BOMBAY HIGH COURT

New India Life Assurance Co. Ltd

Vs.

Commissioner of Income Tax

Income-tax Ref. No. 40 of 1956

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

12.02.1957

JUDGMENT

Chagla, C.J.

1. The assessee is an insurance company and carries on business in life insurance and other insurance business. It has its head office in Bombay and its branches in other parts of India including Indian States. During the two years under reference the assessee company earned profits of Rs. 65,203- and Rs 1,27,836/- in respect of the non-life assurance business carried on in the Indian States and the question that had to be considered was whether these two sums were liable to tax both under the Income-tax Act and the E. P. t. Act. The Income-tax Officer came to the conclusion that the profits in respect of Indian States insurance policies arose in British India and hence the immunity from tax in respect of these profits claimed or sought by the company could not be granted. The assessee appealed to the A. A. C. and the A. A. C. held that the income in respect of this insurance had accrued in the Indian States and therefore he came to the conclusion that these amounts were not liable to tax. From this decision the Commissioner appealed to the Tribunal. It is important to note that the only ground of appeal taken by the Commissioner was that the learned A. A. C. erred in holding that the sum of Rs. 65,203/- (and the same applies to the other sum of Rs. 1,27,836/-) represented profit accruing or arising in Indian States from business transacted in those States and deleting the same from the income of the assessee. The Tribunal in its decision upheld the view of the A. A. C.; but it set aside the order of the A. A. C, and directed that he should dispose of the appeal after taking into consideration the question of apportionment. In other words, the view of the Tribunal was that, although the income had accrued in the Indian States, the question should be considered whether any process for the earning of that income had taken place in British India and in accordance with the ratio of *Commissioner of Income Tax, Bombay v. Ahmedbhai Umarbhai and Co*[1]*.,* the income should be apportioned between Indian States and British India. It is this decision of the Tribunal that is being challenged by the assessee, and what is urged before us is that the only

ground of appeal by the Commissioner of Income-tax before the Tribunal was whether the income had accrued in British India or in the Indian States. The question of apportionment was never agitated either before the I. T. O. or before the A. A. C. or in the grounds of appeal, and it is said that it was not open to the Tribunal under Section 33 (4)

[1]1950-18 ITR 472

to decide on a question which was not a question urged by the appellant before it.

2. Now, it is not disputed that the Commissioner, notwithstanding the grounds of appeal, did urge this point before the Tribunal; nor is it suggested that the assessee had not sufficient notice to meet this new ground urged by the Commissioner. But the stand taken by the assessee is that, whether leave was given to the Commissioner to urge this point before the Tribunal and whether the assessee had sufficient notice of this new ground, the Tribunal had no competency at all to decide the appeal on a ground not taken by the Commissioner in his grounds of appeal. This raises a rather important question and we therefore must carefully consider what are the powers of the Tribunal functioning as an appellate Court.

3. Before we look at the authorities and before we look at the section and the relevant rules, it. is desirable to consider on general principles what are the powers of an appellate Court. When an appellant comes before a Court, of appeal, he comes there because he is dissatisfied with the decision of the trial Court and he challenges that decision ; and he challenges that decision on certain grounds which are set out in the grounds of appeal or in the memo of appeal. The respondent, if he has not appealed or has not cross-objected, is satisfied with the decision of the trial Court and he is before the Court of appeal to support the judgment of the trial Court, The appellant may challenge the decision of the trial Court even on grounds not contained in the grounds of appeal if the Court of appeal grants him leave to do so. Undoubtedly in granting leave the Court of appeal would consider various factors: whether the question raised would involve questions of fact which may necessitate a remand; whether the conduct of the appellant is such as to disentitle him to raise the new ground; and so on. But if leave is granted and if the other side has notice of the new ground which the appellant seeks to urge, there does not seem to be any reason why the Court of appeal should not permit the appellant to challenge the decision of the trial Court on a ground other than that taken in the grounds of appeal. The position with regard to the respondent is different; it is not open to him to urge before the Court of appeal and get a relief which would adversely affect the appellant. If the respondent wanted to challenge the decision of the trial Court, it was open to him to file a cross-appeal or cross-objections. But the very fact that he has not done so shows that he is quite content with the decision given by the trial Court. Therefore, under these circumstances, his only right is to support the decision of the trial Court. It is true that he may support the decision of the trial Court, not only on the grounds contained in the judgment of the trial Court, but on any other ground. In appreciating the question that arises before us, one must clearly bear in mind the fundamental difference in the positions of the appellant and the respondent. The appellant is the party who is dissatisfied with the judgment; the respondent is the party who is satisfied with the judgment. Now what we have just said is nothing

more than really a summary of the provisions with regard to appeals and cross-objections contained in O. 41, of the Civil Procedure Code; and, as we shall presently point out, the position of the Appellate Tribunal is the same as a Court of appeal under the Civil Procedure Code and the powers of the Appellate Tribunal are identical with the powers enjoyed by an appellate Court under the Code.

4. Now, in the first place, we must look at the section which confers jurisdiction upon the Tribunal to hear appeals from the decisions of the A. A. C. Sub-section (4) of Section 33 provides that the Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner. The expression "thereon" has come in for considerable judicial comment and observation, and the authorities lay down that the power of the Tribunal is confined to dealing with the subject-matter of the appeal and the subject-matter of the appeal is constituted by the grounds of appeal preferred, by the appellant. This subject-matter cannot be expanded even by the appellant unless leave is granted to him to do so by the Appellate Tribunal. The subject-matter can certainly not be expanded by the respondent, as already pointed out, if he has not either appealed or cross-objected. Now there is a rule of procedure framed by the Tribunal with regard to the hearing of appeals which rule is In the following terms:-

> "12. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal; but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:
> Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

It will be noticed that this rule is identical in terms with Rule 2 of Order 41. What has happened in this case is that the appellant (the Commissioner) undoubtedly has travelled outside the subject-matter of the appeal in that he has pressed upon the Tribunal a point of view with regard to apportionment which is not covered by the grounds of appeal; but he being the appellant, it was open to him to do so if leave was granted by the Court of appeal. It is true that on the record there does not appear any formal leave. It is also true that the appellant has not amended his grounds of appeal. But leave may be implied and the very fact that the Tribunal permitted the Commissioner to urge this ground goes to show that leave was granted to him. With regard to the proviso, it is not suggested by the assessee that he did not have a sufficient opportunity of contesting this ground. Therefore, this rule is satisfied. Indeed, if the case had arisen under the Civil Procedure Code and the question was of interpreting Order 41, Rule 2, it could not possibly have been urged by the respondent that the Court of appeal could not permit the appellant to argue the appeal on a different ground from the one taken up by him in the grounds of appeal.

5. But what Mr. Kolah says is that, whatever the construction of this rule and whatever the provisions of the Civil Procedure Code, we are bound by the clear decisions of this Court and we must give effect to these decisions. Now the earliest decision in point of time is the judgment of Mr. Justice Kania which has often been referred to in this context, and that is in *Motor Union Insurance Co. Ltd. v. Commissioner of Income Tax. Bombay*[2], Mr. Justice Kania in this judgment construes both Section 33 (4) and the relevant rule which at that date was K. 21; now, we understand, it is R. 12; and what the learned Judge has said at page 282 (of ITR) is:-

> "Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-

[2](1945) 13 ITR 272

> objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour." Now note that Mr. Justice Kania is speaking of the respondent: he is not speaking of the appellant. At page 283 (of ITR): (at P. 290 of AIR), the learned Judge observes:-"In deciding those grounds it can pass appropriate orders. But, in our opinion, it is not open to the Tribunal itself to raise a ground or permit the party, who has not appealed, to raise a ground, which will work adversely to the appellant."

So far as the respondent is concerned, he cannot raise a new ground. As regards the Tribunal itself, obviously what the learned Judge meant was that, if the appellant did not urge a ground, then the Tribunal could not itself decide the appeal on a ground which might adversely affect the appellant. Then the learned Judge considers R. 21 and he says:-

> "In terms, it limits the appellant to the grounds urged in his memorandum of appeal, and prescribes that if he wishes to raise any further ground, he has to do so after obtaining the leave of the Tribunal. The proviso does not enlarge the powers of the Tribunal to raise grounds of appeal against the appellant." Therefore, again, what is being emphasized is that the Tribunal should not give a relief to the respondent which relief was not given to him by the trial Court and which relief he has not himself sought by either cross-appealing or cross-objecting. It only says that the Tribunal is not obliged to rest its decision on the grounds urged by the appellant. It recognises the principle that the judgment of the lower Court may be supported on any ground even though it is not raised in the memo of appeal. That, however, does not permit the Tribunal to urge any other ground which would work adversely to the appellant; and when we look at the facts of that case, It is clear that what the Tribunal had done was to give a relief to the Commissioner in appeal when the assessee had appealed and the Commissioner had rested content with the decision of the A. A. C. and the relief granted was obviously to the

prejudice of the appellant.

6. There are two unreported judgments on which Mr. Kolah has relied. One is the judgment in *Puranmal Radhakishen and Co. v. The Commissioner of Income Tax, Bombay City I*[3], In this judgment we relied on the judgment of Mr. Justice Kania; but it is clear in this judgment also that the Tribunal in an appeal by the assessee gave relief to the Department when the Department had accepted the decision of the A. A. C. and which relief was prejudicial to the assessee, and we pointed out that the assessee came to the Tribunal to improve his position and to his surprise found that his position was rendered worse by the Tribunal than if he had not appealed at all and the Department found itself in a better position although it had not appealed. The other unreported judgment Is in Panchal's case, - Income-tax Ref. No. 19 of 1953 (Bom) (D). It is true that the paper-book shows that both the Commissioner and the assessee had appealed to the Tribunal: but it is not clear from the facts that the Commissioner, to whom certain relief was given which he had not asked for, was given leave by the Tribunal to urge this new point and that the other side had notice of this new ground. We set aside the order of the Tribunal giving relief to the Commissioner on the ground that it was clear from the grounds of appeal

[3] Income-tax Ref. No. 51 of 1955 decided by us on 4-9-1956 (C)

filed by the Commissioner before the Tribunal that it was never contended by the Commissioner that the assessment should be on a particular basis. Therefore, this is not a decision which is binding on us and which lays down that although the appellant was given leave by the Tribunal and even though the other side had sufficient opportunity to meet the new ground, still the appellant should not be permitted to raise a new ground in appeal.

7. Then Mr. Kolah has relied on an old judgment which dealt with the powers of the Commissioner in appeal on lines which are similar - *Lachiram Baldeodas v. Commissioner of Income Tax*[4], What is relied on is the observation *at page 296 (of ITR), which is as follows:

> "The learned counsel for the assessee contended that the provisions of Section 32 (3) of the Act gave the Commissioner ample powers when disposing of an appeal to pass such orders as he thinks fit and that this includes the power to enhance an assessment. The use of the word 'thereon' in this sub-section, however, seems to imply that the Commissioner, when dealing with the appeal under Section 32, can pass orders only with respect to the subject-matter of the appeal, and cannot, suo motu, proceed to enhance an assessment which he has the power to do under Section 33 of the Act." These observations do not, in our opinion, carry the matter any further, because we accept the principle that the expression "thereon" restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and that the subject-matter of the appeal is constituted by the grounds of appeal, unless with leave that subject-matter Is expanded or increased by adding a new ground after leave has been given by the Tribunal.

8. Then there is a very recent judgment of this Court in *Commissioner of Income Tax v. B. C.*

Swimming Bath Trust[5], which clearly supports the view that we are taking. In that case the assessee put forward before the Appellate Tribunal an entirely new contention which had not been urged before the I. T. O. or the A. A. C. and the Tribunal permitted the assessee to raise that point and the Commissioner came before us on a reference urging that the Tribunal had no power to permit the assessee to raise a ground not covered by the grounds of appeal. We rejected that contention and we pointed out at page 285 that on this question R. 12 of the Appellate Tribunal Rules was quite clear and that "the Tribunal has been given the authority to permit a new point to be raised provided that the party who is affected by the raising of the new point has been given sufficient opportunity of being heard on this point and the Tribunal in the statement of the case points out that when this point was raised the representative of the Department never asked for an adjournment to consider the question and the matter was argued without the appeal being adjourned and therefore in the opinion of the Tribunal the Department was not denied sufficient opportunity of being heard on this new ground raised by the assessee"; and the point seemed to be so clear that Mr. Joshi who appeared for the Commissioner did not even seriously press this question. To the same effect is the judgment of the Punjab High Court in *Oriental Building and Furnishing Co. v. Commissioner of Income Tax*[6], and also the same view is taken by the Nagpur High Court in *Byramji and Co. v Commissioner of Income Tax C. P. and U. P*[7]., and this is

[4]1936-4 ITR 279
[5](1954) 27 I. T. R. 279
[6]1952-21 ITR 105: AIR 1952 Pun 40
[7](1943) 11 ITR 286: AIR 1943 Nag 229

rather a striking case because the Tribunal had refused leave to the appellant to urge a new ground and the High Court interfered and held that the Tribunal had not exercised its discretion judicially in refusing leave and that the appellant shall have been permitted to urge the new point taken by it.

9. Therefore, in our opinion, it is clear that it was competent to the Tribunal to reverse the decision of the A. A. C. on the ground that the question of liability to tax should be determined after the question of apportionment had been decided

10. Now, Mr. Kolah is most anxious that we should make it clear that the remand to the A. A. C. is confined to the question of apportionment. That is quite clear because the Tribunal has accepted the finding of the A. A. C, that the income accrued in the Indian States. The A. A. O. cannot go behind that finding. Within the ambit of that finding it would be for the A. A. C. to determine whether there is a case of apportionment of the income which has accrued in the Indian States as between the Indian States and British India.

11. There is one other small point which is that it was urged by the Department that these two amounts should be included in the total income of the company for rate purposes and that view seems to have been accepted by the Tribunal. Now it is clear and Mr. Joshi has naturally seen how impossible the contention is that when you are dealing with a company, no question of rate arises. A company is liable to pay tax at a flat rate. The question of rate only arises when you are dealing with individual assessee. Therefore, either these two sums are liable to tax or they are not. If they are liable to tax, they would be taxed at the same rate as the other income of the

company. No purpose can be served by including these two items in the total income of the company.

12. The result, therefore, is that we will answer question (1) in the affirmative and question (3) also in the affirmative. We answer question (4) in the negative.

13. With regard to question (2) which raises the question of apportionment, it is clear that this question does not arise out of the order of the Tribunal. The Tribunal has not decided on the merits of the contention with regard to apportionment and this question would only arise if after the A. A. C. has decided against the assessee, the assessee goes in appeal to the Tribunal and the Tribunal accepts the decision of the A. A. C. But at the present stage all that has happened is that the Tribunal has asked the A. A. C. to determine whether there is any case for apportionment, and if so, how the income should be apportioned.

14. With regard to Question (1) under the E. P. T. Reference, that question must also stand over for the same reason as Question (2) under the Income-tax Reference. Question (2) under the E. P. T. Reference must be answered in the affirmative and Question (3) also in the affirmative.

15. Assessee to pay three-fourths of the costs of this reference.
Reference answered accordingly.