Privy Council Appeal No. 83 of 1946

The Commissioner of Income Tax, West Punjab, North-West Frontier and Delhi Provinces, Lahore - - - - - - - - - - *Appellant*

v.

The Tribune Trust, Lahore - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH OCTOBER, 1947

Present at the Hearing:

LORD SIMONDS
LORD NORMAND
LORD MACDERMOTT

[*Delivered by* LORD SIMONDS]

This appeal is brought from a judgment of the High Court of Judicature at Lahore dated the 23rd March, 1944, which was delivered on a reference made by the Commissioner of Income Tax, West Punjab, N.W.F. and Delhi Provinces under Section 66 (3) of the Indian Income Tax Act (XI of 1922) pursuant to a mandamus issued by the same Court on the 3rd April, 1941.

The appeal raises somewhat complicated questions of procedural and substantive law and it is necessary to state the facts at some length.

The respondent, the Tribune Trust, which will generally be referred to as " the respondent ", was created by one Sardar Dayal Singh in the year 1898 and it appears to have been assessed to, and to have paid, income tax on the income profits or gains of its property, from the year 1917-18 to the year 1931-32. But in respect of its assessment for the year 1932-33 it raised an objection on the ground that it was exempt from taxation by virtue of Section 4 (3) (i) of the Income Tax Act already mentioned, which provides " This Act shall not apply to the following classes of income:—(i) any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes . . . .".

This claim led to a reference to the High Court of Judicature at Lahore under Section 66 of the Act. That Court, on the 4th June, 1935, held, contrary to the contention of the respondent, that its income was not exempt from tax. The respondent appealed to His Majesty in Council, and this Board, after referring the matter back to the Commissioner for further findings of fact, on the 13th June, 1939, reversed the judgment of the High Court and held that the income, in respect of which the respondent had been assessed for the year in question, was exempt from tax. Their Lordships' decision is reported in L.R. 66 I.A. 241.

The assessments of the respondent's income for the years subsequent to 1932-33 were held in abeyance pending the judgment of the High Court in the matter of the assessment for that year, but after its judgment in June, 1935, assessments were completed in accordance therewith and payments were duly made by the respondent in respect of the

assessments for the years 1933-34, 1934-35, 1935-36, 1936-37, 1937-38, 1938-39, and also in respect of supplementary assessments for the years 1931-32 and 1936-37.

The history of these assessments is briefly as follows:—

1931-32. A supplementary assessment was made under Section 23 (4) read with Section 34 of the Act on the 14th November, 1936. An appeal to the Assistant Commissioner was dismissed as no appeal from an Order under Section 23 (4) was then competent, and an application to the Commissioner under Section 33 was also rejected.

1933-34 and 1934-35. Orders of assessment were passed under Section 23 (3) on the 4th of September, 1935. The respondent appealed to the Assistant Commissioner under Section 31 and its appeals were rejected on the 31st of August, 1936. No further action was taken by the respondent.

1935-36. The assessment was made under Section 23 (3) on the 27th January, 1936. No appeal was filed.

1936-37. The assessment was made under Section 23 (3) on the 11th November, 1937. An appeal was rejected by the Assistant Commissioner on the 14th May, 1938. No further action was taken by the respondent.

1937-38. The assessment was made under Section 23 (3) on the 26th of January, 1938. No appeal was filed.

1938-39. The assessment was made under Section 23 (3) on 26th of October, 1938. No appeal was filed.

The relevant dates of the different stages of these assessments are tabulated below:—

Assessment Year	Date of Assessment Order	Date of Payment	Appellate Order dismissing Appeal
1931–32 supplementary	24.11.36	22. 1.37	22. 7.37
1933–34	4. 9.35	21.10.35	31. 8.36
1934–35	4. 9.35	21.10.35	31. 8.36
1935–36	27.11.36	4. 1.37	—
1936–37	11. 9.37	4.10.37	14. 5.38
1936–37 supplementary	26.10.38	8.12.38	—
1937–38	26. 1.38	26. 3.38	—
1938–39	26.10.38	7. 1.38	—

It is not disputed that all these assessments had been made and had become final and conclusive before this Board gave its decision in respect of the assessment for the year 1932-33.

On the 30th August, 1939, the respondent wrote to the Commissioner of Income Tax, the present appellant, submitting that in view of this decision of the Board all the assessments above mentioned should be cancelled. The material part of his letter is as follows:—

> " In this connection I have further to submit that in view of the same order our assessment for the years referred above should also stand cancelled. You will, therefore, very kindly review those orders and grant us the refund due to us. All these assessments with the exception of supplementary one made under Section 34 for the year 1931-32, relate to the years subsequent to the year for which our appeal has been accepted by the Privy Council. The supplementary assessment for the year 1931-32 was also made after the year 1932-33 and as such that too was illegal and has to be set aside. For your convenience I have prepared a statement showing the refund due to us for the remaining years."

This letter was followed by a letter dated the 25th October, 1939, from the respondent's advocate in which he requested that the appellant would treat the earlier letter " as a joint petition under Section 33 of the Indian Income Tax Act " and praying that the assessments in question might be quashed.

At this stage it is relevant to note precisely what course the Commissioner took; for some argument has been founded upon it. He appears to have treated it as a matter of course that his consideration of the matter should be invoked under Section 33 and he made an order, so describing it, on the 23rd November, 1939, in the following terms:—

> " In accordance with the recent decision of the Privy Council a refund has been granted to the assessees in respect of their assessment for the year 1932-33. The present petition relates to the assessments for 1931-32 (supplementary), 1933-34, 1934-35, 1935-36, 1937-38 and 1938-39. It was open to the assessees to keep those assessments alive by having them included in the reference to the Privy Council. As they did not do so, I can see no reason for re-opening the assessments at this stage."

Their Lordships will at a later stage comment on the terms of this Order.

Disappointed by this failure, the respondent on the 22nd January, 1940, filed seven petitions (one in respect of each assessment) to the appellant praying him to state a case and refer it to the High Court at Lahore under Section 66 (2) of the Act on two questions of law which were said to arise under the said Order. These questions were in substance (1) whether the assessments in question should not have been quashed under Section 33 of the Act in view of the decision of the Privy Council in regard to the 1932-33 assessment and (2) whether the Order of the 23rd November, 1939, refusing to re-open the assessments was legally correct.

On the 9th April, 1940, the Commissioner dismissed these petitions declining to state a case as in his opinion there was no question of law arising which was a proper subject for reference under the Section. To this aspect of the case their Lordships will later recur.

The respondent then moved the High Court by seven separate applications (one in respect of each assessment) praying that the Commissioner might be required under Section 66 (3) of the Act to state a case on certain questions which were alleged to arise out of his said Order of the 23rd November, 1939. On the 3rd April, 1941, the High Court acceded to these applications and directed the Commissioner to state a case for reference under Section 66 upon the following questions which it thus reformulated:—

> " (A) Whether there were any remedies open to the assessee by which he could have kept the assessments alive for the purposes of demanding a refund under Section 33?
>
> (B) Whether the matter of the assessability of the assessee was not res judicata by reason of the Privy Council decision . . .?
>
> (C) Whether, in view of the matter between the parties being assessability of the assessee, assessments made subsequent to the year 1932-33 are not ultra vires and therefore no assessment in the eye of the law at all? "

Pursuant to this direction the Commissioner on the 1st April, 1943, stated a case and in effect gave his opinion upon the several questions as follows:—(A) Yes; (B) Not as regards any assessment except that for the year 1932-33; (C) the assessments were not ultra vires. He also made some further observations upon the question whether in the circumstances of the case a reference lay, and made a preliminary submission that it did not lie.

The reference was duly heard by the High Court and on the 3rd March, 1944, judgment was delivered by Din Mohammad, J., with whom Sale, J., agreed. It is significant of the difficulties of the case that once more the questions were formulated and were re-stated in the following form:—

" (1) Whether the assessments made subsequent to the years 1932-33 including the supplementary assessment for the year 1931-32 were a nullity in view of the decision of their Lordships of the Privy Council . . .?

(2) Whether the Commissioner of Income Tax acted improperly in refusing to exercise the discretion vested in him to cancel the said assessments and to order the repayment of the sums received from the assessees on account of those assessments?

(3) Whether the assessees could be denied the relief claimed by them under Section 33 of the Income Tax Act on any valid ground? "

The High Court rejected the preliminary submission of the Commissioner holding that its own previous decision on this matter could not be questioned and upon the questions as restated in the case held in favour of the respondent (1) that the assessments in question were a nullity; (2) that the Commissioner had acted improperly in refusing to exercise the discretion referred to; and (3) that the respondent could not be denied the relief claimed by him under Section 33 on any valid ground. From this decision the present appeal has been brought.

Reference must now be made to the relevant Sections of the Income Tax Act and, while, strictly, the only matters of appeal are the questions as finally settled in the case stated, it will not be found possible to avoid reference to the jurisdictional point which formed the subject of the earlier decision of the High Court. So closely interlocked are the procedural and substantive law of income tax.

The incidence of income tax in India is governed by the Indian Income Tax Act, 1922, as subsequently amended. Chapter I, consisting of Sections 3 and 4, is headed " Charge of Income Tax " and Section 4, which by Subsection (1) enacts that, save as thereinafter provided, the Act shall apply to all income profits or gains as therein defined, by Subsection (3) makes the provision for exemption which has already been set out earlier in this judgment. The exemptions are numerous and include " agricultural income " which is elaborately defined in Section 1.

Chapter III consisting of Sections 6 to 17 inclusive is headed " Taxable Income " and defines the heads of income profits and gains which are chargeable to tax and by whom the tax shall be paid. The respondent attached some importance to the fact that in contradistinction to the language of Section 4 (3), Sections 14 and 15, which also confer exemption, open with the words " The Tax shall not be payable ". In their Lordships' opinion the difference in language does not create a different legal result.

Chapter IV, headed " Deductions and Assessments " and consisting of Sections 18 to 39 inclusive, deals elaborately with these two subjects. It prescribes in detail the duties of the income tax authorities and the obligations and rights of the assessee and in particular by Section 30 defines the right of appeal to the Assistant Commissioner against an assessment and the limit of time within which an appeal may be brought, and by Section 31 defines the powers and duties of the Assistant Commissioner upon the hearing of an appeal. This Section contains a proviso that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such an enhancement. Section 32 provides that any assessee objecting to an order passed by an Assistant Commissioner under Section 28 or to an order enhancing his assessment under Subsection (3) of Section 31 may appeal to the Commissioner within 30 days of the date on which he was served with notice of such order. This Section provides by Subsection (3) that in disposing of the appeal the Commissioner may after giving the appellant an opportunity of being heard pass such orders thereon as he thinks fit. Their Lordships pause at this point to observe with what particularity the rights of the assessee in regard to appeal are defined. The Sections to which reference has been made are couched in language which is apt to create rights and to define their limits. Then comes Section 33 round which so much argument has ranged.

Section 33 enacts " (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under Subsection (4) of Section 5. (2) On receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit: Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard ".

It is this Section, as the third question in the case stated indicates, upon which the respondent relies as establishing a right to relief, and their Lordships will recur to it, observing however that in its language and in its context it appears ill-designed for such a purpose.

Sections 33A to 39 deal with specific matters which do not require to be noticed.

Chapter V, as its heading " Liability in Special Cases " indicates, deals in Sections 40 to 44 with certain special cases, as does Chapter VA.

Chapter VI deals with Recovery of Tax and Penalties and calls for no comment.

Chapter VII headed " Refunds " deals in Sections 48 to 50A with that subject. There has been considerable amendment of these Sections but there has been no amendment which affects the matter under appeal. Upon the assumption (which appears to be justified by the concluding words of Section 48 (4) of the amending Act of 1939) that the operative provisions are contained in the Act before its amendment in 1939, the position in regard to refund is that, if the Assistant Commissioner or the Commissioner in exercise of their respective appellate powers is satisfied that the amount of tax paid by an assessee for any year exceeds the amount with which he is properly chargeable for that year, he shall cause a refund to be made by the Income Tax Officer of any amount found to have been wrongly paid or in excess. But there is an important proviso, viz., Section 48A (3) (which in the amending Act was replaced by Section 48 (4)), that nothing in the Section shall operate to validate any objection or appeal which is otherwise invalid or to authorise the revision of any assessment or other matter which has become final and conclusive or the review by any officer of a decision of his own which is subject to appeal or revision or where any relief is specifically provided elsewhere in the Act, to entitle any person to any relief other or greater than that relief.

Chapter VIII deals with offences and penalties. Chapter IX with supertax and Chapter IXA with certain special matters. Chapter X is headed " Miscellaneous " and contains the important Section 66 under which upon a case stated reference can be made to the High Court.

This Section 66 provides (1) that if in the course of any assessment under the Act or any proceeding in connection therewith other than a proceeding under Chapter VIII a question of law arises, the Commissioner may either on his own motion or on reference from any Income-tax authority subordinate to him draw up a statement of the case and refer it with his own opinion thereon to the High Court; (2) that within 60 days of the date on which he is served with notice of an order under Section 31 or Section 32 or of an order under Section 33 enhancing an assessment or otherwise prejudicial to him the assessee, in respect of whom the order or decision was passed, may by application as therein mentioned require the Commissioner to refer to the High Court any question of law arising out of such order or decision and the Commissioner shall within 60 days of the receipt of such application draw up a statement of the case and refer it with his own opinion thereon to the High Court: Provided that a reference shall be from an order under Section 33 only on a question of law arising out of that order itself and not on a question of law arising out of a previous order under Section 31 or Section 32 revised by the order under Section 33. It is further provided by Section 66 (3) that, if the Commissioner refuses to state a case on

the ground that no question of law arises, the assessee may apply to the High Court which may require the Commissioner to state a case and refer it. It is this jurisdiction which, as already stated, has been successfully invoked in this case.

Finally it is necessary only to refer to Section 67 of the Act which provides that no suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act and no prosecution suit or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under the Act.

Having thus briefly reviewed the relevant Sections of the Act under which the respondent was in fact assessed to income tax and paid it, their Lordships return to the questions in the case stated.

The first, and perhaps the most important, question, is whether the assessments were a " nullity ". This is the word ultimately chosen to express the legal concept upon which the respondent founds its claim to relief. Their Lordships find some difficulty in understanding what is meant by the word in its present context. The assessments were duly made, as they were bound to be made, by the Income Tax officer in the proper exercise of his duty. If this Board had otherwise decided the appeal which came before it in 1939, they would have stood unquestionable and unquestioned. It does not appear to their Lordships that they were a " nullity " in any other sense than that if they had been challenged in due time they might have been set aside. But the same thing is true of every assessment which is open to successful challenge and it is just because convenience of administration demands that the validity of an assessment shall be tested in a particular way, that the Income Tax Act provides that way and at the same time enacts by Section 67 that it shall be tested in no other way. Their Lordships in the course of reviewing the Act observed upon the language of the Section conferring the exemption now in question. They would repeat that they do not find in it any justification for the view that an assessment, which may ultimately be held to be invalid in that it does not give effect to the provision for exemption, is thereby rendered a " nullity ". In coming to this conclusion they find strong support in the recent decision of this Board in *Raleigh Investment Co. Ltd.* v. *Governor-General in Council*, reported in L.R. 74 I.A. 50.

Their Lordships then must answer the first question by saying that the assessments were not a nullity.

It is then upon the footing that there were assessments validly made, which were effective until they were set aside, that the second question must be answered. This question does not in terms refer to Section 33 of the Act, as does the third question. But it is the power of revision or review contained in that Section upon which the respondent relies. It is necessary then to ask what is the " discretion " vested in the Commissioner and what is intended by the use of the word " improper " in connection with its exercise.

Upon the first part of this question their Lordships are placed in a position of some embarrassment, as was learned counsel for the appellant, by an admission which appears to have been made by or on behalf of the appellant in the High Court, for it seems that it was there conceded that Section 33 empowered the Commissioner to grant to the respondent all the relief that it claimed, to set aside all assessments whether or not they had under the provisions of the Act become final and conclusive, and to order the refund of all sums paid, whether or not the time for appeal had expired. Their Lordships must not be taken as assenting to this view of the Commissioner's powers, but they will, nevertheless, assume for the purpose of this appeal that he had such a power and will upon that assumption proceed to consider whether his action in refusing to exercise it in favour of the respondent was improper.

Upon this part of the case the argument for the respondent, which found favour with the High Court, was that the refusal of the Commissioner was " improper " in the sense that it was contrary to equity

and good conscience that money should be retained which ought never to have been paid. It was not very clear how far this argument was based on the premise, now held by their Lordships to be fallacious, that the assessments were a " nullity ", but it can presumably be placed on a broad ethical basis whatever may be the true view of the assessments. Upon this footing then the argument must be that the assessee has a right enforceable against the Commissioner to require refund of tax paid by him upon grounds of equity and good conscience, though the assessment has been made and the tax received in good faith.

Their Lordships cannot accept this argument. They have reviewed the code of Income Tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the taxpayer. It would be wholly incompatible with this that he should have a collateral right, necessarily vague and ill-defined, founded on the principles of equity and good conscience. Their Lordships are of opinion that the only remedies open to the taxpayer, whether in regard to appeal against assessment or to claim for refund, are to be found within the four corners of the Act. This view of his rights harmonises with the provision of Section 67, to which reference has already been made, that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced.

It has however as a subsidiary argument been urged on behalf of the respondent that it appears upon the face of the order of the Commissioner of the 23rd November, 1939, that he exercised improperly the discretion assumed to be vested in him and that his order should therefore be set aside. It is true that the sentence " It was open to the assessees to keep these assessments alive by having them included in the reference to the Privy Council " is not happily expressed, but it is sufficiently clear that what the Commissioner had in mind was that it was open to the assessees to have availed themselves of the procedure which the law provided, including if necessary an appeal to His Majesty in Council and that, as they had not done so, he refused to re-open the assessments. This was in fact the reason and, as their Lordships think, a valid reason for the course that he took. Moreover their Lordships, even if they thought that the Commissioner had not expressed himself with sufficient clarity, could do no more than send the matter back to him for further consideration. They would not, upon so slender a ground, conclude that he had exercised his discretion improperly and direct him to exercise it differently.

The third question in the case stated is " Whether the assessees could be denied the relief claimed by them under Section 33 of the Income Tax Act on any valid ground? "

The fallacy implicit in this question has been made clear in the discussion of the first two questions. It assumes that Section 33 creates a right in the assessee. In their Lordships' opinion it creates no such right. On behalf of the respondent the well-known principle which was discussed in *Julius* v. *Bishop of Oxford,* 5 A.C. 214, was invoked and it was urged that the Section which opens with the words " The Commissioner may of his own motion " imposed upon him a duty which he was bound to perform upon the application of an assessee. It is possible that there might be a context in which words so inapt for that purpose would create a duty. But in the present case there is no such context. On the contrary Section 33 follows upon a number of Sections which determine the rights of the assessee and is itself, as its language clearly indicates, intended to provide administrative machinery by which a higher executive officer may review the acts of his subordinates and take the necessary action upon such review. It appears that as a matter of convenience a practice has grown up under which the Commissioner has been invited to act " of his own motion " under the Section and where this occurs a certain degree of formality has been adopted. But the language of the Section does not support the contention, which lies at the root of the third question and is vital to the respondent's case, that it affords a claim

to relief. As has been already pointed out, appropriate relief is specifically given by other Sections: it is not possible to interpret Section 33 as conferring general relief.

Their Lordships therefore can only answer the third question by saying that it is wholly misconceived and that, if the respondent claimed relief under Section 33, his claim was rightly rejected.

Their Lordships have felt much doubt whether they should refer to the procedural point which arises under Sections 33 and 66 (2), i.e., whether, where the Commissioner acting under Section 33 makes an order refusing to set aside an assessment, his order is " otherwise prejudicial " to the assessee, so that the latter can under Section 66 (2) require him to refer any question of law arising from such order to the High Court. This question was raised before the High Court at an earlier stage in these proceedings and the decision of that Court was not appealed. On the present appeal the learned counsel for the appellant has placed in the forefront of his case the contention that there was no order by the Commissioner prejudicial to the assessee out of which any of the questions of law decided by the High Court could be said to have arisen. From this the conclusion is drawn that there was no jurisdiction in the High Court to entertain the reference. Having decided this case on the merits adversely to the respondent so that in any case they must humbly advise His Majesty that this appeal should be allowed, their Lordships think it is not strictly necessary to decide the point. But having heard argument upon it and considered the conflicting decisions in the Courts of India they have come to a clear conclusion which they think it right to express. It appears to them that an order made by the Commissioner under Section 33 can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order under review. If the assessee has a complaint against any assessment or order made by a subordinate officer, he has the appropriate and specific remedy which the Act provides. The Commissioner may act under Section 33 with or without the invitation of the assessee: if he does so without invitation, it is clear that, if he does nothing to worsen the position of the assessee, the latter can acquire no right: the review may be a purely departmental matter of which the assessee knows nothing. If on the other hand the Commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification for giving him a new right of appeal. He has a specific right of appeal against the assessment or order of the subordinate officer, which is subject to its own time limit. That he cannot enlarge by taking a course which is on his part purely voluntary. This view of the Section is confirmed by the exception. For it is proper that, where the Commissioner does make an order which worsens the position of the assessee, the latter should have a right of appeal, since against that order he has no other right. It is further confirmed by the proviso to Section 66 (2) which limits a reference from an order under Section 33 to cases where the question of law arises out of that order itself and excludes it where the question of law arises out of a previous order under Section 31 or Section 32 which is revised under Section 33. In the case in which a reference is permitted, there is a new point of law which could not be otherwise the subject of appeal: in the case in which it is excluded, the point of law was one that could already have been appealed under the appropriate Section.

For these reasons their Lordships are of opinion that a reference does not lie from an order under Section 33 unless that order is prejudicial to the assessee in the sense that he is in a worse position than before the order was made. Applying that principle to the present case their Lordships are of opinion that, as the Commissioner did not enhance the assessments made upon the respondent or otherwise alter his position for the worse, the reference was from the outset incompetent. They

would only add that the respondent could not make an otherwise incompetent reference competent by adducing a reason for setting aside the assessment which was not available to it at the date of the assessment.

For the reasons above stated their Lordships are of opinion that this appeal must be allowed and the judgment of the High Court of Judicature at Lahore of the 23rd March, 1944, set aside and they will humbly advise His Majesty accordingly. In the special circumstances of this case they think it right to order that the parties should bear their own costs of this appeal and of all the proceedings in the High Court.

(38675) Wt. 8013—20 180 2/48 D.L. G. 338

In the Privy Council

THE COMMISSIONER OF INCOME TAX, WEST PUNJAB, NORTH-WEST FRONTIER AND DELHI PROVINCES, LAHORE

v.

THE TRIBUNE TRUST, LAHORE

DELIVERED BY LORD SIMONDS

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