BOMBAY HIGH COURT

S.M. Modi

Vs.

Commissioner of Income-Tax

Income-tax Ref. No. 25 of 1957

(Tendolkar and S.T. Desai, JJ.)

25.09.1957

JUDGMENT

Tendolkar, J.

1. The applicant before us is S. M. Modi who produced the picture 'Jhansi-ki-Rani'. For the purpose of this production he had employed two foreigners Ernest Haller and Forrest Judd. They arrived in India in September and November, 1951 respectively. Mr. Modi had paid remuneration to these employees in the sums of Rs. 1,31,520/- and Rs. 33,478/- respectively in the two accounting years 1951-52 and 1952-53. If these foreigners were not resident in India during the accounting years, Mr. Modi was under a liability to deduct income-tax at the maximum rate from the salary paid to these employees at the time of payment by reason of Section 18, Sub-Section (3A). Mr. Modi failed to do so. The Income-tax Officer was of opinion that these two employees were not 'resident' in the taxable territories and directed Mr. Modi to pay income-tax and supertax with appropriate surcharge in the case of both these foreigners. The demand was not paid; and Mr. Modi filed two appeals one in each case to the Appellate Assistant Commissioner. These two appeals were held to be not competent on the ground that the only right of appeal that Mr. Modi could have was under Section 30 (1A), and the conditions precedent to the right of appeal granted under that section were not fulfilled. Mr. Modi then appealed to the Tribunal against both the orders of the Appellate Assistant Commissioner; and the Tribunal also held that the appeals were not competent, applying the provisions of Section 30 (1A). It was contended on behalf of Mr. Modi before the Tribunal that his right of appeal arose out of Section 30, Sub-Section (1). The Tribunal negatived this argument; and the question that has been referred to us by the Tribunal is:

> "1. Whether the Producer who did not deduct and pay tax, was entitled to file an appeal to the Appellate Assistant Commissioner in either case as provided by Section 30(1A)?"

Obviously the question as framed does not bring out the real dispute between the parties. There is no doubt whatever that there is no right of appeal which Mr. Modi can have under Section 30 (1A) to which we will presently draw attention; and the only right of appeal, which he claimed, was under Section 30 (1). We will, therefore, reframe the question by deleting the words "as

provided by Section 30 (1A)."

2. Now, we will deal with the relevant sections as they stood at the relevant time for the purpose of this reference. Section 18 (3A) enacts:

> "Any person responsible for paying to a person not resident in the taxable territories any interest not being interest on securities; or any other sum chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay income-tax thereon as an agent, deduct income-tax at the maximum rate." Then sub-Clause (6) states:
> "All sums deducted in accordance with the revisions of this section shall be paid within the "scribed time by the person making the deduction to the credit of the Central Government or as the Central Board of Revenue directs." Sub-clause (7) provides:
> "If any such person does not deduct or after deducting fails to pay the tax as required by or under this section, he, and in the cases specified in sub-ss. (3D), and (3E) the company of which he is the principal officer shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax, provided that the Income-tax Officer shall not make a direction under Sub-Section (1) of Section 46 for the recovery of any penalty from such person unless satisfied that such person has wilfully failed to deduct and pay the tax."

Now, Sub-Section (3A) makes it obligatory on an employer to deduct tax from the salary payable to his employee if such employee is not resident in the taxable territory. Therefore, an essential condition of the applicability of this sub-section is that the employee is not resident in the taxable territory. The concept of "resident" for the purpose of the Income-tax Act has been defined in Section 4A of the Income-tax Act. It is not only actual residence in India but it includes within its scope other cases such as for example under sub-cls. (a) (ii) of Section 4A :

> "Where a person maintains or has maintained for him a dwelling place in the taxable territories for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in the taxable territories for any time in that year."

It is in the context of Section 4A that it is to be determined whether an employee is or is not a resident and it is only when he is not a resident that the liability to deduct under Section 18 arises. If that liability is discharged and the deduction is made, Sub-Section (6) provides that the person who deducts shall pay over the deduction to the Central Government, and Sub-Section (5) of that section provides that this payment shall be treated as a payment of income-tax or super-tax on behalf of the person from whose income the deduction was made. Then, when we come to Sub-Section (7), it deals with two cases; one where an employer fails to deduct and (2) where after deducting he fails to pay the tax to the Central Government; and in either case the sub-section provides that he will be deemed to be an assessee in default in respect of the tax. Now, before a person can fall in the first category and it can be said of him that he has failed to deduct, it must necessarily be established that he was liable to deduct. In other words, it must be determined whether the employee from whose salary he did not make the deduction was not resident in India, because if he was resident, there is no liability to deduct the tax. The other case, where the employer after deducting does not pay, is a much simpler case, where the liability to pay over

what has been deducted arises by reason of Sub-Section (6). But we are here dealing with a case falling under the former category where the employer did not deduct. Before such employer can be called upon to pay tax and can in terms of Sub-Section (7) be deemed to be an assessee in default, obviously there must of necessity be an adjudication as to whether the particular employee from whose salary he should have made the deduction was or was not resident in British India; and it appears to us that Sub-Section (7) has implicit in it the requirement that the I. T. O., who proposes to give effect to this sub-section and to deem an employer to be an assessee in default will first determine whether the employee in respect of whose income the deduction should have been made was a resident in India. In the present case, on the record before us it does not appear that any such adjudication was made by the I. T. O.

3. Then, we come to the next stage after the I. T. O. seeks to treat the employer as a deemed assessee in default. Does he have a right of appeal if he contends that he was not liable to deduct the tax? The contention for the Department is that the only right of appeal conferred on him is under Section 30 (1A), whilst the contention on behalf of the applicant before us is that he has a right of appeal under Section 30 (1) as he denies his liability to be assessed. Now Section 30 (1A) is in these terms:

> "Any person having, in accordance with the provisions of sub-ss. (3A), (3B) or (3C) of Section 18, read with Sub-Section (6) of that section, deducted and paid tax in respect of any sum chargeable under this Act other than interest who denies his liability to make such deduction may appeal to the Appellate Assistant Commissioner to be declared not liable to make such deduction."

This sub-section in terms refers to cases where a deduction has been made and the amount deducted has been paid by way of tax and cannot possibly have any application to a case where it is alleged that the employer has failed to make a deduction. Therefore, this sub-section cannot avail the Department in this case. Obviously we are dealing with the case of a person who has never deducted the tax and could not, therefore, have paid it. We are dealing with the case of a person who has failed to deduct tax and thereby brought upon himself the consequence of Sub-Section (7) that he is deemed to be an assessee in default in respect of that tax. If he has a right of appeal at all, it cannot possibly be found in Section 30 (1A), and, in our opinion, that sub-section has no application to the facts of the present case.

4. The next question then is : Does the applicant before us have a right of appeal under Section 30 (1)? The relevant words of that section are : "any assessee denying his liability to be assessed under this Act may appeal to the Appellate Assistant Commissioner"; and the question is whether the applicant before us is a person denying his liability to be assessed. Now, the words "assessed under this Act" have been interpreted by their Lordships of the Privy Council as being synonimous with "charged with tax under the Act" in *Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas*[1], and there can be no doubt whatever that the applicant before us has been charged with tax under the Act and if he has been charged with tax under the Act and he denies his liability to be charged with such tax, he has a right of appeal under Section 30

[1](1938) 6 ITR 414 at p. 421 : (AIR 1938 PC 175 at p. 178)

(1).

5. Mr. Amin for the Department contends that the applicant before us is not assessed because he says - and this is the view that found favour with the Tribunal - that the applicant is "deemed to be an assessee in default" under Section 18 (7). Mr. Amin contends that an "assessee" and an "assessee in default" are two different concepts. What the applicant is deemed to be by virtue of Section 18 (7) is "an assessee in default"; but he says that he is not deemed to be an assessee at all. Now, an assessee in default is referred to in Section 45 of the Income-tax Act; and it is quite plain that one has to be an assessee before he can be an assessee in default, because an assessee in default is merely a person who has failed to pay within the time allowed the tax payable by him. In place of an actual assessee, you may have a deemed assessee and the deemed assessee will also become an assessee in default if he fails to pay his tax within the time allowed. Therefore, in our opinion, a deemed assessee in default undoubtedly is a deemed assessee as well and not a wholly different entity from an assessee. But strictly speaking the interpretation of the words "deemed assessee in default" does not appear to us to matter very much for the purpose of determining the issue before us, because, as we have already pointed out, if the true meaning to be attached to the words "assessed under the Act" in Section 30 (1) is "charged with tax under the Act" then quite obviously the applicant before us was charged with tax under the Act. We must also keep in mind the fact that if we were to adopt the view that has been pressed before us by Mr. Amin in a case such as the one before us where an employer has not deducted any tax from any salary payable to his employee, where a demand is made against him under Section 18 (7), even if the demand is not justified either because the employee was resident in this country or for any other cause, the employer will be without a remedy by way of appeal or otherwise. In this particular case, in addition to the income-tax, the applicant before us has also been called upon to pay supertax. Now, the amendment which made it incumbent on the employer to deduct super-tax was made in November 1953 with effect from 1-4-1952 and at the relevant period or at any rate part of it, there was no obligation at all to deduct super-tax; and yet the applicant cannot agitate the question of his liability to deduct super-tax at any place anywhere, if the interpretation that Mr. Amin wants us to put upon Section 18 (7) is the correct interpretation. Therefore, taking all these matters into account, it appears to us that the applicant before us is a person denying his liability to be assessed under the Act, and is, therefore, entitled to appeal against an order made under Section 18 (7). One of the grounds in such an appeal can be, as it was in this case, that there was no liability initially to deduct tax, because the employee was resident within jurisdiction, and if this fact has not been adjudicated upon by the I. T. O. as he was bound to do, before seeking to enforce the liability against the employer, that in itself would be a sufficient ground of appeal. If it has been adjudicated upon, the adjudication itself may be challenged in anneal. In either case an appeal will lie, and it would be open to the applicant to challenge his liability to pay tax on any ground open to him under the Income-tax law.

6. Our answer, therefore, to the first issue, which we have set out above and amended is in the affirmative.

7. A second question has also been referred tous and it is in the following terms:

> "Whether for the purpose of disposing of the Producer's appeals on the limited question as to their competency, it was obligatory on the Tribunal to go into the question as to whether Judd and/or Haller were resident in the taxable territories in the appropriate accounting year?"

It is only if the appeal was competent that the Tribunal would have had to apply their mind to the contention that the application was not liable to be taxed under Section 18 (3) on the ground that Judd and Haller were 'resident' in the taxable territories. Our answer, therefore., to question (2) will be in the negative.

8. The Income-tax Commissioner to pay costs. No order on the notice of motion. No order as to costs.
Reference answered accordingly.