Privy Council Appeal No. 71 of 1939

The Punjab Co-operative Bank, Limited, Amritsar - - *Appellant*

v.

The Commissioner of Income-tax, Lahore - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* VISCOUNT MAUGHAM]

This is an appeal from a judgment of the High Court of Judicature at Lahore dated the 3rd February, 1938, delivered on a reference under s. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces.

The appellant (hereinafter referred to as the Bank) is a joint stock company, incorporated in the year 1905, carrying on the business of banking. The objects for which the Bank was established are set out in paragraph 3 of its Memorandum of Association and include—

> " (A) To carry on in India and elsewhere the trade or business of banking in all its branches, and to transact and do all matters and things incidental thereto, or which may at any time hereafter be usual in connection with the business of banking or dealing in money or securities for money."

Paragraph 82 (i) of the Articles of Association provides that the Directors—

> " may invest funds of the Company upon such securities or investments as they may think advisable; from time to time, vary such securities and investments, and convert the same, as occasion may require or as they may deem expedient, but they shall not invest or employ any part of the funds of the Company in the purchase of its own shares."

The profits of the Bank derived from its business during the year 1935 were assessable to income-tax in the year 1936-7 which is the year of assessment involved in this appeal.

The High Court on the 3rd February, 1938, decided that on the facts stated in the statement of the case drawn up by the Commissioner of Income-tax under section 66 (2) of the

Income-tax Act a question propounded by the Commissioner must be answered in the affirmative, with the result that the amount of Rs. 1,42,588 realised by the Bank on the sale in 1935 of certain securities and shares over their cost price is taxable as part of the profits or gains of the business of the Bank which arose in 1935 (see section 10 of the Income-tax Act).

On the 17th June, 1938, the High Court certified under section 66A of the Income-tax Act on the petition of the Bank that the case was a fit case for appeal to His Majesty in Council. As it happened the two learned Judges who gave this certificate were those who heard and decided the case on the 3rd February, 1938.

On the appeal coming on for hearing before their Lordships a preliminary objection to the appeal was taken which has been elaborately argued, and it seems desirable in the first place to deal with this objection. It is based on the contention that no direct appeal now lies to His Majesty in Council from any judgment, decree or final order made by any High Court in British India unless that Court has recorded that it *withholds* the giving of a certificate that a substantial question of law as to the interpretation of the Government of India Act, 1935, is involved. That is said to be the effect of section 205 of the Act, and reliance is placed on a decision of their Lordships in a recent case which must be considered later. Section 205 is in the following terms:—

> "(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.
>
> "(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

The object of this section is plain. It is to ensure that in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder (which for brevity will be referred to hereafter as the "specified question of law") the appeal, if any, that is the direct appeal, shall lie to the Federal Court. The word "direct" is used

because section 208 makes provision for an appeal in such a case on certain conditions from a decision of the Federal Court to His Majesty in Council; but nothing turns on this for the present purpose.

The means adopted in the section to carry out the above object are these: (1) The appeal is stated to lie to the Federal Court if the High Court certifies that the specified question of law is involved and is a substantial question. (2) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law, being a substantial question, is involved. This part of subsection (1) contains some other important words which will be considered later. (3) Where such a certificate is given any party in the case may appeal to the Federal Court on defined grounds (subsection (2)). (4) Where such a certificate is given no (direct) appeal shall lie to His Majesty in Council even with special leave (subsection (2)).

It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise.

What then is the position if it becomes manifest to the Board that, by some mischance or inadvertence or forgetfulness, the High Court has neglected its duty under the latter part of subsection (1) to give a certificate in a case where the specified question of law is or may reasonably be involved? It is plain that it is for the High Court, not this Board, to determine whether the question is involved and if so whether it is substantial. In such an event although the jurisdiction of His Majesty in Council has not been affected, since there has been no certificate, nevertheless there has been a dereliction of duty by the High Court, and the Board, in accordance with the principles on which it is accustomed to act in tendering advice to His Majesty, would not think it right to hear the appeal until a proper certificate has been obtained or it is on record that a certificate has been withheld.

The precise event in fact happened in the recent case of *Errol Mackay* v. *Oswald Forbes* (1940) 67 Ind. App. 64. It seemed to the Board that a question of interpretation arose under an Order in Council made by virtue of sect. 293 of the Government of India Act, 1935. There was no certificate by the High Court. It was suggested by counsel for the appellants that the Court might have considered sect. 205 and might have decided to withhold a certificate, though that decision was not expressed. Their Lordships expressed the view that this was unlikely in that case, and in the absence of a certificate they thought that the appeal

should be dismissed with costs. They added, however, that if the High Court should thereafter make an order withholding a certificate under sect. 205, the appellants were to be at liberty to apply to His Majesty in Council to have the appeal restored.

Their Lordships are of opinion that this order was perfectly correct, not because sect. 205 took away the jurisdiction in a strict sense of His Majesty in Council, but for the more general reason indicated above. They will add that the course taken of dismissing the appeal was no doubt to some extent due to the circumstance that the Board entertained little doubt that the certificate would be given. If the case had been one in which there was a real doubt whether the certificate would be given or withheld, a more lenient course might have been taken, and the appeal might have been directed to stand over until the High Court had either given a certificate or decided to withhold it.

It remains to consider what the position is and what course should be taken by the Board when the appeal is from the High Court and no such specified question of law can with any reasonable probability be thought to be involved, and where, not unnaturally, the High Court have neither granted a certificate nor recorded that a certificate is withheld. The first question here is whether in such a case sect. 205 applies at all, and at this point it is necessary to examine the language in the latter part of sub-sect. (1) in order to determine the nature of the duty imposed upon the High Court. The language is of a very comprehensive kind. The duty is to be that of "every High Court in British India." It is to consider "in every case" whether or not the specified question is involved. And finally the Court is "of its own motion" to give or to withhold a certificate accordingly. Their Lordships, however, are of opinion that this part of sub-sect. (1) is directory in the sense in which that word is used in the well-known distinction between enactments or phrases in them which are mandatory or absolute and those which are merely directory. There are several reasons for this conclusion: first, the object of sect. 205 is as above stated, secondly, the circumstance that the duty is imposed on the Judges of the High Court, persons occupying positions of great importance and dignity to whom mandatory clauses would not be addressed without strong reason, thirdly, that, in fact, there is no provision whatever for imposing any penalty or deprivation of right on a litigant, if the High Court should neglect to comply with its judicial duty as laid down in the section. In other words, the duty is imposed on the Judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court; but there is no condition precedent imposed on an appeal to His Majesty in Council in the

absence of a certificate. The responsible persons—in this case the Judges of the High Court—may be "blameable" —as Lord Blackburn observed in the instructive case of *Justices of Middlesex* v. *The Queen* (1884) 9 A.C. 757, at p. 778—but third parties have nothing to do with that.

If the sentence imposing the duty is only directory, as their Lordships think is clear for the reasons stated, an important consequence follows. It is a well settled general rule that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially" (*Woodward* v. *Sarsons*, 1875 L.R. 10 C.P. 733 at p. 746; see also *Earl of Mountcashell* v. *Viscount O'Neill*, 1856, 5 H.L. Cases 937 at p. 955). It is sufficient if the plain object of the directory provision is carried out (*Walter* v. *Rumbal*, 1695, 1 Ld. Raym. 53; *Jarvis* v. *Hemmings* [1912] 1 Ch. 462). If these principles are applied in the present case it will be apparent that the following alternative view arises: either sect. 205 in imposing on the High Court the duty of giving or withholding a certificate is doing so only in cases where there is a reasonable possibility that the specified question arises or may arise, or, alternatively, the duty is one which need only be complied with in such a case. It is plain that in the vast majority of cases no such question can arise. It seems to their Lordships most difficult to believe that the Legislature was intending to lay on the Judges of every High Court an obligation as part of their judicial duties to record their intention to "withhold" a certificate in such cases as an ordinary judgment on a criminal trial or in a libel action or a decree or judgment in an every-day case for the recovery of a trifling sum of money, for example, in a normal action for a debt. Their first duty is "to consider"; but only it would seem when there is in fact something to consider. Their Lordships have come to the conclusion that the duty imposed on the Judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that the specified question may be involved.

The conclusions on this matter of the construction of sect. 205 are accordingly these: First, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court. Secondly, if in the absence of a certificate it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the High Court have had an opportunity of doing one or the other. Thirdly, the section on its true construction is dealing only with cases where there is a reasonable possibility that the specified question may arise, and the duty is imposed on the Judges of the High Court only in those cases.

Their Lordships desire to add that the case of *Errol Mackay* v. *Oswald Forbes* (*supra*) related to a case within

the second of these propositions. The remarks of the Board as regards the duties of the Judges of the High Court must be read as confined to cases of the nature which arose in that case; and in that connexion reference may be made to the remarks of Lord Halsbury in *Quinn* v. *Leatham* [1901] A.C. 495 at p. 506 that every judgment must be read as applicable to " the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found." It may be well to add that their Lordships do not differ from the opinion expressed in that case as to the duty of the Judges of the High Court in a case to which the section is applicable to record a determination to withhold a certificate if they think that is the right course. Preferably that should be done by the Judges who have heard the case; but it is not essential in every case and may sometimes be impossible, for example, when there are two Judges and they differ on the question whether the certificate should be given or withheld. It may be noted that in the *Errol Mackay* case (*supra*) their Lordships provided for the event of the High Court making an order at some later date withholding the certificate in question, and that order doubtless could be made by Judges other than those who delivered the original judgment.

It follows from the above observations that the preliminary objection fails, since in the present case there is no possible ground for thinking that any question, still less a substantial one, as to the interpretation of the Government of India Act 1935 can be involved.

Two other matters were argued on the preliminary objection, first, whether a decision on a reference under sect. 66 (2) of the Income-tax Act is " a judgment, decree, or final order " within the meaning of those words in sect. 205; secondly, whether the certificate given as above mentioned on the 17th June 1935 under sect. 66A of the Income-tax Act is not a sufficient proof that the certificate under sect. 205 of the Government of India Act (if the section was applicable) had been withheld. On these two questions their Lordships do not think it necessary to express any opinion.

Coming now to the appeal by the Bank it may be observed that the High Court rightly appreciated that the question was ultimately one of fact to be decided on the findings of the Commissioner under sect. 66 (2) of the Income-tax Act, and that the appellant Bank had to establish either that the Commissioner had misdirected himself on some question of law or that there was no sufficient evidence to justify his findings. Their Lordships note that the High Court, in deciding that neither of these points had been made good, examined and considered a number of cases most of which related to Insurance Companies and Banks. Their Lordships do not propose to attempt to recon-

cile all these decisions and the various dicta which are to be found in the reports of them, which might indeed prove to be an impossible task; and they will add that the cases relating to Insurance Companies largely turn on the nature of the insurance business actually carried on and the way in which reserve funds have been set aside and dealt with.

In the present case it appears that on the 31st December 1934 the value of the investments of the Bank amounted to Rs.50,88,550, mainly held in Indian Government securities which, being readily saleable, could if necessary be promptly realised in order to pay claims. During the year 1935 some 10 lacs of these Government securities and some shares were sold, and the profit made taking the differences between the cost price of the investments and the prices at which they were sold was Rs.1,42,588. The grounds on which the Bank contends that the profit of Rs.1,42,588 made on the sale of some of its securities in the year 1935 does not form part of the profits of its business of banking are succinctly stated thus, in the statement of the case: That the Bank had treated the investments in shares and securities as a reserve for emergencies and had resorted to their sale in the accounting period 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs.2,66,000 with the Reserve Bank of India under the provisions of sect. 42 (1) of the Reserve of India Act 1934 (No. 11 of 1934). The Bank claimed also that it did not "deal in shares and securities" and that therefore the profit made by the sale of shares and securities was not taxable.

In the statement the Commissioner finds that up to 1933 there was no sale of securities. The first sale took place on the 30th November 1934. On the other hand, he declines to accept the contention that the Bank had to sell the securities in order to meet heavy withdrawals of deposits and to make the compulsory deposit with the Reserve Bank of India. He states from an examination of the books that it is clear that the profits realized by selling shares and securities were utilized in increasing the reserves. A general view of the financial position since 1932 as on the 31st December of each year can be gathered from a table contained in the Statement which is as follows: —

Accounting year.	Assessment year	Deposits in Thousands.	Investments in Thousands	Total reserve in Thousands
		Rs.	Rs.	Rs.
1932 ...	1933-4 ...	11,543	4,584	997
1933 ...	1934-5 ...	12,361	4,931	1,041
1934 ...	1935-6 ...	11,882	5,088	1,043
1935 ...	1936-7 ...	11,310	3,859	1,234

It is apparent that the decrease of deposits in the year 1935 as compared with the previous year is roughly 5 per cent. while the decrease in investments as between the two years is more than 20 per cent. So far from there being a finding that the sales of shares and securities were due to any special emergency, the Commissioner says that it is apparent

that the Bank had been selling the shares and securities in order to take full advantage of the high prices prevailing in 1935. He was of opinion that the Bank had been "carrying on business in shares and securities since the closing months of 1934." This may well be the correct view and a sufficient ground for dismissing this appeal; but their Lordships do not wish to give any support to the contention that in order to render taxable profits realised on sales of investments in such a case as that before them it is necessary to establish that the taxpayer has been carrying on what may be called a separate business either of buying or selling investments or of merely realising them.

The principle to be applied in such a case is now well settled. It was admirably stated in a Scottish case, *Californian Copper Syndicate* v. *Harris* (1904 6 F. 894; 5 Tax Cases 159), and the statement has been more than once approved both in the House of Lords and in the Judicial Committee. (See for example *Commissioner of Taxes* v. *Melbourne Trust Ltd.* [1914] A.C. 1001 at p. 1010.) Some dicta which appear to support the view that it is necessary to prove that the taxpayer has carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments are taxable, for example, the dicta in the case of *Commissioners of Inland Revenue* v. *Scottish Automobile and General Insurance Co.*, 6 Tax Cases 381, at pp. 388, 389, cannot now be relied on. It is well established to cite the exact words used in the *Californian Copper* case: —

> " that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds at somewhat higher rates of interest. But the banker has always to keep enough cash or easily realisable securities to meet any probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. If as in the present case some of the securities of the Bank are realised in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words that it is an act done in "what is truly the carrying on" of the banking business.

This, it appears to their Lordships, is the more appropriate and satisfactory ground for dealing with the question arising in the present case. It accords exactly with one of the findings in the statement of the Commissioner agreeing

with the views both of the Income-tax officer who first dealt with the case and of the Assistant Commissioner. He observed

> " that the purchase and sale of shares and securities are so much linked with the deposits and withdrawals of clients that with the existing articles of Association the purchase and sale of shares and securities are as much part of the assessee's business as receiving deposits from clients and paying them off are, and therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the latter transactions are."

There can be no doubt that there is ample evidence to justify this view, and in their Lordships' opinion, as in that of the High Court, it is sufficient to dispose of this appeal.

Their Lordships will accordingly humbly advise His Majesty that the appeal must be dismissed with costs.

(25508) Wt. 8017—49 210 8/40 P. St. G. 338

In the Privy Council

THE PUNJAB CO-OPERATIVE BANK, LIMITED, AMRITSAR

v.

THE COMMISSIONER OF INCOME-TAX LAHORE

DELIVERED BY VISCOUNT MAUGHAM

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS.
POCOCK STREET, S.E.1.

1940