COMMISSIONER OF Income Tax, WEST BENGAL Vs DUNCAN BROTHERS AND COMPANY LTD.

Court: Calcutta High Court

Date of Decision: May 20, 1955

Acts Referred: Income Tax Act, 1961 â€" Section 66(1)

Citation: (1955) 28 ITR 427

Hon'ble Judges: Chakravartti, C.J; Lahiri, J

Bench: Full Bench

Judgement

CHAKRAVARTTI, C. J. - This reference was made at the instance of the Commissioner of Income Tax, West Bengal, and the question referred

reads thus :

Whether on the facts and in the circumstances of this case, the Tribunal was justified in holding that 60 per cent. of the income from dividends

received by the assessee from tea companies can be deemed to be agricultural income ?

When the reference came up for hearing sometime ago, we were informed that the identical point was pending consideration by the Supreme

Court in an appeal taken to that Court from Bombay. The Supreme Court has since had occasion to decide the point in disposing of the Bombay

appeal. It is not disputed that the present question is covered and concluded by the decision of the Supreme Court and that according to that

decision, the question must be answered in the negative.

Mr. Ginwala has, however, taken a subsidiary point on behalf of the assessees. He has contended that the reference to this Court was not made

within ninety days of the receipt of the application for a reference, as required by section 66(1) of the Income Tax Act and that, accordingly, the

reference was time-barred and not entertainable. The learned counsel has pointed out that the Tribunals order in favour of making a reference was

made on the 19th of December, 1951, but he is unable to inform us when the application for a reference was made. He has, however, referred us

to a note by the Registrar of this Court included in the paper book from which it would appear that the statement of case was submitted after the

lapse of ninety days from the date of the receipt of the application. Mr. Ginwala contends that although he is unable to inform us specifically when

the application was made, he is entitled to rely on the note made by the Registrar and that it appears on the face of that note that the reference was

not made within the time limited by section 66(1).

Having thus established the facts, Mr. Ginwala proceeds to contend that the direction contained in section 66(1) to the effect that the Tribunal must

draw up a statement of case and refer it to the High Court within ninety days of the receipt of the application for a reference is mandatory. The

identical question was considered by us in the case of Raja Benoy Kumar Sahas Roy v. Commissioner of Income Tax, West Bengal, where we

held that the direction in section 66(1) of the Act, referred to by Mr. Ginwala, was directory. The learned counsel, however, contends that certain

considerations which are very pertinent to the question were not urged before us in the previous case and that, upon those considerations, we

should now review our former decision and decide in his favour.

Mr. Ginwalass argument is a short and simple one and it can be put in the following way. He refers to the sixth sub-section of section 33 which

ways that ""save as provided in section 66, order passed by the Appellate Tribunal on appeal shall be final."" It is contended that the parties to an

appeal before the Tribunal are entitled to retain the benefit of the appellate decision and if such benefit is to be taken away from them, it can be

taken away only in strict accordance with the manner laid down in section 66. Unless it is down in accordance with section 66(1), the finality of an

appellate decision of the Tribunal cannot be invaded or disturbed. The importance of strict compliance with the provisions of section 66 is

therefore patent and the party who has succeeded before the Tribunal is entitled to insist that his rights under the Tribunals decision shall not be

taken away from him except in accordance with law, that is to say, except in accordance with section 66(1). The point sought to be made, so far

as I can understand it, is that since the observance of the time-limit prescribed by section 66(1) bears upon the rights of the parties, the direction as

to observing the limit ought to be construed as imperative and not merely directory. If the Tribunal was not to be held to the time-limit prescribed

by the section, it could sit on an application for any length of time and the party who had succeeded before the Tribunal might find at the end of

several years that his rights under the Tribunals decision had then been put in peril.

These consideration do not persuade me to held that the view taken by us in Raja Benoy Kumar Sahas Roy v. Commissioner of Income Tax,

West Bengal, was not correct. Although we said in that case that the direction as to the time within which the reference was to be made was not

mandatory, we did not say that it was optional with the Tribunal to make or not to make a reference within the time prescribed. To say that a

particular provision requiring a public authority to do a certain thing is directory is not to say that the provision can be disregarded at pleasure. The

true distinction between a provision which is directory and a provision which is mandatory is that, in the former case disregard of the provision

does not by itself invalidate the act done, whereas in the latter case it does. The rule of conduct expected to be followed by the public authority

addressed by the provision is however not different in the two cases. The difference lies only in the consequences of a breach.

I have said so much only in order to allay the apprehensions of Mr. Ginwala that if the time-limit u/s 66(1) was to be left at large, despite the clear

provision contained in the section, the Tribunal might make any reference at any time and the assessees might find their Income Tax affairs

consigned to a state of complete chaos. I do not foresee that such a state of things will or can result, if the direction contained in section 66(1) is

construed as directory. The true reason why a provision of that character ought not to be construed as mandatory was given by us in our previous

decision. Broadly stated, the reason is, as was stated by the Privy Council in the case of Montreal Street Rail Co. v. Normandin, to which we

referred, that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in

neglect of that duty would work serious general inconvenience or injustice to persons who had no control over those entrusted with the duty, and

at the same time would not promote the main object of the Legislature, such provisions should be construed as being directory only and not

imperative.

Mr. Ginwala contended that it need not be held that parties were absolutely at the mercy of the Tribunal and therefore if they were made to suffer

for the neglect or default of the Tribunal, underserved prejudice would be caused to them. It was said that if a party who had applied for a

reference found that the Tribunal was not drawing up a case and submitting it within ninety days from the date of his application, such party might

move the High Court for a writ of mandamus on the Tribunal to do its duty, that is to say, to make a reference. The difficulty that a party would

have to wait till the ninetieth day in order to see if the Tribunal would yet make a reference was said to be no real difficulty, because even if the

High Court was moved for a writ of mandamus after the lapse of ninety days, a writ could be issued directing the Tribunal to make a reference

even at that stage, although the statutory duty required to be performed had not been performed within the time limited by the statute.

I am not impressed by the aforesaid argument. As I pointed out when Mr. Ginwala was addressing us, it really begs the question and assumes that

the direction contained in section 66(1) is mandatory. Nor do I consider it to be a practical answer to the difficulty referred to by the Privy Council

in stating their proposition that members of the public, having no control over public authorities, charged with the performance of a public duty,

should not be made to suffer the consequences of default or delay in the performance of such duty by holding that the relevant direction was

mandatory, because they could not conveniently compel the public authority to perform their duty within time.

I may add, though it is hardly necessary, that a question of limitation is always a question between the parties and not a question between the

parties or one of them and the Court. What the party who has won before the Tribunal is entitled to insist on is that his opponent, if he seeks to

have the question re-opened and examined by the High Court, must make his application for a reference within the time limited by section 66(1)

and that if he fails to apply within such time, an application made later must not be entertained. After the expiry of the period of limitation for

making an application for a reference, the finality of the decision of the Tribunal would become absolute. But the party who has won before the

Tribunal cannot properly plead limitation against his opponent for some default which not he, but Tribunal has committed and therefore section

66(1), in my view, cannot be construed as laying down that the observance of the time-limit for making a reference is also mandatory and that a

default in that regard shall make the reference incompetent, although the consequence may be a make a party suffer for the fault of the Tribunal.

Having given my best consideration to the arguments advanced by Mr. Ginwala, I find no reason to revise the opinion expressed by us in the

previous case.

As regards the question itself, I have already said that, according to both parties, it is concluded by the decision of the Supreme Court in Mrs.

Bacha F. Guzdar, Bombay v. Commissioner of Income Tax, Bombay.

For the reasons given above, the answer to the question referred should, in our opinion, be No.

The Commissioner is entitled to have the costs of this reference.

LAHIRI, J. - I agree.

Reference answered in the negative.