

Badar Shoe Stores in Re.

Badar Shoe Stores in Re.

SooperKanoon Citation : sooperkanoon.com/465522

Court : Allahabad

Decided On : Feb-08-1945

Reported in : [1946]14ITR431(All)

Appeal No. : Reference by the Income-tax Appellate Tribunal under Section 66(1) of the Indian Income-tax Act (XI)

Appellant : Badar Shoe Stores in Re.

Judgement :

This is a reference by the Income-tax Appellate Tribunal under Section 66 of the Income-tax Act at the instance of the Badar Shoe Stores (hereinafter called the assessee).

The statement of the case beings by saying that the necessary facts are set out in the judgment of the Appellate Tribunal and in greater detail in the assessment orders for the years 1939-40 and 1940-41. We deprecate the practice, which is becoming too common, of omitting a sufficient statement of facts from the statement of the case and of referring this Court to a miscellany of other documents for the collection of the full facts necessary for the determination of the question of law submitted, and we shall take the opportunity of referring to the unfortunate consequences if this practice at a later stage of this judgment.

The assessee, a firm of which a certain Mr. Badr-Uzzaman was the proprietor, had carried on business as dealers in shoes at the Shoe Market Agra, since at least

the beginning of the year 1936. For the accounting year 1935-36 the gross profits returned by the assessee amounted to approximately five percent. of the turnover of the year and in each of the subsequent four years, including the accounting year 1939-40, the gross profits returned varied between 5 per cent. and 5.6 per cent. of the years gross turnover. In due course on the 18th July, 1940, the Income-tax Officer received the return of the assessee of the profits of the accounting year 1939-40 for the assessment year 1940-41. This disclosed that the gross income for the accounting year was Rs. 9,433, being a percentage of 5.6 of the turnover, and a net income of Rs. 2,050. These figures, apparently for the first time, aroused the suspicion of the income-tax Officer and he, there upon, examined the accounts of the accounting year 1939-40 in detail. As a result of this examination he found that on the 29th October, 1939, an item on the debit side of the accounts had been inflated by a sum of Rs. 5,000. The Income-tax Officer came to the conclusions that this was fraudulent and he caused a notice to be served on the assessee under Section 23(2) of the Indian Income-tax Act to attend at his office. On the 6th August, 1940, the assessee's statement was recorded and, to put the matter shortly, the assessee had no explanation to give satisfactory to the Income-tax Officer, whose suspicions by this time had also been aroused in respect of the balances brought forward in the 1939-40 accounts from previous years. On or about the same date a notice was served on the assessee by the Income-tax Officer under Section 22(4) of the Act calling upon him to produce, or to cause produced, his books of account for the accounting years ending 31st March 1937, 1938 and 1939, in addition to those for the year 1939-40 already before the Income-tax Officer. This notice provoked the reply from the assessee on the 15th August, 1940, that his books for previous years were not available as, following the practice of his firm, 'he apprehended' that they had been sold as waste paper by his Delhi office. The assessee attempted to produce some evidence to this effect, but it was disbelieved as fact by the Income-tax Officer. The Income-tax Officer on the following day, on the 16th August, 1940, recorded the statement of the assessee to the foregoing effect. At the same time he issued a notice, which is Ex. T. - C. to the statement of the case, under Section 34(1) of the Act stating that in consequence of definite information which had come into his possession he had discovered that the assessee's income assessable to income-

tax for the year ending 31st March, 1940, had been under assessed, and he required the assessee to deliver to him by a certain date a return in the form attached. It is to be noticed that this affected the assessment year 1939-40 in respect of the accounting year 1938-39, which was the year previous to the year in which the Income-tax Officer had found - we deliberately use a neutral word -the discrepancy of Rs. 5,000. Having, as the assessment order puts it, 'got scent of the mischief' though the discrepancy of Rs. 5,000 in the year 1939-40 mentioned above, the Income-tax officer then went through the books thoroughly for that year and discovered further discrepancies, amounting to inflation of purchases to the extent of a further three thousand and four hundred rupees, making Rs. 8,400 in all, and a reduction of cash balance to the extent of Rs. 10,000 in respect of the year 1939-40. The position, therefore, was, as we understand it, that, at the time the Income-tax Officer had actually served his notice under Section 34 in respect of the accounting year 1938-39, he had already, to his own satisfaction, actually found out a fraud to the extent of Rs. 5,000 in respect of the accounting year 1939-40, which subsequently led to his making further discoveries of the same kind in respect of the same year to the extent of a further Rs. 3,400 by way of inflation of purchases and Rs. 10,000 by way of reduction of cash balances. Moreover, at the time of the service of the notice on the 16th August, 1940, his suspicions had been thoroughly aroused as regards the balances brought forward in the books of the accounting year 1939-40 from the previous year.

We have had to collect these facts painfully rather from a number of documents included in the volume accompanying the statement of the case than from the statement of the case itself. The statement of the case, which is a relatively brief document, sums the matter up as we think inaccurately in paragraph 6 by saying :

'It would appear from the above resume that the information that came into the possession of the Income-tax Officer, viz.,

(1) that the appellant had inflated purchases by Rs. 8,400;

(2) that the he had attempted to reduce cash balances by Rs. 10,000;and

(3) that there were cash deposits in his books of account with regard to which he was unable to give any satisfactory explanation,

was actually obtained in the course of the assessment for the year 1940-41, and that all the irregularities that were noticed related in fact to transactions that took place during the financial year 1939-40 and not during the financial year 1938-39 whose income, profits and gains formed the subject-matter of the assessment in question....'

This may be true as far as it goes, but, in view of the real point raised by the question, it is very material to know exactly what the state of mind of the Income-tax Officer was at the time he served the notice of the 16th August, 1940, under Section 34 of the Income-tax Act in respect of the accounting year 1938-39. At that date he had already formed the definite conclusion in respect of the accounting year 1939-40 that there had been a fraud to the extent of at least Rs. 5,000. He suspected further frauds in respect of that year, which were not verified until later. Moreover, from the conclusions he had drawn from his discovery of the five thousand rupees fraud, he suspected the balances brought forward from previous years. He had actually formed a conclusion of fact that the assessee had told him a falsehood in respect of the disposal of his previous books as waste paper. In addition to these things, he had, on the 16th August, 1940, the following further facts before him. He knew that the assessee's returns of gross profits in each of the five years, including the accounting year 1939-40, had been shown at a uniform rate of 5 per cent. of the turnover. He had already found out that in respect of one of those years (the accounting year 1939-40) the rate of actual profit relative to the turnover had been substantially higher than 5 per cent. As appears from the assessment order itself, he knew that the assessee's business had been more or less uniform throughout those five years and he, therefore, based on these materials a conclusion of fact on the 16th August, 1940, that there was the likelihood of similar results in the previous accounting years. That is our analysis of the facts, which, as we have said, we have had to collect for ourselves rather than discover from the statement of the case. They can be summarized thus :-

(1) At the date of the relevant notice under Section 34, the Income-tax Officer had established to his own satisfaction an actual fraud in the books for the accounting year 1939-40;

(2) the Income-tax Officer had established to his own satisfaction that he had been told by the assessee a falsehood as regards the destruction of the books for the previous years, and

(3) the Income-tax Officer had reached the conclusion that, in the circumstances of his knowledge of the course of business over the whole period of five years, there was a probability that, the returned income having proved false in one year, it would on investigation prove false in other years of that period also.

We can now approach the actual question of law put to us. We must concede that it is a question of law, because it involves not only the careful construction of the words of Section 34 of the Act, but the determination of certain principles of law involving such considerations as the degree of certainty in the mind of the Income-tax Officer required to constitute 'definite information' and 'discovery' within the meaning of the section. The actual question is in these words :-

'Whether, in the circumstances of the case, the Income-tax Officer had, within the meaning of Section 34, definite information in consequence of which he could have discovered that the assessee's income of 1938-39 had escaped assessment in the assessment year 1939-40.'

The use of the expression 'in the circumstances of the case ' is to be deprecated where those circumstances are not in fact set out in the case itself, but otherwise the question appears to cover the point involved. It is now necessary to turn to the section itself. It runs :-

'(1) 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..... serve on the person liable to

pay tax on such income, profits or gains.... a notice.... under sub-section (2) of Section 22, and may proceed to assess or re-assess such income, profits or gains.....'

The construction of this sections needs to be carefully approached. In the first place, it has to be observed that the section as amended in 1939 is radically different from the section prior to that amendment. Prior to the amendment, it provided that if, for any reason, income, profits or gains chargeable to income-tax had escaped assessment in any year or had been assessed at too low a rate, the Income-tax Officer might, at any time within one year after the end of that year, serve on the assessee a notice preliminary to re-assessment. This left it uncertain both whether the Income-tax Officer himself was to be the sole judge of whether circumstances had arisen to justify his action and as to the degree of certainty which was required from him. The amendment of 1939 is designed, we think, to dispel that uncertainty, and, therefore, it must be assumed that the legislature in laying down in the amended section the positive conditions in which the Income-tax Officer can take action intends those conditions to be strictly fulfilled. Section 34 as amended, is, we think, not merely is a section designed to afford the Income-tax Department a ready means of reopening past accounts, but is a section which is designed to protect the subject against anything in the nature of an inquisition at the instance of the department, founded on mere suspicion rather than on positive material. We think that, for the proper application of the amended Section 34 of the Indian Income-tax act to any given set of circumstances, it is important to bear these considerations in mind. There are two things required by Section 34 to exist before it can be put into operation. First, the has to be in the possession of the Income-tax Officer and it must be in his possession at the date on which he puts Sections 34 into operation 'definite information.' Secondly, the consequences of that 'definite information' has to have been that, at the date at which he puts Section 34 into operation, he has 'discovered' 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.

We shall take the second, or 'discovers,' part of the section first. On this there is considerable guidance to be obtained from English decisions under the Taxes Management Act, 1880, and the English Income-tax Act. We appreciate that great care has to be taken in using authorities relevant to the English Acts in construing an Indian Statute, and, although the material word 'discovers' appears in the English Acts, it is not accompanied by the requirement that the discovery shall be the result of definite information. Nevertheless, we consider it legitimate to inform ourselves of the meaning that has been attributed to the word 'discover' standing alone by English Courts in the context of the English Income Tax Act. Section 52 of the Taxes Management Act, 1880, provides that : 'If the Surveyor discovers that any properties or profits chargeable to the duties have been omitted.....', then he may make an additional assessment.

The words of Section 125, sub section (1), of the English Income Tax Act, 1918, are, so far as material, the same. In the case of *King v. Commissioners for the General Purposes of the Income Tax for Kensington*, three individual learned Judges of the English Court of Appeal have placed their several constructions on the word 'discovers.' Mr. Justice Bray says that it means 'comes to the conclusion from the examination he makes and from any information he may choose to receive. There is nothing to prevent him from getting such information as he can....'

Mr. Justice Avory said that in his opinion 'the word means has reason to believe.'

Mr. Justice Lush says that :- 'If we take discovers, as I think it was intended to be taken, as equivalent to finds or satisfies himself, the difficulty disappears.....'

The facts of that case were that the Surveyor had ascertained that at the material time a foreign company had existed and that the assessee had been carrying on a business in Bolivia. He had discovered material from which he was able reasonably to conclude that that business had been profitable and upon that the Surveyor had deduced that the assessee had omitted a return of his foreign possessions or of part of them. Admittedly, the Surveyor in this case had discovered substantial facts, but the importance of it is that the learned Judges, in the context of the English Act, placed, upon the word 'discovers' no higher

meaning than that of having a reason - no doubt a legitimate reason-to believe. In any close analysis of a discovery in a non-physical sense, absolute certainly is never attainable and there must always be some element, however infinitesimal, of doubt in any human deduction. We think, with respect, therefore, that the word 'discover' must necessarily always involve a measure merely of belief, and, provided that that belief is the belief of an honest and reasonable person based upon reasonable grounds, we have difficulty in seeing what further fulfilment of the word 'discover' there can be. In *King v. Bloomsbury Income tax Commissioners* the Lord Chief Justice referred to the case of *King v. Commissioners for the General Purposes of the Income Tax for Kensington* (ubi supra) with approval and said himself that :-

'The Surveyor may be mistaken in the discovery, but if there is information before him upon which he could, and did honestly believe the person to be liable to the duties, the only remedy is by the appeal prescribed by the Statutes.'

In *Ingle v. Farrand*, a case under Section 125 of the English Income Tax Act, 1918, the Master of the rolls said that :-

'The Surveyor is not required to form an opinion, which is later held by the Courts to be the correct view, before he takes action. There must be information before him which would enable him, acting honestly, to come to the conclusion that a state of facts requiring him to take action.....'

In *Williams v. Trustees of W. W. Grundy*, the word 'discover' was extended to include a case in which an Income-tax Officer found out that certain income was chargeable to tax. In that case the successor of the original inspector found out that a certain interest was a merely a contingent interest and that upon that basis the income in question would be taxable. This was a 'discovery' not of a physical fact but of the true construction of a certain document. Nevertheless, it was held to be a 'discovery'. On the other hand, there are cases to show that a mere change of opinion based on some facts and figures does not amount to a 'discovery' : *Anderton and Halstead, Limited v. Birrell*. The case of *Commissioner of Income-tax, Bengal v. Messrs. Mahaliram Ramjidas* was decided by the Judicial Committee of the Privy Council on the unamended Section 34 and is, therefore,

scarcely relevant to the amended section. Their Lordships of the Privy Council, however, took the view in respect of the unamended section that it was enough that the Income-tax Officer on the information which he had before him and in good faith considered that he had got ground for believing that the assessee's profits had for some reason escaped assessment or had been assessed at too low a rate.

Our conclusion from a consideration of these authorities is that, so far as the word 'discovers' in the amended Section 34 is concerned, it requires that the Income-tax Officer should have formed an honest and reasonable belief upon material which could reasonably support such belief. In the nature of things, it cannot amount to a conclusion of certainty. It is not necessary that, if the matter came to be subsequently decided in a Court of law, the Court should necessarily form the same conclusion as that formed by the Income-tax Officer. The Income-tax Officer's belief, in the sense described above, is to our minds, a 'discovery' within the meaning of the Act.

We now come to the words 'definite information.' These present less difficulty, but it has to be remembered that both what is a 'discovery' and what is 'definite information' must necessarily vary with the circumstances of the case. We think that the words 'definite information' are placed in Section 34 of the Indian Income-tax Act to protect the subject against an assault by the Income-tax Officer based upon mere suspicion. The 'definite information', which is something more than mere gossip or rumour, must lead to the discovery, or 'belief' as we have described it above. But we are not prepared to engage ourselves to the view that, provided the information is definite and does lead to that belief, it need necessarily be information of fact, though in ninety-nine cases out of a hundred it would inevitably be information of fact. Still less need it be information of actual escape from assessment or under-assessment. It may well be information of circumstances not themselves amounting to under-assessment or escape from assessment, but leading to the belief of under-assessment or escape from assessment. In short, it may be circumstantial evidence.

In the circumstances of the case before us, and applying the conclusions we have arrived at as to the true meaning of the words 'discovers' and 'definite information', we have come to the conclusion that, in respect of the notice under Section 34 of the Indian Income-tax Act served on the assessee by the Income-tax Officer on the 16th August, 1940, in relation to the accounting year 1938-39, there was, at the time he served that notice, before him 'definite information', in consequence of which he 'discovered' that income, profits or gains of the year 1938-39 had escaped assessment or had been under-assessed. He had concluded a definite fact, viz., that in the accounting year 1939-40 the assessee had falsified his books. It is true that that by itself was not direct evidence that he had falsified books in a preceding year. But the Income-tax Officer knew more than that. He knew that the low rate of profits to turnover for the preceding years, as returned by the assessee, had been the same as the rate of profit to turnover in the year in which the assessee had falsified his books. It appears to us that those two pieces of information, which had prior to the 16th August, 1940, come into the possession of the Income-tax Officer, constituted material of a definite nature from which he could form a reasonable belief - not certainly - that the assessee's profits in the previous year had escaped assessment. Nor does it end even there. He had 'discovered' by the 16th August, 1940, not only that the assessee was a dishonest man in relation to his returns but that he had deliberately withheld his books of account for the year 1938-39 and for years preceding that year. We must, we think, accept the Income-tax Officer's conclusion of fact upon this point - at any rate so far as his own state of mind was concerned - since we have no reason to doubt that it was a genuine and reasonable conclusion of fact. It is certainly not in appeal before us and there is nothing upon the record to show that it was a conclusion which the Income-tax Officer could not properly draw, leading to a belief that the assessee had made away with his books.

For these reasons we shall answer the question put to us in the affirmative.

The Commissioner of Income-tax will be entitled to the costs of this reference and we assess the fee of counsel representing the Commissioner at the sum of Rs. 200. A copy of this judgment will be sent under the seal of the Court and the signature of the registrar to the Appellate Tribunal for such orders to be passed by

them as are necessary to dispose of the case conformably with it.

Reference answered in the affirmative.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com