(1958) 11 BOM CK 0035

Bombay High Court

Case No: Msc. Application No. 217 of 1958

Bhagwandas Kevaldas		APPELLANT
	Vs	
N.D. Mehrotra and Another		RESPONDENT

Date of Decision: Nov. 13, 1958

Acts Referred:

- Constitution of India, 1950 - Article 223
- Income Tax Act, 1961 - Section 18A(1), 18A(2), 18A(6), 23B, 33A(2)

Citation: (1959) 36 ITR 538

Hon'ble Judges: S.T. Desai, J; K.T. Desai, J

Bench: Division Bench

Advocate: N.A. Palkhiwala, for the Appellant; G.N. Joshi, for the Respondent

Judgement

S.T. Desai, J.

This is a petition for a writ of certiorari or any other appropriate writ under article 226 of the Constitution and it arises out of an order for penalty interest made by the Income Tax Officer, the second respondent before us, in respect of the assessment of the petitioner for the assessment year 1948-49. The first respondent is the Commissioner of Income Tax, Bombay. The second respondent served a notice upon the petitioner u/s 18A(1) for the assessment year 1948-49, requiring the petitioner to pay a sum of Rs. 25,973-5-0 in equal installments as an advance payment of tax. The petitioner filed an estimate of the income and tax payable thereon. That was u/s 18A(2) and that was done on the 17th of September, 1947. Thereafter a revised estimate was filed by the petitioner. But that fact is not material. After the petitioner filed his return of income, the second respondent made a provisional assessment u/s 23B and the petitioner paid the amount of that provisional assessment. Subsequently when the assessment was finalised on 31st March, 1953, the second respondent did not charge any penalty interest u/s 18A(6). However, on 21st September, 1956, he informed the petitioner that he had made a mistake is not charging penalty interest and as he wanted to rectify the mistake he

called upon the petitioner to show cause why he should not do so. Ultimately, he issued a notice of demand for Rs. 14,929-10-0. In that order it was stated that penal interest was being charged u/s 18A(6). The original assessment order was made on 31st March, 1953, and the order of rectification made by the Income Tax Officer u/s 35 was made on 4th October, 1956. In the meantime, proviso 5 was added to section 18A(6) and retrospective operation was given by the Legislature to the proviso and it came into operation respectively from 1st April, 1952. On 5th December, 1956, the petitioner went in revision to the Commissioner of Income Tax and on 1st February, 1958, the Commissioner of Income Tax substantially dismissed the revision application, but he modified the order and directed that penal interest should be charged for a shorter period. The present petition was field on 1st May, 1958.

2. An objection was taken by Mr. G. N. Joshi, learned counsel for the Revenue, that the only relief sought by the petitioner was that in the petition the petitioner challenged the legality of the orders made by the Income Tax Officer and that he had not properly done so as far as the order passed by the Commissioner of Income Tax was concerned. On such objection being taken, Mr. Palkhivala, learned counsel for the assessee, applied for an amendment of the petition and by the amendment it was only sought to add the following words before the grounds :

"The orders of the respondents are void for want of jurisdiction and/or error apparent on the face of the record on the following among other grounds."

3. The application for amendment was opposed by counsel for the Revenue. As no new fact was sought to be incorporated or introduced in the petition and the case of the petitioner was substantially the same as brought out in the petition we granted the application for amendment.

4. The contentions have been pressed before us by learned counsel for the assessee and strong reliance has been placed on a decision of this court in Shantilal Rawji v. M. C. Nair, IV Income Tax Officer, E-Ward, Bombay, to which decision I was a party. That was a case of penal interest and in that case, the Income Tax Officer had passed an order rectifying an earlier order made by him under which order he had not charged any penal interest. When a notice of demand was issued by the Income Tax Officer u/s 18A(6) the petitioner applied to this court challenging the validity of the order of rectification and it was held by my Lord the Chief Justice and myself that if it were clear that u/s 18A(6) it was incumbent upon the Income Tax Officer to charge interest then his failure to do so would be an error apparent on the face of the record and capable of being rectified by him u/s 35. We also held that the position was different. The view we took of the matter was that the fifth proviso to section 18A(6) which was inserted in the Act in May 1953, that is, after the original order of assessment had been made, and the proviso having been given retrospective effect from 1st April, 1952, must be deemed to have been part of the Act on the date of the assessment order. That being the position, the conclusion we reached was that the Income Tax Officer had vested in him a discretion to reduce or

waive the interest payable by the assessee and that notwithstanding the fact that the proviso was not there on the statute book when the assessment order was made. In our judgment in the case we referred to the decision of the Supreme Court in State of Bombay v. Pandurang Vinayak, where their Lordships of the Supreme Court pointed out the effect of a deeming provision being inserted in any statute and being given respective operation. We also referred to a passage from the judgment of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council in which the learned Law Lord very forcibly brought out the full effect of the legal fiction. The view which we ultimately took of the matter was that the Income Tax Officer had no jurisdiction to pass the order of rectification. By operation of the deeming provision, which was retrospective in its operation, it was to be assumed and taken that on the date on which he made the assessment order he had jurisdiction and power to reduce or waive the amount of interest payable by the assessee. The Income Tax Officer not having done so and not having said anything in his order as to why he had not done so, the only inference possible was that he had decided to waive the amount of interest and in those circumstances he had no jurisdiction subsequently to rectify that order on the ground that there was an error apparent on the face of the record.

5. The argument of learned counsel for the assessee pressed before us is twofold. It is said that the Income Tax Officer''s order stands and is the principal order which the assessee wants to be quashed under a writ of certiorari. The order, in revision no doubt, was made by the Commissioner of Income Tax but the order of the Income Tax Officer cannot be said to have been merged in the order of the Commissioner of Income Tax. Consequently, so the argument has proceeded, complete relief would be afforded to the petitioner by our setting aside the order of the Income Tax Officer and leaving untouched the order of the Commissioner of Income Tax. It is said that there is considerable difference between an order passed by a court of appeal and an order under revision. It is said that in the case of an appeal, the order or decision of the trial court becomes merged in the order or decision of the court of appeal, whereas in revision that is not the position. Learned counsel has drawn our attention to a decision of this court in K. B. Sipahimalani v. Fidahussein Vallibhoy, and drawn our attention to certain observations from the judgment delivered by the learned Chief Justice in that case and particularly one observation :

"When the revisional court does interfere with the order of the court below, the result is not that the order of the lower court is merged in the order passed by the revisional court but the result is that the order of the revisional court sets aside or modifies the order of the lower court."

6. It is not necessary for us to express any opinion on this point. The real question before us is not so much of merger of an order but the question is what is the effective order or the operative order which must be quashed on a writ of certiorari

before any relief can be granted to the petitioner-assessee. Since the Commissioner of Income Tax did not merely dismiss the revisional application against the order of the Income Tax Officer but modified that order, it would be necessary, in our opinion, for the assessee to get the order of the Commissioner of Income Tax set aside before he can hope to get any relief at our hands, and it is hardly necessary to stress the principle that this court would decline to pass an order which would not be an effective order. In our judgment, the present contention of Mr. Palkhivala must be negatived.

7. It is next argued by learned counsel that even assuming that the petitioner was bound on this petition to challenge both the orders, that is, the order of the Income Tax Officer rectifying the assessment order and the order of the Commissioner of Income Tax modifying that order, he has fully made out a case for adequate relief. The argument has been that the order of the Income Tax Officer rectifying the original assessment order was without jurisdiction. In support of that, learned counsel relied on the decision of this court in the case of Shantilal Rawji, to which we have already made reference. In that case, as we have already mentioned, the view was taken that the order of the Income Tax Officer in a case of this nature would be without jurisdiction. The next step of the argument of learned counsel is that the Commissioner of Income Tax should have held that the Income Tax Officer had no jurisdiction to pass the order under revision and his order is, therefore, vitiated by an error apparent on the face of the record. Here, Mr. Palkhivala is on surer ground. The effect of the decision of this court in Shantilal Rawji''s case certainly is that the order of the nature before us passed by the Income Tax Officer would be without jurisdiction and if the matter is carried in revision before the Commissioner of Income Tax and the Commissioner of Income Tax were to reject the plea that the order was without jurisdiction, his own order would be erroneous in law and what is more it would be an error apparent on the face of the record. Learned counsel has also stated that the assessee could have come to the High Court on a writ petition without approaching the Commissioner in revision.

8. On the other hand, it has been argued by Mr. G. N. Joshi, learned counsel for the Revenue, that there is no error of law apparent on the face of the record. Mr. Joshi has striven hard to impress upon us an aspect of the case which it is said was not brought out in the case of Shantilal Rawji. We do not think it is open to this court to take any view contrary to that taken in the case of Shantilal Rawji Mr. Palkhivala informs us that the Department has accepted the decision in the case of Shantilal Rawji and has not proceeded further in the matter. However, we are not concerned with that either. The argument of Mr. Joshi has been that the Commissioner of Income Tax was fully conscious of the legal position u/s 18A(6) and the proviso to that section. He was also fully aware of the rules prescribed as enacted in that proviso to section 18A(6). It has been urged that all these facts and circumstances and the legal position and the rules were present to the mind of the Commissioner and if the Commissioner after applying his mind to all that gave partial relief to the

assessee and rejected the rest of his contention, it cannot be said that there was an error of law apparent on the face of the record. It was stressed that the decision of this court in Shantilal Rawji''s case came after the Commissioner of Income Tax decided the matter. Mr. Joshi is right when he says that the decision of this court in Shantilal Rawji''s case was given after the Commissioner of Income Tax substantially rejected the revisional application of the assessee. There is reference in the order passed by the Income Tax Officer to the case of Shantilal Rawji but that is in a different context. Originally, the writ petition in that matter had been summarily rejected by the trial court and the learned Chief Justice and I in appeal set aside that order summarily rejecting that petition and directed that the petition should be heard on merits. Therefore, Mr. Joshi is right when he says that the Commissioner of Income Tax did not have before him the decision of this court in the case of Shantilal Rawji. The argument has proceeded that it cannot be said that the law was settled when the Commissioner of Income Tax decided the matter. There was no decision of the court to the effect that an order passed by the Income Tax Officer of the nature before us would be without jurisdiction. The argument is not tenable and for this reason. When the court decides a matter it does not make the law in any sense but all it does is that it interprets the law and states what the law has always been and must be understood to have been. A question of error of law apparent on the face of the record does arise on this petition and what we have to see is whether at the date of the petition, the petitioner is able to establish from the record including the order of the Commissioner of Income Tax that there is an error of law apparent on the face of the record. Therefore, it is in the light of an decision in Shantilal Rawji''s case that we have to examine the order of the Commissioner of Income Tax and if that be done - and we have no doubt that is the only correct approach in these matters - it is difficult to see how it can be said that there is no error of law apparent on the face of the record.

9. Mr. Joshi has drawn our attention to a decision of the Supreme Court in Hari Vishnu Kamath v. Syed Ahmad Ishaque and referred to certain observations of their Lordships as to what is an error of law apparent on the face of the record. Their Lordships have pointed out in that case that the principle is sound but difficulty sometimes arises in applying the principle. In the case before us it is not possible to say or suggest that there is any difficulty in applying the principle as to what can be said to be an error of law apparent on the face of the record. An error on determining the question of existence or non-existence of jurisdiction in the Income Tax Officer to revise his own order is evidently, in our judgment, a clear error which was apparent on the face of the record. When the matter went before the Commissioners, he had to apply his mind to the question, viz., whether the Income Tax Officer had or had not jurisdiction to revise that order. His conclusion, which was against the assessee, is erroneous and it is that error of the Commissioner of Income Tax, which is the error apparent on the face of the record.

10. The result is that the petition succeeds and a writ of certiorari will issue against the respondents as prayed in prayer (a) and the orders passed by the respondents u/s 33A(2) and section 35 will be quashed. Respondents to pay the costs of the petitioner of this petition.

11. In this matter when we granted amendment to the petitioner, we made an order directing the petitioner to pay the costs of the respondents of the petition up to the stage of the making of the amendment. Learned counsel are agreed that in view of that the amounts directed to be paid under the orders for costs should be set off one against the other. In the result, neither party will have to pay any costs in respect of this petition.

12. Petition allowed.