Commissioner Of Income-Tax, West ... vs Simon Carves Limited on 17 August, 1976

Equivalent citations: 1976 AIR 2368, 1977 SCR (1) 207, AIR 1976 SUPREME COURT 2368, 1976 4 SCC 435, 1976 TAX. L. R. 994, 1976 (1) SCWR 12, 1976 2 ITJ 460, 1977 (1) SCR 207, 1976 UPTC 752, 105 ITR 212, 1977 SCC (TAX) 61, 1971 U J (SC) 771, 1977 (1) SCJ 30, 1976 UJ (SC) 771, 1976 44 TAXATION 149

Author: Hans Raj Khanna

Bench: Hans Raj Khanna, Ranjit Singh Sarkaria, Jaswant Singh

PETITIONER:
COMMISSIONER OF INCOME-TAX, WEST BENGAL-1,CALCUTTA

Vs.

RESPONDENT:
SIMON CARVES LIMITED

DATE OF JUDGMENT17/08/1976

BENCH:
KHANNA, HANS RAJ
BENCH:
KHANNA, HANS RAJ
SARKARIA, RANJIT SINGH
SINGH, JASWANT

CITATION:
1976 AIR 2368 1977 SCR (1) 207
1976 SCC (4) 435

ACT:
Income-tax (11 of 1922) ss. 34 and 42, Income-tax Act (43 of 1961) s.147 and Income-tax Rules, 1922, r. 33 corresponding to r. 10 of 1962 Rules--One of the methods mentioned in r. 33 applied for assessment--Higher tax liability if another method in rule adopted--If a case of income escaping assessment.

HEADNOTE:
Section 42, Income-tax Act, 1922, provides for assessing the income, profits gains deemed to accrue or arise in the taxable territories to a person not resident in the taxable territories. RuLe 33 of the 1922-Rules is made for comput-

ing the profits and gains of business deemed to accrue or arise in India in cases where the income tax officer finds that the provisions of s. 42 of the 1922-Act do not provide sufficient criteria. The rule mentions three methods and it would be open to the income-tax officer to select and apply one of the three methods mentioned in the rule.

The assessee-respondent in the present case, is a non-resident company carrying on business as construction engineers both in India. and in other parts of the world. The Income-tax Officer found that s. 42 of the 1922-Act did not provide sufficient criteria for computing the profits and gains of the assessee deemed to accrue or arise in India and, therefore, assessed the income applying one of the three methods mentioned in r. 33. As it resulted in lower tax liability, his successor initiated proceedings under s. 147(b) of the Income-tax Act, 1961, adopted another method contemplated by r. 33. and assessed the income at a higher figure. The Appellate Assistant Commissioner, the Tribunal and High Court held that in making the reassessment the Income-tax Officer could not depart from the method of computation followed in the original assessment, and adopt an alternative method of computation though permitted by the rule.

In appeal to this Court, it was contended that the lower tax liability in the original assessment showed that it was a case of escaped assessment and as such s. 147 of the 1961-Act was attracted.

Dismissing the appeal,

HELD: It is open to the Income-tax Officer at the time of making the original assessment to adopt one of the three methods mentioned in r. 33 for computing the taxable income of the assessee. From the mere fact that the method selected by him resulted in lower tax liability compared to the liability which would have resulted from the adoption of another method under the rule, it would not follow that the discretion was not exercised by the Income-tax Officer in a proper and judicious manner, and that it would be a case of income escaping assessment. [212 E-F]

(1) The discretion to choose one of the methods in r. 33 ought to be exercised by the Income-tax Officer in a proper and judicious manner. In the present ease, there is nothing to show that the discretion was not so exercised by the Income-tax Officer, nor was it suggested that he was actuated by any oblique motive. The Income-tax Officer ordering reassessment does not sit as a Court of appeal over the officer making the original assessment, nor is it open to him to substitute his own opinion regarding the method of computation of the income especially when the method of computation adopted at the time of original assessment was permissible in law. The taxing authorities exercise quasi-judicial powers, and in doing so, they must act in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax, which is legitimately due from an assessee, should remain unrecovered, they

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must also at the same time not act in a manner which indicates that the scales are weighted against the assessee. It is not correct to say that unless. the authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed not to have exercised their discretion in a proper and judicious manner. [213C, 212G]

(2) The original order of the first Income-tax Officer was a legally correct order and was not vitiated by any error. The absence of an error would justify the inference that it is not a case of income escaping assessment. There is necessarily an element of error which becomes in cases of income escaping assessment mentioned in s. 147(b) of Act of 1961 manifest in the light of subsequent information received by the Income-tax Officer. In the present case, no income has escaped assessment due tO oversight, inadvertence or a mistake committed by the first Income Tax Officer. Therefore, the case would not fall within the ambit of s. 147(b) of the 1961 Act, s. 34(1)(b) of the 1922-Act.

[213A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1313 of 1973.

(From the Judgment and Order dated 7-9-1972 of the Calcutta High Court in Income Tax Reference No. 208 of 1966).

V.P. Raman, Addl. Solicitor Genl. and M.N. Shroff for the Appellant.

K. Ray and D.N. Gupta, for the Respondent. The Judgment of the Court was delivered by KHANNA, J. This appeal on certificate, by the Commissioner of Income-tax, is against the judgment of the Calcutta High Court whereby the High Court answered in a reference under the Income-tax Act the following question in favour of the assessee- respondent and against the revenue:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that in making the reassessment under section 147(b) of the Income-tax Act, 1961, the Income-tax Officer could not depart from the method of computation permitted in Rule 33 of the Income-tax Rules and followed in the original assessment, and adopt an alternative method of computation also permitted under the said Rules (corresponding to Rule 10 of the Income-tax Rules, 1962) ?"

The matter relates to the assessment year 1959-60, the corresponding financial year for which ended on March 31, 1959. The assessee is a non- resident company carrying on business as construc- tion engineers. The Income-tax Officer made the original assessment on May 31, 1960 on a total income

of Rs. 21,49,169. On November 5, 1962 the Income-tax Officer initiated proceedings under section 147(b) of the Income-tax Act, 1961 (herein- after referred to as the Act) and completed the assessment on February 29, 1964 on a total income of Rs. 69,85,097.

At the time of the original assessment the assessee filed the return of income along with the auditor's certificate of the trading results of the various contracts. One of those contracts was in respect of work at Durgapur with the Hindustan Steel Ltd. In respect of that work the assessee filed a provisional estimate of income which was arrived at "by calculating the income that could be attributable in relation to the tax deducted under section 18(B) by the Hindustan Steel Ltd." The Income-tax Officer computed the income from that contract at Rs. 5,33,164. The income from the other contracts was computed at Rs, 16,16,005 "as per audited statements."

In the reassessment proceedings the Income-tax Officer purported to find as under:

> (i) That the assessee's outlay in India to the total outlay in various contracts represented a fair index of operations carried out in India and as such 60 per cent of the profits attributable to sterling payments and claimed to be exempt related to operations in India and fell to be included in the assessee's total income;
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> (ii) that the figure of depreciation required to be changed; and
>
> (iii) that some portion of the income had to be assessed under section 4(1)(A) on receipt basis.

The total income of the assessee, as already mentioned, was determined as a result of reassessment to be Rs. 69,85,097. In arriving at the figure of the total income the Income-tax Officer estimated the income in respect of Durgapur contract to be Rs. 5,33,164 as had been done in the original assess- ment. Regarding the other contracts, the Income-tax Officer determined the income of the assessee in reassessment pro- ceedings to be Rs. 64,51,933. The difference in the income computed at the time of the original assessment and at the time of reassessment was due to the fact that the Income-tax Officer at the time of original assessment adopted one method of computation under rule 33 of the Income-tax Rules, 1922 while the Income-tax Officer making reassessment adopt- ed another method under that rule.

On appeal it was submitted before the Appellate Assist- ant Commissioner on behalf of the assessee that the action of the Income-tax Officer in reopening the assessment under section 147(b) was without jurisdiction and that the Income-tax Officer had no jurisdiction to change the method of computation as originally adopted in the revised proceedings. The Appellate Assistant Commissioner held that the proceedings under section 147(b) were bad and that the Income-tax Officer could not adopt an alternative method of computation in the reassessment proceedings. He, therefore, allowed the appeal. The Appellate Assistant Commissioner at the same time observed that the Income-tax Officer would be justified in computing the income to be Rs. 22,23,231 and that the assessee had no objection to such a revision. In appeal before the Tribunal the department urged that the Appellate Assistant Commissioner was not justified in holding that the Income-tax Officer

(i) had no jurisdic- tion to start proceedings under section 147(b) of the Act; and (ii) that the Appellate Assistant Commissioner had erred in allowing deductions in the income of the assessee. The Tribunal held on the first ground that proceedings under section 147(b) had been validly initiated. Regarding the second ground, the Tribunal observed in agreement with the Appellate Assistant Commissioner that the mode of computation adopted in the original assessment was one permitted under rule 33 of the Income-tax Rules 1922 and that the mode adopted in reassessment was another alterna- tive method. The tribunal held that both the methods being permissible, it could not be said that any mistake was committed in computing the income at the time of the origi- nal assessment on a particular basis adopted with reference to rule 33. In the opinion of the Tribunal, the Income-tax Officer could not in reassessment proceedings depart from the method of computation adopted in the original assess- ment. The Tribunal directed that the reassessment be made "adopting the same method of computation as in the original assessment subject to any adjustments which may be justified such as excess depreciation being charged in the account and so on."

At the instance of the revenue, the question reproduced above was referred to the High Court. The High Court, while answering the question against the revenue, referred to the connotation of the words "escaped income" and observed " .... it means an income which the asses-

see has succeeded in getting away with or has eluded observation or search or notice of the tax authorities. In other words, it cannot mean an item of income which has not been taxed by purusing a method approved by law. In the instant case, the excess income was not taxable under the third method but it has become taxable by following another method sanctioned by the same rule, namely, rule 33. This is not, therefore, a case of escaped income which has not been brought into the orbit of taxation in the reassessment proceedings." In appeal before us learned Additional Solicitor General has assailed the judgment of the High Court and has contended that the High Court was in error in holding that the instant case was not one of income escaping assessment. As against that, Mr. Ray on behalf of the assessee- respondent has canvassed for the correctness of the view taken by the High Court.

Before dealing with the contentions advanced, it may be apposite to refer to the relevant provisions. According to section 4(1)(c) of the Indian Income-tax Act, 1922, subject to the provisions of that Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which if such person is not resident in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year. Sub-section (1) of section 42 of the Act of 1922, inter alia, provides that all income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connec- tion in the taxable territories, shall be deemed to be income accruing or arising within the taxable territories, and where the person entitled to the income, profits or gains is not resident in the taxable territories, shall be chargeable to income-tax either in his name or in the name of his agent. According to sub-section (3) of section 42, in the case of a business of which all the operations are not carried out in the taxable territories, the profits and gains of the business deemed under this section to accrue or arise in the taxable territories shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. The assessee-respondent in the present case carried on business as construction engineers both in India

and other parts of the world. The Income-tax Officer, it seems, found that the provisions of section 42 of the Act of 1922 did not provide sufficient criteria for computing the profits and gains of business deemed to accrue or arise in India. Resort was accordingly had to rule 33 of the 1922 Rules. The above rule has been made to meet such an eventuality, and reads as under:

> "In any case in which the Income-tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascer- tained, the amount of such income, profits or gains for the purposes of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the busi- ness or in such other manner as the Income-tax Officer may deem suitable."

Shorn of the parts with which we are not concerned, the rule provides that in any case in which the Income-tax Officer is of the opinion that the actual amount of income, profits or gains accruing or arising to any person residing out of the taxa- ble territories, whether directly or indirectly, through or from any business connection in the taxable territories cannot be ascertained, the amount of such income, profits or gains for the purpose of assessment to income-tax may be calcu- lated

(i) on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable, or

(ii) on an amount which bears the same propor- tion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or

(iii) in such other manner as the Income-tax Officer may deem suitable.

The above rule makes it clear that if other condi- tions mentioned in the rule are satisfied, it would be open to the Income-tax Officer in computing the income, profits or gains to apply one of the three methods mentioned in the rule. It is the common case of the parties, and that is also the underly- ing assumption of the question referred to the High Court, that the Income-tax Officer in making the original assessment adopted one method while the Income-tax Officer making reassessment adopted another method contemplated by rule 33. The ques- tion with which we are concerned is whether it would be a case of income escaping assessment if the Income-tax Officer adopts a method of computa- tion which is permissible under the law but which method results in lower tax liability compared to the other method which too is permissible in law. According to the learned Additional

Solicitor General, the adoption of a method even though permitted by rule 33 which results in lower tax liability of the assessee compared to the other method mentioned in the rule would warrant the conclusion that income has escaped assessment and as such section 147 of the Act of 1961 would get attracted. After giving the matter our earnest consideration, we find it difficult to accept the above contention. It was open, as already men- tioned, to the Income-tax Officer at the time of making the original assessment to adopt one of the three methods mentioned in rule 33 for computing the taxable income of the assessee. Discretion was vested by rule 33 in the Income-tax Officer for the purpose of making his choice of the methods, and the same was to be exercised in a proper and judi- cious manner. There is nothing before us to show that the discretion was not exercised by the said officer in a proper or judicious manner. It is also not suggested that the Income-tax Officer was actuated by some oblique motive. From the mere fact that the method selected by him was such as result- ed in lower tax liability of the assessee compared to the liability which would have resulted from the adoption of other method, it would not follow that the discretion was not exercised in a proper and judicious manner. The taxing authorities exercise quasi judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is part. of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee. We are wholly unable to subscribe to the view that unless those authori- ties exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee they should be deemed not to have exer- cised it in a proper and judicious manner. The order made by the Income-tax Officer at the time of the original assessment was a legally correct order and was not vitiated by any error. The absence of an error in that order would justify the inference that the present is not a case of income escaping assessment. There is necessarily an element of error in cases of income escaping assessment mentioned in section 147(b) of the Act of 1961. Such error resulting in income escaping assessment becomes manifest in the light of information coming subsequently into the possession of the Income-tax Officer. Where, as in the present case, the order making the original assessment was a legally correct order and was not vitiated by any error, the case would not be one which would fall within the ambit of section 147(b) of the Act of 1961 or section 34(1)(b) of the Act of 1922. We may add that the Income-tax Officer ordering reassess- ment' does not sit as a court of appeal over the Income-tax Officer making the original assessment. Nor is it open to the Income-tax Officer ordering reassessment to substitute his own opinion regarding the method of computing the income for that of the Income-tax Officer who made the original assessment, especially when the method of computation adopt- ed at the time of original assessment was permissible in law. The fact that the adoption of a different method of computation would have resulted 'in higher yield of tax would not in such a case justify the reopening of the as- sessment.

It has been argued on behalf of the appellant that reassessment under section 147(b) would be justified where in the original assessment income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. The present however, we find, is a case which does not fall in any of those categories.

We would, therefore, uphold the judgment of the High Court and dismiss the appeal with costs.

V.P.S. Appeal dis- missed.