
Commissioner of Income Tax, Bombay City Vs Ramsukh Motilal

Income Tax Ref. No. 26/X of 1954

Court: Bombay High Court

Date of Decision: Sept. 24, 1954

Acts Referred:

Income Tax Act, 1922 " Section 22, 22(1), 22(2), 24(2), 34

Citation: AIR 1955 Bom 227 : (1955) 57 BOMLR 130 : (1955) ILR (Bom) 289

Hon'ble Judges: Chagla, C.J; Tendolkar, J

Bench: Division Bench

Advocate: G.N. Joshi and P.R. Sunkersett, for the Appellant; Shankarlal G. Bajaj, for the Respondent

Judgement

Chagla, C.J.

This reference raises a rather important question as to the validity of a notice issued u/s 34, Income Tax Act and also as to

whether if such a notice is invalid it could be waived. The very few facts that are necessary to understand this contention are that the assessment

year of the assessee is 1944-45 and that he was assessed on 4-12-1948, on an income of Rs. 6,484. The Income Tax Officer was then satisfied

that some income had escaped assessment and he therefore issued a notice u/s 34 on 19-3-1949, The notice required the assessee to make a

return by 25-3-1949. The assessee made a returns and he was assessed. He then appealed to the Appellate Assistant Commissioner and before

the Appellate Assistant Commissioner for the first time he raised the contention that the notice issued u/s 34 was invalid and therefore the

assessment must be set aside. The Appellate Assistant Commissioner rejected his contention. He then went in appeal to the Tribunal and the

Tribunal upheld his contention. The Commissioner has now come on a reference to us.

2. Now, turning to Section 34, it deals with two cases of escaped assessment which fall under (a) and (b). The first case is where there is an

omission or failure on the part of the assessee to make a return, and the second case is where, even without there being an omission or failure on

the part of the assessee, the Income Tax Officer receives certain information with regard to income having escaped assessment. Therefore, the first

two conditions that are necessary before an assessment u/s 34 can be made is that the case must fail under (a) or (b) to the satisfaction of the

Income Tax Officer.

After the Income Tax Officer is satisfied, he has got to serve on the assessee a notice containing all or any of the requirements which may be

included in a notice under Sub-section (2) of Section 22, and after this notice has been served, the jurisdiction is conferred upon the Income Tax

Officer to proceed to assess or re-assess the income which has escaped assessment. Therefore, Section 34 incorporates by reference the

requirements of a notice contained in Sub-section (2) of Section 22. It is true that the notice need not contain all the requirements which are

mentioned in Section 22(2). Any one of the requirements may be mentioned. Therefore, we must turn to Section 22 (2) in order to find out what

are the requirements of a notice mentioned in that sub-section.

3. Sub-section (2) of Section 22 provides, to the extent that it is material, that the Income Tax Officer may serve a notice upon a person requiring

him to furnish, within such period not being less than 30 days as may be specified in the notice, a return in the prescribed form and verified in the

prescribed manner setting forth along with such other particulars as may be provided for in the notice his total income and total world income

during the previous year. Mr. Joshi's contention is that the only requirements u/s 22 (2) are the furnishing of a return, the verification and the

particulars if required, and according to Mr. Joshi what Section 34 lays down is that the notice must contain all of these three requirements or any

one of these three requirements. Mr. Joshi's contention is that the period of the notice which is mentioned in Section 22 (2) is not a requirement of

the notice.

In our opinion that contention is clearly untenable. Each of the three requirements mentioned in Section 22 (2) is qualified by the Legislature

providing that the notice must give time to the assessee to comply with that requirement within a period which cannot be shorter than 30 days. The

requirement is not merely to make a return or to verify or to give particulars, The requirement is In each case that the return must be made, the

verification must be made, or the particulars must be given, within a period not less than 30 days. Therefore, it is clear that if a notice u/s 34

embodies any of the requirements u/s 22(2), it must at the same time permit the assessee to comply with that requirement within a period which is

not less than 30 days. If the period is shorter than 30 days, then the requirement is not the requirement as set out in Section 22 (2). In this case the

notice gave only six days to the assessee to make a return u/s 34. Therefore the requirement was different from the requirement u/s 22 (2) and the

notice was clearly bad.

4. But Mr. Joshi's contention is that even if the notice is bad, it has been waived by the assessee, first, by his making a return pursuant to that

notice, and secondly, by his appearing before the Income Tax Officer, allowing the assessment order to be made, and not objecting to the

assessment till he went in appeal to the Appellate Assistant Commissioner. That raises a very important question as to whether failure to give a

proper notice u/s 34 is merely a procedural defect or whether it is failure to comply with a condition precedent to the assumption of jurisdiction by

the Income Tax Officer. In other words, does the Income Tax Officer get jurisdiction to assess u/s 34 only after he has given notice as required by

that section, or whether he has jurisdiction even though he may not give notice and the failure to give notice is merely a procedural defect which

does not affect his jurisdiction? Apart from authorities, with which, we shall presently deal, on a plain reading of Section 34 itself it is clear that the

Income Tax Officer can only proceed to assess or re-assess escaped income after a notice provided in that sub-section is given. He would, have

no jurisdiction to assess or re-assess if a notice as provided in Section 34 was not given. Mr. Joshi says that this is not a case where notice has not

been given. A notice has been given, but the notice may not be exactly in accordance with the law. In our opinion, if a notice is not given as

provided, by Section 34, then in the eye of the law it is no notice at all, and clearly the Income Tax Officer proceeded to assess the assessee u/s

34 without complying with the condition precedent laid down in Section 34 which alone could have given him jurisdiction to assess the assessee.

5. Our attention has been drawn by Mr. Bajaj to a decision of this Court in -- "Commissioner of Income Tax v. Ekbal & Co.", AIR 1945 Bom

316 (A). That is a judgment of Sir Leonard Stone C. J. and Mr. Justice Kania, and there the Court held that a notice given u/s 22 (2) did not

comply with the provisions of that section because the notice was short and they held the notice bad. The assessee had made a return in

compliance with that notice and it seems he had not taken any objection before the Income Tax Officer to his being assessed. But the Court held

that the notice being illegal, the fact that the assessee submitted a return later or that it was accepted for the purpose of making the assessment did

not cure the defect that initially lay in the notice. Therefore, this decision clearly laid down two propositions of law that a defect in a notice u/s 22

(2) made the notice illegal and such illegality could not be waived.

6. Next we have a judgment of the Federal Court in -- "Chatturam v. Commr. of I.-T., Bihar", AIR 1947 FC 32 (B), to which Mr. Justice Kania,

as he then was, was a party, and in fact the judgment of the Federal Court is delivered by the learned judge himself. In that case a certain

notification was issued by the Governor of Bihar on 26-6-1940, retrospectively applying the provisions of the Income Tax Act to a certain Division

Known as the Chotanagpur Division which was a partially excluded area, and a notice had been issued u/s 22 (2) prior to the date when this

notification was issued. The assessment was challenged on various grounds and one challenge was that the notice was bad inasmuch as it was

issued before the notification came into force and the assessee could not be assessed under the provisions of the notification.

This argument was dealt with by Mr. Justice Kania and the learned Judge held that the issue or receipt of a notice is not 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, and further held that the jurisdiction

to assess and the liability to pay the tax are not conditional on the validity of the notice. The learned Judge then points out, after citing certain cases,

that the liability of a citizen to pay tax arises under the charging sections of the statute. The assessment is merely procedural to determine the

quantum of the tax and that the provisions with regard to notice are procedural provisions. The second proposition laid down is that the defect is a

notice being a procedural defect, it could always be waived by the assessee.

Now, this judgment is strongly relied upon by Mr. Joshi and he says that if this principle were applied to the facts of this case, the failure to give a

proper notice u/s 34 was a procedural defect and that procedural defect could be waived by the assessee. With very great respect to the Federal

Court, Mr. Justice Kania completely overlooked the judgment of the Bombay High Court to which reference has been made and to which he was

a party. As we have already pointed out, that judgment expressly held that a defect in a notice u/s 22 made the notice illegal and that illegality could

not be waived. This judgment held that a failure to give a proper notice u/s 22 (2) was a mere procedural irregularity which could be waived. To

the extent that this judgment deals with Section 22 (2), undoubtedly, it may be said that this judgment overrules the judgment of the Bombay High

Court in -- "I. T. Commr. v. Ekbal & Co.", (A). But what we have to consider in this case is not a defect in the notice issued u/s 22 (2) but a

defect in the notice issued u/s 34, and the question is whether these two cases are in "pari materia".

7. Now, there is a very important, and in our opinion a fundamental distinction between a notice issued u/s 22 (2) and a notice issued u/s 34. A

notice u/s 22 (2) is not obligatory & it is not a condition precedent to the assumption of jurisdiction by the Income Tax Officer. A public notice u/s

22(1) is obligatory & without issuing any notice u/s 22 (2) if a return is made by an assessee pursuant to the public notice, the Income Tax Officer

would have jurisdiction to assess. Nay, even if no public notice was issued and a voluntary return was made by an assessee, it cannot be disputed

that the Income Tax Officer would have jurisdiction to assess. In that sense Section 34 is entirely different from Section 22 (2).

As we have already pointed out, the very scheme of that section is that the Income Tax Officer has no jurisdiction to assess u/s 34 without giving

the notice referred to in that section. Therefore, whereas it will be perfectly true to say, as the Federal Court said, that Section 22 (2) is a

procedural section and the failure to give notice or a defect in a notice is a procedural defect, in the case of Section 34 it is not a procedural defect

but it is a failure to comply with a condition precedent to the assumption of jurisdiction. It is true that the observations of the Federal Court, with

respect, are rather wide and it may seem as if they apply to all notices under the Income Tax Act. But the decision is given in respect of Section 22

(2) and again, with respect, the decision must be confined to the facts of that case.

It is clear that Mr. Justice Kania was thinking of the special incidents of the notice given u/s 22 (2) because it is pointed out by the learned Judge

(p. 35):

.....Suppose a person, even before a notice is published in the papers u/s 22 (1), or before he receives a notice u/s 22 (2) of the Income Tax Act,

gets a form of return from the Income Tax Office and submits his return, it will be futile to contend that the Income Tax Officer is not entitled to

assess the party or that the party is not liable to pay any tax because a notice had not been issued to him.

8. We have then a direct decision of the Calcutta High Court with regard to a notice u/s 34 in -- COMMISSIONER OF AGRICULTURAL

Income Tax Vs. SULTAN ALI GHARAMI., . The Court there was considering the Bengal Agricultural Income Tax Act, 1944, which

substantially corresponds with the Income Tax Act. In that case no notice was given u/s 34, but a notice was given u/s 22 (2), and in compliance

with that notice a return was made. But the Income Tax Officer proceeded to assess u/s 34, and the question arose whether the assessment was a

valid assessment, and the Calcutta High Court held that the assessment was bad . The learned Chief Justice refers to the Federal Court judgment

and distinguishes it, and at p. 449 the learned Chief Justice says:

.....Besides it may be that when any particular notice is in fact issued a defect in it or an irregularity concerning it will not affect the validity of the

assessment. But the question in the present case is not so much the invalidity of the notice u/s 24 (2) (which corresponds with Section 22(2)

Income Tax Act), as the validity of the proceedings which were commenced without complying with the statutory requirement of a notice u/s 38

(which corresponds with Section 34, Income Tax Act). The decision of the Federal Court does not cover an omission of a step which the statute

regards as a condition precedent to the commencement of proceedings in exercise of jurisdiction.

Therefore, it is clear that the learned Chief Justice in that case takes the view that a notice u/s 34 is a condition precedent to the commencement of

proceedings in exercise of jurisdiction. But having held that a proper notice u/s 34 is a condition precedent to the assumption of jurisdiction, the

learned Chief Justice goes on to consider the question of waiver and on the facts of the case he holds there is no waiver. With very great respect to

the learned Chief Justice, it is difficult to understand how there can be a waiver of a condition precedent, compliance with which alone can confer

jurisdiction upon an authority or a tribunal.

It is well settled that no consent can confer jurisdiction upon a Court if the Court has no jurisdiction, and if we take the view that the Income Tax

Officer can have jurisdiction only provided he complies with the conditions laid down in Section 34, then no consent by the assessee or no waiver

on his part can confer jurisdiction upon the Income Tax Officer. Therefore, while agreeing with the Calcutta High Court that the notice provided for

in Section 34 is a condition precedent to the assumption of jurisdiction, with respect we are unable to accept the view that a defect in a notice

given u/s 34 or a failure to give notice u/s 34 can be waived by the assessee.

The answers, therefore, we must give to the questions raised are: (1) In the negative, (2) In the affirmative, Commissioner to pay the costs.

9. Answer accordingly.