BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs.

Kishoresinh Kalyansinh Solanki

Income-tax Reference No. 31 of 1959

(S.T. Desai and Mr. V.S. Desai, JJ.)

06.04.1960

JUDGMENT

S.T. Desai, J.

1.This reference taken out at the instance of the Commissioner of Income-tax, Ahmedabad, raises a question of construction of a provision in section 33B of the Income-tax Act. The assessment year is 1954-55 and the assessment for that year was made on the assessee in the status of a registered firm on August 31, 1954. The Commissioner of Income-tax was of the opinion that the order granting registration to the firm and the order of assessment made thereafter were prejudicial to the interests of the Revenue and he, therefore, took action under section 33B(1) and on July 5, 1956, revised the order of the Income-tax Officer holding as under :

> "There being grave doubts about the genuineness of the firm it was wrong on the part of the Income-tax Officer to have passed an order under section 26A registering the firm and dividing the profits in the names of the alleged partners. Both the orders of the Income-tax Officer, namely the assessment order as well as the order granting registration, are, therefore, vacated with a direction that a fresh assessment after giving proper opportunity to the assessee should be made."

2. The assessee went to the Tribunal in appeal against that order and contended inter alia that sufficient opportunity had not been given to him to show cause why the order of assessment and the order granting registration should not be vacated. The Tribunal decided the appeal on January 22, 1957, and reached its conclusion as under :

> "Consequently, not only do we hold that the assessee was not given sufficient opportunity of being heard as contemplated by section 33B of the Indian Income-tax Act but we are

also of the opinion that the order passed by the Commissioner of Income-tax is not quite in consonance with the intention of the statute as contained in section 33B of the Income-tax Act. Consequently we set aside the order of the Commissioner of Income-tax and remand the case to him for giving the assessee sufficient opportunity of being heard, that is of showing cause as to why the order of the Income-tax Officer should not be cancelled and also to find as a fact as to whether there was or was not in existence a genuine firm constituted which carried on the business during the year under consideration. This finding should be given after making or causing to be made such enquiry as he deems necessary in this connection. He can thereafter pass such appropriate orders as he thinks proper in the light of the conclusions drawn upon the basis of the enquiry made."

3. Thereafter, the Commissioner of Income-tax examined the books of account and the statements of the alleged partners and other material and passed an order on July 4, 1957, holding that no genuine firm had come into existence and by that order he cancelled both the assessment order and the order of registration under section 26A and directed that the assessment should be made on Kishoresinh Kalyansinh in his individual capacity. The assessee carried the matter once again in appeal to the Tribunal and the contention put forward by him in the forefront of his appeal was that the order of the Commissioner of Income-tax under section 33B-the second order-had been made beyond the period of two years from the date of the order sought to be revised and the orders in revision was therefore invalid and ineffective in law. It will be convenient to set out here the whole of section 33B.

"33B. (1) The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
(2) No order shall be made under sub-section (1) -
(a) to revise an order of reassessment made under the provisions of section 34; or (b) after the expiry of two years from the date of the order sought to be revised.
(3) Any assessee objecting to an order passed by the Commissioner under sub-section (1) my appeal to the Appellate Tribunal within 60 days of the date on which the order is communicated to him.
(4) An appeal to the Appellate Tribunal under sub-section (3) shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a treasury receipt in support of having paid the fee of ₹ 100 and such appeal shall be dealt within the same manner as if it were an appeal under sub-section (1) of section 33."

4. The greatest stress was laid before the Tribunal on the provision contained in clause (b) of sub-

section (2) of section 33B. It was urged that the plain and clear meaning of this provision was that no order revising an order passed by an Income-tax Officer could be made by the Commissioner after the expiry of two years from the date of the order sought to be revised. On behalf of the Commissioner of Income-tax, it was urged that the order dated July 4, 1957, (the second order) that was passed by the Commissioner of Income-tax could not be regarded as an order made under section 33B(1) simpliciter but must be regarded as one under section 33B(1) read along with sub-section (4) of that section which provides for an appeal to the Tribunal and which appeal had to be dealt with in the same manner as if it were an appeal under sub-section (1) of section 33. It was also urged that the original order under section 33B(1) having been passed by the Commissioner of Income-tax on July 5, 1956, within the prescribed period of limitation, the setting aside of such an order by the Tribunal did not have the effect of making it invalid for all purposes and his subsequent order was merely in continuation of the earlier order passed by him, which was within time. The Tribunal was of the opinion that the assessee's objection had force in it. It has stated in its order that there was a lacuna in the Act, as it did not provide for an extension of the period of limitation under section 33B(1) in circumstance such as has arisen in the instant case. Then, it has observed in its judgment :

> "Perhaps, if the Tribunal had not set aside the assessment and had merely called for a remand report, then no question of limitation would have arisen. The Tribunal having set aside the order of the Commissioner of Income-tax made it impossible for him to overcome the provisions of section 33B(2)(b) when he came to make a fresh order under section 33B(1) of the Act. When the Commissioner's order under section 33B(1) is set aside by the Tribunal or the High Court, then it becomes well nigh impossible for the Commissioner to pass another order under section 33B(1) within the two year period of limitation. But the remedy lies with the Legislature and not with the court whose duty is merely to interpret the law."

5. It is argued before us by Mr. G. N. Joshi, learned counsel for the Revenue, that what is to be regarded is not the second order but the first order which indisputably was made on July 5, 1956, an that was within two years of the original order of assessment made on August 31, 1954. It is further said that the original order having been passed within the prescribed period, what happened thereafter did not have the effect of making the subsequent order invalid for all practical purposes and what happened subsequently was merely in continuation of the earlier order passed by the Commissioner. It is extremely difficult to accept this argument. Here is an order made under section 33B(1) which is vacated and in terms it is stated that the orders is set aside. There can therefore be nothing like a continuation of that order when subsequently the commissioner was directed to carry out the directions given by the Tribunal by its order made on January 22, 1957.

6. It is next urged that the operation of the material words in subsection (2) "No order shall be made under sub-section (1).... after the expiry of two years from the date of the order sought to be revised" must on a proper reading of the sub-section be confined to an order made suo motu

by the Commissioner in exercise of his powers under sub-section (1) of section 33B and cannot apply to any order that he may subsequently make under section 33B in pursuance of any direction or order of the Appellate Tribunal of the High Court or the Supreme Court, as the case may be. It is said that when the Commissioner carries out the order or directions given in any such case, he cannot be said to exercise his powers or act under sub-section (1) of section 33B simpliciter but can be said to act under section 33B(1) read with section 33(4). In substance and effect, he would in any such case be doing nothing more or nothing less than carrying out the directions of the appellate authority or the High Court or the Supreme Court as the case may be. The contention is that this is the only possible construction to the provision as to limitation contained in sub-section (2)(b) of section 33B. We are not particularly impressed with this argument. The language of the sub-section does not, in our opinion, readily accord with this construction. It seems to us that if literal meaning only is to be given to the provision under consideration, it must embrace any order in revision passed by the Commissioner under section 33B in any manner and at any stage, whether suo motu or after the matter goes back to him or is remanded to him in pursuance of any order of any higher authority. Therefore, it is not possible to accede to the argument that the only possible meaning that can be applied to sub-section (2), confining the consideration only to its language, must be that the order contemplated and for which limitation is prescribed is an order made suo motu and not an order made at any subsequent stage in pursuance of any order or direction of any higher authority.

7. Alternatively, learned counsel had urged that in any case the construction submitted by the Revenue is the preferable construction. It is pointed out that any such order passed by the Commissioner in revision is, according to the machinery provided by the Act, subject to an appeal to the Appellate Tribunal and thereafter there can be further proceedings by way of reference to the High Court and ultimately an appeal to the Supreme Court. All this would take a number of years and the Legislature could not possibly contemplate a situation wherein notwithstanding any express order or direction given by the appellate authority or the High Court or the Supreme Court the Commissioner would be disentitled to carry out that order or that direction simply on the ground that a period of two years had expired from the date of the order sought to be revised. The argument is that the literal constriction of the section which has found favor with the Tribunal and which has been pressed on behalf of the assessee would lead to manifest absurdity.

8. Mr. D.D. Shah, learned counsel for the assessee, has contended before us that the first order of July 5, 1956, having been vacated by the Tribunal, in law the second order of the Commissioner under section 33B(1) made on July 4, 1957, is the only order which requires to be taken into consideration in applying the provision of limitation contained in sub-section (2) of section 33B. Then, it is said that this latter order which was made on July 4, 1957, could only be made under sub-section (1) of section 33B even if it was made after the direction or order of a higher authority. The language of the limitative provision in sub-section (2), so the argument has run, is absolute and permits of no modification and no qualification. Its natural and grammatical

meaning can only be one and that meaning is that the Commissioner has no power to make any order under section 33B at any time after the expiry of two years from the date of the order sought to be revised. The circumstances that he makes his order after an earlier order made by him within time has been vacated and acts in pursuance of an orders or direction of a higher authority cannot touch the position and can make no difference to the application of this provision which imposes a bar of limitation. Mr. Shah has also drawn our attention to the provisions of section 34(3) as they stood at the material time. In order to appreciate this argument, it is necessary to set out the material part of those provisions :

> "No order of assessment or reassessment, other than an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of sub-section (1) or sub-section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable :
> Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made shall apply to a reassessment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to gives effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."

9. It is pointed out that section 34(3) deals with orders of assessment or reassessment made under section 34 as also orders of assessment made under section 23 subject to an exception but with that exception we are not concerned. The argument is that the Legislature has in express terms provided a period of limitation for making an assessment order under section 23 and has also provided a period of limitation for making an order of assessment or reassessment in cases of escaped income under section 34. Having done so, the Legislature felt the necessity of engrafting an exception on the operation of that rule of limitation, because it must have been felt that but for the exception enacted under the proviso, the period of limitation of four years would have operated in every case, even when the order was made under section 23 or under section 34 after there had been an order or direction from a higher authority, be it the Appellate Tribunal or the High Court or the Supreme Court. At first blush, it may seem that there is some substance in this contention. But the position improperly analyzed comes to this that in a case of assessment under section 23 or an orders of assessment or reassessment under section 34, a situation may arise when the Income-tax Officer may have to pass orders once again under those very sections and by the time he sits down to do so, the period of limitation of four years laid down in section 34(3) may well have already elapsed. Not being the intention of the Legislature in any such case to allow the possibility of any such contention being raised, the Legislature out of abundant caution though it fit to engraft the proviso to sub-section (3) of section 34. An order of assessment under section 23 or a revisional order under section 33B or an orders of assessment or reassessment under section 34 must indubitably be made within the prescribed time. But what is to happen

when an order so made is subsequently set aside by a higher authority and the Income-tax Officer or the Commissioner of Income-tax is asked by an order passed or direction given to make an order according to the same in respect of the same subject-matter ? Should it in any such case be open to a party to say that the second order made in pursuance of the order of the higher authority or direction given by the higher authority is not to be operative and has to remain a dead letter simply because the period prescribed for the original making of the order has already expired ? It is inconceivable that the Legislature would lay down any absolute rule prescribing a period of limitation which would operate in this absurd manner. That position seems to have been realised at the time of enacting the proviso to section 34 and the way we read that proviso, it seems to us that the proviso was enacted only ex abundanti cautela. That being the position, the argument founded on the absence of any such proviso to section 33B(2) should not, in our judgment, make any difference to the legal position. The true meaning of any passage in a difference to the legal position. The true meaning of any passage in a statute is that which best harmonises with the object and each passage of the statute and the court should ordinarily and as far as possible see that the interpretation it puts on a particular provision makes a consistent enactment of the whole statute. Where the main object and the intention is clear, it must not be reduced to a nullity by the draftsman's unskilfulness. The court will read not only the particular provision but also allied and cognate provisions as forming a connected scheme and not treat them as detached provisions. It has been emphasised before us that we are dealing with a taxing provision and the taxing provision should receive a strict interpretation. We do not think that the observations which we have made above militate in any way against this well-established cannon of construction.

10. Of course, a fiscal enactment should be construed strictly and in favour of the subject. Of course, again as a general rule, interpretation must depend on the language of the section and not upon the consequence that may follow upon it. But this rule of interpretation of literal construction cannot be rigidly adhered to if it leads to manifest absurdity. In such a case, as it has so often been said, the court acts under the influence of an irresistible conclusion that the Legislature could not possibly have intended what its words may signify. The cardinal rule of literal construction and linguistic clearness - it does not require to be stressed - must not be pushed so far as to result in irrational or absurd conclusions. As was observed by Lord Summer in a passage which has now become locus classicus :

> "There is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature." Of course, this has to be read only as a general observation and we must do so without being forgetful of other fundamental principles of interpretation. A casus omissus is not to be supplied because it is a strong thing to read words in a statute which are not there except in the case of clear necessity and when clear reason for it is to be found in the favour corners of the statute itself. At the same time a

> casus omissus is not to be readily inferred. The preferable meaning of the clause under consideration seems to us to be to restrict it to the fitness of the matter. We must read the words of the clause though wide in the abstract as used with reference to an order made only suo motu by the Commissioner. They need not be read in too elastic a manner. They should preferably be regarded as expressive of a particular intention when it is possible to give them an import consonant with the particular subject matter and avoid a meaning resulting in absurdity, repugnancy or inconsistence. For all these reasons, it seems to us that if we were to give to clause (b) of section 33B(2) its literal meaning as urged by Mr. Shah, we would fail to give effect to the intended meaning of the lawmaker, albeit to be gathered from the Act itself and having regard to the object and aim of the relevant provisions. Where an alternative meaning is possible, and in our judgment this is a case where such meaning is possible, we must prefer that meaning which can fairly lead us to give effect to the intention of those who framed the law, if we can do so without doing violence to any established principle of construction. The phraseology of sub-section (2)(b) of section 33B permits of a construction which presents a result which would be manifestly absurd. The preferable and the correct conclusion, therefore, seems to us to be that the period of limitation prescribed in the provision under consideration cannot apply to any order passed by the Commissioner of Income-tax in pursuance of any order or direction of any higher authority.

There is a notice of motion taken out by the Commissioner and in that notice of motion it is urged that the question should be reframed in the manner there suggested. The question as framed is as under :

> "Whether on the facts and in the circumstances of the case the limitation provided in section 33B(2) is applicable to an orders passed subsequent to an order of the Tribunal setting aside the order of the Commissioner under section 33B of the Act ?"

11. The question is wides enough to include what is sought to be brought out by the suggested question. The conclusion we have reached is that the rule of limitation prescribed in section 33B(2) does not reach a cases of the nature before us and our answer to the question is in the negative.

12. Assessee to pay the costs. There will be no order as to the costs of the notice of motion.

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