

In Re: Burn and Co.

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Court : Kolkata

Decided On : Aug-25-1933

Reported in : AIR1934Cal515,150Ind.Cas.404

Appellant : In Re: Burn and Co.

Judgement :

Costello, J.

1. This matter came before us on a case stated by the Commissioner of Income-tax, Bengal, Under Section 66(2) Income-tax Act (11 of 1922). The assessments, out of which the questions at issue arise, are assessments of the years 1928-1929 and 1929-1930, said to have been made Under Section 34 of the Act on 19th February 1932. It is necessary to relate at some length the history of the matter, in order that it may be clear how the points, which we have to determine, have arisen. Down to the year 1927-1928, assessment was made on a firm named Messrs. Martin and Co., and upon the present applicants, Messrs. Burn and Co. as separate assesses, but in that year, when it came to the notice of the Income-tax Officer that Messrs Martin and Co. had apparently acquired by purchase the firm of Messrs. Burn and Co. the Income-tax Officer proceeded to make an assessment on Messrs. Martin and Co. on the total income of both these firms jointly. Messrs. Martin and Co., made an objection to this joint assessment and as a result of that objection, the matter eventually came before this Court on an application Under Section 66(2) when it was held that the firm of Messrs Burn and

Co. had been purchased, not with any funds belonging to the firm of Messrs. Martin and Co., but with other funds, which were the private property of the individual persons, who happened to be the partners of Messrs. Martin and Co. and further that the acquisition of the firm of Messrs. Burn and Co., by these individuals was a separate venture, which should have no connexion with Messrs. Martin and Co., for the purpose of assessment to income-tax.

2. The order of this Court was dated 16th May 1930, and, in accordance with that order, the assessment on Messrs. Martin and Co., as a registered firm was modified and the profits of Messrs. Burn and Co., which had been added to the income of Messrs. Martin and Co., in that year by the Income-tax Officer for assessment purposes, were deducted. In view of the fact that Messrs. Burn and Co., had filed a return of income in pursuance of a notice issued Under Section 22(2) in respect of their own income for the previous year, that is, the year 1927-28, the Income-tax Officer, on receipt of the order of the High Court, proceeded to make an assessment Under Section 23(1) on Messrs. Burn and Co., on the basis of that return. Messrs. Burn and Co., challenged the validity of that assessment [made Under Section 23(1)] and asked for a reference Under Section 66(2) of the Act to the High Court and a reference was duly made by the Commissioner of Income-tax. In that reference, certain questions of law were formulated and, on 18th February 1932 all of them were decided against Messrs. Burn and Co., as assesseees. While the matter of the legality of the assessment made in the year 1927-28 on Messrs. Martin and Co., based on the joint income of both the firms, were still pending before this Court, the assessments of the years 1928-29 and 1929-30 were completed. They were made-just as the 1927-28 assessment had been made-on Messrs. Martin and Co., on the joint income from the two firms. The assesseees again took exception to this procedure and it was then agreed between them and the Income-tax authorities that the decision of the High Court as regards the 1927-28 assessment should govern the assessments for the years 1928-29 and 1929-30. Accordingly, when the High Court held that the 1927-28 assessment was irregular and that Messrs. Martin and Co., could not be assessed jointly on the income of themselves and Messrs. Burn and Co., the 1928-29 and 1929-30 assessments on Messrs. Martin and Co., were once more modified.

3. In the meantime however Messrs. Burn and Co., the present applicants, had filed returns of their separate income in respect of the years 1928-29 and 1929-30. The Income-tax Officer therefore after the judgment of the High Court previously mentioned proceeded to make an assessment Under Section 23(1) on the basis of those returns. To this, Messrs. Burn and Co. objected and the matter ultimately came before the Commissioner for Income-tax on another application Under Section 66(2) and the Commissioner of Income-tax, thereupon, came to the conclusion that those assessments were indeed irregular, in view of the fact that the returns, which had been filed by Messrs. Burn and Co., had been filed 'suo motu' and not in compliance with any notice issued Under Section 22(2). The Commissioner of Income-tax, upon that, cancelled those assessments, by an order dated 30th March 1931 and further directed that the Income-tax Officer should take steps to make assessments Under Section 34, Income-tax Act, on the income which should have been assessed in the years 1928-29 and 1929-30. On 31st March notices Under Section 34 were duly served on Messrs. Burn and Co., and assessments were duly made. Appeals against those assessments were preferred and finally the Commissioner of Income-tax was asked, in an application Under Section 66(2), to refer certain questions of law, arising out of those assessments, to this Court and these are the questions with which we are now concerned. The Commissioner of Income-tax, in his statement of the case, has set out certain dates in connexion with the assessments of the two years, out of which these questions arise, and it may perhaps be desirable that we should here reproduce them. The material dates and events are as follows:

17th January 1929.-Assessment for the years 1928-29 made on Messrs. Martin and Co., on income including the income of Messrs. Burn and Co.

16th May 1930.-Order of the High Court cancelling the assessment for the year 1927-28 made on Messrs. Martin and Co., on the joint income from the two firms.

4th June 1930.-Order of the Commissioner directing the assessment of the year 1927-28 to be revised in conformity with the order of the High Court and asking also that the assessments for the years 1928-29 and 1929-30 should be revised in accordance with the agreement between the Commissioner and the assesseees,

viz., that the decision of the High Court in the matter of the 1927-28 assessment would govern those assessments also.

24th October 1930.-Revised assessment on Messrs. Martin and Co., for the years 1927-28, 1928-29 and 1929-30 excluding the income of Messrs. Burn and Co.

8th November 1930.-Assessment on Messrs. Burn and Co., in respect of the income of that firm only for the years 1927-28, 1928-29 and 1929-30.

30th March 1931.-Cancellation of the assessments for 1928-29 and 1929-30 on Messrs. Burn and Co. by the Commissioner Under Section 33 of the Act on an application for a reference to the High Court on the ground that the proceedings for assessment had not been legally initiated.

31st March 1931.-Issue of notice Under Section 34 on Messrs. Burn and Co., in respect of the income which should have been assessed in the years 1928-29 and 1929-30.

19th February 1932.-Completion of these proceedings Under Section 34 by the Income-tax Officer and assessment.

4. The Commissioner of Income tax states that, arising out of the 1928-29 assessment, six questions of law were formulated by the assessees Under Section 66(2). The first question runs as follows:

Did the terms of the notice in this case, dated 31st March 1931, purporting to be served Under Section 34 of the Indian Income-tax Act, 1922, constitute a valid notice under the said section?

5. That question has been referred by the Commissioner to this Court. As regards the other questions put forward by the assessees they, seem to resolve themselves into these two questions: (1) In the circumstances of this case, when did the income, which should ordinarily have been assessed in 1928-29 escape assessment? (2) Was the notice, served on the assessee in this case Under Section 34, a notice served within the period of limitation allowed by that section? These two questions relating to the 1928-29 assessments were also referred by

the Commissioner to this Court. Now, as regards the 1929-30 assessment, the questions formulated were these:

Did the terms of the notice in this case, dated 31st March 1931 purporting to be served Under Section 34, Income-tax Act, 1922, constitute a valid notice under the said section

6. The Commissioner points out in his statement of the case that this was an assessment which should ordinarily have been made in the year 1929-30 and he says that, even in accordance with the contention advanced by the assesseees with regard to the correct interpretation of Section 34 of the Act, the notice Under Section 34 was in fact served in due time, for it was served before the end of the year following the year 1929-30. It is not necessary that we should say very much with regard to the questions put forward in connexion with the assessment of the year 1929-30, because Mr. Pugh, who appeared on behalf of the applicants, quite early in his argument admitted that the notice, dated 31st March 1931, in respect of the year 1929-1930, was served within the time limited Under Section 34 of the Act and he abandoned the contention that, by reason of the actual form of the notice, it was not a valid notice under that section.

7. What we are really now concerned with therefore is the question whether or not the notice dated 31st March 1931, requiring Messrs. Burn and Co. to deliver to the Income-tax Officer, not later than the 5th May 1931, or within 30 days of the receipt of the notice, a return of their income from all sources which were assessable for the year ending the 31st March 1929, was in form a good notice, and otherwise, even if it were, whether it nevertheless constituted a valid notice under Section 34 of the Act. A copy of the actual notice is set out on p. 41 of the paper book. It is headed 'Notice Under Section 34, Income-tax Act 21 of 1922.' The notice was however in the form of a letter, instead of being in the common form prescribed by the Central Board of Revenue, but it was nevertheless conceded by Mr. Pugh that, in fact, all the details provided for in that form of notice had, in fact, been dealt with in the letter and we gathered the impression that Mr. Pugh did not seriously desire to stress this particular point. It is to be observed that there is no standard form of notice prescribed in Section 34 itself. All that the

section requires is that a notice

containing all or any of the requirements which may be included in a notice Under Sub-section (2), Section 22,

shall be served. Mr. Sundaram in his well known text-book 'The Law of Income-tax in India,' 3rd Edn., at p. 844 says:

If the information, on which the supplementary assessment is proposed to be made, has already been furnished by the assessee himself, though in some other connexion, and it has also been verified by him, it is strictly speaking unnecessary for the Income-tax Officer to issue notice, though in practice the assessee is probably given an opportunity of being heard, on the analogy of the provision in Section 35.

8. We are quite satisfied that the form of the notice which was given on 31st March 1931 sufficiently and properly complied with the requirements of Section 34, Income-tax Act. The substantial questions which we have to decide, as regards the 1928-29 assessment, is, first of all, the question whether, on the ground that the income of the year 1928-29 did not escape assessment, Section 34 can be made applicable at all. Section 34 reads as follows:

If, for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year 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), 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: Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

9. The argument advanced on behalf of the applicants, Messrs. Burn and Co., is that Section 34 ought never to have been invoked in this case at all, because the income concerned had in fact not escaped assessment. It is to be observed that Section 34 can only be brought into operation if for any reason income chargeable to income-tax has escaped assessment in any year. Mr. Pugh has argued with great cogency that the income of Messrs. Burn and Co, for the year 1928-29 did not escape assessment, though the liability for income tax may have been placed on the wrong shoulders. It is to be borne in mind from the history of the case, which we have narrated, that the assessment for the year 1928-29 was completed while the matter of the assessment for the year 1927-28 was still pending before the High Court. The assessment was made on Messrs. Martin and Co., on 17th January 1929. On 19th December 1928, Messrs Burn and Co., had written to Mr. Martin who was, then the Income-tax Officer a letter, in which they stated that they proposed to close the accounts of their firm in the month of July in each year instead of on 30th April as theretofore. They also pointed out that Under Section 2, Sub-section 11(a), they required the consent of the Income-tax Officer to do that and they asked to be informed of the conditions that the Income-tax Officer would think fit to impose on them. They concluded the letter by saying: 'We propose making the alteration for the purpose of assessing tax for the year 1928-29.' In reply to that letter the Income-tax Officer on 10th January 1929, informed Messrs. Burn and Co., that he was prepared to allow the alteration in the accounting period provided the firm paid tax on 15 months' profits in the assessment for 1928-29. In reply Messrs. Burn and Co., on 11th January 1929, wrote to the Income-tax Officer, Mr. Martin, a further letter, in which they said:

With reference to your letter, No. R-F 15 of the 10th instant, we have the honour to enclose herewith return Under Section 22(2), Income-tax Act, 1922, for the official year 1928-29.

10. It will be seen therefore that Messrs. Burn and Co., did actually make a return for the year 1928-29. We think it not unreasonable to hold that the assessment was made in response to a notice under the Act. In the circumstances, we find it not a little difficult to understand how it came about that the Commissioner took the view that the return filed by Messrs. Burn and Co., had been filed, as he says, 'suo

motu' and it would seem that there never was any necessity for the Commissioner to have made the order of 30th March 1931, cancelling that assessment. However, be that as it may, we should be inclined to hold that, in all the circumstances of the case, the income of Messrs. Burn and Co., in respect of the year 1928-29, did not escape assessment. It is however not necessary that we should express a definite opinion on this point, in view of the conclusion we have arrived at with regard to the further point taken on behalf of the assesseees in respect of the assessment of the year 1929-30. This point relates to the interpretation to be put upon the expression 'in any year' for the purposes of Section 34. The argument put forward on behalf of the assessee is that no assessment could lawfully be made Under Section 34 because the notice purporting to have been given under that section was served more than one year after the year in which the assessment should normally have been made and that if the income of Messrs. Burn and Co., escaped assessment at all it escaped assessment in the year 1928-29 and therefore proceedings Under Section 34 could only have been opened before the end of the year 1929-30. The view of the income-tax authorities seems to have been this: that there was an assessment of income for the year 1928-29 on the income of Messrs. Martin and Co., and that that assessment must be presumed to have been valid until it was declared to be invalid, and it was only held to be invalid as a result of the order of this Court dated 16th May 1930, or by the Commissioner's order dated 4th June 1930, and his subsequent order dated 30th March 1931.

11. The Commissioner seems to have been of the opinion that the earliest possible date from which the period of limitation could be held to run was the date of the order of the Commissioner of 4th June 1930, to the effect that the assessment should be dealt with in accordance with the decision of the High Court of 16th May 1930. It was contended before us on behalf of the income-tax authorities that the correct view is that the period of limitation should run from 30th March 1931, that is, the date on which the Commissioner cancelled the separate assessment of Messrs. Burn and Co., and directed the Income-tax Officer to make a fresh assessment of their income Under Section 34. The Commissioner seems not to have appreciated that the expression 'escape assessment' is not the same as 'escape from' assessment and that, upon the assumption that there was at one

time an assessment of the income of Messrs. Burn and Co., at the proper time, it would scarcely be right to say that they escaped assessment in respect of that income at a later period. Mr. Pugh has argued that the expression 'in any year' can only refer to the year in which the assessment would normally and properly be made or, at any rate, initiated, and as regards the year 1928-29 he has put the matter thus:

12. The year 1927-28 was the earning year. The year 1928-29 was the assessment year or, as we may call it, the tax year, and the year 1929-30 was the 'corrective' year, so that as regards the assessment for the year 1928-29 the income-tax authorities would merely have had time up to 31st March 1930, within which to take proceedings Under Section 34, supposing always that the income of Messrs. Bum and Co., had in fact previously escaped assessment. It may perhaps not inaptly be said that, in relation to the assessment year 1928-29 the year 1929-30 was as it were an 'annus poenitentiae' available to the income-tax authorities. Mr. Pugh crystallised the whole of his argument into this proposition: If there was no escape from assessment, then Section 34 did not apply at all; if on the other hand, there was an escape, then the proceedings Under Section 34 were altogether too late. It was conceded by both sides that if the expression 'in any year' bears the meaning contended for by Mr. Pugh, then, without doubt, the notice of 31st March 1931 was given too late and so the income, tax authorities would be delegated to the remedies, if any, they might still have consequent on the original assessment. Mr. Pugh, in support of his argument as to the meaning of the expression 'in any year' as used in Section 34, referred to a number of the other sections of the Income-tax Act, 1922, notably Section 2, Sub-section (2), Sub-section 3, 6, 12 and 23 and he invited us to come to the opinion that the language and tenor of those sections, as well as the language of Section 34 itself, indicate that in the expression 'in any year' the word year can only refer to the actual 12 months in which an assessment would normally and properly be made.

13. It is obvious that to hold otherwise would bring it about that if an assessment had been duly made, and, if for any reason the assessment was subsequently cancelled even after a considerable lapse of time, the right of the income-tax authorities to demand a fresh return by virtue of the provisions of Section 34 might

be prolonged indefinitely. Having carefully considered the matter and having given due weight to the arguments of the learned Advocate-General we think we ought to accept the contention put forward by Mr. Pugh on behalf of the assesseees and to hold that the expression 'in any year' must be read as meaning the year during which proceedings in assessment in respect of that very year should have been initiated. We, accordingly, hold that the notice served on the assesseees in this case Under Section 34 was not a valid notice in that it was not served within the period of limitation allowed by the section. For the reasons already given this disposes of the case in favour of the assesseees, We make no order as to costs,

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