Commissioner Of Income-Tax, Calcutta vs Bidhu Bhushan Sarkar (Dead) Through His ... on 3 October, 1966

Equivalent citations: 1967 AIR 916, 1967 SCR (1) 685, AIR 1967 SUPREME COURT 916

Author: Vishishtha Bhargava

Bench: Vishishtha Bhargava, J.C. Shah, V. Ramaswami

PETITIONER:
COMMISSIONER OF INCOME-TAX, CALCUTTA

Vs.

RESPONDENT:
BIDHU BHUSHAN SARKAR (DEAD) THROUGH HIS LEGAL REPRESENTATIVE

DATE OF JUDGMENT:
03/10/1966

BENCH:
BHARGAVA, VISHISHTHA
BENCH:
BHARGAVA, VISHISHTHA
SHAH, J.C.
RAMASWAMI, V.

CITATION:
1967 AIR 916 1967 SCR (1) 685

ACT:
Income-tax Act, 1922, ss. 5(7A), 34-Proceeding pursuant to notice under s. 34 "filed" by Additional Income-tax Officer as another proceeding for same year pending before Principal Income-tax Officer-Latter issuing another notice under s. 34-Whether proceeding on first notice still pending-Whether second notice and assessment thereafter valid-Whether transfer under s. 5(7A) only possible when proceedings pending-Notice under s. 34 just before expiry of eight years-Assessment completed within one year thereafter-Whether valid or barred by limitation.

HEADNOTE:
In proceedings pursuant to a notice under s. 34 of the Income-tax Act 1922 , the Additional Income-tax Officer

passed an order to the effect that the income should be taken in the assessment on a second return for the same year pending before the Principal Income-tax Officer, for which there was another file and that the case was, therefore, "filed".

The Principal Officer, after issuing a notice under s. 34 , passed an assessment order, but in an appeal against that order, he himself pointed out that he had no jurisdiction to make the order. The Appellate Assistant Commissioner therefore set aside the assessment order. The Commissioner thereafter transferred the case from the Additional Officer to the Principal Officer. The latter then issued another notice to the under s. 34 and in pursuance of that notice passed an assessment order.

The assessee appealed against this order to the Appellate Assistant Commissioner on the grounds, that (i) the notice under S. 34 of the Principal Officer was invalid because the proceedings instituted on the first notice by the Additional Officer were still pending; and (ii) if the first notice of the Additional Officer was still effective, the assessment made was barred by time. The Appellate Assistant Commissioner accepted these contentions and allowed the appeal but the Tribunal reversed this decision. The High Court, on a 'reference held in favour of the assessee.

On appeal to this Court,

HELD : (i) In the circumstances of the case the word "filed" in the order of the Additional Officer was equivalent to "disposed of", so that after that order no proceedings on the basis of his notice remained pending. What the Additional Officer intended and did, in effect, was to terminate the proceedings before him without making any order of assessment on the ground that the order of assessment in respect of the income in question would be made by the Principal Officer in the proceedings before him. [690 G-691 A]

Esthuri Aswathiah v. income-tax Officer, Mysore State, [1961] 2 S.C.R. 911; 41, I.T.R. 539 and Haji Mohamed Main v. C.I.T. Calcutta, (Calcutta High Court, Income-tax Reference No. 128 of 1961, judgment dated Feb. 23, 1955), referred to. 686

P. T. Anklesaria and Ors. v. C.I.T., Bombay South, 35 I.T.R. 532, distinguished.

Even if the order of the Additional Officer were to be regarded as invalid, its effect could not be that the proceedings before him must be held to have continued after that order was made by him. Even an invalid order terminating proceedings has the effect of terminating them; and in such a case the appropriate method for correcting the illegality committed is to have that order vacated by appellate or other higher authorities having jurisdiction to intervene. [692 E-F]

The High Court erred in holding that the proceedings on the notice issued by the Additional Officer were pending on the

view that unless there was a case pending, there could be no transfer of a case under s. 5(7A). The word "case" in s. 5(7A) is used in a comprehensive sense including both pending proceedings as well as proceedings to be instituted in future. [693 B-D]

(ii)The order of assessment was not barred by time. The notice having been validly issued by the Principal Officer within the period of eight years prescribed by s. 34(3), the actual order of assessment could be made validly before the expiry of one year from the date of the notice. [693 H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 401 of 1965. Appeal from the judgment and order dated January 10, 1962 of the High Court at Calcutta in Income-tax Reference No. 22 of 1960.

S.V. Gupte, Solicitor-General, N. D. Karkhanis and R. N. Sachthey, for the appellant.

A.K. Sen, P. K. Mukherjee and S. K. Banerjee, for the respondent.

The Judgment of the Court was delivered by Bhargava, J.- The assessee in the proceedings out of which this appeal has arisen was Bidhu Bhushan Sarkar, who died and is now represented in these proceedings through his legal representative. The assessee used to be assessed by the Income-tax Officer of District 24 Parganas in Bengal. For the assessment year 1947-48, the assessee filed a voluntary return before the Income-tax Officer on December 22, 1947, showing a net loss of Rs. 330/-. This return was filed without any notice under S. 22(2) of the Income-tax Act having been served on him. Before any proceedings could be completed on that return, there was change in territorial jurisdiction and as a result, the assessee's place of business came within the jurisdiction of the Income-tax Officer District 1(2), Calcutta. In this Income-tax Office, there were a number of Income-tax Officers. The senior-most Income-tax Officer used to be designated as Income-tax Officer, District 1(2), and was treated as the principal Income tax Officer (hereinafter referred to as "the P.I.T.O."). Since there were a number of Addi-

tional Income-tax Officers, there was distribution of jurisdiction,and the case of the assessee fell within the jurisdiction of the 8th Additional Income-tax Officer, District 1(2) (hereinafter referred. to as "the A.I.T.O."), and consequently, came up before him. On January 16, 1949, the A.I.T.O. started departmental proceedings with the object of taking proceedings under s. 34, presumably because he considered the voluntary return declaring a loss of Rs. 330/- as invalid. He thereafter issued a notice under s. 34 on February 23, 1950. In the meantime, on March 31, 1949, the assessee had filed another voluntary return for the same assessment year in respect of his income from military contracts before the P.I.T.O., and in this return be declared a loss of' Rs. 11,33,940/-. The proceedings pending before the A.I.T.O. in pursuance of his notice dated 23rd February, 1950 came up, before him on the 4th February, 1952. On that date, he passed' the following order which may, for convenience, be reproduced in full, as this case turns mainly upon the interpretation of this order :-

> " Mr. Kalipada Bose, constituted attorney, Appears and submits that the old return already submitted may be treated to be submitted in response to notice under s. 34(1)(a). The income should be taken in the assessment of the military contract income for which there is another file. The case is, therefore, filed."

The proceedings before the P.I.T.O. on the voluntary return, filed by the assessee on the 31st March, 1949, were continuing,and in those proceedings he issued a notice under s. 23(2) on 1st August, 1950. Subsequently, on 12th February, 1952, he cancelled those proceedings on the view that a voluntary return of loss was not valid, took proceedings under s. 34, and issued a notice under that section on the same day. These proceedings. under s. 34 culminated in an order of assessment by the P.I.T.O. under s. 34(4) passed on 31st January, 1953. The assessee filed' an appeal against that order of assessment and when the appeal came up, the P.I.T.O. himself drew the attention of the Appellate Assistant Commissioner to the fact that he had no jurisdiction over the assessee as there was already a file of the assessee with the A.I.T.O. He, therefore, requested that the assessment should be set aside as it was void ab initio. The Appellate Assistant Commissioner accepted this request of the P.I.T.O., set aside-the assessment on 7th December, 1955, and made a direction that the assessment could be completed according to law by the officer having proper jurisdiction over the case. Thereafter, on the 30th December, 1955, the Commissioner of Income tax made an order transfer-ring the case of the assessee from the A.I.T.O. to the P.I.T.O. There was an appeal by the assessee against the direction of the Appellate Assistant Commissioner that the assessment should be completed by the officer having proper jurisdiction over the case. That appeal was allowed by the Income-tax Appellate Tribunal on the 23rd April,1957, and the direction of the Appellate Assistant Commissionerwas set aside. In the meantime, in pursuance of the direction of the Appellate Assistant Commissioner contained in his order dated 7th December, 1955, and the order of transfer by the Commissioner made on 30th December, 1955, the P.I.T.O., on 11th February, 1956, issued a fresh notice under s. 34 to the assessee, and in pursuance of that notice, made an assessment on 2nd May, 1956.

Against this assessment dated 2nd May, 1956, there was an .appeal to the Appellate Assistant Commissioner challenging the assessment on various grounds, one of which was that the notice dated 11th February, 1956 was invalid, because the proceedings ,instituted on the notice under s. 34 dated 23rd February, 1950 were still pending, and while these proceedings had not terminated, another fresh notice under s. 34 could not be validly issued. A further ground was that if the notice dated 23rd February, 1950 is considered as still effective, when the assessment was made on 2nd May, 1956, that assessment was barred by time. These pleas were accepted by the Appellate Assistant Commissioner, but the Income-tax Appellate Tribunal, on appeal, reversed his decision and decided both the points against the assessee and in favour of the department. On an application under s. 66(1), the Tribunal then referred the following two questions for opinion of the Calcutta High Court "(1) Were the notice u/s. 34 issued by the Principal Income- tax Officer on 11th February, 1956 and the assessment raised in pursuance thereof, valid in law, in view of the fact that the proceedings commenced by the 8th Addl. Income-tax Officer u/s. 34 on the basis of notice dated 23rd February, 1950 were "filed" ?

(2) Whether on the facts and circumstances of the case, the assessment dated 2nd May, 1956 made by the Principal (main) Income tax Officer, Distt. 1(2) was barred by time ?"

The High Court disagreed with the view of the Tribunal and held that the notice dated 23rd February, 1950 was valid, and proceedings on it were continuing, so that the revenue authorities 'Could not extend the period of limitation by assessing after the expiry of eight years by issuing a second notice on the eve of the expiry of eight years to obtain a period of one additional year from the date of the service of the second notice. The assessment was, therefore, held to be barred by limitation on the ground that .it should have been completed. by 31st March, 1956. This appeal has now been brought up to this Court by the Commissioner of Income-tax, Calcutta, on a certificate granted under s. 66A(2) by the High Court.

It appears in this case that at one stage there was a contest between the parties as to whether the notice dated 23rd February, 1950 was validly issued under s. 34 or not. Even before the High Court it seems that some attempt was made on behalf of the assessee to raise the question that the notice dated 23rd February, 1950 under s. 34 was invalid on the ground that it was issued without completing the assessment on the voluntary returns submitted on December 22, 1947 and March 31, 1949. On behalf of the Commissioner, the contention before the High Court was that on the question referred to the Court it was not open to the assessee to raise this contention. The objection raised by the Commissioner was rightly accepted by the High Court. It is plain from the two questions referred to the High Court that the High Court was not called upon to express any opinion about the validity of the notice dated 23rd February, 1950. The first question only invited the opinion of the High Court on the limited point whether, in view of the fact that proceedings commenced by the A.I.T.O. on the basis of notice dated 23rd February, 1950 were merely filed, the notice under s. 34 issued by the P.I.T.O. and the assessment based on it were valid in law. The only other question was whether the order of assessment dated 2nd May, 1956 made by the P.I.T.O. was barred by time. Neither of these questions enlarged the scope of the reference before the High Court so as to permit it to examine the validity of the notice dated 23rd February, 1950, and the Court, therefore, was right in refusing to go into this question. In this appeal, consequently, we are only concerned with the correctness of the answer returned by the High Court to the two questions referred to it by the Tribunal. The answer given by the High Court to the two questions referred to it is clearly based on the view taken by that Court that the order of the A.I.T.O. dated 4th February, 1952, did not terminate or put an end to the proceedings which were going on before him in pursuance of the notice under s. 34 dated 23rd February, 1950, and it is the correctness of this view of the High Court that has to be examined.

Learned Solicitor-General, appearing on behalf of the Commissioner, urged before us that in interpreting the effect of the order made by the A.I.T.O. on the 4th February, 1952, we should try to discover what was the real intention of the A.I.T.O. when he

ordered that the case is "filed". The intention has to be inferred from all the surrounding circumstances in which the order was made. At the time when this case came up before him on 4th February, 1952, the A.I.T.O. was expecting a return to be filed by the assessee in response to the notice which had been issued by him under s. 34. A constituted attorney appeared for the assessee and requested that the return already filed on the 22nd December, 1947 may be treated as the return submitted in response to the notice. The A.I.T.O., noted this fact. Further, it appears that he was already aware that another proceeding on the basis of a voluntary return was pending before the P.I.T.O., and consequently in his order he recorded his opinion that the income (referring to the income to which the voluntary return dated 22nd December, 1947 related) should be taken 'in the assessment of the military contract income for which there was another file. This remark recorded by him in his order gives clear indication that he felt at that stage that it would not be right for him to continue the proceedings which were pending before him, obviously because another proceeding for assessment of the same assessee was pending before his senior Officer, viz., the P.I.T.O. He, therefore, ordered the case to be filed. In making this order, the only intention the A.I.T.0 could have was that the proceedings before him should no longer remain in existence as being unnecessary proceedings. The very income which he was called upon to assess to tax was to be taken into account by his senior officer and, therefore, he felt that he should not continue simultaneous proceedings for the same purpose as the proceedings before his senior Officer. In ordering that the case be filed, therefore, he clearly intended that the proceedings before him should be terminated or dropped. There is no indication in the order that what the A.I.T.O. intended was that the proceedings before him should continue to remain pending and should be dealt with by him at subsequent stage. In fact, if the A.I.T.O. had thought that those proceedings before him had to continue and he did not want any conflict with his senior officer, the order that he would have made in the circumstances before him was that these proceedings be also submitted to the P.I.T.O. He seems to have considered it unnecessary to do so, because his opinion was that, in the assessment proceedings going on before the P.I.T.O., the income to which the proceedings before him related would also be included, so that there was no need for any proceedings remaining in existence before him. The intention, thus, clearly was to drop the proceedings and not to continue them any further. Of course, he could have expressed his intention more clearly by saying that he was cancelling the proceedings before him, or was terminating them. We think that the learned counsel for the Commissioner has rightly contended that, in the circumstances of this case, the word "filed" should be interpreted as being equivalent to "disposed of", so that after that order, no proceedings on the basis of notice dated 23rd February, 1950 remained pending before the A.I.T.O. In effect, therefore, what he did was to terminate the proceedings before him without making any order of assessment, on the ground that the order of assessment in respect of the income in question would be made by the P.I.T.O. in the proceedings before him.

An order in language not contemplated by the Income-tax Act in proceedings on a notice under s. 34(1) came for interpre- tation before this Court in Esthuri Aswathiah v. Income-tax Officer, Mysore State.(') In that case, the assessee had submitted a return showing that he had no assessable income. Thereupon, the Income-tax Officer made an order "no proceedings." Subsequently, when a notice under s. 34(1) for reassessment was issued, an objection was taken that the notice was incompetent, because proceedings on the return filed were still pending. This Court held that the submission that the previous return "had not been disposed of" and until the assessment pursuant to that return was made, no notice under s. 34(1) for reassessment could be issued, had no substance. It was further held that the Income-tax Officer had passed the order "no proceeding" and such an order, in the circumstances of the case, meant that the Income-tax Officer accepted the return and assessed the income as 'nil'. In that case, thus, the order "no proceeding" was interpreted in the light of the circumstances in which that order was passed. In the case before us, the order directing that the case be-filed has to be similarly interpreted in the circumstances in which it was passed; and as we have indicated above, the only proper interpretation is that the A.I.T.O. intended to conclude the proceedings before himself in view of the fact that proceedings were going on before his senior officer. Our attention was also drawn to a decision of the Calcutta High Court in Income-tax Reference No. 128 of 1961-Haji Mohamed Mian v. The Commissioner of Income-tax, Calcutta in which judgment was delivered on February 23 1965. In that case also, proceedings had begun on the basis of a notice under s. 22(2) of the Income-tax Act, and, at a latter stage, the Income-tax Officer ordered that the proceedings be filed on the ground that no return had been filed by the assessee in response to the notice. The order of the Income-tax Officer was interpreted as amounting to dropping of the proceedings, and it was further held that the dropping of the proceedings meant the termination thereof without any order of assessment. In that case also, therefore, the subsequent issue of notice under s. 34 was held to be valid and not vitiated on the ground that proceedings for assessment in pursuance of the notice under s. 22(2) were still going on.

Mr. A. K. Sen, on behalf of the assessee, urged before us that once proceedings had been started under s. 34 by issue of the not' Ice dated 23rd February, 1950, the proceedings brought into existence (1) [1961] 2 S.C.R. 911 could not be dropped, because the scheme of the Income-tax Act is that such proceedings must end in some final order of assessment, even though that order may be to the effect that there is no taxable income and no tax is determined as payable. He relied on a decision of the Bombay High Court in P. T. Anklesaria and others v. Commissioner of Income-

tax, Bombay South(') in which the Income-tax Officer received a voluntary return, though without any notice under s. 22(2), issued a notice under s. 23(2), and again, after obtaining the permission of the Commissioner to issue a notice under s. 34, he issued a notice under s. 23(2), and failed to issue any notice under s. 34. Thereafter, the Income-tax Officer made the following order -

"Return has been filed under S. 34 claiming a loss of Rs. 74,140/- only. Since I find that no income has escaped assessment, proceedings under section 34 are dropped."

In these circumstances, the High Court held that as there was a valid return voluntarily filed by the assessee, the order of the Income-tax Officer was invalid and bad in law. There was no provision by which the Income-tax Officer could refuse to assess the loss shown in the return, especially when he had actually issued a notice under s. 23(2) after the return had been made. It was urged before us that, on the principle laid down in that case, the order made by the A.I.T.O. directing that the case be filed must be held to be an invalid order as it was essential that he should have passed an order assessing the income and then determining the tax payable under s. 23, even if the result of the determination was that the tax payable was nil. Even if it be accepted that the order made by the A.I.T.O. in the present case was invalid, its effect cannot be that the proceedings before the A.I.T.O. must be held to have continued after that order was made by him. Even an invalid order terminating proceedings has the effect of terminating them; and in such a case, the appropriate method for correcting the illegality committed is to have that order vacated by appellate or other higher authorities having jurisdiction to intervene. As long as the order is not set aside, it remains in force and takes full effect. The order was not totally without jurisdiction; at best, it was an order not contemplated by law and it could not be treated as a non-existent order. In the present case also, the order of the A.I.T.O. directing that the case be filed could have been set right on appeal, or by a reference to the High Court, in case the Triburial refused to correct it. While it was not set aside, the only conclusion possible is that the proceedings before the A.I.T.O. terminated and did not any longer continue to remain pending.

The High Court, in dealing with this question, proceeded on the further basis that when the order of transfer was made by the (1) 35 I.T.R. 532.

Commissioner of Income-tax on 30th December, 1956, this pro- ceeding must have been treated as pending, because, otherwise,. the order of transfer would not relate to any pending case at all. The High Court held: "Therefore, when the transfer of the case was made under s. 5 (7A), it cannot be said that the notice issued by the Additional Officer had been wiped out, or did not remain alive. If there was no case, there could not be any transfer of the case." We are unable to accept the view of the High Court that an order of transfer could not have been made unless some. specific proceeding for assessment of the assessee to tax was actually pending. The explanation to s. 5(7A) makes it clear that the word " case", in relation to any person whose name is specified in the order of transfer, means all proceedings under the Act in respect of any year which may be pending on the date of the transfer,. and also includes all proceedings under the Act which may be commenced after the date of the transfer in respect of any year. The word "case " is thus used in a comprehensive sense of including both pending proceedings as well as proceedings to be instituted in future. Consequently, an order of transfer can be validly made even if there be no proceedings pending for assessment of tax and the purpose of the transfer may simply be that all future proceedings are to take place before the officer to whom the case of the assessee is transferred. In the present case, the proceedings on the notice dated 23rd February, 1950, had already been termi- nated by the A.I.T.O. by his order directing that the case be filed. Consequently, the effect of the order of transfer was that all the records relating to the assessment of the assessee had to be sent to the P.I.T.O., and this was with

the object that, in future, all .proceedings relating to assessment of this assessee were to be taken by the P.I.T.O. and not the A.I.T.O. The order does not necessarily, indicate that those proceedings which the A.I.T.O. had actually terminated were still to be treated as pending and to stand transferred as pending proceedings. Since the case of the assessee was transferred to the P.I.T.O. at the stage when no proceeding Was pending before the A.I.T.O., the P.I.T.O. became seized of the jurisdiction to take any proceedings against the assessee which the law permitted. It was clearly in exercise of this jurisdiction that the P.I.T.O. issued the Subsequent notice dated 11th February, 1956. That notice was, therefore, competently issued by him and was also valid, because it was issued before the expiry of eight years from the end of the relevant assessment year 1947-48. The notice having been issued validly within the period of limitation permitted by s. 34(3), the actual order of assessment could be made validly before the expiry of the period of one year from the date of the notice. The order of assessment dated 2nd May, 1956, was consequently a valid order and was not barred by time.