Privy Council Appeal No. 63 of 1937

The Commissioner of Income-tax, Bombay Presidency and Aden - - - - - - - - - *Appellant*

v.

Messrs. Khemchand Ramdas - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF SIND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1938.

Present at the Hearing :

LORD WRIGHT.
LORD ROMER.
SIR LANCELOT SANDERSON.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD ROMER.]

The respondents to this appeal are a firm who carry on business at Bunder Abbas and Kerman outside British India but are assessable to taxation in respect of their income under the provisions of the Indian Income-tax Act, 1922. Their total income during the fiscal year ending on the 31st March, 1926, being in the opinion of the Income-tax Officer, Shikarpur, of such an amount as to render them liable to income-tax under that Act for the year ending the 31st March, 1927, a notice was served upon them by that official in accordance with the provisions of section 22 (2) requiring them to make a return of that income. He also served upon them a notice under subsection (4) of the same section requiring production of the relevant accounts and documents. Had the respondents thought fit to comply with these notices they would have avoided a good many of the difficulties in which they subsequently found themselves involved. Unfortunately they completely ignored the notices. The duty of the Income-tax Officer in such circumstances is prescribed by section 23 (4) of the Act. It is to " make the assessment to the best of his judgment." One of the peculiarities of most Income-tax Acts is that the word " assessment " is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable, and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. The Indian Income-tax Act is no exception in this respect, and

some discussion took place before their Lordships as to the meaning of the words "make the assessment" in section 23 (4), the question debated being whether the words mean no more than "compute the total income" or whether they include also the determination of the tax payable. It was pointed out that by subsection (1) of the same section, which deals with the cases where the officer is satisfied with the return made by the tax-payer, the officer is in terms directed both to assess the total income and to determine the sum payable on the basis of such return. So, too, under subsection (3), which deals with the cases where the officer is not satisfied that the return is correct or complete. In such cases the subsection requires that the officer, after hearing evidence as therein mentioned, shall "assess the total income of the assessee and determine the sum payable by him on the basis of such assessment." Subsection (4) on the other hand merely directs the officer to "make the assessment to the best of his judgment," and contains no specific reference to a determination by him of the sum payable. Unless, therefore, the word "assessment" in subsection (4) is intended to mean something more than the word means in subsections (1) and (3) (and it may be observed that this is by no means improbable in an Income-tax Act), the officer is not in terms given any power to determine the sum payable by the tax-payer. Their Lordships do not find it necessary to express any opinion upon this question, which seems to them to be merely one of academic interest. For even if such a power be not given expressly by the direction to "make the assessment," it is, in their opinion, plainly implied, reading the section as a whole. And this view is strongly corroborated by section 29, which is in these terms:—

> "When the Income-tax Officer has determined a sum to be payable by an assessee under section 23 . . . the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable."

Now the prescribed form in terms applies to an assessment under section 23 (4).

In the present case the officer in due course acted under the subsection and made an assessment to the best of his judgment, and at the same time or shortly afterwards served upon the respondents a notice of demand under section 29. But before dealing further with such assessment and demand it is necessary to refer to some other provisions of the Act and the rules made thereunder.

By section 55 of the Act it is provided as follows:—

> "In addition to the income-tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature."

By virtue of section 56 the total income of an unregistered firm is for the purposes of super-tax the total income as assessed for the purposes of income-tax, and an assessment

(which here must mean a computation) of total income that has become final and conclusive for the purposes of income-tax is made final and conclusive for the purposes of super-tax for the same year.

By section 58 all the provisions of the Act (with certain exceptions not material for the present purpose) are made applicable so far as may be to the charge, assessment, collection and recovery of super-tax.

By section 2 . . . (14) the words " registered firm " are defined as meaning a firm constituted as therein mentioned of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner.

On the 18th May, 1926, the respondents applied to the Income-tax Officer for registration and such registration was effected by him on the 17th January, 1927.

It is now necessary to return to the " assessment " made by the Income-tax Officer under section 23 (4) and the notice of demand served by him upon the respondents under section 29.

The assessment is dated the 17th January, 1927 (the same date it may be noticed as that on which the registration of the respondents was effected) and so far as material is in the following terms:—

> " The assessee has failed to return form I.
>
> " In spite of several appointments having been given he has failed to produce Bunder Abbas account in Shikarpur books. He is accordingly assessed on enquiries on an income of Rs.1,25,000 at the maximum rate.
>
> " The firm having applied for registration is registered, therefore no super-tax is levied."

Their Lordships have no information either as to the terms of the notice of demand under section 29 following upon this assessment or as to the precise date upon which it was served upon the respondents. It would seem, however, that it was served not later than the month of March, 1927.

After service of that notice the Income-tax Officer had done all that was required of him under the Act for the purposes of ascertaining the liability of the respondents to income-tax and super-tax for the fiscal year ending on the 31st March, 1927. So far, too, as the respondents were concerned, their assessment for the year (using the word assessment in its most comprehensive sense) had become final and conclusive. For though by section 30 (1) a right of appeal to the Assistant Commissioner is given to an assessee objecting to the amount or rate at which he is assessed under section 23 or denying his liability to be assessed under the Act, the subsection contains a proviso to the effect that no appeal shall lie in respect of an assessment made under section 23 (4). If, however, the respondents concluded from all this that after payment of the sum mentioned in the notice of demand all their taxation troubles for that year were ended, they were reckoning without the Commissioner of Income-tax and the powers conferred upon that functionary under section 33 of the Act. That section so far as material for the present purpose, is as follows:

" (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him. . . .

" (2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit:

" Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

The circumstances in which in the present case the Commissioner exercised or purported to exercise the powers conferred upon him by the section have been described by him in the following words:

" In January, 1928, it was brought to the notice of the Commissioner of Income-tax that the deed of partnership produced by the firm for the purposes of its registration was not a valid deed of partnership and that therefore the order granting registration was not correct. Hence a notice under section 33 of the Act was issued to the firm on 9th January, 1928, calling upon it to show cause why the Income-tax Officer's order of 17th January, 1927, registering the firm be not set aside. The firm thereupon sent a written representation and after considering it, the Commissioner, in virtue of his powers under section 33 of the Act, revised on 13th February, 1928, the Income-tax Officer's order regarding registration of the firm and ordered its cancellation, directing the Income-tax Officer to take the necessary action thereupon."

It is by no means certain that the Commissioner came to a correct conclusion regarding the invalidity of the registration of the respondents. But, as the law stood at that time, no appeal lay from an order made by the Commissioner under section 33, and it must be taken that the order cancelling the registration was properly made. Nor is it at all certain that such order could operate retrospectively so as to affect the respondents' liability to super-tax for the year 1927-28. It has, however, been conceded by the respondents in effect that by reason of such order they must be treated as having been an unregistered firm during the fiscal year in question and could have been charged with super-tax for that year had the proper steps been taken for that purpose. Their Lordships are willing to deal with the case on the footing of such concession without expressing any opinion upon the question whether the concession was rightly made. The real question between the parties is whether the action taken by the Income-tax Officer consequent upon the Commissioner's order of cancellation has been effectual to charge the respondents with such super-tax.

What he in fact did was to issue an order dated the 4th May, 1929, which (so far as material) is in the following terms:—

" The firm was originally assessed to Income-tax on an income of Rs.1,25,000 as a registered firm. The registration order was subsequently cancelled. The firm is accordingly assessed to super-tax on Rs.1,25,000 less Rs. 50,000. Issue N.D. accordingly for super-tax of Rs.5,468-12-0."

The N.D. (notice of demand) was served upon the respondents three days later.

It is to be observed that the order was issued more than one year after the close of the fiscal year ending on the 31st March, 1927, and more than one year after the date of the earlier demand to which reference has already been made. The significance of this fact will appear presently. It should be added that the respondents in no way challenged the figures contained in the order of the 4th May, 1929. What they did challenge was the power of the Income-tax Officer to make the order at all. Accordingly on the 4th June, 1929, they appealed to the Assistant Commissioner under section 30 (1) asking that the order might be set aside. It is clear from the Commissioner's statement cited above that the Income-tax Officer in making the order complained of was acting in pursuance of the directions given to him by the Commissioner under section 33; and at that time, as has already been stated, no appeal could be brought against an order made under that section. But no such order can be made that is inconsistent with the other provisions of the Act. One of the questions, therefore, arising upon the appeal, was whether the Income-tax Officer had any power to make the order apart from the direction given to him by the Commissioner. If he had not, the fact that such direction was given was an irrelevant circumstance. Another question arising upon the appeal was as to its competency. Having regard to section 58 (1) of the Act the provisions contained in section 30 (1), giving a right to appeal to the Assistant Commissioner in the case of an assessee denying his liability to be "assessed under the Act," which must mean in that context "charged with tax under the Act," is as applicable to super-tax as it is to ordinary income-tax. But the proviso to that subsection has to be considered. If the order of the 4th May, 1929, can properly be described as an assessment under section 23 (4), no appeal would lie.

The appeal came on for hearing on the 12th April, 1930, and was dismissed by the Assistant Commissioner upon its merits. He did not deal with the question of the competency of the appeal. He merely held that the order of the 4th May, 1929, was valid, and he confirmed the tax. In so doing he must have been acting under the powers given to him by section 31 (3) (*a*), which is in these terms:—

> "In disposing of an appeal the Assistant Commissioner may in the case of an order of assessment:—
>
> "(a) confirm, reduce, enhance, or annul the assessment."

* * * *

In confirming the tax, therefore, the Assistant Commissioner must have regarded the order as an assessment within the meaning of the subsection, as indeed it was. But he expressed no opinion upon the question whether such assessment was one made under section 23 (4).

Following upon the dismissal of their appeal the respondents then applied to the Commissioner himself, asking him to exercise his powers under section 33 and set

aside both the order of the Income-tax Officer "levying super-tax" and the order of the Assistant Commissioner that confirmed such tax. Inasmuch as the Income-tax Officer in "levying super-tax" had merely acted in pursuance of the directions given him by the Commissioner, the respondents could not have felt too certain of success. So they asked him in the alternative to refer the matter to the High Court under the provisions of section 66 (2) of the Act. That subsection is, or rather was at that time, as follows:—

> "(2) Within one month of the passing of an order under section 31 . . . the assessee in respect of whom the order was passed may by application . . . require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner shall within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

Subsection (3) of the same section ran as follows:—

> "(3) If, on any application being made under subsection (2) the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may . . . apply to the High Court, and the High Court, if it is not satisfied with the correctness of the Commissioner's decision, may require the Commissioner to state the case, and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

The application to the Commissioner to set aside the order of the Income-tax Officer was rejected by the Commissioner as was the application to state a case. He regarded the case as a clear one of assessment under section 23 (4) in respect of which no appeal would lie. The appellate proceedings before the Assistant Commissioner and the appellate order were therefore in his opinion illegal. "Hence," said he, "I quash them under section 33 of the Act." The proceedings having been quashed there was in his view no order out of which any questions of law could arise and nothing therefore that could be referred to the High Court under section 66 (2). He accordingly refused to state a case.

In their Lordships' opinion the Commissioner was plainly wrong in so doing. One of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to him was competent in view of the proviso to section 30 (1). By deciding this question himself adversely to the respondents, the Commissioner could not deprive the respondents of the right of having the question decided by the Court. This was the view of the matter rightly taken by the Court, who upon application made to them by the respondents under section 66 (3) ordered the Commissioner to state a case and refer it to them for their decision.

The Commissioner accordingly drew up a statement of the case and referred it with his own opinion thereon to the Court, setting out in the statement at some length his reasons for thinking that he ought never to have been ordered to do so.

The case in due course came on for hearing before Additional Judicial Commissioners Aston and Rupchand Bilaram on the 22nd January, 1934. Their decision was in favour of the respondents. The Commissioner then applied for and obtained from the High Court a certificate that the case was a fit one for granting leave to appeal to His Majesty in Council. The present appeal was thereupon lodged.

At the hearing before the Additional Judicial Commissioners the arguments would appear to have covered a wide range and to have raised a number of interesting and important questions of law. Their Lordships do not, however, find it necessary to consider all these questions. It is in their opinion sufficient to dispose of this appeal if the two questions to which they have already called attention be decided, as in their Lordships' opinion they should be decided, in favour of the respondents. These two questions are (1) was the appeal to the Assistant Commissioner from the order of the 4th May, 1929 competent? (2) Had the Income-tax Officer any power to make that order in view of the provisions of sections 34 and 35 of the Act to which reference will presently be made?

These two questions are so closely related to one another that they can conveniently be considered together.

In order to answer them it is essential to bear in mind the method prescribed by the Act for making an assessment to tax, using the word assessment in its comprehensive sense as including the whole procedure for imposing liability upon the tax-payer. The method consists of the following steps. In the first place the taxable income of the tax-payer has to be computed. In the next place the sum payable by him on the basis of such computation has to be determined. Finally a notice of demand in the prescribed form specifying the sum so payable has to be served upon the tax-payer. The second of these steps involves the determination of two sums, namely, the sum payable for income-tax and the sum payable for super-tax. The notice of demand in the prescribed form also provides for the sums payable for income-tax and super-tax being specified separately. Considerable discussion accordingly took place before the High Court on the question whether a demand for super-tax in order to be valid ought to be made simultaneously with the demand for income-tax. Aston A.J.C. considered that the demand for super-tax should be made within a reasonable time of the assessment for income-tax, meaning no doubt, by assessment the service of the notice of demand for income-tax which normally completes the assessment. Rupchand Bilaram A.J.C. was of opinion that the demand for super-tax should be made within a reasonable time, and therefore almost simultaneously with the demand for income-tax. Both of them held for this reason (amongst others) that the service of the notice of demand of the 4th May, 1929, was illegal and inoperative to impose liability upon the respondents. Their Lordships do not find it necessary to express any opinion upon this point inasmuch as in their view and for the reasons

which they will now proceed to give it does not call for determination in the present case.

It had been argued on behalf of the appellant that the Act nowhere imposes any limit of time within which an assessment under the provisions of sections 23 and 29 is to be made, and that the service of the notice of demand can, therefore, be made at any time. This is true. It had, in effect, been so determined by this Board in the case of *Rajendra Nath Mukerjee* v. *Income-tax Commissioner,* 61 I.A., p. 10. But it is not true that after a final assessment under those sections has been made the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time.

It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections. In the present case the liability of the respondents both for income-tax and for super-tax was determined by the income-tax officer on the 17th January, 1927. In the order made by him on that date he assessed the respondents to income-tax at the maximum rate, but as the respondents were at that time a registered firm he held, as he was bound to hold, that no super-tax was to be levied. On some date before the end of March, 1927, he served on the respondents a notice of demand for the tax that he had determined was properly leviable. The assessment having been made under section 23 (4) no appeal lay in respect of it. The assessment of the respondents was therefore final both in respect of income-tax and super-tax. Their liability in respect of both taxes had been finally determined, and none the less because the question of their liability to super-tax had been determined in their favour. It was, indeed, contended before their Lordships that the assessment could not be regarded as having been determined inasmuch as the Commissioner might at any time, and apparently after any lapse of time however long, cancel the registration of the respondents as a registered firm and so subject the respondents to liability to pay super-tax. Their Lordships would, in any case, hesitate long before acceding to a contention that would lead to so extravagant results. In their opinion, however, the contention cannot prevail. The Commissioner's powers under section 33 can only be exercised subject to the provisions of the Act, of which the provisions in sections 34 and 35 are in this respect of the greatest importance. These sections are or were at the material time as follows:—

> " 34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed

at too low a rate, the Income-tax Officer may, at any time within one year 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, and may proceed to assess or re-assess such income, profits or gains, 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 the tax shall be charged 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.

" 35.—(1) The Income-tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion rectify any mistake apparent from the record of the assessment, and shall within the like period rectify any such mistake which has been brought to his notice by such assessee:

" Provided that no such rectification shall be made, having the effect of enhancing an assessment unless the Income-tax Officer has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

" (2) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

" (3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly."

In view of these express provisions of the Act, it is in their Lordships' opinion quite impossible to suppose that the income-tax officer may in every kind of circumstance and after any lapse of time make fresh assessments or issue fresh notices of demand; or that the Commissioner can direct him so to do. In their Lordships' opinion the provisions of the two sections are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued. In the present case it is a debatable question whether the circumstances were such as to bring it within the provisions of section 34. It is not necessary to determine that question inasmuch as, in their Lordships' opinion, the case clearly would have fallen within the provisions of section 35 had the income-tax officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For looking at the record of the assessments made upon them as it stood after the cancellation of the respondents' registration—and the order effecting the cancellation would have formed part of that record—it would be apparent that a mistake had been made in stating that no super-tax was leviable. The income-tax officer took no further step, however, until May, 1929, and by then he was hopelessly out of time whichever of the two sections was applicable.

Their Lordships are accordingly of opinion that the order of the 4th May, 1929, was one that the Income-tax Officer had no power to make, and that the second of the two questions to which they have referred must be answered

in the negative. It necessarily follows that the first of those questions should be answered in the affirmative. For the order could only be justified, if at all, as one made, not under section 23 (4), but under either section 34 or section 35. If it was made, as the Commissioner has found in purported exercise of the powers given by section 23 (4), the assessee nevertheless had a right of appeal to the Assistant Commissioner under section 30, and the Commissioner was in error when he quashed the proceedings on that appeal. For as was truly said by Sir Shadi Lal in the case of *Duni Chand* v. *Commissioner of Income-tax,* Ind. L.R. 10 Lahore 596, at p. 601:—

> " The mere fact that the assessment purports to have been made under that subsection does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that subsection."

For these reasons, which do not differ substantially from the opinions expressed by the Court of the Judicial Commissioner, their Lordships are of opinion that the appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

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In the Privy Council

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN

v.

MESSRS. KHEMCHAND RAMDAS

DELIVERED BY LORD ROMER

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