Singh Engineering Works, Kanpur vs Commr. Of Income-Tax, United ... on 4 February, 1953

Equivalent citations: AIR1953ALL735, [1953]24ITR93(ALL), AIR 1953 ALLAHABAD 735

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a reference under Section 66 (1) of the Income-tax Act. The following three questions have been referred to this Court for our decision :

> "Q. 1. Whether effect of an order passed by the Appellate Assistant Commissioner under Sub-clause (b) of Sub-section (3) of Section 31 of the I. T. Act setting aside the original assessment is; to set aside the entire assessment proceedings that had taken place before the Income-tax Officer and when the Income-tax Officer re-starts the assessment, he is bound to start, afresh all the proceedings under the Income-tax Act from the stage of filing of the return and to treat all the evidence existing, on the original assessment as non-existent?
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> Q. 2. Whether, in the circumstances set forth in question No. 1, the notice issued by the Income-tax Officer in the first assessment proceedings calling upon the appellant to explain certain cash credits in his accounts ceases to be operative for the re-assessment which has been decided to be made and the Income-tax Officer is bound to issue a fresh notice in that respect and to call for a fresh. explanation from the assessee?
>
> Q.3. Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee's income liable to assessment?"

The first two questions are not very happily worded. As a matter of fact, the questions suggested by the assessee were clearer.

2. The assessee is a Hindu undivided family carrying on the business of the manufacture and sale of iron bars strips etc. in Kanpur. The assessee has income from house property as also from business

carried on in the name of Singh Engineering Works and Singh Plate Mills etc. Usual notices under Section 22 of the Income-tax Act were issued, requiring the assessee to produce its account books for the relevant account period, i.e. 1-4-1941 to 31st March, 1942. The assessee, however, produced account books only from 12-9-1941, that is, the accounts from 1-4-1941 to 11-9-1941, were not produced. The assessee gave some explanation that the account books had been taken away by one Amar Singh, an employee, but that explanation was not accepted. Notice to produce those books was issued and ultimately, on failure to comply with the notice, the Income-tax Officer proceeded to make assessment under Section 23(4) of the Income-tax Act. The assessee had filed a return showing an income of Rs 2,625/- from house property and Rs. 72,725/- from business. The Income-tax Officer, however, made a best judgment assessment under Section 23 (4) of the Act on the basis of an income of Rs. 4,65,150/-. Deducting Rs. 2,59,361/-for purposes of excess profits tax liability, the net assessable income, according to the Income-tax Officer, was Rs. 2,05,789/-. This order is dated 29-3-1944. There was an appeal filed in. the Court of the Appellate Assistant Commissioner of Income-tax &, on 27-3-1945, the Appellate Assistant Commissioner set aside the order of the Income-tax officer and directed the latter "to make a fresh assessment after proper enquiries." The Income-tax officer proceeded thereafter to make fresh enquiries in accord-dance with the directions given by the Appellate Assistant Commissioner of Income-tax and carae to the conclusion that the total profits came to Rs. 3,33,981/- and deducting therefrom Rs. 1,71,915/- for excess profits tax liability, the assessable profits were held to be Rs. 1,62,066. An appeal was filed, against the order, before the Appellate Assistant Commissioner of Income-tax and then before the Income-tax Appellate Tribunal but the assessment order of the Income-tax Officer was affirmed.

3. Shri Pathak on behalf of the assesses has however, explained that it was not his contention that the Income-tax Officer did not make any fresh enquiries as directed by the Appellate Assistant Commissioner, or, that his client was deprived of any opportunity to place before the Income-tax Officer such material as he might have considered relevant. He contended that "his arguments were based on a pure question of law that, after the Appellate Assistant Commissioner of Income-tax had set aside the assessment order and has sent the case back to the Income-tax officer, the entire proceedings sub-sequent to the filing of the return under Section 22 of the Income-tax Act should be deemed to have been set aside and fresh proceedings should have been started. Our attention has been drawn to Section 31 (3) (b) of the Income-tax Act, the relevant portion of which runs as follows: "31(3) -- In disposing of an appeal, the Appellate Assistant Commissioner may, in the case of an order of assessment.

(a) X X X X

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment."

4. In the case, before us, the only direction given by the Appellate Assistant Commissioner of Income-tax was that the Income-tax Officer shall make a fresh assessment after proper enquiries. As

we have already said, it is not suggested that proper enquiries were not made and the learned counsel has not been able to explain on what basis he urges that the material which was on the record at the time when the assessment, which had been set aside, was made must be treated as non-existent and must not bo taken into consideration. The Appellate Assistant Commissioner had pointed out that certain photographic impressions, on which the Income-tax Officer had relied, were not admissible in evidence for want of proof. The Income-tax Officer was no doubt not entitled to utilise that material without further proof and it is not suggested that he did. There is no reason why the other evidence which was properly admitted and placed on the record and to which no exception had been taken, "should be deemed to be non-existent". Therefore, our answer to the first question is that the Income-tax Officer is bound to proceed in accordance with the directions given by the Appellate Assistant Commissioner of Income-tax and any material on the record properly admitted and which had not been held to be inadmissible, can be taken into consideration in making the fresh assessment.

5. As regards the, second question, it is not suggested that the assessee had no opportunity or was denied the opportunity to give any explanation. What is urged is that fresh notice should have been given and a fresh explanation called for. We do not think that any such duty was imposed on the Incomer-tax Officer under the order of the Appellate Assistant Commissioner. The assessee knew of the proceedings before the Income-tax Officer, the assessee had been asked to explain the absence of the account books for a part of the period, the assessee had furnished an explanation, the assessee knew that the explanation furnished had been rejected, tha assessee no doubt could again press for its acceptance and, if the assessee wished to furnish any further explanation there was nothing to prevent the assessee from doing so. It is not suggested that the Income-tax Officer refused to take into consideration any explanation offered by the assessee. We see no reason for holding that the Income-tax Officer was bound to issue a fresh notice calling for a fresh explanation when the assessee had already offered an explanation before and did not offer any other explanation afterwards. Our answer to the second question is that the previous notice issued by the Income-tax Officer does not become inoperative and the Income-tax Officer is not bound to issue a fresh notice calling for a fresh explanation from the assessee.

6. Coming to the third question, we have already said that the Income-tax Officer had made the assessment under Section 23(4) of the Income-tax Act. The Income-tax Officer had set out the basis on which he had made the best judgment assessment. The matter was taken up before the Appellate Assistant Commissioner of Income-tax who, in a very well considered order, gave reasons for upholding the conclusions arrived at by the Income-tax Officer. The reasons given by him are mentioned in the third paragraph of his order, dated 22-2-1947. In making his best judgment assessment, the Income-tax Officer had taken into account a sum of Rs. 50,000/-which was an unexplained deposit in the proprietor's account. A bank draft for Rs. 50,000/-drawn on the Central Bank of India, Kanpur, was sent from Amritsar and it was suggested by the assessee that this sum of Rs. 50,000/-was not really any trade receipt but was a part of the withdrawals made in the previous financial year which had remained unspent in its hands and which was transmitted from Amritsar to Kanpur. The Income-tax Officer and the Appellate Assistant Commissioner of Income-tax, for reasons given by them, considered it reasonable that the amount should he considered taxable, income of the assessee. The explanation given by the assessee was not accepted either by the

Income-lax Officer or by the Appellate Assistant Commissioner.

7. When the case came up before the Income-tax Appellate Tribunal the line taken by the learned counsel for the assessee was that he admitted and did not challenge the other items of income and thus conceded that the income-tax Officer was right in his estimate that profits to the extent of Rs. 2,83, 981/- out of Rs. 3,33,981/- had been made but, as regards the sum of Rs. 40,000/-, he challenged the findings of the Income-tax Officer and the Appellate Assistant Commissioner and urged that the explanation given by the assessee should have been accepted. The Tribunal rejected this contention for practically the same reasons for which the Appellate Assistant Commissioner had rejected it. Those reasons, if we might say, were very cogent. The assessee had pointed out that, in the previous account year, a sum of Rs. 1,13,746/- had been withdrawn in the course of that year against deposits amounting to Rs. 6,093/-. The balance, according to the assessee, was left in its hands and, out of that balance, it had transmitted from Amritsar to Kanpur the sum of Rs. 50,000/- on 14-2-1942. It, however, appears that, out of Rs. 1,13,746/-withdrawn' in the previous year, sum of Rs. 81,875/- had been withdrawn on 26-3-1941. The assessee had suggested that the assessee wanted to buy a house in Mussoorie but, as the transaction fell through, the amount remained in assessee's hands and, ultimately, the assessee decided to build a house at Amritsar &, after having constructed that house, out of the balance left over, a sum of Rs. 50,000/- was transmitted to Kanpur The Income-tax Appellate Tribunal pointed out that, if the assessee had this large sum of money in hand, there was no reason why the assessee should have withdrawn smaller sums of money between the dates, 26-3-1941, and 14-2-1942. The Tribunal has further pointed out that, during that period, the assesses purchased a house in Mussoorie for Rs. 40,000/- and withdrew that amount for that purpose and that no accounts had been furnished about the construction of any house at Amritsar. For these and other reasons given by the Tribunal, it rejected the explanation of the assessee. After having rejected the explanation, the Tribunal said: "The fact, therefore, remains that the onus which lay on the appellant of proving the source of the cash credits and connecting them with the withdrawal has not bean discharged by him. We, therefore, hold that he had failed to account for the cash credits of Rs. 50,000/- appearing in his account. It follows as a presumption of fact that they represent the profits outside his book of account. We, therefore, agree with the Income tax authorities in the addition of this amount for the purpose of computation of the assessable income of the appellant." In deciding the case in the manner in which it did, the Tribunal followed the same line as was followed by the Court of Appeal in --'Stoneleigh Products, Ltd. v. Dodd', (1948) 30 Tax Cas 1 (A), where the assessee company showed in its books of account an amount of £ 1,392-12s.-7d. standing to the credit of "Director's Current Account", the director in question being Mr. Alfred Lee, who explained now he came by that money which, he said, he had advanced to the company. His explanation was found to be false and the learned Judge (Atkinson, J.) observed as follows:

> "The Commissioners, therefore, had the relevant contentions before them, and said: We do not believe Mr. Lee, and we considered the Appellant Company had not discharged the onus that lay Upon it of displacing the assessment. I am bound to take the view --I cannot escape from it -- that they must have directed their attention to the two issues which had been raised by the Appellant Company. They must have considered whether these sums were lent to the Company, or whether they were not,

> and I am quite satisfied that they came to the conclusion that the alleged loans were wholly fictitious. They considered the whole story was untrue, and that the £1,300 was really part of the taxable profits of the Company."

The learned Judge held that there was no basis for disagreeing with, the conclusion arrived at by the Commissioners. When the matter went up before the' Court of Appeal, the Court of Appeal treated it as a pure question of fact and held that, on the evidence of Alfred Lee having been rejected, it having been believed that Mr. Lee was not in a position to advance the money, no conclusion other than, that arrived at by the Commissioners was possible.

8. We may note here that, in the statement of the case, it was overlooked that this was a decision by the Income-tax Officer under Section 23(4) of the Income-tax Act. It does not appear from the appellate order of the Tribunal that it was called upon to decide that the material, on the basis of which the Appellate Assistant Commissioner had decided the appeal before him, was or was not sufficient for the conclusion arrived at by him. The only argument, that seems to have been advanced before the Tribunal, was whether the explanation given by the assessee should or should not have been accepted. After having rejected that explanation, the Tribunal held that the onus lay on the appellant, that is, the assessee of proving the source of the cash credits and connecting them with the withdrawal, but the assessee had not discharged that onus.

9. Arguments have been advanced at some length on the question of onus. We may, however, point out that the question whether the onus lay on the assessee of proving the source of the cash credits or whether it was for the Income-tax Officer to establish, on the materials before him, that this was taxable income has not been referred to us for decision. The Tribunal has referred to us a question which, so far as we can see, does not arise at all from the appellate order in a case where the assessment was made under Section 23 (4). The question is:

> "Q. Whether there was any material before the Tribunal to justify the finding that the cash credits in question represented the assessee's income liable, to assessment?"

The proper question, to our minds, which can arise in an assessment under Section 23(4) is:

> "Q. Whether, in the circumstances of the case,, the Income-tax Officer had made a fair estimate of the assessable income and whether his decision was reasonable?"

10. Shri Pathak on behalf of the assessee has urged that there is no material difference between an assessment under Section 23(3) and an assessment under Section 23(4) of the Income-tax Act and that in both cases the Income-tax Officer must have sufficient material on which he can base his finding. The point is however, covered by high authority and we need only cite the following cases in which the difference has been clearly pointed out:

11. In -- 'Abdul Baree v. Commr. of Income-tax, Burma', 5 ITC 352 (Rang) (FB) (B), a Full Bench of the Rangoon High Court presided over by the learned Chief Justice, Sir Arthur Page, pointed out:

> " 'Ex hypothesi' en assessment under Section 23(4) must be made upon inadequate materials. It is a mere estimate, and if it is made by the Income-tax Officer 'bona fide' and 'to the best of his judgment' (which, only means as best as he can in the circumstances) the assessee who has 'not chosen to state an, account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made' upon him by the Crown."

The learned Chief Justice relied on the judgment of the Lord President in --'Macpharson and Co. v. Moore', (1903-06) 6 Tax Cas 107 at p. 114 (C) and held as follows:

> "When it is said that a tribunal is invested with a 'judicial discretion' what is meant is that in certain proved or admitted circumstances it has been given the power to act or not to act in a particular way. Such a discretion, no doubt, 'must be .exercised within the limit to which an honest man competent to the discharge, of his office ought to confine himself."

12. In -- 'Commissioner of income-tax U. P. and C. P. v. Laxminarayan Badridas', AIR 1937 P C 133 (D) their Lordships of the Judicial Committee approved of the above decision. Dealing with the matter of assessment under Section 23(4) of the Act, their Lordships pointed out that, in the case before them, as the assessee did not produce his account books, the Income-tax Officer took into consideration the local repute that the respondent's money-lending business was extensive and included the purchasing of debts at large profit to himself and that, as a result of local enquiries, the Income-tax Officer had found that the assessee had fluid resources amounting to ten lacs of rupees and was reputed to be the richest man in the district. In answering the question. No. (v) which was as follows:

> "(v) Is their evidence to substantiate the Income-tax Officer's reasoning in the last paragraph of the order saying that legal enquiries prove that the assessee made in the account year taxable income of a lakh of rupees?"

their Lordships said:

> "As to (v) no evidence was necessary. The Officer had merely to estimate as best he might the income for purposes of assessment. If any reasons were given, as in the present case, it was merely to show that the estimate was not arbitrary."

At page 138 of the judgment their Lordships made the well-known observations which are now deemed to be decisive of this point and which run as follows:

> "The officer is to make an assessment to the best of his judgment against a person, who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must, make what he honestly believes to be a fair-estimate of ths proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into

> consideration local knowledge and repute in regard to the assessee's circumstances, and. His, own, knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving; at a fair and proper estimate; and though, there must necessarily be guess-work, in the matter, it must be honest guess-work. In, that sense, too, the assessment must be to some extent arbitrary."

13. Reference has also been made to a Full. Bench decision of the Madras High Court in --'Gunda Subbayya v. Commr. of Income-tax, Madras', AIR 1939 Mad 371 (E) and on the strength of that decision it is urged that there is no real difference between an, assessment under Section 23(3) and that made under Section 23(4) of the Income-tax Act and both have to be justified on the ground of materials available on the record. The point did not really arise in that case. The only point that was raised was whether, when an Income-tax Officer sits down to make an assessment under Section 23(3), and finds that the evidence produced before him is not satisfactory, he can make a best: judgment assessment under Section 23(4). In the course of the judgment, however, the learned Chief Justice pointed out :

> "The assessment must be to the best of his judgment and the word 'judgment' itself implied consideration of something. Here it must be the consideration of facts relating; to the income of the assessee."

The learned Chief Justice held that even in a best judgment assessment under Section 23(4) there must be some material for the conclusions, arrived at by the Income-tax Officer and the only difference, according to him, between an assessment under Sub-section (3) and an assessment under Sub-section (4) of Section 23 was that Under Section 23(4) a more summary method was contemplated by the Act as the assessee had been guilty of deliberate default. We do not think there is any real difference between the decision of their Lordships of the Judicial Committee and the observations made by the learned Chief Justice of Madras. As a matter of fact, the observations of their Lordships of the' Judicial Committee were binding on the Madras Court & the Madras Court could not have gone against the decision of the Judicial Committee. The Judicial Committee did not lay down that there need be no material. They pointed out that the Income-tax Officer has to come to an honest conclusion and the honest conclusion must be on some basis. There is a difference between the recording of a finding on a point on the evidence produced by the Parties and a case where, in the absence of such evidence, the Income-tax Officer is left to make such enquiries as are open to him and to make an honest and reasonable assessment; At the time when their Lordships of the Judicial Committee decided the case of --'AIR 1937 PC 133 (D)', an order under Section 23(4) was not appealable and it was, therefore, not necessary for the Income-tax Officer to give any reasons for his conclusions. Now that the section has been amended and the order has been made appealable, probably, it would be necessary for the Income-tax Officer to indicate how his mind had worked and on what basis he had made the assessment but, in such an appeal, the burden must be on the assessee to show that the Income-tax Officer had either acted mala fide, or, that his order was not reasonable and was capricious.

14. Interference by the appellate or other higher courts with the exercise of the best judgment by an Income-tax Officer must, in our opinion, be on the same principles on which appellate 'courts usually interfere with the exercise at discretion by a trial court. Their Lordships of the Judicial Committee, in --Rehmatunnissa Begum v. Price', AIR 1917 PC 116 (F), held :

> "The Appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an Appellate Court to substitute its discretion for that of the Court from, which an appeal has been preferred. The justice of this argument is undoubted.....It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion....."

In --'Ormerod v. Todmorden Joint-stock Mill Co.', (1882) 8 QBD 664 (G), Brett, L. J., said:

> "This Court lays down for itself the rule, which I think is the right one, that it will not exercise its own discretion unless it thinks the case is perfectly clear."

Holker, L. J., in the same case, remarked :

> "Assuming, as I do now, that there may be an appeal, when ought an appeal to be allowed? It ought to be allowed in a very strong case, that is where otherwise, according to James, L. J., injustice would be done."

The exercise of the best judgment depends on application of judicial discretion by the 'Income-tax. Officer and there should be no interference with his order unless it is shown to the satisfaction of the appellate court that the discretion has been exercised mala fide or arbitrarily or capriciously. The burden of satisfying the appellate Court in this respect must rest on the party challenging the exercise of the best judgment by the Income-tax Officer. There was no suggestion in the case before us that the order of the Income-tax Officer was either mala fide, capricious, arbitrary or unreasonable. If the question referred to us had been whether the Income-tax Officer could have reasonably come to the conclusion in a best judgment assessment under Section 23(4) that the income of the assessee was as computed by him, we would have had no hesitation in answering the question in the affirmative.

15. Shri Jagdish Swarup, learned counsel for the Department, at one time pressed that we should ask for a fresh statement of the case under Section 66(4) of the Income-tax Act so that we may have before us facts or circumstances on which the Income-tax Officer and the Appellate Assistant Commissioner of Income-tax had acted, but, in that case, we would have to ask for a reference on a question not raised by the assessee before the Appellate Tribunal. Having read the order of the Income-tax Officer and the Appellate Assistant Commissioner, we do not feel disposed to ask for any further reference. Question No. 3 as framed, to our minds, does not arise out of the appellate order and we need not, therefore, give any answer to it.

16. Our answers to the first two questions are, therefore, in the negative and, as we have already said, the third question does not arise out of the appellate order.

17. The assessee must pay costs to the Department which we assess at Rs. 400/-.