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COMMISSIONER OF Income Tax, BOMBAY Vs EDULJI F. E. DINSHAW.

Income-tax Reference No. 11 of 1942

Court: Bombay High Court

Date of Decision: April 7, 1943

Acts Referred:

Finance Act, 1939 â€" Section 6#Income Tax Act, 1961 â€" Section 55

Citation: (1943) 11 ITR 340

Hon'ble Judges: Beaumont, C.J

Bench: Division Bench

Judgement

BEAUMONT, C.J. - This is a reference by the Income Tax Commissioner raising two questions, which arise in the following circumstances. The

assessment year was the 1939-40, and the accounting year was from April 1, 1938, to March 31, 1939. On December 22, 1939, the Income

Tax Officer made his assessment, and it is apparent from the figures given in the case that more than half of the income of the assessee was derived

from dividends and interest on securities. Under sub-section (4) of Section 6 of the Finance Act of 1939 the Income Tax Officer calculated the

Income Tax payable at the rates prescribed in the Finance Act o 1938, but the calculated the super-tax at the rates prescribed in the Finance Act

of 1939. The assessee appealed to the Appellate Assistant Commissioner against the assessment, and the Appellate Assistant Commissioner, who

was Mr. Murphy, held that super-tax, as well as Income Tax, ought to have been calculated at the rates prescribed i the Finance Act of 1938. In

accordance with his order a refund of super-tax was sanctioned, and the assessee received there fund in March, 1940. In August, 1940, Mr.

Murphy, who had then become the commissioner, issued notice to the assessee u/s 33 of the Indian Income Tax Act, stating that it appeared to

him that the Appellate Assistant Commissioner, who was Mr. Murphy himself, had incorrectly reduced the super-tax assessment, and calling upon

the assessee to show cause why the Income Tax Officers order should not be restored. On the hearing of that notice the Commissioner took

different view to that which he had taken as Appellate Assistant Commissioner, and directed that the super-tax demand be enhanced to the figure

at which it had originelle been assessed by the Income Tax Officer.

The two questions which, in substance, arise, are, first, whether the Income Tax Commissioner had power u/s 33 to make the order which he did

make; and, secondly, if he had such power, whether the order he made was right. The first question depends entirely on the construction of the

Income Tax Act, as it existed on the material dates. The assessment was made u/s 23 and u/s 29 notice of demand was served. The demand was

complied with, and the tax was paid. u/s 30 the assessee has a right to appeal to the Appellate Assistant Commissioner, which right he exercised

with the result which I have already stated. u/s 32 he had a further right of appeal, did he so desired, to the Commissioner. Then comes Section

33, which provides that the Commissioner may of his own motion call for the record of any proceeding under the Act which has been taken by any

authority subordinate to him or by himself when exercising the powers of an Appellate Assistant Commissioner under subsection (5) of Section 5,

and on receipt of the record the Commissioner ma make such inquiry or cause such inquiry to be made and, subject to the provisions of the Act,

may pass such order as he thinks fit. Then Section 34 provides for the income of an assessee having escaped assessment, and, so far as material,

provides that if for an reason income 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 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, and the provisions of the Act, so far as may be, apply accordingly as if the notice were a notice under that sub-section. So

that the scheme u/s 34 is that if the Income Tax Officer considers that income has escaped assessment, he serves notice corresponding to the

notice which he would serve for making the original assessment, and then he proceeds to make a fresh assessment, and the assessee would have

the same right of appeal against that fresh assessment as he had against the original assessment. In my opinion, it is clear that the Commissioner of

Income Tax cannot by a revision order u/s 33 enhance the tax on the ground that income has escaped assessment, unless he proceeds u/s 34. He

can, no doubt, u/s 33 direct the Income Tax Officer to take action u/s 34; but, in my opinion, if a re-assessment is to be made on the ground that

income has escaped assessment, that can only be done by the procedure laid down u/s 34.

The argument of the Commissioner seems to me to produce most extraordinary results. His contention is that u/s 33 he can call for the papers

before the Income Tax Officer, at any rate within the time limited by Section 34, and he can then of his own motion enhance the assessment on the

ground that income has escaped assessment, or been assessed as too low a rate. It is argued that there was not an enhancement of the tax,

because the amount was restored to the figure at which the Income Tax Officer had originally assessee it. But, in my opinion, if the Commissioner

was entitled to enhance the assessment as it existed under the appellate order of the Assistant Commissioner, he could havw enhanced it to any

amount, not only to the amount at which it had been assessed by the Income Tax Officer. At the time when the Commissioner took action u/s 33

the assessment was that which had been arrived at as a result of the Appellate Assistant Commissioners order, and, in my judgment, the

commissioner had no power to increase that amount on the ground that income had escaped assessment, or been assessed at too low a figure,

except by directing the Income Tax Officer to proceed u/s 34. That view is in accordance with the views expressed by two High Courts, the

Madras High Court in Sheik Abdul Kadir v. Commissioner of Income Tax, and by the Rangoon High Court in Commissioner of Income Tax,

Burma v. Ved Nath Singh.

The Commissioner in this case expressed the opinion that the action of his predecessor was justified. The commissioner is required u/s 66 (2) to

state his opinion, and not merely to argue the case which his office desires to set up. That can be left to counsel at the hearingh I must confess I

think it unfortunate that the Commissioner in stating his opinion did not think fit to refer to the decisions of the two High Courts, of which he can

hardly have been ignorant, and which appear to me to be inconsistent with the opinion which he expressed. He does not the difficulty that to

employ the power of revision u/s 33 to enhance the assessment on the ground that income has escaped assessment would be to enable that

operation to be performed without the safeguards which are provided by Section 34, namely, that there must be a fresh assessment from which the

assessee would have a right of appeal under the Act. It was pointed out by Mr. Setalvad the at the right of appeal was only to the Assistant

Commissioner and to the Commissioner, and, no doubt, in practice that right of appeal proved a farce. I have been hearing Income Tax references

in this Presidency for the last thirteen years and in would say that in at least ninetu per cent. of the cases which have come before this Court the

Assistant Commissioner has agreed with the Income Tax Officer, and the Commissioner has agreed with the Assistant Commissioner, however

complicated and difficult questions may have been. But although that may have been result in practice of giving a right of appeal to superior Income

Tax Officers, I apprehend that that was not what was in the contemplation of the Legislature when they gave the right of appeal. I have no doubt

they contemplated that superior officers would exercise their powers in a judicial spirit, and consider on merits the cases which came before them.

It seems to me quite impossible to suppose that the Legislature intended that the rights of appeal which were given could be overridden by the

Commissioner exercising his powers of revision u/s 33. Section 33 only enables the Commissioner to make an order, subject to the provisions of

the Act, and I think that decision of the Privy Council, to which we have been referred, in Commissioner of Income Tax, Bombay v. Khemchand,

supports the view that those words prevent the Commissioner from making an order u/s 33, which would fall u/s 34 or Section 35.

The actual question raised is in a curiously limited form. The question asked is :

whether the Commissioner can revise the order of the Appellate Assistant Commissioner u/s 33 and ask the assessee to repay the amount of the

refund ordered by the Assistant Commissioner after the Appellate Assistant Commissioners order to make the refund has been carried out and the

amount of refund has been received by the assessee?

It seems to me that the answer to that question necessarily involves the consideration of the wider question whether the Commissioner can u/s 33,

revise an assessment by holding that income has escaped assessment, and I havw no doubt whatever that the answer to the question must be in the

negative.

The second question is:

Whether on a proper construction of the Indian Income Tax Act and of the Indian Finance Act, 1938, the super-tax ought not to be charged to

the assessee at the rates applicable for the year beginning April 1, 1938.

If our answer to the first question is correct, the second question does not, of course, arise. But as this case may go further, I think it desirable to

express an opinion on that second question, which seems to me to present no great difficulty. The question turns entirely on the construction of

Section 6 of the Finance Act of 1939. That section provides in sub-section (1):

Subject tot he provisions of sub-section (2

- (a) Income Tax for the year beginning on the day of April 1, 1939, shall be charged at the rates specified in Part I of Schedule II, and
- (b) rates of super-tax for the year beginning on the day of April 1, 1939, shall, for the purposes of Section 55 of the Indian Income Tax, Act,

1922, be those specified in Part II of Schedule II.

Then comes sub-section (4) which creates the only difficulty. That sub-section provides :

Notwithstanding anything contained in sub-section (1) or sub-section (2), where more than half of the total income of any individual or Hindu

undivided family consists of income from salaries, interest on securities or dividends in respect of which the individual or Hindu undivided family is

deemed, under the provisions of Section 49B of he Indian Income Tax Act, 1922, to have Income Tax imposed in British India, or consists of

income falling under more than one of those heads -

(a) Income Tax for the year beginning on the day of April 1, 1939, shall be charged in respect of such total incomes at the rates of Income Tax

which were imposed for the year beginning on the day of April 1, 1938, in respect of incomes of individuals or Hindu undivided families,....

Pausing there for a moment, it is not disputed that the assessee falls within the class specified in sub-section (4) and so far as Income Tax is

concerned, his tax has been assessed at the rates applicable for the year 1938, but then comes sub-clause (b), which provides that -

in cases in which super-tax has been deducted under the provisions of Section 18 of the said Act or would have been so detestable had the Indian

Income Tax (Amendment) Act, 1939, come into force on the day of April 1, 1938, the rates of super-tax of the year beginning on the day of April

1, 1938, shall, for the purposes of Section 55 of the Indian Income Tax Act, 1922, be the rates of super-tab which were imposed for the year

beginning on the day of April 1, in 1938 respect of incomes of individuals or Hindu undivided families, as the case may be.

Now, it is admitted that the assessee, being a resident in India, does not fall within the terms of sub-clause (b), because the tax would not have

been deductible u/s 18, and that seems to me to dispose of the matter. In my view, sub-section (4) grants relief to a certain class of persons, which

class includes the assessee. In the case of Income Tax, relief is granted under sub-clause (a), and in the case of super-tax it is granted under sub-

clause (b), and unless the assessee falls within sub-clause (b), no relief is granted to him, and he has to pay super-tax at the rates specified in

Schedule II. It seems to me impossible to extract any other meaning out of the section.

The argument of the assessee is that he can either comply with the conditions in sub-section (4) limiting the class of persons to whom relief is

granted, or he can comply with the terms of sub-clause (b). It seems to me obvious that is he only falls within the class no relief is granted to him in

respect of super-tax unless he falls within sub-clause (b). No doubt, super-tax is merely an additional duty of Income Tax for most of the purposes

of the Income Tax Act, but in Section 6 of the Finance Act the two duties are distinguished. Therefore, if it is necessary to answer the question, I

should answer it by saying that. On a proper construction of the Indian Finance Act, 1939, the super-tax ought to be charged to the assessee at

the rates applicable for the year beginning April 1, 1939. It is difficult to answer the question by an affirmative or negative, because it is stated in a

negative form.

Commissioner to pay costs.

Deposit of Rs. 100 to be refunded.

KANIA, J. - Two questions have been submitted by the Commissioner for the Courts opinion. The first question recites also whether the power

u/s 33 could be exercised after an order of refund is carried out by the office. That fact in my opinion is not material. The principle involved in the

question is of far-reaching effect and is not necessarily connected with the fact that the Income Tax Officer had refunded the payment on the order

made by the Appellate Assistant Commissioner. The question is whether when the Commissioner purports to act u/s 33, he has the power to fix a

sum or the assessment, which is higher than the sum fixed by the Appellate Assistant Commissioner, on the ground that some income had escaped

assessment or the rate charged was lower than the one which should have been charged. I propose t confine my observations to that situation,

because in the present case the ground for revision is stated to be that there charged was lower than what ought to have been charged.

On behalf of the Commissioner it was urged that Section 33 of the Act (in force at the time of the assessment) gave the Commissioner the widest

power to make such orders as he thought fit. The section is expressly worded so as to make it subject to the provisions of the Act. That

expression was construed by the Privy Council in Commissioner of Income Tax, Bombay v. Khemchand as covering Sections 34 and 35. When it

was argued that the Commissioner could revise an order at any time he thought fit, Lord Romer, in the course of his judgment, observed :-

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 Commissioners powers u/s 33 can only be exercised subject to the provisions of the Act of which the

provisions in Sections 34 and 35 are in these respect of the greatest importance.

Therefore the contention that the Commissioner had the wide powers as contended for is set at rest by those observations.

The next question is whether in making his order in this case the Commissioner was acting within his powers, as interpreted by the judgment of the

Privy Council. I have already pointed out that the Commissioner in this case had put up the figure of super-tax beyond what the Appellate

Assistant Commissioner had fixed and the only ground on which that was done was that the rate fixed by the Appellate Assistant Commissioner

was lower than the one permitted by law. It should be noted that in Section 34 these are the every words used. The construction of Section 33

when read with Sections 34 and 35 was considered by the Madras High Court and the Rangoon High Court in the two cases referred to by the

learned Chief Justice in his judgment and both the Courts came to the conclusion that it was not right for the Commissioner while purporting to act

u/s 33 to override the provisions of Section 34. It seems to me clear that if the Commissioner thought that the view of the Appellate Assistant

Commissioner was erroneous and a different view should be taken, it was his duty to give directions to proceed u/s 34 and it was to within his

power himself to Act as if u/s 34 and re-assess on the ground that the rate charged was lower. The argument that the figure fixed by the

Commissioner is the same section and the Commissioners power under that section. If the power to re-assess and enhance the figure which was

assessed by the Appellate Assistant Commissioner exists, there is no reason to think that the power is limited to putting it up only to the extent it

was originally fixed by the Income Tax Officer. I therefore agree that the first question should be answered in the negative.

Under the circumstances the second question is not necessary to be answered. If necessary, I agree that it should be answered as suggested by the

learned Chief Justice. It is clear that under the Indian Finance Act, 1939, by Section 6(1) it was provided that for the financial year 1939 the rates

of income - tax and super-tax should be as prescribed in the schedule to that Act. Sub-section (4) was introduced to give relief in certain cases.

The first part of that sub-section defines a class of persons to whom such relief was to be given. To put it briefly it covers person whose income

from salary, interest and dividends was more than half of the total income. Sub-section (4)(a) provides what relief was to be granted to them in

respect of Income Tax . Although in the general scheme of the Act Income Tax may include super-tax for certain purposes, it is clear that in

Section 6 of the Indian Finance Act, 1939, there is a distinction between the imposition of Income Tax and super-tax. Having regard to that

distinction ""super-tax"" cannot be included in the term ""income tax"" in sub-section (4)(a). Sub-section (4)(b) provides the reliefs to be given to the

same class of persons in the matter of super-tax. A plain reading of that sub-section shows that out of the class mentioned in sub-section (4) relief

in respect of super-tax had to be granted only in respect of persons who were covered by the express words of that sub-section. In only included

persons from whose income super-tax was deducted or deductible u/s 18 of the Act. Unless therefore the assessee came within that category sub-

section (4)(b) did not apply and he could only get the relief in respect of the Income Tax as provided by sub-section (4)(a). Any other construction

would be completely re-writing the section which it is not the function of the Court to do. It is futile to argue that this interpretation would give rise

to some futile distinctions, because sub-section (4) itself is an exempting section which creates a class of persons in whose favour exemption is

granted and thereby makes a distinction as between them and the rest of the persons liable to taxation under the Income Tax Act.

Reference answered accordingly.