Privy Council Appeal No. 85 of 1932.

Sir Rajendra Nath Mukerjee and others - - - - *Appellants*

v.

The Commisioner of Income Tax, Bengal - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1933.

Present at the Hearing:

LORD MACMILLAN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* LORD MACMILLAN.]

On the 8th November, 1930, the income tax officer for District V, Calcutta, made an assessment order on Burn & Co., an unregistered firm carrying on business in Calcutta, assessing them to income tax and supertax for the year 1927–28, under section 23 (1) of the Indian Income Tax Act, 1922. The main question in the present appeal, in which the individual partners of Burn & Co. are the appellants, is whether it was competent to make this assessment on the firm after the expiry on the 31st March, 1928, of the year in respect of which the assessment was made.

The explanation of the delay in making the assessment is as follows. It appears that towards the end of the year 1926–27 the partners of the registered firm of Martin & Co., which also carried on business in Calcutta, purchased the business and assets of Burn & Co. The purchase was effected not by or on behalf of the firm of Martin & Co., but by the partners of that firm as individuals who contributed funds for the purpose proportionally

to their shares in Martin & Co. and became partners in Burn & Co. with the same shares therein as they held in Martin & Co. In the year 1927–28 Martin & Co. was a registered firm while Burn & Co. was unregistered. Under the Income Tax Act registered and unregistered firms are differently taxed in various important respects.

On the 7th April, 1927, the income tax officer of District I issued a notice to Burn & Co. under section 22 (2) calling for a return of their total income for the year to the 31st March, 1927, with a view to assessing them for the year 1927–28. A similar notice was issued to Martin & Co. on the 8th April, 1927, by the income tax officer of District II. When they issued these separate notices the income tax officers were unaware that the business of Burn & Co. had been bought by the partners of Martin & Co. On the 24th September, 1927, Martin & Co. made a return of their total income in compliance with the notice issued to them in April, and on the 13th January, 1928, Burn & Co. made their return. Meantime the purchase of the business of Burn & Co. by the partners of Martin & Co. having come to the knowledge of the income tax authorities, Burn & Co.'s file was transferred to the officer dealing with District II, and on the 25th February, 1928, he made an assessment on Martin & Co. in respect of the combined incomes returned by Martin & Co. and Burn & Co. on the footing that the business of Burn & Co. had become a branch of the business of Martin & Co.

Martin & Co. appealed against this assessment, and after sundry procedure, which need not be detailed, the High Court, on the 16th May, 1930, held that the income of a registered firm cannot for the purposes of the Act be aggregated with the income of an unregistered firm, but that the income of each must be separately assessed, irrespective of the fact that the persons interested in the profits of both concerns are the same. Before pronouncing this decision, the High Court had, by a reference back to the Commissioner, ascertained that the business of Burn & Co. had been bought, not with any funds belonging to Martin & Co., but with other funds belonging to the individuals who were the partners in Martin & Co., and that the intention of the purchasers was to embark on a separate venture unconnected with Martin & Co.

In consequence of this decision the assessment which had been made on Martin & Co. was amended by the elimination therefrom of the income returned by Burn & Co., and on the 8th November, 1930, an assessment, being the assessment under appeal, was made on Burn & Co. on their income as returned by them on the 13th January, 1928. The partners of Burn & Co. appealed against this assessment to the Assistant Commissioner, by whom it was confirmed. They then, under section 66 (2), required the Commissioner to refer certain questions of law to

the High Court. The questions as framed by the Commissioner and referred by him, were as follows :—

"1. Whether the assessment made under section 23 (1) on the petitioners on 8th November, 1930, for the year 1927–28 in pursuance of the notice under section 22 (2), issued on them on 7th April, 1927, was a legal assessment ?

2. Whether proceedings can now lie against Messrs. Burn & Co. in view of the fact that final and conclusive assessments have now been made on Messrs. Martin & Co. and on their individual partners ?

3. Upon a true construction of the Indian Income Tax Act must not any assessment be completed within the year of assessment or in the event of such assessment not being so completed, is not the only remedy open to the income tax authorities to proceed under section 34 ? "

The High Court answered the first and second questions in the affirmative and the third question in the negative, whereupon the present appeal was taken.

The argument of the appellants was that on a sound construction of the provisions of the Income Tax Act it is incompetent to make any assessment to tax after the expiry of the year for which the tax is charged except in the cases provided for in section 34. That section played so important a part in the debate that it may be well to quote it in full :—

"34. 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 subsection (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 subsection :

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."

The appellants were not able to point to any express provision of the Act limiting the time within which an assessment must be made. In particular, section 23, under which the assessment in question purports to have been made, contains no such limitation. They relied, however, on inferences which they sought to draw from other sections of the Act, and especially from section 34. The language of the Act is no doubt naturally suited to the normal case of taxation carried through all its processes within the compass of the tax year, but their Lordships do not find in any of the sections to which they were referred, apart from section 34, any provisions which would justify the importation into the Act of an implied prohibition against the making of an assessment after the expiry of the tax year. Nor does section 34, when it is examined, support the appellants' contention. That section applies to two cases, viz., (1) the case where income has escaped assessment in any year, and (2) the case where income

has been assessed at too low a rate in any year. In either of these cases a notice calling for a return may be issued and an assessment or re-assessment may be made of such income as has escaped assessment or has been assessed at too low a rate in the tax year, but such notice may be served only within one year after the expiry of the tax year. The inferences which the appellants asked their Lordships to draw from those provisions were: (1) that it is only in the cases to which section 34 applies that an assessment can be made after the expiry of the tax year, and (2) that if a case does fall within either of the cases to which section 34 applies, no assessment can be made after the expiry of the tax year unless it is made within the year following the tax year, or at least unless a notice calling for a return is made within the year following the tax year.

It will be observed that under section 34, if a notice is served within one year after the expiry of the tax year, the subsequent assessment or re-assessment may apparently be made at any time after service of the notice and not necessarily within the year following the tax year. It would be odd if in this case the assessment could be made more than a year after the expiry of the tax year, while in the normal case, where a return is made within the year, the assessment could not be made a day after the expiry of the tax year. Their Lordships do not accept the inference sought to be drawn from section 34, that it is only where income has escaped assessment in the tax year, or has been assessed too low in that year, that an assessment may be made after the expiry of the tax year. It may be that in the two cases to which the section applies if no notice is served within the year following the tax year, no subsequent assessment or re-assessment can be made of the income which has escaped assessment or been assessed too low, but that is not to say that in no other case can an assessment be made after the expiry of the tax year.

The appellants, however, submit that this is a case of income escaping assessment within the meaning of section 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under section 34 with its time limitation. This involves reading the expression "has escaped assessment" as equivalent to "has not been assessed." Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped." That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from section 66 which refers to "the course of any assessment." To say that the income of Burn & Co. which in January, 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co., has "escaped" assessment in 1927–28 seems to

their Lordships an inadmissible reading. The fact that section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have " escaped " assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in *Lachiram Basantlal* v. *Commissioner of Income Tax, Bengal*, 5 Reports of Income Tax Cases (India), 114, by the learned Chief Justice (Rankin) at p. 118 : " Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof." It may be that if no notice calling for a return under section 22 is issued within the tax year then section 34 provides the only means available to the Crown of remedying the omission, but that is a different matter.

Their Lordships find it sufficient for the disposal of the appeal to hold, as they do, that the income of Burn & Co. did not " escape assessment " in the year 1927–28 within the meaning of section 34 and that consequently the serving of a notice within the year 1928–29 was not an essential prerequisite of a valid assessment of that income. As there is no other time limit prescribed, or necessarily implied, in the Act, the assessment of 8th November, 1930, was therefore not out of time, and the first question was correctly answered by the High Court in the affirmative and the third question in the negative.

The appellants had another argument against the validity of the assessment. Their Lordships share the difficulty experienced by the learned Chief Justice in appreciating it. It was directed to the second question stated by the Commissioner and appears to turn on the fact that after the judgment of the High Court on Martin & Co.'s appeal final and conclusive assessments were made on Martin & Co. and the individuals composing that partnership without including the income of those individuals as partners of Burn & Co. Their income as partners of Burn & Co. then, it is suggested, " escaped assessment " because, as expressed in the sixth and seventh reasons appended to the appellants' case, the partners of Burn & Co. were (in the absence of an assessment on the firm) liable to be assessed individually on their shares of the firm's profits and while they were so liable they were finally assessed (as partners of Martin & Co.) without any of their shares in the profits of Burn & Co. being included. In their Lordships' opinion the amendment of Martin & Co.'s assessment by the elimination of Burn & Co.'s profits with a view to the separate assessment of the latter cannot in any proper sense be described as an escape from assessment of the income of Burn & Co. or of the firm's partners. The second question was therefore rightly answered in the affirmative by the High Court.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the respondent's costs.

In the Privy Council.

SIR RAJENDRA NATH MUKERJEE
AND OTHERS

v.

THE COMMISSIONER OF INCOME TAX,
BENGAL.

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.