

PATNA HIGH COURT

Firm Jitanram Nirmalram

Vs

Commr. of Income-tax

Misc. Judicial Cases Nos. 38 and 39 of 1949

(Ramaswami and Sarjoo Prosad, JJ.)

23.02.1951

JUDGMENT

Ramaswami, J.

1. This reference is made by the Income-tax Appellate Tribunal under Section 66(2) of the Indian Income-tax Act.

2. The applicant was assessed under the Excess Profits Tax Act in respect of the chargeable accounting periods corresponding to 1941-42 and 1942-1943. He subsequently filed an application before the Commissioner of Income-tax under Section 20 of the Excess Profits Tax Act for re-calculation of the amounts. The Commissioner asked for a report from the Income-tax Officer who made recompilation and communicated the result to the applicant on 18th July 1944. The applicant made certain suggestions on 24th July 1944. Three days after the Income-tax Officer issued notice under Section 34 of the Income-tax Act which is to the following effect :

"Whereas in consequence of definite information which has come into my possession I have discovered that your income assessable to income-tax for the year ending 31st March 1943 has (a) escaped assessment, I therefore propose to assess the said income that has escaped assessment. I hereby require you to deliver to me not later than 28-8-44 or within 30 days of the receipt of this notice, a return in the attached form of your total income and total world income assessable for the said year ending 31st March 1943."

The final report was submitted to the Commissioner by the Income-tax Officer on 31st July 1944. On 15th September 1944 the Commissioner passed final order to the effect that there was deficiency of profits and the applicant was not liable to excess profits tax for the years in question. After the receipt of Section 34-notice the applicant filed the requisite returns and his representative stated that the applicant had no objection to the total income being increased by

Rs. 29,842 for 1942-43 and by Rs. 19,682 for 1941-42. The Income-tax Officer accordingly made statement on these amounts. Against the order of the Income-tax Officer the applicant preferred appeals to the Appellate Assistant Commissioner but was unsuccessful. The applicant again preferred appeals to the Income-tax Appellate Tribunal but the appeals were dismissed.

3. Pursuant to an order of the High Court under Section 66(2) of the Income-tax Act, the Appellate Tribunal has propounded the following question for determination of the High Court : "Whether in the circumstances of the case, the proceeding under section 34, Income-tax Act, was validly started?"

4. It appeared to us in the course of argument that the question should be reframed as follows so as to bring out the real issue between the parties : "Whether in the circumstances of the case, the proceeding under Section 34, Income-tax Act, was valid?"

5. The answer to this question depends upon the construction of Section 34 of the Indian Income-tax Act, 1922, which enacts :

"If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal Officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22."

6. On behalf of the applicant the argument was addressed that the notice under Section 34 was not valid since on the date of issue of the notice the final order of the Commissioner of Income-tax with respect to recalculation of the profits of the applicant had not been made. Learned counsel pointed out that it is a necessary condition for the issue of notice under Section 34, that the Income-tax Officer should discover "in consequence of definite information which has come into his possession" that "the incomes or profits or gain have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate." It was contended that in the circumstances admitted in the present case the Income-tax Officer could not have discovered on 27th July 1944 that income of the applicant has escaped assessment for the years in question. In my opinion the argument addressed by the learned counsel is untenable and cannot succeed; for it is not questioned in the present case that the applicant had filed a petition on 10th April 1944 before the Commissioner of Income-tax for recompilation of his liability under the Excess Profits Tax Act. The Commissioner had thereupon asked for a report from the Income-tax Officer who

was also in charge of collection and assessment of excess profits tax. The Officer accordingly recomputed the tax liability of the applicant and communicated the result to the applicant on 18th July 1944. The applicant made his suggestions to the Income-tax Officer on 24th July 1944. There-after the Income-tax Officer issued a notice under Section 34 of the Act and at the same time submitted his final report about re-computation of the excess profits to the Commissioner of Income-tax. It is true that the final order of the Commissioner was made on 15th September 1944.

7. But it is impossible to accept the argument of the learned counsel that on 27th July 1944 when the Income-tax Officer issued notice under Section 34 there was no "definite information" which had come into his possession in consequence of which he "discovered" that the income had escaped assessment or had been under-assessed. For it is not possible to assume that the order of the Commissioner was the sole item of information upon which the Income-tax Officer issued notice under Section 34. On the contrary it is clear from the facts which preceded the issue of the notice that the Income-tax Officer had gathered information as a result of his own calculation that a part of the income of the applicant had escaped assessment.

8. In support of his argument learned counsel referred to '*Commr Of Income-Tax, Madras v. Lakshmana Iyer*¹', and '*Fazal Dhala v. Commr. Of Income-Tax, B and O*²', But these authorities are not of much assistance to the applicant.

9. In the Madras case the Chief Justice indeed laid stress on the fact that the application of Section 34 must depend upon the particular circumstances of each case and even definite information with regard to the state of the law would bring the section into operation. Upon the special facts of that case the High Court held that there was no "definite information" in the possession of the Income-tax Officer when he served the notice under Section 34. It appears that the share of profits falling to a minor who had been admitted to the benefits of a partnership in which his father was a partner was under a wrong conception of law, not included in the father's assessment for the year 38-39 it was however included in the following year 39-40 and this inclusion was held to be proper by the High Court in September 1941. In March 1940 the Income-tax Officer had served a notice on the assessee under Section 34 in respect of the son's share of profits which had escaped assessment in 1938-39. But the Income-tax Appellate Tribunal held that the Income-tax Officer was not entitled to reopen the assessment for the year 1938-39 because he had already applied his mind to an identical question and had adjudicated upon it. It is manifest that the facts of the present case are widely different.

10. In '*FAZAL DHALA'S CASE*', 1944-12 ITR 341 (Pat), the assessee was assessed for the year 1937-38 on 4th September 1937 but proceedings under Section 34 were started on 7th May 1938 on the ground that the income of the Madras branch of the assessee had escaped assessment and these proceedings terminated on 30th November 1938. On 30th August 1938 the assessee was assessed for the year 1938-39. On 29th July 1939, a notice under Section 34 was issued to him

stating that his income had partially escaped assessment and the final assessment was made on 10th August 1943. The assessee contended that as the only reason for the Income-tax Officer to start proceedings under Section 34 in respect of the year 1938-39 was that the income of the Madras branch had not been assessed and as this fact was present in the mind of the Income-tax Officer on 30th August 1938 when the assessment for 1938-39 became final, the notice under Section 34 issued on 29th July 1939 was not valid in law. Upon the facts of that case it was held by the High Court that the notice under Section 34 of the Indian Income-tax Act issued on 20th July 1939 was not tenable in law. It should be noticed that the Appellate Tribunal had found that at the time the Income-tax Officer started proceeding under Section 34 he had in mind the existence of the Madras branch of the business and there was no material to hold that the Income-tax Officer had some other reason which induced him to issue the notice.

11. It is manifest that the circumstances of the present case are wholly different. It is obvious that the phrase "definite information" in Section 34 cannot be construed in a universal sense; its meaning must depend and must necessarily vary with the circumstances of each case. It is necessary that the information should be more than mere gossip or rumour. But it need not be information of fact nor need it be information of actual escape of tax. So far as the word "discovers" in Section 34 is concerned it only requires that the Income-tax Officer should have formed an honest and reasonable belief upon material which could reasonably support such belief. In the nature of things, it cannot amount to a conclusion of certainty. Upon the facts stated in this case it is manifest that the notice under Section 34 has been validly issued.

12. Even if we assume for a moment that the notice under Section 34 is defective it is impossible in my opinion to hold that the proceedings are illegal or that excess assessment made is null and void. It is of importance to state that Section 34, though a part of the Act, imposes no charge on the subject and it is merely part of the machinery of the assessment. The liability to pay the tax is founded on Sections 3 and 4 of the Income-tax Act, which are the charging sections. The jurisdiction to assess the liability to pay tax cannot on principle depend on the validity of the notice. I do not think it is necessary in all cases in order to enable the Income-tax Department to receive the money that there should be an assessment actually served of that sum which is ultimately paid.

13. In *Whitney v. Commissioners Of Inland Revenue*³, Lord Dunedin stated : "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, 'ex hypothesi', has already been

fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay".

14. In *'W.H. Cockerline and Co. v. Commrs. Of Inland Revenue⁴'*, Lord Hanworth after quoting the above passage from Lord Dunedin's judgment states :

"Lord Dunedin, speaking, of course, with accuracy as to these taxes, was not unmindful of the fact that it is the duty of the subject to whom a notice is given to render a return in order to enable the Crown to make an assessment upon him; but the charge is made, in consequence of the Act, upon the subject; the assessment is only for the purpose of quantifying it. In a passage in Lord Justice Sergeant's judgment in the Case of WILLIAMS' he says this : 'I cannot see that the non-assessment prevents the incidence of the liability, though the amount of the deduction is not ascertained until assessment. The liability is imposed by the charging section, namely Section 38' - which is Excess Profits Duty -'the words of which are clear. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified, and when quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately.' With the greatest respect to the learned Judge, I think he has attached quite undue importance to the machinery of assessment and recovery and too little importance to the creation and the charge of the liability."

15. In *'Attorney General v. Aramayo⁵'*, the whole Court held that there may be a waiver as to the machinery of taxation which inures against the subject.

16. The principle has been accepted in *'Chatturam v. Commissioner Of Income-Tax' Bihar⁶'*, in which the assesseees were residents in the Chotanagpur Division in the Province of Bihar. This area was declared to be a "partially excluded area" by an order in Council dated 3rd March 1936. On or about the 20th April, 1940, the assesseees were served with a notice under Section 22(2) of the Income-tax Act for furnishing a return for the accounting year 1939-40. On the 22nd April, 1940, a notice under Section 22(1) was published in the newspapers requiring persons generally to submit the returns in the prescribed form. On the 26th May, 1940, the Governor of Bihar by Notification under Section 92(1) of the Government of India Act, 1935, directed that the Indian Income-tax (Amendment) Act, 1939, the Income-tax Law Amendment Act, 1940, and the Indian Finance Act, 1940, should be deemed to have been applied to the Chotanagpur Division with effect retrospectively from the dates on which the said Acts came into force in other parts of the Province of Bihar. The assesseees were assessed to income-tax on the 9th March, 1941.

17. The assesseees contended that the assessment proceedings initiated and completed against them were invalid and that neither the Notification nor the Regulation was competent in law to validate those proceedings. It was argued before the Federal Court that the notices under Section

22(1) and (2) of the Income-tax Act were already issued before the Notification of 26th May 1940. It was maintained that the notices were the foundation of the jurisdiction of the Income-tax Officer and since at the material time the Finance Act of 1940 was not operative in the area in question the Governor by his Notification could not give jurisdiction to the Income-tax Officer in respect of his 'ultra vires' notices.

18. The contention was rejected by the Federal Court on the ground that it was based on a misunderstanding of the jurisdiction of the Income-tax Act. At p. 307 Kania, J., (as he then was) observed :

"This contention is founded on a misunderstanding of the jurisdiction of the Income-tax officer and the operation of the Income-tax Act. The income-tax assessment proceedings commence with the issue of a notice. The issue or receipt of a notice is not, however, the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessee to pay the tax. It may be urged that the issue and service of a notice under Section 22(1) or (2) may affect the liability under the penal clauses which provide for failure to act as required by the notice. The jurisdiction to assess and the liability to pay the tax, however, are not conditional on the validity of the notice."

19. For the reasons stated I am of opinion that in the circumstances of the case the proceeding under Section 34 of the Income-tax Act was valid and the question of law referred by the Income-tax Appellate Tribunal should be answered in the affirmative. The assessee must pay the costs of this reference. Hearing fee Rs. 250.

Sarjoo Prosad, J.

20. I agree. The only point which has been urged before us, as it was urged before the tribunal, is that the notice issued under Section 34 of the Income-tax Act was not valid; the ground of attack being that the order of the Commissioner of Income-tax under which the recomputation of the profits of the applicant was finalised having been passed in September 1944 notice under Section 34 could not be issued in July 1944 because the Income-tax Officer could not anticipate that the order of the Commissioner would be. The notice, therefore, it is alleged wrongly states that certain sums of money had escaped assessment at the time when the notice was issued. There appears to be some fallacy underlying this argument. There is no doubt that the sums of money indicated in the notice had escaped assessment during the periods in question, namely, 1941-42 and 1942-43 although the discovery is actually made by the income-tax officer at the time when the matter is referred to him for report. He then discovered that these amounts of 'income' had been wrongly included in 'excess profits' and therefore had escaped assessment. There is nothing to show that this was an erroneous inference arrived at by the Income-tax Officer and the fact that this position was not disputed by the assessee when the matter actually came up for assessment before the revenue authorities indicates that the inference of the Income-tax officer

was correct. The notice thus contained the statement of an existing fact even on the date of the notice under Section 34 of the Act. Therefore there is nothing wrong with the notice at all. So far as the legal aspect of the question is concerned my learned brother has already very fully discussed the matter and I have nothing to add to that.

Answer accordingly.

Cases Referred.

¹1945-13 ITR 242 (Mad)

²1944-12 ITR 341 (Pat)

³(1926) 10 Tax Cas 88

⁴(1932) 16 Tax Cas 1

⁵(1925) 9 Tax Cas 445

⁶1947-15 ITR 302 (FC)