PATNA HIGH COURT

Commissioner of Income Tax

Vs

Maharaja Pratap Singh Bahadur

Misc. Judicial Case No. 665 of 1954

(Ramaswami, C.J. and Raj Kishore Prasad, J.)

13.07.1956

JUDGMENT

Ramaswami, C.J.

1. In this case the assessee, namely, Maharaja Pratap Singh Bahadur, had agricultural income from his zamindari for all the four assessment years 1944-45 to 1947-48. Assessment was made by the income-tax authorities for all these assessment years, but the income of the assessee with regard to interest on arrears of rent was not included in the computation of the assessable income. The Income-tax authorities followed this course in view of the decision of the Patna High Court in *Lakshmi Daiji v. Commissioner of Income-tax B and O*[1], (A). But the view of the law taken by the Patna High Court was reversed by the Judicial Committee in the *Commissioner of Income-tax, B and O v. Kamakhaya Narayan Singh*[2], It was held by the Judicial Committee that the interest on arrears of agricultural rent was not agricultural income within the meaning of Section 2 (1) of the Income-tax Act and was, therefore, not, exempt from income-tax. The decision of the Judicial Committee is dated the 6th of July, 1948. In accordance with this decision the Income-tax Officer issued notices under Section 34 of the Income-tax Act against the assessee for all the four assessment years. These notices were issued on the 8th of August, 1948. The assessee filed returns of income in response to these notices and included in the returns the receipt of interest on arrears of rent. The Income-tax Officer completed all the assessments on the 26th of August 1948. The Income-tax Officer followed the procedure laid down by Section 34 as it stood before it was amended by Act 48 of 1948. The amendment received the assent of the Governor General on the 8th of September, 1948. The assessee took appeals to the Appellate Assistant Commissioner against the order of the Income-tax Officer, but the appeals were dismissed. The assessee took the matter in appeal again to the Appellate Tribunal. The appeals were heard before the Patna bench constituted of Mr. Sastri, the Judicial Member, and Mr. Narayana Row, the Accountant Member. There was difference of opinion between these two members as to how the appeals were to be decided. Mr. Sastri, the Judicial Member, held that the procedure prescribed under the old Section 34 applied to the case and there was "definite information" obtained by the Taxing authorities within
the meaning of the old Section 34. The Judicial Member also held that the assessee was estopped from contesting the validity of Section 34 because he had responded to the notice and included

the receipt of interest from the rent in his income. The Accountant Member, Mr. Narayan Row, expressed a different view on both these points. He held, firstly, that there was no waiver on the part of the assessee merely because he filed the return of income in response to the notice under Section 34.
In the second place, the Accountant Member took the view that the amended Section 34 applied to the case and since the peremptory requirements of the amended section were not complied with the proceedings under Section 34 taken by the Income-tax authorities were legally invalid and the assessments made under Section 34 are also invalid and should be cancelled. The appeals were then placed before the President of the Appellate Tribunal, who held, in the first place, that there was no waiver on the part of the assessee and, secondly that the assessments under Section 34 were legally invalid because the requirements imposed by the amended Section 34 had not been complied with.

2. Under Section 66(1) of the Income-tax Act the Appellate Tribunal has submitted for the opinion of the High Court the following questions of law :

> (1) "Whether in the circumstances of the case, assessment proceedings were validly initiated under Section 34 of the Indian Income-tax Act?
> (2) If so, whether in the circumstances of the case, the amount received from interest on arrears of agricultural rent was rightly included in the income of the assessee?"

On behalf of the Income-tax Department Mr. Bahadur addressed the argument that the proceedings under Section 34 were validly initiated and majority of the Appellate Tribunal has not taken the right view. The point taken by learned Counsel was that the case is governed by Section 34 as it stood before the amendment made by Act 48 of 1948. It was pointed out by learned Counsel that the Amending Act was promulgated on the 8th of September, 1948, on which date it received the assent of the Governor-General, it was contended, therefore, that the Income-tax authorities were entitled to proceed under the old section against the assessee. I do not accept this argument as correct. The reason is that Section 34 was amended by Section 8 of Act 48 of 1948, and Section 1 of the Amending Act makes Section 8 expressly retrospective with effect from the 30th of March, 1948. Section 1 of Act 48 of 1948 states :-

> "1. (1) This Act may be called the Income-tax and Business Profits Tax (Amendment) Act, 1948.
> (2) Sections 3 to 12 shall be deemed to have come into force on the 30th day of March, 1948, and the amendment made in the Indian Income-tax Act, 1922 (XI of 1922) by Section 2 shall be deemed to be operative so as to apply in relation to all assessments subsequent to the assessment for the year ending on the 31st day of March 1948.

Sections 13 to 15 shall be deemed to have come into force on the day on which the Business Profits Tax Act, 1947 (XXI of 1947) came into force."

Section 8 of the Amendment Act is to the following effect :-

> "8. For Section 34 of the said Act, the following section shall be substituted namely :

"34. (1) If - (a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been underassessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee or, if the assessee is 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 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that -

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation. - Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

"x x x x x."

3. In the present case notices under Section 34 were issued by the Income-tax Officer on the 8th of August, 1948; and after the assessee filed his returns the Income-tax Officer completed the

assessments on the 26th of August, 1948. It is true that the Amending Act, namely, Act 48 of 1948 was promulgated on the 8th of September, 1948. But Section 1 of the Act makes the amendment expressly retrospective with effect from the 30th of March, 1948. It follows, therefore, that the amended Section 34 should be deemed to have been in existence with effect from the 30th of March, 1948. It is true that on the 8th of August, 1948, when the Income-tax Officer issued notices under Section 34, Act 48 of 1948 had not been promulgated. But, as I have pointed out, Section 1 of the Act makes Section 8 of that Act expressly retrospective, and by a process of fiction the amended Section 34 is deemed to have been in existence with effect from the 30th of March, 1948. It follows, therefore, that on the 8th of August, 1948, the amended Section 34 was in operation and it was the duty of the Income-tax Officer to comply with the peremptory requirements of Section 34 before he issued the notices upon the assessee for the escaped income. It was contended by Mr. Bahadur on behalf of the Income-tax department that it was physically impossible for the Income-tax Officer to comply with the requirements of the amended Section 34 on the 8th of August, 1948. The argument is correct, but the Income-tax Department was not prejudiced because notices under Section 34 could be reissued after the 8th September, 1948, the date of the Amending Act, and after complying with the requirements of the amended Section 34. In any case, the effect of Section 1 of Act 48 of 1948 is that by a process of fiction the amended Section 34 is held to be in existence and operative with effect from the 30th of March, 1948, and the old Section 34 was non-existent with effect from that date. The Income-tax authorities were, therefore, bound to proceed under the amended Section 34 in this case; and since the peremptory requirements of Section 34 had not been complied with, it must be held that the proceedings taken under Section 34 were not legally valid.

4. What are the limits up to which the statutory fiction may be extended? The question turns on the construction of the particular statute. If the Statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled as a matter of construction to discover and ascertain for what purposes and between what persons the statutory fiction is to be applied and full effect must be given to the statutory fiction and it should be carried to its logical limits. That is the principle laid down by the Supreme Court in a recent case, *State of Bombay v. Pandurang Vinayak*[3], The matter has been very clearly put by Lord Asquith in an English case *East End Dwellings Co. Ltd. v. Finsbury Borough Council*[4], The question at issue in that case was the proper interpretation to be placed on Section 53(1) (a) of the Town and Country Planning Act, 1947. In dealing with this question Lord Asquith expressed the same principle as follows :-

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is
> emancipation from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs". My concluded opinion, therefore, is that effect must be given to the statutory fiction created by Section 1 of Act 48 of 1948 and it must be deemed that the amended Section 34 was in existence on the

8th of August, 1948, when the Income-tax Officer issued notices against the assessee. If that is the correct view of the law, it follows that the Income-tax Officer was bound to comply with the mandatory requirements of the amended Section 34, and his failure in this regard vitiates the entire proceeding.

5. It was next contended on behalf of the Income-tax Department that even if the amended Section 34 applied, the jurisdiction of the Income-tax Officer to proceed to tax the escaped income is not affected by his failure to obtain sanction of the Commissioner or because the Income-tax Officer has failed to record reasons for initiating the proceedings. I cannot accept this argument as correct. I do not share the view that the conditions imposed by the proviso to Section 34(1) can be disregarded by the Income-tax Officer as being mere procedural formalities. The proviso to Section 34(1) clearly states that the Income-tax Officer shall not issue a notice unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice. In my opinion, these conditions are the essential basis of the jurisdiction of the Income-tax Officer to take action under Section 34 and these conditions are to be strictly complied with and the Income-tax Officer has no authority to proceed under Section 34(1) or to make assessment of tax of the escaped income without complying with these conditions.

The view that I have taken is supported by the decision of the Bombay High Court in *Commissioner of Income-tax, Bombay v. Ramsukh Motilal, Bombay*[5], and two decisions of the Calcutta High Court, *Commissioner of Agricultural Income-tax v. Sultan Ali Gharami*[6], and *R. K. Das and Co. v. Commissioner of Income-tax, West Bengal*[7], Mr. Bahadur, however, placed reliance upon two cases, *Chatturam v. Commissioner of Income-tax, Bihar*[8], and *Jitan Ram Nirmal Ram Firm v. Commr. of I. T. B and O.*[9], I do not agree that the principle of these decisions has any bearing on the question to be decided in the present case. In the first case, namely, 1947-15 ITR 302 , it was decided by the Federal Court that a failure to give proper notice under Section 22 was a procedural irregularity which could be waived. It should be noticed that no question was raised in that case as to the construction of Section 34, which is entirely different in its scheme and import from Section 22. It may be that the issue of a notice under Section 22 is not obligatory and is not a condition precedent to the jurisdiction of the Income-tax Officer to make the assessment. But the language of Section 34 is entirely different from that of Section 22 and, as I have already pointed out, the condition imposed by Section 34 must be strictly complied with, for the jurisdiction of the Income-tax Officer to assess income-tax under that section depends essentially upon the compliance of the peremptory conditions imposed by that section. The ruling of the Federal Court in 1947-15 ITR 302 has, therefore, no

application to the present case. As regards the other case, 1951-19 ITR 476 , it was held by the High Court that notice under Section 34 was legally valid and there was no defect in the form or contents of that notice. The ratio of that case has no application to the present case, because the material facts here are quite different. A point was also taken by the learned counsel on behalf of the Income-tax Department that there has been a waiver of the procedural benefit on the part of the assessee and so the assessment under Section 34 cannot be interfered with. The argument was based upon the circumstance that the assessee filed a return of income in response to the notice issued under Section 34. In my opinion, the argument cannot be accepted as correct. As I have already said, the conditions imposed toy Section 34 are conditions which go to the very root of

the jurisdiction of the Income-tax Officer to assess tax, and the waiver on the part of the assessee cannot confer jurisdiction upon the Income-tax Officer if the statutory conditions are not complied with. Even assuming that there could be waiver in such a case on the part of the assessee, the mere fact that the assessee has furnished return in response to notice is not in itself sufficient to constitute waiver on his part. It should also be noticed in the present case that the assessee had filed a return before 26-8-1948 and the Amending Act was promulgated on 8-9-1948. It is manifest that the assessee could not toe aware of the provisions of the amended Section 34 on or before 26-8-1948. How could it, therefore, toe said that the assessee waived certain legal advantages of which he was not even aware on the date of the return? There is also another point which should be taken into account. The assessee was bound in response to the notice to file a return. It is not a matter of opinion on the part of the assessee, for Section 28(1)(a) of the Act states that a penalty will be imposed on the assessee if he fails to furnish the return in response to the notice. It is also manifest that under Section 23(4) of the Act the assessee will render himself liable to assessment by the Income-tax Officer to the best of his judgment. The filing of return is, therefore, not a matter of option; it is a matter of obligation on the part of the assessee and there can, therefore, be no question of waiver. For these reasons I think that the argument of the learned counsel on the question of waiver must be rejected.

6. For these reasons, I hold that the proceedings for assessment under Section 34 against the assessee were legally invalid and the assessments made by the Income-tax Department on the income of the assessee under Section 34 are illegal. I would accordingly answer the questions of law referred to by the Income-tax Appellate Tribunal in favour of the assessee and against the Income-tax Department. The assessee is entitled to cost of this reference. Hearing fee Rs. 250/-.

Raj Kishore Prasad, J.

7. I agree.

Answer accordingly.

Cases Referred.

[1]1944-12 ITR 309 (SB)
[2]1948-16 ITR 325
[3] AIR 1953 SC 244
[4]1952 AC 109
[5]1955-27 ITR 54 : AIR 1955 Bom 227
[6]1951-20 ITR 432 (Cal)
[7] AIR 1956 Cal 161
[8](1947) 15 ITR 302
[9](1951) 19 ITR 476