AIR 1943 Bom 122 : (1943) 45 BOMLR 168

Bombay High Court

Case No: Income-tax Reference No. 8 of 1942

Govindram Seksaria		APPELLANT
	Vs	
The Commissioner of Income Tax (Central)		RESPONDENT

Date of Decision: Sept. 30, 1942

Acts Referred:
Income Tax Act, 1922 â€" Section 23(4), 34, 43

Citation: AIR 1943 Bom 122 : (1943) 45 BOMLR 168

Hon'ble Judges: Kania, J; John Beaumont, J

Bench: Division Bench

Judgement

John Beaumont, Kt., C.J.
In this case the Commissioner has raised eight questions, all of which he considers should be answered in his

favour.

2. The facts necessary to be stated by way of introduction are few. The assessment year is the year 1935-36, and the assessees were assessed as

the statutory agents, u/s 43 of the Indian Income Tax Act, 1922, of one Mahavirprasad Vishwanath. For the assessment year 1932-33 a notice

had been given u/s 43, and the assessees had been held to toe the statutory agents. No fresh notice was given in subsequent years, but the

assessees were assessed as such agents, and in respect of the relevant year 1935-36 they were assessed as statutory agents on March 25, 1936,

and the tax was paid. On March 19, 1937, notice was issued on the assessees u/s 22(2) and Section 34, alleging that some income for which they

were liable as such agents had escaped assessment. The assessment order on that supplementary assessment was made on January 3, 1940, u/s

23(4), that is to say it was a best judgment assessment.

3. The first question raised is :

Whether the notice issued under Sections 34 and 22(2) on March 19, 1937, ceased to be valid and effective in law by reason of the abolition of

the Special Circle and the transfer of the assessees'' case to the Income Tax Officer, Section I (Central).

It is admitted that, having regard to previous decisions of this Court, that question must, so far as this Court is concerned, be answered in the

negative.

4. The second question is :

Whether the notice u/s 22(4) dated August 8, 1939, not having been issued by the Income Tax Officer of the area in which the assesses'' place of

business was situate,, the said notice and the proceedings based on it are valid in law.

There, again, it is admitted that having regard to previous decisions of this Court, we are bound to hold that the notice, though originally invalid,

was validated by the Governor General''s Ordinance of December, 1939. I need not, therefore, deal more at length with these questions.

5. The third question is :

Whether Mr. G.H. Gondalia, who made the assessment order dated January 3, 1940, was a duly appointed Income Tax Officer entitled in law to

make the said order ?

Mr. Gondalia was an Assistant Income Tax Officer on the relevant dates. The Indian Income Tax Act in Section 5 deals with the appointment of

Income Tax Officers, but does not mention Assistant Income Tax Officers. They are, we are told, in a lower grade, drawing, naturally, a lower

salary in the Income Tax Office. By an order dated September 27, 1939, the Commissioner of Income Tax (Central), that is one of the

Commissioners appointed under the amended Income Tax Act without reference to area, passed an order in the following terms :

Mr. G.H. Gondalia, Assistant Income Tax Officer, Bombay City, is hereby appointed, with effect from September 27, 1939, forenoon to perform

the functions of an Income Tax Officer and is posted to hold charge of Section I (Central) vice Mr. H.B. Parekh granted leave. He will take over

charge from Mr. S.B. Athalye.

The notification relating to the appointment appeared in the Gazette of India of September 30, 1939. After a notification that Mr. Parekh, Income

Tax Officer, Section I (Central), had been granted leave from September 25, 1939, the next notification was in these terms :

Mr. G.H. Gondalia, Assistant Income Tax Officer, Bombay City, has been appointed to Section I (Central) vice Mr. H.B. Parekh, with effect

from September 27, 1939.

6. It is said that the effect of the order of the Commissioner, Central, and the notification in the Gazette, is to appoint Mr. Gondalia an Income Tax

Officer to hold charge in the place of Mr. Parekh. But it is noticeable that neither in the order nor in the notification is Mr. Gondalia appointed an

Income Tax Officer; he is appointed to do the work of an Income Tax Officer; but he is described as an Assistant Income Tax Officer, and I have

no doubt that the order was framed in that way, because the authorities wanted to avoid paying Mr. Gondalia salary as an Income Tax Officer. In

fact we are told that he continued to draw the pay of an Assistant Income Tax Officer. It is noticeable that he signed the assessment order of

January 3, 1940, and the order u/s 27, to which I will refer presently, of February 2, 1940, as Assistant Income Tax Officer. Merely appointing a

man to perform the duties of an office does not amount to a substantive appointment to that office. I apprehend that appointing a District Judge to

officiate as a High Court Judge, and to hold office in the place of a High Court Judge proceeding on leave, would not by itself constitute the District

Judge a High Court Judge, particularly if he continues to draw only the salary of a District Judge. He must be appointed a High Court Judge.

Although I have no doubt that an Income Tax Officer can be appointed to act in a temporary vacancy, in my opinion, it is not permissible to

appoint somebody, who is not an Income Tax Officer so to act. If the contention of the Commissioner is right, he would be justified in appointing a

junior clerk in his office or even the office peon at Rs. 25 per mensem to perform the functions of an Income Tax Officer. Income Tax Officers

have to perform very responsible duties, and I think that an assessee is entitled to say that he can only be assessed by somebody who is on the

relevant date in the grade of Income Tax Officer, and that he cannot be assessed by somebody who is not in that grade, but is merely appointed to

perform the functions of an Officer in that grade. Therefore, in my opinion, Mr. Gondalia was not properly appointed.

7. Mr. Gondalia''s appointment was also attacked on the ground that the person appointing him, namely, the Commissioner of Income Tax

(Central) had no power to appoint an Income Tax Officer. It is not necessary to decide that point, as we think that Mr. Gondalia was not in fact

appointed. I will only notice that the argument, as I understand it, is that under the Government of India Act the appointment of Income Tax

Officers is vested in the Central Government, that although it may be that before the introduction of the Government of India Act, 1935, that power

had been delegated to Commissioners, who were all Commissioners appointed with reference to area, and although the notification of the

Government of India dated April 14, 1937, exhibit L, may have introduced the same provisions after the passing of the Government of India Act,

still the Commissioner (Central) appointed without reference to area was an Officer who first came into existence under the amendment to the

Indian Income Tax Act on April 1, 1939, and, therefore, it is said that the power to appoint Income Tax Officers was never delegated to him. On

the other hand, the Commissioner contends that the delegation was to Commissioners of Income Tax, and as the Commissioner (Central) was

such a Commissioner, he was empowered to appoint Income Tax Officers. As I have said, it is not necessary to say which of those contentions is

right, because the point does not arise.

8. The fourth question is :

Whether, in the absence of a fresh notice u/s 43 in respect of the assessment year 1935-36, the assessment levied on the assessees as agents for

Mahavirprasad Vishwanath is valid in law.

I think that Mr. Setalvad''s argument on behalf of the Commissioner that the larger question, whether notice once given u/s 43 will'' enure for

subsequent years, does not really arise because of the actions of the assessees in this particular case. 1 will only say that I see obvious difficulties in

holding that an appointment of an agent for one year will hold good for subsequent years. In order to justify the appointment of an agent u/s 43 the

Commissioner has to be satisfied on certain questions of fact, and the assessee has a right to dispute his liability to be deemed the agent. It is

obvious, that although an agent may fail in a particular year to resist the claim that he is an agent, circumstances may alter, and in the next year he

might be able to resist the claim. However, in this particular case the agents did not dispute their liability to be assessed in respect of the year

1935-36. They were actually assessed, and they paid the tax, and it seems to me that that amounts to an admission on their part that in respect of

the year 1935-36 they were the ''agents of the principal for the purposes of Section 43. The re-assessment u/s 34 is a part of the assessment for

the year 1935-36, and although the actual re-assessment was not made until the beginning of 1940, the facts necessary to constitute them agents

for the re-assessment were the same, and have to be determined for the same date, as in the case of the original assessment. I think that in the face

of their conduct it is not open to the assessees to assert that for the year 1935-36 they were not the agents of the principal. I have no doubt that

the answer to question (4); must be in the affirmative.

9. Then question (5) is :

Whether there was evidence before the Income Tax Officer on which he could have come to the conclusion that the assessees had failed to show

that they had been prevented by sufficient cause from complying with the terms of the said notices u/s 22(2) and Section 22(4).

Inasmuch as we have held that Mr. Gondalia was not appointed an Income Tax Officer, it may be said that none of the other questions properly

arise. But as the case may go further, it is desirable to answer them. For the purposes of the other questions, I will assume that Mr. Gondalia was

properly appointed an Income Tax Officer.

10. The fifth question really arises in respect of an order made u/s 27. After the re-assessment was made u/s 23(4), that is as a best judgment

assessment, the assessees applied u/s 27 to have the assessment cancelled. In order to establish their right to such an order they] have to satisfy the

Income Tax Officer that the assessees were prevented by sufficient cause from making the return required by Section 22(2), or that they did not

receive the notice issued u/s 22(4) or Section 23(2), or that they had not a reasonable opportunity to comply, or were prevented by sufficient

cause from complying, with the terms of the last mentioned notices. The substantial question is whether the assessees were prevented by

reasonable cause) from complying with the notice for production of their books. Now, the relevant dates are these. On April 27, 1939, the

Commissioner (Central) assigned the assessees'' case to an Income Tax Officer, Central, and on June 15 the assessees wrote to that Income Tax

Officer challenging his jurisdiction. The objection to jurisdiction was that u/s 64 (1) the assessees were entitled to be assessed by a local Income

Tax Officer, and that their case could not be assigned to an Income Tax Officer appointed without reference to area. On August 8 the Income Tax

Officer served a notice u/s 22(4) on the assessees requiring them to produce certain books. I think that notice was served on the assessees in their

personal capacity and in relation to their personal assessment, but the books could, of course, have been used in relation to their assessment as

agents. On December 15, 1939, this Court held, in the case of another assessee in exactly the same position as the present assessees, that the

contention as to jurisdiction was well founded, and that the assessee in question was not liable to be assessed by an Income Tax Officer, Central.

Dayaldas Kkushiram v. Commissioner of Income Tax, Central (1939) 42 Bom. L.R. 414 The result was that on that date it was established that

the Income Tax Officer, Central, had no business to serve the order which he had served requiring the assessees to produce their books. On

December 30 the Governor General promulgated an Ordinance, the effect of which in substance was to overrule the decision of this Court, and the

Ordinance was made retrospective. So that, on December 30, for the first time, the order of August 8 requiring production of books became valid.

Now, it seems to me obvious that the assessees ought to have been given reasonable time in which to produce their books. Upto December 30

they were entitled to refuse to produce their books to an officer who had no right to assess them. After December 30 they had no right to adopt

that attitude. But they ought to have been given reasonable time to produce the books. The Income Tax Office was closed from December 30 till

January 2, and we are told that the Governor General''s Ordinance was not published in Bombay till January 6. But on January 3, 1940, the

Income Tax Officer made his order u/s 23(4). It seems to me that the assessees are entitled to say :"" We have not had reasonable time to produce

our books; in fact we had no time at all since the order requiring us to produce the books became a legal order."" I think, therefore, that question

(5) must be answered in the negative.

11. The answer to question (8) very largely depends on the same considerations. That is :

Whether, in making the assessment u/s 23(4), the Income Tax Officer exercised his judgment, and acted honestly and without caprice ?

I think we are bound to say that he did not exercise judgment honestly and without caprice in making a best judgment assessment without giving

any time to the assessees to produce their books after the order for producing them was validated. I would, therefore, answer question (8) also in

the negative.

12. Then there is question (6), which is :

Whether the assessees were entitled to file an appeal to the Appellate Assistant Commissioner against the assessment order dated January 3,

1940, u/s 23(4) of the Act ?

The position is that assessments u/s 23(4) of the Indian Income Tax Act, 1922, were not appealable, until the Act was amended on April 1, 1939,

when, for the first time, such orders became appealable. Seeing that the order in this case was made on January 3, 1940, I. confess that it seems to

me rather difficult to see why the order is not appealable. But the Commissioner contends that the right of appeal conferred by the Amendment Act

does not extend to any assessment which was pending at that date, and for that he relies on two decisions of the Privy Council and one decision of

the High Court of Rangoon.

13. In Colonial Sugar Refining Company v. Irving (1927) L.R. 54 IndAp 421 the Privy Council were dealing with a statute which had put an end

to appeals to the Privy Council, and they held that a right of appeal is a substantive right, and not a mere matter of procedure, and that in the

absence of clear language the statute should be construed as not applying to appeals in suits pending when the statute was passed. The Privy

Council held that a man filing a suit is entitled to say ""I have a right to carry my grievance to the highest tribunal,"" that that is a substantive right, not

lightly to be taken away, and they held that it was not taken away by the statute in that case.

14. In Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi, [1905] A.C. 369 the Privy Council applied the same principle to a

statute granting a right of appeal. They held that a statute granting a right of appeal also dealt with rights, and not procedure, because it put an end

to the finality of certain orders, but the Privy Council were there dealing with an order actually made before the right of appeal was given, and they

held that in the absence of clear words the statute should not be construed as giving a right of appeal against a subsisting order.

15. In Sakeena Bibi v.C. Stephens ILR (1926) Ran. 221 the principle of that case was applied to a suit pending when the statute was passed, in

which no order had been made. Whether that was a legitimate extension of the principle established by the Privy Council, I am not altogether sure.

It is one thing to say that a man filing a suit has a vested right to take his case to the highest tribunal then permissible; it is going rather further to say

that if and when he obtains a decision from a Court from which at the moment there is no appeal he will have a vested right to treat the order as

final, although an appeal is permissible when the order is passed. But, however that may be, I am clearly of opinion that the principle does not

apply to an assessment u/s 23(4) of the Indian Income Tax Act. It is quite impossible, to my mind, to say that an Income Tax. Officer in every

assessment pending on April 1, 1939, had a vested right to insist that if he should make an assessment u/s 23(4), it must be final. An Income Tax

Officer can only make an assessment u/s 23(4), where there is default by the assessee, and until the last moment he is not in a position to say

whether there will be such default.

16. I would, therefore, answer question (6) in the affirmative.

17. Question (7) does not arise.

Kania, J.

18. The relevant facts and dates are stated in paragraphs 2 to 9 of the reference, and the material portions have been summarised in the judgment

of the learned Chief Justice just delivered. I have nothing to add to the judgment delivered in respect of questions (1) and (2).

19. In respect of question (3), the question is whether Mr, Gondalia was a duly appointed Income Tax Officer, and as such made the order in

question. The departmental order, which is recited at p. 5 of the reference, only appoints him to perform the functions of an Income Tax Officer

and posts him to hold charge of Section I (Central) vice Mr. H.B. Parekh, granted leave. The first part of that order only clothed him with authority

to perform the functions of an Income Tax Officer, which is certainly different from appointing him an Income Tax Officer. The second part, which

directs him to hold charge, also does not go to the full length required to make him an Income Tax Officer. To put it at its highest in favour of the

Commissioner, Mr. Gondalia by this order held office, where he was to perform the functions of an Income Tax Officer, and was the Assistant

Income Tax Officer. It is relevant to refer to the orders made by him in the matter of the assessees. Both those orders were made and signed by

him as ""'Assistant Income Tax Officer."" It is, therefore, clear that although he may be clothed with authority to perform the functions of an Income

Tax Officer, in fact in making the orders he did not act as an Income Tax Officer, and the orders in fact made by him, as stated in the orders

themselves, were as Assistant Income Tax Officer. It is open to argument that that description was a mistake, but there is no material to show that

it was a mistake at all. The notification in the Government Gazette, the terms whereof have been quoted in the judgment of the learned Chief

Justice, does not carry the case further. That notification describes Mr. Gondalia as Assistant Income Tax Officer and posts him to Section I

(Central), which only means that he will hold charge of that section. But those words do not make him an Income Tax Officer for that section. The

further words ""vice Mr. H.B. Parekh"" also, in my opinion, do not take the matter further. It only shows that Mr. Gondalia by virtue of that

notification was as if authorized to sit in the chair occupied by Mr. Parekh. In law, as the notification and orders have been worded, in my opinion,

it is not proved that Mr Gondalia was the Income Tax Officer authorized to handle the case of the assessees and had passed the orders in question

in that capacity. I agree, therefore, that the answer to question (3) should be as stated in the judgment of the learned Chief Justice.

20. A decision on the first part of question (4) is sufficient to answer the question. I agree with the learned Chief Justice in the answer to that for the

reasons mentioned in his judgment. The larger argument, which was advanced, is not necessary to be decided, and, therefore, I do not propose to

express any definite view on that larger question. The contention urged on behalf of the Commissioner is that once a notice is served on the party

and he is held to be an agent, such decision is good for all time to come, unless the party himself moves and takes steps to get that decision set

aside. On a plain reading of Section 43 of the Income Tax Act that view appears to put the burden altogether on the wrong foot. u/s 43 before a

person can be held liable as agent and proceedings are taken against him, he is entitled to be heard on that question before the Income Tax Officer

makes his order. The scheme of the income tax) Act is that the assessment for each year is self-contained. Bearing that in mind it appears difficult

to accept the Commissioner''s contention as advanced in the reasons given by him in the reference in respect of question (5).

21. As regards questions (5) and (8), I have nothing more to add except to emphasize that the proceedings were resisted by the assessee till

December 30, 1939, and according to the law of the land as interpreted by the decision of this Court, rightly resisted. If so, the only question for

consideration is whether there was default on the part of the assessee thereafter. The time spent in respect of the re-assessment u/s 34 before is not

material, because the Income Tax Office had allowed that time to expire, and from about June, 1939, the assessee had taken his stand on the

dispute that the Income Tax Officer in question had no jurisdiction to call upon him to furnish the information called for and produce the books

mentioned in the notice. If that contention was correct, it is evident that in fact no time at all was given to the assessees to comply with the

requisition of the notice, and the conduct of Mr. Gondalia in making the order of January 3, 1940, was arbitrary and capricious.

22. As regards question (6), the three cases cited by Mr. Setalvad, in my opinion, do not support his contention. It is necessary to turn to the

words of Section 30 before the Amendment; Act of 1939. That section gave a right of appeal to the assessee on the points mentioned therein.

Then there is a proviso, which says that no appeal shall lie in respect of an assessment made under Sub-section (4) of Section 23, or under that

sub-section read with Section 27. The effect of the amendment in 1939 was inter alia to remove this proviso. The question, therefore, is whether in

respect of the assessment proceedings, which were pending on April 1, 1939, this proviso barred a right of appeal given by the Amending Act of

1939. In this connection the words of the proviso, in my opinion, are very clear. They only debar an appeal in respect of an assessment made

under that section when that Act was in operation. It does not deal with assessment proceedings pending at the time. Therefore, unless on the date

of the Amending Act an assessment order had been made, and in respect of which the taxing authorities, as it is put, had acquired a right to prevent

the assessees from making an appeal, no question arises. On the facts it is clear that there was no such assessment made before April 1, 1939.

Therefore, the words of the proviso do not debar an appeal to the Assistant Commissioner. In my opinion, therefore, this contention must fail and

the question must be answered in the affirmative.

23. Per Curiam. With regard to costs, the Commissioner has succeeded in three questions, two of which, no doubt, were not argued because of

previous decisions of this Court, but still they were properly raised, and the assessees have succeeded in four questions.

24. We certainly do not propose to lay down any rules which would fetter the discretion of the Court as to costs. But we have to consider the

number of questions raised, their difficulty, the amount of evidence involved in dealing with them and the conduct of the parties.

25. In this case as the Commissioner has failed on the more important questions, we order him to pay one-third of the assessees'' costs.

26. Certificate to issue that no question u/s 205 of the Government of India Act, 1935, arises in this case.