment order is valid, we have to consider whether the assessment order was made within the period of one year from the date of the service and whether the notice was issued within the time mentioned in Sub-Section (1). The Advocate General suggests that we must read the proviso to Sub-Section (3) as an independent and substantive provision of law, and he suggests that the reason for enacting this proviso in the language in which the Legislature has

enacted it is to deal with cases where after the issue of the notice the assessee seeks to evade service. Now if the Legislature wanted to deal with such a contingency, the proper place to deal with it would have been Section 34 (1) itself. But we cannot possibly construe a proviso to Sub-Section (3) as in effect and in substance curtailing the rights of the assessee to have the notice served within the time mentioned in Section 34 (1), because if we were to accept the Advocate General's contention, this must be the result, that after the Legislature has clearly provided that the assessee was entitled to have the notice served upon him within the period of eight years mentioned in Section 34 (1). in order that there shall be a valid assessment under Section 34 the Legislature proceeded under Section 34 (3) to take away that right and provided for the notice being issued within eight years and not necessarily served within eight years. We find that the High Court of Allahabad in a very recent judgment in *Sriniwas v. Income-tax Officer 'A' Ward*[1], has taken the same view of both Section 34 (1) and the proviso to sub-section (3).

3. The result is that we must answer the question submitted to us in the negative. Commissioner to pay the costs.

Answer in the negative.

[1](1957) 30 ITR 381: AIR 1956 All 657