Privy Council Appeal No. 7 of 1957

Gokuldas Ratanji Mandavia - - - - - - - - *Appellant*

v.

The Commissioner of Income Tax - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST DECEMBER, 1958

Present at the Hearing:

LORD TUCKER
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from the judgment of the Court of Appeal for Eastern Africa which varied, on the appellant's appeal, a Decree of the Supreme Court of Kenya which had dismissed the appellant's appeal against assessments to income tax for the years 1943 to 1951 subject to remitting treble additional tax for the year of assessment 1951.

Over the earlier years in issue in this case the Kenya Income Tax Ordinance 1940 was in force. As from 1st January 1951, that Ordinance was replaced by the East African Income Tax (Management) Act, 1952. It is common ground that there is no relevant difference so far as the present case is concerned and their Lordships were referred, as were the Courts below, to the Sections of the 1952 Act.

It is convenient to set out Sections 40 (1), (2) and (3), 59 (1) and (3), 71, and 72 before coming to the facts.

Section 40 of the Act provides as follows:—

"(1) Any person who—

(*a*) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of Section 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of Sections 36 to 39 inclusive; or

(*b*) omits from his return for any year of income any amount which should have been included therein shall be chargeable with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable in respect of his total income as determined after including the amounts omitted,

and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.

(2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross

or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.

(3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of Section 72 as well as in cases where such income or any part thereof is determined from returns furnished ".

Section 59 (1) of the Act provides : " The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return of income and of such particulars as may be required for the purposes of this Act with respect to the income upon which such person appears to be chargeable ".

Section 59 (3) of the Act provides: " Where any person chargeable with tax has not furnished a return within nine months after the end of the year of income, it shall be the duty of every such person notwithstanding that no notice has been served upon such person under sub-section (1) to give notice to the Commissioner before the 15th October in the year following the year of income that he is so chargeable ".

Section 71 of the Act provides:—

" (1) The Commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.

(2) Where a person has delivered a return, the Commissioner may—

(*a*) accept the return and make an assessment accordingly ; or

(*b*) if he has reasonable ground for thinking that the return is not a true and correct return, refuse to accept the return and, to the best of his judgment, determine the amount of the income of the person and assess him accordingly.

(3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to tax, he may, according to the best of his judgment, determine the amount of the income of such person, and assess him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return ".

Section 72 of the Act provides :—

" Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder:—

Provided that—

(*a*) where any fraud or wilful default has been committed by or on behalf of any person in connexion with or in relation to tax for any year of income, the Commissioner may, for the purpose of making good to the revenue of the Territories any loss of tax attributable to the fraud or wilful default, assess that person at any time ;

(*b*) an objection to the making of such assessment or additional assessment on the ground that the time limited for the making thereof has expired shall only be made on objection or appeal as provided for under the provisions of this Act ".

On the view which their Lordships take no question as to penalties arises at present. It would therefore be undesirable to deal with facts which on that issue may hereafter require consideration.

The appellant has been resident in Kenya since 1921. According to his own statement he approached the Revenue authorities in 1943. This was disputed but it is not disputed that prior to 1953 he was not served with notices under Section 59, nor did he make returns of his income. The appellant in 1950 gave oral notice to the respondent that he was chargeable in respect of 1950 and the previous eight years. As a result of that interview there was correspondence and information was asked for and some of it given. The machinery of the Act was not set in motion until 26th May, 1953. On that day the respondent wrote asking for information and a deposit of £2,000. The letter also contained the following paragraph:—

> "As you do not appear at any time to have made a Return of total income and claim for allowances, I am sending under separate cover forms covering years of Assessment 1943 to 1953. These should be completed and submitted to me along with the Accounts of your professional activities and of your property dealings as set out in preceding paragraphs."

No previous notice requiring a return having been sent, the "time allowed" within Section 71 would be the minimum of thirty days in accordance with Section 59 (1). The appellant was at that time in England and replied asking for time until he could get back to East Africa, which might be by the end of July. The answer to this letter was as follows:—

Ref No. 70.

E.A. Income Tax Department,
Nairobi.

15th June, 1953.

Mr. G. R. Mandavia,
68, St. Mark's Road,
London, W.10.

Dear Sir,

I have to thank you for your letter of the 4th June, and have noted your explanation concerning your absence from Kenya. I have further noted that there is no prospect of your being able to return before the end of July next. In these circumstances, and in order that there may be no undue delay in collection of duty, I propose to submit estimated Income Tax assessments for all years for which, on the basis of the figures which you have already submitted, you would appear to be liable. These assessments will, of course, be subject to adjustment on final agreement of liability.

In view of the fact that you were clearly liable and must have been aware of the fact that you were liable to taxation for a considerable period before any approach was made to this Department, I propose to have the assessments made with the addition of penalties. The quantum of the penalties will also be subject to adjustment at the discretion of the Commissioner when your liability has finally been established.

The notices of assessment will be issued to your Nairobi address and you will presumably be advised of their receipt and be able to give formal notice of appeal if you so desire.

I am unable to agree that you are not in a position to pay any deposit. On your own showing you have substantial properties in Nairobi, from which presumably you could obtain funds. In these circumstances I would repeat my request for a payment on account of £2,000. If this is sent to me at this address, it will be brought to account against the estimated assessments which it is proposed to raise, and final payment will be adjusted at a later date.

Yours faithfully,

REGIONAL COMMISSIONER.

The assessments referred to were made on or before the 18th June. They were postdated the 26th June but nothing turns on that. Assessments were often postdated to allow the taxpayer more time.

The taxpayer submitted that these assessments were ultra vires and void in that they were made before the "time allowed" by Section 71 had expired. This is admitted by the respondent if the power to make these assessments has to be found under that Section. The respondent justifies the assessments under the words of Section 72. "Where it appears to the Commissioner that any person liable to tax has not been assessed . . . the Commissioner may assess such person at such amount as according to his judgment he ought to have charged."

The assessments contained triple penalties under Section 40 in addition to the tax. Being made under Section 72 the proviso was relied on as justifying those assessments which related to years more than seven years from the time of the assessments.

Both Courts below held that the assessments were properly made under Section 72. The learned Judge remitted the triple penalties for 1951 because the appellant had given notice of his liability to tax for that year and supplied some figures. The appellant appealed. The Court of Appeal confirmed the assessments in respect of the tax and a penalty equal to the amount of the tax. As regards the further penalties the Court remitted them to the Supreme Court for retrial by another Judge.

The question of ultra vires is a difficult one and their Lordships have been much assisted by Counsel on each side.

The appellant before the Board submitted that:

(1) Section 72 did not apply until the machinery under Section 71 had been put into operation and that the assessments were therefore ultra vires.

(2) Alternatively that if Sections 71 and 72 were alternatives the respondent had elected to give notice under Section 59 and could not then operate Section 72 during the currency of the "time allowed".

(3) That the Court of Appeal had not judicially considered the question of wilful default or neglect under Sections 40 and 72 or alternatively that in any event the whole sum assessed as penalties should be remitted to the Supreme Court.

If he succeeds on his first submission points (2) and (3) do not arise.

The arguments on the first point may be summarised as follows.

The appellant submitted that Section 71 (1) lays down the procedure which has to be followed in all cases. The words "time allowed", and this is not disputed, refer to the time allowed for the furnishing of the return under Section 59 (1). If therefore the Commissioner believes someone to be assessable or possibly assessable he must serve a notice. If a return is made and is accepted the Commissioner proceeds under Section 71 (2) (*a*). If he does not accept the return then he proceeds under Section 71 (2) (*b*). If no return is delivered then Section 71 (3) applies. In no case can he assess until the "time allowed" has expired.

There may be cases in which the return and particulars show that no tax is chargeable and no assessment is therefore made. The return is accepted or not disputed but does not lead to an assessment.

Coming then to Section 72, it is submitted for the appellant that the cases in which the person has not been assessed will be those referred to in the last paragraph, but in which at some later date additional information makes it appear to the Commissioner that an assessment ought to have been made. In other words Section 72 is dealing only with cases where subsequent information leads either to an assessment for the first time or to an additional assessment. It has no application to cases in which the machinery of Section 59 (1) has not been operated.

The respondent relies on the general words of Section 72. They cover he submits any case in which a person has not been assessed whether he

has had a notice and " a time allowed " under Sections 59 and 71 or not. He conceded that it would be contrary to the scheme of the Act to operate Section 72 in current cases. Sections 59 and 71 were clearly intended to be the normal machinery. But if a year or longer had elapsed following the year of income Section 72 was properly available. It seemed impossible to formulate any precise limit of time before which the use of Section 72 would be ultra vires. The Court of Appeal accepted the argument that the two Sections overlap over the whole period.

> " If the Department were to abandon altogether the practice of requiring returns to be made, and began to assess in every case by guesswork under section 72, the Courts might not be slow to say that the powers given by the Act were being abused. But where powers given to a Department of Government, or other statutory authority, are capable of being, through perversity, misused, it does not follow that they are likely to be misused, and much less does it follow that they should be construed in an unnaturally restricted sense merely because of the theoretical danger of misuse."

Their Lordships have come to the conclusion that the construction submitted by the appellant is right for the following reasons.

If the power to make an assessment under Section 72 applies to the making of an original assessment their Lordships are unable to imply a term restricting it to back cases or making it ultra vires to operate it at any time.

One would expect an opportunity to make a return to be a condition precedent to assessment. This is supported by the provisions for personal allowances in Part VI of the Act. If the respondent is right any person can be assessed without having any such opportunity. There would be two concurrent jurisdictions one providing reasonable protection for the taxpayer and the other providing no protection quoad the original assessment, apart from a right to appeal.

Such a construction seems to their Lordships inconsistent with the general and mandatory provisions of Section 71. That Section is providing how all original assessments are to be made.

Section 72 deals inter alia with additional assessments, with cases in which, owing presumably to subsequent information, the Revenue desires to reopen what had apart from Section 72 been settled. Having regard to the wording of Section 71 it seems to their Lordships necessary to restrict the words as to assessing for the first time in Section 72 to cases in which the machinery of Section 59 (1) having been operated no assessment has been made. So far as the taxpayer is concerned after he had made his return or had an opportunity of doing so, it was settled that he was under no liability to tax for that year. Subsequent information leads the Revenue to reopen the matter and decide that he ought to be assessed.

Section 72 is dealing with the reopening of cases which had been settled under the normal procedure.

This explains the fact that Section 72 contains a prima facie limitation of seven years whereas Section 71 contains no limitation. On the respondent's argument this seems inexplicable. On the other argument it seems reasonable that there should after a certain time be no reopening of what has been settled unless there has been fraud or wilful default.

The construction also gains support from the words " ought to have been charged ", when they occur for the second time in Section 72. They there apply to " such amount " as well as " such additional amount ".

Before making the assessments therefore the " time allowed " under Section 71 had to elapse. It is common ground that it did not and their Lordships will humbly advise Her Majesty that the appeal be allowed and the assessments set aside. The respondent must pay the appellant's costs throughout.

(39561) Wt. 8021—825 10/. 12/58 D.L.

In the Privy Council

GOKULDAS RATANJI MANDAVIA

v.

THE COMMISSIONER OF INCOME TAX

DELIVERED BY LORD SOMERVELL OF HARROW

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