Jadavji Narshidas and Co. Vs Commissioner of Income Tax, Bombay City-II

Court: Bombay High Court

Date of Decision: Aug. 23, 1956

Acts Referred: Income Tax Act, 1922 â€" Section 22(2), 34, 42, 43, 66

Citation: AIR 1957 Bom 23 : (1956) 58 BOMLR 928 : (1957) ILR (Bom) 33

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

Bench: Division Bench

Advocate: N.A. Palkhivala, for the Appellant; B.A. Palkhivala, for the Respondent

Judgement

Chagla, C.J.
A very short question arises on this reference whether aa assessment made on the assesses as an agent of a non-resident

principal was bad in taw on the ground that no notice u/s 43, Income Tax Act was served upon him. The assessee submitted, a return as the agent

of the non-resident principal.

It also appears that a notice u/s 22(2) was directed to be issued by the Income Tax Officer, but the contention of the assessee was that that notice

was not served upon him, and the assessee before the Income Tax Officer did not take up any contention with regard to the failure to serve upon

him a notice u/s 43. It was only in appeal before the Appellate Assistant Commissioner that this contention was raised for the first time.

The Appellate Assistant Commissioner held that no notice u/s 22(2) was served on the appellant, but he rejected the contention of the assessee

that by reason of the failure to serve a notice u/s 43 the assessment was had. The Tribunal took the same view as the Appellate Assistant

Commissioner and dismissed the appeal to the extent that it related to the question of non-service of a notice u/s 43.

2. The main contention that Mr. Palkhivala wishes to put forward is that when a notice u/s 22(2) has been served the return made by the assessee

is not voluntary, and therefore when he makes the return as an agent the return cannot he looked upon as a waiver of the right of the assessee to

have a notice served upon him u/s 43.

We have not permitted Mr. Palkhivala to raise this contention because it is absolutely clear on the record that the assessee"s contention before the

Appellate Assistant Commissioner and the Tribunal was that he had not been served with a notice u/s 22(2). On this contention of the assessee the

Appellate Assistant Commissioner actually found as a fact that notice u/s 22(2) had not been served and in the statement of the case the Tribunal

has pointed out that there is no evidence of the service of this notice.

It is not open to the assessee, because a different fact may help him to advance a particular legal argument, to go hack upon his own admission and

the finding of fact based on that admission and tell us on this reference that we should accept the contention of the Taxing Department that the

notice was served and permit him to argue this reference-on that basis. Mr. Palkhivala says that we must presume that if the Income Tax Officer

directed a notice u/s 22(2) to be served that notice is served upon the assessee.

Undoubtedly, we would have raised that presumption in the normal circumstances, but when the assessee himself stoutly contests the case put tor-

ward by the Department that he had been served with the notice and actually invites a finding of the Appellate Assistant Commissioner, which

finding is given in his favour, it is rather curious for Mr. Palkhivala now to suggest that we should rely on the presumption and not on his client''s

''own clear admission and the finding of fact by the Appellate As-sistant Commissioner.

3. Therefore, this reference must be argued on the basis that a notice u/s 22(2) was not served upon the assessee. The fact therefore is that without

having been called upon to make a return by a notice u/s 22(2) the assessee voluntarily made a re-turn and in that return he admitted his status as

an agent of a non-resident principal.

The question then is, having made that return without a notice u/s 43 being served upon him, could he then urge that the assessment made on that

retura was bad for failure to issue the notice? The answer to this question must depend upon whether the notice u/s 43 is a condition precedent to

the assumption of jurisdiction by the Income Tax Officer for the purpose of assessing the assessee as an agent of the non-resident principal.

The question answers itself when one looks at Sections 42 and 43. It is Section 42 that imposes the liability upon the agent. That is the charging

section with regard to the liability of an agent to pay the tax due by his non-resident principal. Section 43 is procedural and it lays down the

procedure for determining who is the agent who has got to meet the liability which has already been fixed u/s 42.

4. Now, the contrast between the provisions of Section 34 and Section 43 will be apparent. Section 34 makes the service of the notice a condition

precedent to the assumption of jurisdiction by the Income Tax Officer to tax income which has escaped assessment. The language of that section

makes that clear, and it is only when a notice has been made a condition precedent in this sense that failure to serve that notice cannot be waived.

It cannot be waived because the notice is not intended merely for the benefit of the assessee; the Legislature insists upon the notice being served as

a condition precedent to''the exercise of jurisdiction.

Any condition which is merely for the benefit of a party can in Jaw be waived by that party, but when the notice is required for the exercise of

jurisdiction, then the party upon whom it has to be served cannot waive that notice because other questions are involved besides his own benefit or

advantage. If, therefore, on principle, apart from authorities, the notice u/s 43 has nothing whatever to do with, the jurisdiction of the Income Tax

Officer to tax an agent for the liability to pay tax of the non-resident principal, then the notice contemplated by that section cannot be looked upon

as a condition precedent which cannot be waived by the assessee.

If the notice can be waived, then there cannot be a clearer case of waiver than the one we have before us. The assessee submits a return as an

agent without being called upon to do so u/s 22(2); he admits his status. It is then difficult to understand why a notice should be served upon him or

why he is prejudiced by the notice not being served upon him.

Section 43 also provides that after a notice has been served an opportunity must be given to the assessee to be near a by the Income Tax Officer

as to the liability of the agent. That again is necessary when the assessee denies his liability as an agent. But in a case Where tne liability is admitted,

neither a notice is necessary nor this opportunity to be heard by the Income Tax Officer would be necessary.

5. Turning to the authorities on which reliance has been placed, there is a direct decision of this Court reported in -- HARAKCHAND

MAKANJI and CO. Vs. COMMISSIONER OF Income Tax, BOMBAY CITY., , where we held that though the scheme of the Income Tax

Act was that the assessment for each year was self-contained and therefore all notices should he served u/s 43 in respect of each assessment year,

such notice need not be served where it was made unnecessary and superfluous by the submission of a return admitting the position and status of

an agent of a non-resident. In this case also there was no notice u/s 22(2) and a return was made by the assessee admitting his position and status

as an agent of the non-resident.

It is said by Mr. Palkhivala that a subsequent decision throws some doubt as to whether in this case we considered the question as to whether a

notice u/s 43 is a condition precedent and whether it could be waived or not, and the decision relied upon is an unrepaired decision. I. T. N. No.

40 of 1954, D/- 17-2-1956 (B). In that case no notice u/s 43 had been served and no return was filed by the assessee, and the contention of the

Department was that inasmuch as the second proviso to Section 43 had been complied with it was not necessary to serve a notice u/s 43.

We rejected this contention pointing out that if the statute laid down two conditions which must be complied with, it was not open to the

Department to urge that the compliance with one condition was sufficient and it was unnecessary to comply with the second. But in the judgment

we expressly left the question whether the notice can be waived or not, open and expressed no opinion on it.

What Mr. Palkhivala is relying upon is that in this judgment we have referred to the service of notice u/s 43 as a condition which must be complied

with, and Mr. Palkhivala reads ""a condition to be complied with"" as ""a condition precedent"". Now, undoubtedly, the assessment would he bad if

notice u/s 43 was not served and that notice had not been waived. In that sense a notice u/s 43 is a condition which the Legislature has required

should be complied with before liability can be imposed.

But it is not as if every condition cannot be waived. It is only those conditions which are conditions precedent, in the sense that they are conditions

precedent to the assumption of jurisdiction, which cannot be waived, and if as we have already pointed out the notice u/s 43 is not a condition

precedent to the assumption of jurisdiction, then there is no reason why it cannot be waived by the party for whose benefit the condition is required

by the Legislature.

6. Then the third judgment which was referred to is the judgment in -- Commissioner of Income Tax, Bombay City Vs. Ramsukh Motilal, . We

were there dealing with notice u/s 34 and we said that whereas. Section 22 was 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 was not a procedural defect but was a failure to comply with a condition precedent to the

assumption of jurisdiction,

It is not possible to suggest that Section 43 stands on the same footing as Section 34. Section 43 is procedural, whereas. Section 34 is a section

dealing with, the jurisdiction of the Income Tax Officer and lays down the conditions which have got to be complied with before that jurisdiction

can be assumed.

7. In our opinion, therefore, the answer to the question submitted to us must be in the negative. The assessee must pay the costs.

8. Answer in the negative.