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MESSRS CHATTURAM HORILRAM LTD.

v.

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA.

[VIVIAN BOSE, JAGANNADHADAS and SINHA JJ.]

Indian Income Tax Act, 1922 (*Act XI of* 1922), *s.* 34—*Assessment set aside owing to Indian Finance Act of* 1939 *not being in force during the assessment year—Indian Finance Act of* 1939 *brought into force retrospectively by Bihar Regulation IV of* 1942—*Fresh notice under s.* 34 *issued—Whether such fresh notice valid.*

The appellant in this appeal had been assessed to Income Tax which was reduced on appeal but that assessment was set aside by the Income Tax Appellate Tribunal on the ground that the Indian Finance Act of 1939 was not in force during the assessment year in Chota Nagpur. On a reference by the Tribunal the High Court confirmed the setting aside of this assessment. By the promulgation of Bihar Regulation IV of 1942 by the Governor of Bihar (which was assented to by the Governor-General) the Indian Finance Act of 1939 was brought into force in Chota Nagpur retrospectively as from the 30th March 1939. On the 8th February 1944 the Income Tax Officer passed an order in pursuance of which a fresh notice was issued under s. 34 which resulted in the assessment of the appellant to income tax. The question for determination in this appeal was whether the notice under s. 34 was validly issued.

Held (i) that for the purposes of s. 34 of the Act the income, profits or gains sought to be assessed were chargeable to income tax according to the scheme of the Act and the provisions of ss. 3 and 4 of the Act;

(ii) that it was a case of chargeable income escaping assessment within the meaning of s. 34 and was not a case of mere non-assessment of income tax because the earlier assessment proceedings in the present case had in fact been taken but failed to result in a valid assessment owing to some lacuna which was not attributable to the assessing authorities.

C.I.T. Bombay v. *Sir Mahomed Yusuf Ismail* ([1944] 12 I.T.R. 8), *Fazal Dhala* v. *C.I.T., B & O.* ([1944] 12 I.T.R. 341), *Raghavalu Naidu & Sons* v. *C.I.T., Madras* ([1945] 13 I.T.R. 194), *Raja Benoy Kumar Sahas Roy* v. *C.I.T., West Bengal* [(1953] 24 I.T.R. 70), *Chatturam* v. *C.I.T., Bihar* ([1947] F.C.R. 116), *Whitney* v. *Commissioners of Inland Revenue* ([1926] A.C. 37), *C.I.T. Bombay & Aden* v. *Khemchand Ramdas* ([1938] 6 I.T.R. 414 at 428), *Sir Rajendranath Mukherjee* v. *C.I.T., Bengal* ([1934] 2 I.T.R. 71), *Madan Mohan Lal* v. *C.I.T., Punjab* ([1935] 3 I.T.R. 438), *C.I.T., Bombay* v. *Pirojbai N. Contractor* ([1937] 5 I.T.R. 338), *Kunwar*

Bishwanath Singh v. *C.I.T., C.P.* ([1942] 10 I.T.R. 322), *Raja Bahadur Kamakshya Narain Singh* v. *C.I.T., B. & O.* ([1946] 14 I.T.R. 683) and *Chatturam* v. *C.I.T., B. & O.* ([1946] 14 I.T.R. 695), referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 38 of 1954.

Appeal from the Judgment and Decree dated the 14th day of March 1951 of the High Court of Judicature at Patna in M.J.C. No. 230 of 1949.

Mahabir Prasad, Advocate-General for the State of Bihar (*R.J. Bahadur* and *S. P. Varma*, with him), for the appellant.

C.K. Daphtary, Solicitor-General for India (*Porus A. Mehta* and *P.G. Gokhale*, with him), for the respondent.

1955. April 18. The Judgment of the Court was delivered by

JAGANNADHADAS J.—This is an appeal by the assessee on leave granted under section 66-A of the Indian Income-Tax Act. The assessee by name Chatturam Horilram Ltd., who is the appellant before us, is a private limited company carrying on in Chotâ Nagpur the business of exporting mica for sale to foreign countries. The assessment in question is for the year 1939-40 and the accounting year is the calendar year 1938. These proceedings were initiated on a notice issued to the assessee under section 34 of the Indian Income-tax Act, 1922, (Act XI of 1922) (hereinafter referred to as the Act). It is the applicability of this section to the facts of this case that is the sole matter for consideration in this appeal. The circumstances under which the above mentioned notice under section 34 was issued are as follows. The appellant had previously been assessed to tax on an income of Rs. 1,09,200 for the same year 1939-40 by an order dated the 22nd December, 1939, which was reduced on appeal by Rs. 31,315. That assessment was set aside by the Income-Tax Appellate Tribunal on the 28th March, 1942, on the ground that the Indian Finance Act of 1939 was not in force during

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the assessment year 1939-40 in Chota Nagpur, which was a partially-excluded area. On a reference by the Tribunal at the instance of the Income-tax authorities, the High Court of Patna agreed with this view and pronounced on the 30th September, 1943, its judgment confirming the setting aside of the assessment. Meanwhile, the Governor of Bihar promulgated Bihar Regulation IV of 1942, which was assented to by the Governor-General on the 30th June, 1942. By this Regulation, the Indian Finance Act of 1939 (along with Finance Acts of other years with which we are not concerned) was brought into force in Chota Nagpur retrospectively as from the 30th March 1939. The relevant portion of the Regulation was in the following terms.

"The Indian Finance Act, 1939, shall be deemed to have come into fore in the area to which this Regulation extends on the 30th day of March, 1939".

On the 8th February, 1944, the Income-tax Officer passed an order as follows:

"Due to recent judgment of the High Court the assessment under section 23(3) stands cancelled and with it the notice under section 34 issued in this case becomes ineffective and is withdrawn. Assessee derives income from mica mining and dealing, money-lending, mining rents and non-agricultural sources of zamindary, and this has escaped assessment in its entirety. Issue notice under section 22(2) read with section 34 again to file a return of income in the prescribed form and within the prescribed time, and inform the assessee that the original notice under section 34 has been cancelled".

It may be mentioned, in passing, that the notice under section 34 which is referred to in the above order as having become ineffective and as, therefore, withdrawn was a prior one which was issued on the 8th July, 1941, *i.e.*, during the pendency of the assessee's appeal relating to the earlier assessment before the Income-tax Appellate Tribunal. It is not quite clear from the record in what circumstances that notice came to be issued. But it looks probable that it relates to certain items appearing in the accounts as

cash-credits to the tune of four lakhs which, as will appear presently, were treated in the later proceedings as concealed income in the absence of any proper explanation by assessee. This prior notice under section 34, having been withdrawn, has no bearing on the question at issue before us in this appeal and has not been relied on by either side. In pursuance of the order dated the 8th February, 1944, quoted above, a fresh notice under section 34 of the Act was issued to the appellant on the 12th February, 1944. The income of the assessee-company was thereupon determined at a sum of Rs. 4,86,351, which on appeal to the Assistant Commissioner, was reduced by Rs. 11,187. Out of this amount a sum of Rs. 4,04,618 related to two items of cash-credits appearing in the name of the partners of the Company which in the absence of any satisfactory explanation, was treated by the Income-tax authorities as secreted profits of the Company. Before the Income-tax Appellate Tribunal two points were raised. (1) Whether the notice dated the 12th February, 1944, under section 34 of the Act was validly issued. (2) Whether the Income-tax authorities were right in holding that the cash-credit items were secret profits. Both the points were decided against the assessee. On the assessee's application to refer both the points for the decision of the High Court, the Tribunal declined to make a reference as regards the second point but referred the first for the opinion of the Court in the following terms:

"Whether in the circumstances of the case, the notice issued on 12-2-1944 under section 34 of the Indian Income-tax Act was validly issued for the assessment year 1939-40?"

The question was answered against the assessee by the High Court and hence this appeal before us. The assessee attempted to reopen the second question relating to secret profits before the High Court but the learned Judges declined to allow it to be canvassed, since the Tribunal did not refer the question to them. We are, therefore, concerned in this appeal only with the question relating to the validity of the notice

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issued on the 12th February, 1944, under section 34 of the Act. It is obvious that if this notice is found to be invalid the assessee would get relief for the entire amount including the amount of secret profits.

The answer to the question which arises for consideration in this appeal depends on a correct appreciation of the requirements of section 34 of the Act. Now, it has to be mentioned that section 34 of the Act, as it originally stood in the Act of 1922, was amended by Act VII of 1939 and this was in turn amended by Act XLVIII of 1948. At the relevant date, i.e., for the assessment year 1939-40, section 34 (1) as amended by Act VII of 1939 (and before its amendment in 1948) was in force. It was as follows:

"If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, (or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act) the Income-tax Officer may, (in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years and) in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section".

Omitting from the above sub-section those portions which are inapplicable to the facts of the present case —marked out within brackets—it may be seen that the facts which require to be established for the validity of the notice under this sub-section are (1) the income, profits or gains sought to be assessed should be chargeable to income-tax and have escaped assess-

ment in any year, and (2) the Income-tax Officer should have discovered it in consequence of definite information which has come into his possession. The contention of the learned counsel for the appellant is that, with reference to the facts of this case, none of these conditions can be said to have been satisfied. It is urged that the income sought to be assessed under these proceedings was not, as a fact, chargeable to income-tax during the assessment year 1939-40. It is said that in any case there can be no question of the income having escaped assessment because, as a fact, the income-tax authorities did proceed to assess the income and that what happened is that the proceedings became infructuous by reason of the High Court having pronounced them to be void. It is also contended that there is no question of discovery of any relevant fact or information, because the non-assessment of the income of the assessee for the period in question was in spite of all the information relating to the income of the assessee having been previously furnished and being in the possession of the Income-tax Officer as would appear from the order of the Officer dated the 22nd December, 1939. It is convenient to deal with this last objection in the first instance.

It may be true that all the information relating to the relevant income of the assessee which is now sought to be taxed was in the possession of the Income-tax Officer in the year 1939 itself when the return was submitted in compliance with the notice under section 22(2) of the Act then issued. But what was required under section 34(1) was not merely fresh information as to the income that escaped assessment but information as to the fact of escapement from assessment of the chargeable income. In the present case the income-tax authorities proceeded to assess the appellant in the normal way during the assessment year 1930-40 itself. Those proceedings became infructuous, by virtue of the decision of the Income-tax Appellate Tribunal and the decision of the High Court confirming it, which disclosed that the Indian Finance Act of 1939 was not in operation in

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the relevant area at the relevant period and that in the absence thereof no valid assessment could be made. The fact, therefore, that the income of the appellant for the relevant year remained without any valid assessment emerged only on the High Court finally giving its decision that the assessment proceedings previously taken were invalid. If, in the circumstances, there was "escapement of chargeable income from assessment"—a question to be dealt with presently—there can be no doubt that this fact can be reasonably said to have been discovered by the Income-tax Officer only when he got definite information as to (1) the passing of the Bihar Regulation IV of 1942 applying the Indian Finance Act of 1939 retrospectively for the relevant accounting period, and (2) the judgment of the High Court pronouncing prior proceedings to be invalid. It is knowledge of both these facts, together, that would, with reference to the circumstances of the present case, constitute the discovery of the relevant fact in consequence of definite information received by the Income-tax Officer. The information as to both these facts taken together could only be after the decision of the High Court on the 30th September, 1943. As already stated, the notice under section 34(1), whose validity is in question, was based on the order of the Income-tax Officer dated the 8th February, 1944, after the judgment of the High Court was pronounced. That order which has been extracted above, shows clearly that it was in consequence of the judgment of the High Court in the background of the promulgation of Regulation IV of 1942 that fresh action under section 34(1) was being initiated.

A number of cases (*C.I.T. Bombay* v. *Sir Mahomed Yusuf Ismail*(1); *Fazal Dhala* v. *C.I.T., B & O.* (2); *Raghavalu Naidu & Sons* v. *C.I.T., Madras*(3); and *Raja Benoy Kumar Sahas Roy* v. *C.I.T., West Bengal*(4)) have been cited before us to show how the phrase "definite information" and the word "discovery" used in this section have been interpreted by the various

(1) [1944] 12 I.T.R. 8.
(2) [1944] 12 I.T.R. 341.
(3) [1945] 13 I.T.R. 194.
(4) [1953] 24 I.T.R. 70.

High Courts. It is unnecessary to deal with these cases at any length. There is here no question as to any new subjective facts such as change of opinion consequent on a correct appreciation of law by the very same, or another, or higher officer, that is pressed into service as bringing about "definite information" and "discovery". We are quite clear that the promulgation of the Regulation and the decision of the High Court are objective facts, information regarding which became available to the Income-tax Officer when he passed the order dated the 8th February, 1944, and it is only when these facts came to his knowledge, that the Income-tax Officer can be said to have discovered that chargeable income escaped assessment in the relevant year.

The main question that requires consideration in this case is whether, on the facts, it can be said that "income chargeable to income-tax has escaped assessment in the relevant year". The contention of the learned counsel for the appellant is that during the relevant year 1939-40 the income was not chargeable to tax *as a fact* and that the retrospective operation of the Finance Act for the relevant year by virtue of a later legislation does not make a difference for this purpose. To decide this question it is necessary to have a clear idea of the scheme of the Income-tax Act and its correlation to the Finance Act of each year. The Income-tax Act is a standing piece of legislation which provides the entire machinery for the levy of income-tax. The Finance Act of each year imposes the obligation for the payment of a determinate sum for each such year calculated with reference to that machinery. As has been pointed out by the Federal Court in *Chatturam* v. *C.I.T., Bihar*(1) quoting from the judgment of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue*(2) "there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are

(1) [1947] F.C.R. 116 at 126.
(2) [1926] A.C. 37.

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liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay". The same idea has been expressed in slightly different language by Lord Romer in the judgment of the Privy Council reported in *C.I.T., Bombay & Aden* v. *Khemchand Ramdas*(1). Chapter III of the Income-tax Act headed "Taxable Income" contains the various provisions with reference to which taxable income is determined. The tax is leviable under section 3 and is in respect of the total income of an assessee in the previous year. The total income is defined in section 2, sub-section (15). The application of the Act to the total income in the hands of an assessee is governed by sections 4, 4-A and 4-B and is determined with reference to concepts relating to residence, receipt and accrual, as indicated therein. Section 3, under which the actual charge of income-tax arises, is as follows:

"Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually".

It is by virtue of this section that the actual levy of the tax and the rates at which the tax has to be computed is determined each year by the annual Finance Acts. Thus, under the scheme of the Income-tax Act, the income of an assessee attracts the quality of taxability with reference to the standing provisions of the Act but the payability and the quantification of the tax depend on the passing and application of the annual Finance Act. Thus, income is chargeable to tax independent of the passing of the

(1) (1938) 6 I.T.R. 414 at 428.

Finance Act but until the Finance Act is passed no tax can be actually levied. A comparison of sections 3 and 6 of the Act shows that the Act recognises the distinction between chargeability and the actual operation of the charge. Section 6 says "save as otherwise provided by this Act, the following heads of income, profits and gains, shall be *chargeable* to income-tax in the manner hereinafter appearing, etc." while section 3, as already quoted above, says that "where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at *that rate or those rates, shall be charged for that year,* etc." Though, no doubt, sections 3 and 4 are the charging sections in the Act as pointed out in *Chatturam* v. *C.I.T., Bihar*(1) at page 125, the wording of section 3 assumes the pre-existence of chargeable income as indicated in section 6. Hence, according to the scheme of the Act the quality of chargeability of any income is independent of the passing of the Finance Act. In this view, therefore, though, as a fact, on account of the Finance Act not having been extended to the relevant area during the year 1939-40, legal authority was then lacking for the quantification of the tax and imposition of the liability therefor, the income of the assessee for the relevant year was nonetheless chargeable to tax at the time, in the sense explained above. Indeed, it, can also be said that the very fact of Regulation IV of 1942, having brought the Finance Act of 1939 into operation retrospectively, in this area, has factually brought about, in any case, the chargeability of the tax during that very year. The relevant portion of the Regulation says that "the Indian Finance Act of 1939 shall be deemed to have come into force in the area to which this Regulation extends on the 30th day of March, 1939". By virtue of this deeming provision the Indian Finance Act of 1939 must be assumed even *factually* to have come into operation on the date specified and the tax must be taken to have become chargeable in that very year, though the actual liability for payment could not arise until proper and

(1) [1947] F.C.R. 116.

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valid steps are taken for quantification of the tax. The contention, therefore, of the appellant that the income was not chargeable to tax in the year 1939-40 cannot be accepted.

The next question that arises is whether the income, though chargeable to tax in the year, can be said to have escaped assessment in the relevant year. The argument of the learned counsel for the appellant is that since assessment proceedings had in fact been taken during the year 1939-40 by an order of assessment dated the 22nd December, 1939, it cannot be said that the income "escaped" assessment. He urges that what happened was that, in spite of assessment having been made, the assessment proceedings became infructuous on account of the decision of the Income-tax Appellate Tribunal setting aside the same and High Court agreeing with it. He contends that, in the circumstances, this is no more than a failure of the assessment proceedings but that it is not an escapement from assessment. He relied upon the Privy Council case in *Sir Rajendranath Mukherjee* v. *C.I.T., Bengal*(1), where their Lordships say that "the expression 'has' escaped assessment" cannot be read as equivalent to 'has not been assessed'" and that "such a reading gives too narrow a meaning to the word 'assessment' and too wide a meaning to the word 'escaped'". Learned counsel for the respondent relies on a number of subsequent cases of the various High Courts (*Madan Mohan Lal* v. *C.I.T., Punjab*(2); *C.I.T., Bombay* v. *Pirojbai N. Contractor*(3); and *Kunwar Bishwanath Singh* v. *C.I.T., C.P.*(4)) which have explained this decision of the Privy Council and pointed out that the particular passage in that judgment which is relied upon had reference to the facts of that case, viz., the proceedings by way of initial assessment being still pending. While no doubt the Privy Council case is thus distinguishable, the contention of the learned counsel for the appellant that the escapement from assessment is not to be equated to

(1) [1934] 2 I.T.R. 71 at 77.
(2) [1935] 3 I.T.R. 438.
(3) [1937] 5 I.T.R. 338.
(4) [1942] 10 I.T.R. 322.

non-assessment *simpliciter* is not without force. Here again, it is unnecessary to lay down what exactly constitutes "escapement from assessment". For the purpose of the present case it appears to us sufficient to say that, where earlier assessment proceedings had in fact been taken but failed to result in a valid assessment owing to some lacuna other than that attributable to the assessing authorities, notwithstanding the chargeability of income to the tax, it would be a case of chargeable income escaping assessment and not a case of mere non-assessment of income-tax. The proceedings for assessment in the present case have failed to result in a valid assessment by virtue of a legal lacuna, viz., the fact of the Indian Finance Act of 1939 not having been extended to the relevant area for the relevant assessment year. Learned counsel for the appellant suggests that the failure of the assessment proceedings in this case must be taken to have been due to the lapse of the income-tax authorities. It is said that inasmuch as Regulation IV of 1942 was actually passed during the pendency of the reference in the High Court in respect of the prior proceedings, the result would have been different, if the Regulation had been brought to the notice of the High Court. There is, however, no reason to think so. The High Court's jurisdiction was only to answer the particular question that was referred to it by the Income-tax Appellate Tribunal and it is extremely doubtful whether they could have taken notice of a subsequent legislation and answered a different question. Learned counsel for the appellant also urged that in any case the deeming provision enacted in Regulation IV of 1942, may be taken to have validated the assessment proceedings previously taken in the year 1939 and at best to have restored the assessment order passed by the Income-tax Officer on the 22nd December, 1939. and confirmed by the Assistant Commissioner. But this overlooks the fact that the order had in fact been set aside by the Income-tax Appellate Tribunal and that the setting aside was confirmed by the High Court on the reference made to it. Admittedly the Regulation was passed after the decision of the

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Income-tax Appellate Tribunal. Notwithstanding that the Regulation IV of 1942 purported to be retrospective, it cannot have the effect of effacing the result brought about by the decision of the Income-tax Appellate Tribunal and the High Court on reference, unless there are clear and express words to that effect. It might have been quite a different matter, if by the date of the Regulation the assessment proceedings themselves were still pending, as in fact happened with reference to assessment proceedings in this area, in respect of a number of assessees for the subsequent assessment year, 1940-41, which were pending by the date of the relevant Regulation and were continued up to their termination. They were held to be valid both by the High Court and by the Federal Court when challenged by the assessees. (See *Raja Bahadur Kamakshya Narain Singh* v. *C.I.T, B & O.* (1); *Chatturam* v. *C.I.T., B & O.* (2); as also *Chatturam* v. *C.I.T., Bihar* (3). It follows, therefore, that, in our view, the income of the assessee chargeable to income-tax escaped assessment in the relevant year 1939-40. The High Court was, therefore, right in answering as it did the question referred to it.

The appeal accordingly fails and is dismissed with costs.

(1) (1946) 14 I.T.R. 683. (2) (1946) 14 I.T.R. 695.
(3) 1947 F.C.R. 116 at 126.

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