

(1943) 04 BOM CK 0010

**Bombay High Court****Case No:** Income-tax Reference No. 11 of 1942COMMISSIONER OF Income Tax,  
BOMBAY

APPELLANT

Vs

EDULJI F. E. DINSHAW.

RESPONDENT

---

**Date of Decision:** April 7, 1943**Acts Referred:**

- Finance Act, 1939 - Section 6
- Income Tax Act, 1961 - 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 of 1938, but he also 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 in the Finance Act of 1938. In accordance with his order a refund of super-tax was sanctioned, and the assessee received the 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 originally 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 may 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 any 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 assessed 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 have 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 hearing 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 see 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 that 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 I would say that in at least ninety 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 the 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 have 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 to the 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 the 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-tax 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 if 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 to confine my observations to that situation, because in the present case the ground for revision is stated to be that the rate 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 Commissioner's 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 respects 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 very 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 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.