

N. Vs. T. Haji Syed Ibrahim Rowther V. Income-tax Officer, Cuddalore, and Another.

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Court : Chennai

Decided On : Jan-30-1962

Reported in : [1963]47ITR665(Mad)

Appeal No. : Writ Petition No. 1098 of 1959

Appellant : N.

Respondent : T. Haji Syed Ibrahim Rowther V. Income-tax Officer, Cuddalore, and Another.

Judgement :

JAGADISAN J. - The petitioner prays for the issue of a writ of certiorari or other appropriate writ to quash the order of the Income-tax Officer, Cuddalore, the first respondent, dated March 1, 1956, in G. I. 137-8/53-54 under section 35 of the Indian Income-tax Act. The second respondent is the Commissioner of Income-tax, Madras, who declined to revise the order of the first respondent.

The brief facts that need be set out are as follows : The petitioner is a resident of Panruti, South Arcot District, and he is a partner in various firms of business. Two of the firms are N. V. T. S. Rowther & Co., Colombo, and N. V. T. S. & Co., Singapore. These are two non-resident firms in which the petitioner as a partner is entitled to a share. For the assessment year 1953-54 the petitioners total world

income was computed at Rs. 62,810 after allowance of the earned income relief. This included the petitioners foreign income from the two firms at Colombo and Singapore. The Income-tax Officer, Cuddalore, by his order of assessment dated January 23, 1954, provisionally adopted the sums of Rs. 13,899 and Rs. 2,924 as the assessee's share of income from the Singapore and Colombo firms respectively. The order of assessment states that these figures are adopted only provisionally subject to revision after completion of assessment of both the firms.

For the year ended April 12, 1953 (assessment year 1953-54), the Colombo firm was treated as non-resident. The firm had submitted a return to the Income-tax Officer, Cuddalore, stating that the income for the year was Rs. 18,220. The officer disallowed a sum of Rs. 10,000 claimed as loss and added that sum to the income returned. Thus the total income of the firm was computed at Rs. 28,220. The firm, having been treated as a non-resident firm, the officer added the following in his order : 'As this income accrued outside India and as there is no Indian income for the firm the firm is declared not liable to tax.' The petitioners share of the income of the firm was shown as Rs. 4,924.

The firm preferred an appeal against this order to the Appellate Assistant Commissioner of Income-tax, Madras. He observed that the firm was a non-resident and that the income of the firm accrued and arose outside the taxable territories. Such income as the firm derived cannot therefore be brought to tax. The appellate authority therefore annulled the assessment of the firm. This order is dated February 29, 1956.

After the assessment of the Colombo firm by the Income-tax Officer he started proceedings under section 35 of the Indian Income-tax Act against the petitioner. He issued a show cause notice on September 23, 1955, in these terms :

'While completing your assessment for 1953-54 your foreign income was provisionally taken as Rs. 16,823 before allowance of statutory exemption of Rs. 4,500 as under :

N. V. T. S. Rowther & Co. (Colombo)

Rs. 2,924

N. V. T. S. Rowther & Co. (Singapore)

Rs. 13,899

I now find that your correct share of income in the said two firms are Rs. 4,924 and Rs. 13,901 respectively. I now propose to adopt your correct share of income in the two foreign firms and revise your assessment as under..... You are requested to state your objections, if any, to my above revision on or before September 30, 1955. If no reply is received by the said date it shall be presumed that you have no objection to my proposal and your assessment will be revised accordingly.'

The petitioner admittedly failed to take any objection before the Income-tax Officer against the proposed revision or rectification. On March 1, 1956, the officer passed an order revising the original assessment under section 35 of the Act, the result of which was to render the petitioner liable for the payment of additional tax of Rs. 1,366-3-0. The following extract from the order is material and relevant :

'At the time of completion of regular assessment in the above case for 1953-54 the assessee's foreign income was provisionally taken as Rs. 16,823 (before allowance of statutory allowance) as detailed below :

Share of income in the non-resident firm of N. V. T. Shamsuddin Rowther & Co. (Colombo)

Rs. 2,924

Share of income in the non-resident firm of N. V. T. Shamsuddin Rowther & Co. (Singapore)

Rs. 13,899

Rs. 16,823

Later it was found that the assessee's correct shares of income in the above-said two firms were Rs. 4,924 and Rs. 13,901 respectively. In my letter dated

September 9, 1955, I proposed revision of his assessment for 1953-54 by adopting the correct shares of income of the assessee in the two firms aforesaid. The due date for filing the objections, if any, was fixed on September 30, 1955, but the assessee has not filed his objections so far. In the circumstances I shall revise the assessment under section 35 as under.....'

The petitioner thereupon moved the Commissioner of Income-tax by petition dated March 15, 1957, for directions to the Income-tax Officer to refix his share income of the Colombo firm at Rs. 2,924. The Commissioner of Income-tax declined to interfere by his order dated June 24, 1958. The petitioner moved the Central Board of Revenue, New Delhi. But the Board negatived relief by its order dated December 12, 1958. This petition challenging the correctness and the validity of the order of the Income-tax Officer granting rectification of the petitioners original assessment dated January 23, 1954, has been filed on October 1, 1959.

The main ground of attack on the order of rectification is that the inclusion of the sum of Rs. 4,924 as the share income of the petitioner of the Colombo firm based upon the order of the Income-tax Officer assessing the firm is illegal and without jurisdiction. The Colombo firm is admittedly a 'non-resident' within the meaning of the expression under section 4 of the Indian Income-tax Act. Persons who are not residents in the taxable territories in the accounting year are not chargeable in respect of income which accrues or arises outside the taxable territories. They are charged only on income received or deemed to be received in the taxable territories for the first time as income in the accounting year and on income which accrues or arises or is deemed to accrue or arise in the taxable territories during the accounting year. The income of the Colombo firm, no part of which accrued or arose in the taxable territories and no part of which was brought within the taxable territory in the accounting year, could not therefore be assessed to tax for the assessment year 1953-54. The Appellate Assistant Commissioner of Madras rightly annulled the order of assessment on the firm.

The petitioner is undoubtedly a resident in the taxable territories and it is not disputed that his share of the income of the foreign firms though accrued and arose outside the taxable territory and though not received in the territory in the

relevant year could be included in computing his total taxable income under the Act. The jurisdiction of the Income-tax Officer to determine the petitioners share of income of the foreign non-resident firm to compute and assess the petitioners total income cannot and has not been disputed. The only point that is debated is whether the computation of the petitioners share of income in the sum of Rs. 4,924 arrived at by the Income-tax Officer in assessing a non-resident firm can be included in the petitioners total income when the assessment of the foreign firm has itself been annulled. The proper procedure to be adopted by the Income-tax Officer in Assessing the share income of a resident partner of a non-resident firm would be to compute the income of the firm in the assessment proceedings of the partner and not to assess the non-resident firm and calculate the share income of the partner and thereafter include it in the total income of the partner. But we are of opinion that in the present case such irregularity of procedure as has occurred cannot in any way vitiate the order of rectification now impugned before us.

The petitioner had ample opportunity to resist the rectification proceedings under section 35 of the Act on the ground that the Income-tax officer could not take into account the assessment proceedings of the non-resident firm and also on the ground that his share of the income of the foreign firm was not more than the sums included under the head of foreign income in the original assessment proceedings. This opportunity the petitioner did not avail himself of as he merely contented himself with ignoring the show cause notice issued to him by the officer. Can the petitioner be now heard to say that in a proceeding under article 226 of the Constitution the rectification order is bad ?

It is now well settled that an applicant for the issue of a prerogative writ is not entitled to an order as of right. The relief which can be granted is purely discretionary. Though it can be granted ex debito justice where it is shown that the subordinate Tribunal has acted without jurisdiction or in excess of jurisdiction it can only be at the instance of an aggrieved party who by his conduct has not disentitle himself to obtain such relief. A person who expressly or by necessary implication acquiesces in any order passed by a subordinate Tribunal by permitting it to pass the order without any objection or protest on his part is clearly a person who has waived his rights if any and cannot therefore be deemed to be a person aggrieved

at all. It is not open to a party armed with a point of law or fact, which may go to the root of the jurisdiction of the Tribunal, or which may affect its decision on merits, to sit on the fence, allow the Tribunal to conduct its proceedings and to pass an order, and thereafter turn his eyes to this court and seek its assistance to quash the proceedings or the order challenging it as bad, infirm and invalid in law.

This principle was emphatically laid down in very clear terms in the leading decision in *Rex v. Williams : Phillips, Ex parte*. At page 614 Channel J. observes thus :

'A party may by his conduct preclude himself from claiming the writ *ex debito justitiae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the court acts in granting or refusing the writ of *certiorari*. This special remedy will not be granted *ex debito justitiae* to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them.'

At page 615 Rowlatt J. sets out the position thus :

'It is a very salutary rule that a party aggrieved must either show that he has taken his objection at the hearing below or state on his affidavit that he had no knowledge of the facts which would enable him to do so.'

The doctrine of acquiescence operating as an impediment to a suitors claim for the benefit of a prerogative writ has come in for consideration mostly in cases where the issue raised was one of jurisdiction of the Tribunal whose decision was impugned. The party cannot take the chance of a decision in his favour by refraining from questioning the jurisdiction or authority of the tribunal and turn against it after an adverse decision against him. In such cases the conduct of the party is treated as submission to jurisdiction which cannot be retracted format the subsequent stage of the proceedings. But an exception has been engrafted upon this rule where the Tribunal is totally lacking in jurisdiction to entertain the proceedings the competency of which is attacked (*Madhava Rao; United*

Commercial Bank Ltd. v. Their Workmen.). This is founded on the well settled proposition of law that an initial lack of jurisdiction can never be made good of conferred by conduct of parties amounting to submission or acquiescence or consent. The general rule of acquiescence as discretionary bar to writ proceedings should not and need not be confined to matters of jurisdiction alone. It can apply with equal facility and logic to all situations, where a person remains passive and takes up the attitude, towards the Tribunal, of 'do what you can or like'. The legal concept or juristic foundation underlying the principle of disability arising from failure to participate in the proceedings before the Tribunal need not be examined. It is enough to say that facts and materials should be placed before the Tribunal by the party who is likely to be affected by the decision and if he omits to do so deliberately or inadvertently he must be deemed to have abided by the decision.

In G. M. T. society v. State of Bombay Chagla C.J. set out the rule thus :

'Now, as we shall presently point out, the English courts have taken the view, and in our opinion rightly, that before a question of jurisdiction is raised on a petition, objection to jurisdiction must be taken before the Tribunal, whose order is being challenged. It is not as if by the petitioner not challenging the jurisdiction of the Tribunal that he confers jurisdiction upon that Tribunal if that Tribunal has no jurisdiction. But what the English courts have said is that the High Court has been asked to exercise a special jurisdiction, not an ordinary jurisdiction, and the High Court is entitled to know what the Tribunal has to say on the question of jurisdiction which the petitioner wants to agitate before the court. There is another principle underlying this view, and that is that the Tribunal which is brought before the court should itself be given an opportunity to decide that it has no jurisdiction, before the high Court is called upon to give its decision.'

This passage no doubt refers only to matters raising jurisdictional issues but we are of opinion that the same principle can well be invoked even in respect of cases where the questions raised before the Tribunal do not relate to jurisdiction but to other matters as well.

The show cause notice issued to the petitioner by the Income-tax Officer as a result of his having taken action under section 35 of the Act makes it quite clear

that, in the absence of any valid objection that may be raised by the petitioner, rectification will be made in the manner proposed. If the petitioner, having received that notice, kept quiet, the only inference that is possible is that he had no objection to the rectification being made as per the terms of the notice. In these circumstances, it will not be open to the petitioner to have the order of rectification quashed by the issue of a writ of certiorari substituting the machinery of this court for that of the Income-tax Officer.

The conduct of the petitioner has undoubtedly been far from diligent. The rectification order is dated March 1, 1956. He moved the Commissioner of Income-tax by way of revision only on March 15, 1957. The revision petition was dismissed by the Commissioner on June 24, 1958. The petitioner states that he moved the Central Board of Revenue, New Delhi, and the board passed an order adverse to him on December 12, 1958. The proceedings before the Board are extra legal and are not warranted by the provisions of the statute. There is no excuse on the part of the petitioner for not moving this court till October 1, 1959, long after the adverse order of the Commissioner of Income-tax against him. We consider that this delay on the part of the petitioner is inordinate and sufficient to disentitle him to any discretionary relief under article 226 of the Constitution.

Learned counsel for the petitioner contended that the facts and circumstances of the case do not clothe the income-tax Officer with any jurisdiction to act under section 35 of the Act. Section 35(1) provides that an Income-tax Officer may at any time within four years from the date of any assessment order passed by him on his own motion rectify any mistake apparent from the record. The words of the statute are wide enough to empower the officer to correct any mistake provide it is apparent from the record; such mistake need not necessarily be purely an arithmetical or clerical mistake. Learned counsel for the petitioner does not dispute this proposition of law. His contention is that the income-tax Officer could have acted only under section 35(5) and that in fact he purported to act only under that provision. Section 35(5) reads :

'35(5). Where in respect of any completed assessment of a partner in a firm it is found on the assessment or reassessment of the firm or on any reduction or

enhancement made in the income of the firm under section 31, section 33, section 33A, section 33B, section 66 or section 66A that the share of the partner in the profit or loss of the firm has not been included in the assessment of the partner or, if included is not correct, the inclusion of the share in the assessment or the correction thereof, as the case may be, shall be deemed to be a rectification of a mistake apparent from the record within the meaning of this section, and the provisions of sub-section (1) shall apply thereto accordingly the period of 4 years referred to in that sub-section being computed from the date of the final order passed in the case of the firm.'

It must be pointed out that in terms the Income-tax Officer did not purport to effect a rectification only based upon the order of assessment of the foreign firm. It may be that he arrived at the figure of Rs. 4,924 by having in mind the order of assessment against the firm. But the order of rectification merely states that the assessee's correct share of income in the foreign firms was as set out thereunder. The rectification is made expressly on the ground that a mistake had occurred in the original assessment of the petitioner in computing his share income of the foreign firms. We are unable to say that there was any lack of jurisdiction on the part of the Income-tax Officer in passing the impugned order of rectification.

The writ petition fails and is dismissed with costs. Counsels fee Rs. 250.

Petition dismissed.

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