Privy Council Appeal No. 63 *of* 1945

The Raleigh Investment Company Limited - - - *Appellant*

v.

The Governor-General in Council - - - - - *Respondent*

FROM

THE FEDERAL COURT OF INDIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DAY OF FEBRUARY, 1947.

Present at the Hearing:

LORD WRIGHT
LORD PORTER
LORD UTHWATT
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD UTHWATT]

This is an appeal by The Raleigh Investment Co. Ltd., from a judgment of the Federal Court of India in its Civil Appellate juridiction reversing a decree passed by a Special Bench of the High Court of Calcutta in its Ordinary Original Civil jurisdiction.

The suit in which that decree was passed was brought by the appellant against the respondent, the Governor-General in Council, claiming repayment of Rs.4,35,295.5.0, part of a larger sum paid by the appellant under an assessment to Income Tax made upon it. The basis of this claim was that in the computation of assessable income effect has been given to a provision of the Income Tax Acts which in the submission of the appellant was *ultra vires* the Indian Legislature, and that the assessment was therefore wrong.

The respondent contended first, that the impugned provision was not *ultra vires* the Indian Legislature and second that, whether the impugned provision was or was not *ultra vires*, the High Court in its ordinary civil jurisdiction was precluded from entertaining the suit by reason of Section 226 of the Government of India Act, 1935 and also by reason of Section 67 of the Indian Income-Tax Act, 1922.

The High Court held that the provision was *ultra vires* and that jurisdiction to entertain the suit was not denied by either of these two sections. An order for repayment of the sum in question was therefore made. The Federal Court held that Section 226 of the Act of 1935 barred the maintenance of the suit before the High Court in its ordinary civil jurisdiction and they expressed their view that the impugned provision was not *ultra vires* the Indian legislature. The Federal Court accordingly ordered the dismissal of the suit.

In the proceedings before the Federal Court the point as to jurisdiction arising under Section 67 of the Act of 1922 was not taken. But jurisdiction cannot be given by consent. It is *pars judicis* to take jurisdiction into consideration and the section has to be considered. Their Lordships, having come to the conclusion that this section bars the maintenance of the suit, do not think it proper to express any opinion on the effect of Section 226 of the Act of 1935 or on the validity of the impugned provision. The views of the High Court and the Federal Court upon the latter topic stand only as dicta receiving neither assent nor dissent from their Lordships.

The material facts so far as relevant are as follow:—

The appellant is a joint stock company incorporated in the Isle of Man, having its registered office in that island, and its main office in England. At all material times it held the bulk of the shares in eleven companies, carrying on business in British India. Two of these companies are companies incorporated in British India, having their registered offices and headquarters in Calcutta. The nine remaining companies (called the sterling companies) are, as to some of them, incorporated in the Isle of Man and, as to the rest, incorporated in England. The business of the sterling companies in India is managed by local Boards, but the ultimate control lies with the London Boards. The meetings of the sterling companies are held in England.

All the dividends that were received by the appellant from the sterling companies were declared paid and received in England. No part of them was ever remitted to British India.

On the 6th January, 1939, the proper Income Tax officer by notice required the appellant to make a return of its total income (and total world income) for the assessment year 1939-40. A return was made on the 18th May, 1939. In the correspondence which followed the appellant raised the point that Explanation 3, to para. 4(1) of the Income-Tax Act 1922, as amended, if it applied to dividends declared and paid outside British India to persons not resident in British India was *ultra vires* the Indian Legislature.

By an assessment order dated the 23rd December, 1940, the Income Tax officer assessed the appellant as a non-resident upon a total income of Rs.75,45,197. The total income so ascertained included the dividends received from the sterling companies.

By an assessment form and notice of demand dated the 23rd December, 1940, the appellant was assessed in respect of income tax and super-tax in the sum of Rs.4,45,202.130. The tax attracted by the inclusion of the dividends from the sterling companies amounted to Rs.4,35,290.5.0. The demand notice required payment on or by the 23rd February, 1941, and stated that in default of payment, the appellants would be liable to penalties and that a warrant of distress might be issued.

The appellant then intimated its intention of appealing against the assessment as far as it related to the taxation of dividends received from the sterling companies, and requested the Income Tax officer to stay his hand pending the appeal. That request was refused and the appellant accordingly, on the 12th March, 1941, paid the tax demanded under protest.

On the 4th June, 1941, the appellant gave notice of appeal to the Appellate Assistant Commissioner of Income Tax. On the 16th January, 1942, the appellant informed the Appellate Assistant Commissioner that it did not propose to proceed with the appeal. By his order dated the 24th January, 1942, the Appellate Assistant Commissioner confirmed the assessment, expressing the opinion that the constitutional questions raised by the appellant could not be entertained in an appeal under the Income-Tax Act, by the provisions of which the Income-Tax Authorities were bound.

On the 17th April, 1942, the appellant instituted the present suit, in the High Court of Calcutta in its ordinary original civil jurisdiction, claiming—

(1) A declaration that in so far as Explanation 3 and the other provisions of the Indian Income Tax Act purport to authorize the assessment and charging to tax of a non-resident in respect of dividends declared or paid outside British India, but not brought into British India, those provisions were *ultra vires* the legislative powers of the Federal Legislature and that therefore the appellant was not liable to be assessed or charged to tax in respect of the dividends from the sterling companies and that the assessment was illegal and wrongful.

(2) An injunction restraining the Department from making assessments in future years in respect of dividends from the sterling companies.

(3) Repayment of Rs.4,35,290.5.0 together with interest.

In form the relief claimed does not profess to modify or set aside the assessment. In substance it does, for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment, and the claim for an injunction is merely verbiage. The cloud of words fails to obscure the point of the suit. An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be *ultra vires*, is not a nullity like an order of a Court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise. Their Lordships therefore regard the suit as in truth directed exclusively to a modification of the assessment.

It is not necessary to set out the impugned provision of the Income-Tax Act pursuant to which the dividends received from the sterling companies were brought into computation. It is sufficient to say that there is a substantial question whether or not that provision is *ultra vires* the Indian Legislature.

Those are the material facts.

Their Lordships now propose to consider and determine whether the bringing of the suit is barred by Section 67 of the Indian Income-Tax Act, 1922. That section runs as follows:—

> " No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act and no prosecution, suit or other proceeding shall lie against any officer of the Crown for anything in good faith done, or intended to be done, under the Act."

The argument for the appellant was that an assessment was not an assessment " made under the Act " if the assessment gave effect to a provision which was *ultra vires* the Indian legislature. In law such a provision, being a nullity, was non-existent. An assessment justifiable in whole or in part by reference to or by such a provision was more aptly described as an assessment not made under the Act than as an assessment made under the Act. The section in question had therefore, it was urged, no application if the impugned provision in the Income Tax Act, 1922, was *ultra vires*. This construction finds some support in cases decided in India.

In construing the section it is pertinent in their Lordships' opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the Courts the question whether a particular provision of the Income-Tax Act bearing on the assessment made is or is not *ultra vires*. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to enquire into the same subject matter. The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there

were no such machinery and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of *ultra vires*, there would be a serious question whether the opening part of the section, so far as it debarred the question of *ultra vires* being debated, fell within the competence of the legislature.

In their Lordships' view it is clear that the Income Tax Act, 1922, as it stood at the relevant date, did give the assessee the right effectively to raise in relation to an assessment made upon him the question whether or not a provision in the Act was *ultra vires*. Under Section 30, an assessee whose only ground of complaint was that effect had been given in the assessment to a provision which he contended was *ultra vires* might appeal against the assessment. If he were dissatisfied with the decision on appeal—the details relating to the procedure are immaterial—the assessee could ask for a case to be stated on any question of law for the opinion of the High Court and, if his request were refused, he might apply to the High Court for an order requiring a case to be stated and to be referred to the High Court (see Section 30 and *Secretary of State* v. *Mcyyappa Chettiar* 4 I.T.R. 341: 1937 I.L.R. Madras 211). It cannot be doubted that included in the questions of law which might be raised by a case stated is any question as to the validity of any taxing provision in the Income-Tax Act to which effect has been given in the assessment under review. Any decision of the High Court upon that question of law can be reviewed on appeal. Effective and appropriate machinery is therefore provided by the Act itself for the review on grounds of law of any assessment. It is in that setting that Section 67 has to be construed.

In their Lordships' view the construction of the section is clear. Under the Act the Income-Tax officer is charged with the duty of assessing the total income of the assessee. The obvious meaning, and in their Lordships' opinion the correct meaning, of the phrase " assessment made under the Act " is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an *ultra vires* provision of the Act is in this view immaterial in determining whether the assessment is " made under the Act ". The phrase describes the provenance of the assessment: it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test.

The results which would follow from the acceptance of the appellant's argument are somewhat curious.

First, no distinction can for the purpose in hand be drawn between an assessment giving effect to an *ultra vires* provision and an assessment giving effect to a wrong construction of a provision to which no objection based on *vires* can be taken. There may indeed be practical difficulties in making out in a Civil Court that a wrong construction has been placed on a provision, but, assuming those difficulties are surmounted, the assessment is established as one which on the appellant's construction is not " made under the Act." All questions of law affecting the accuracy of an assessment might therefore be raised in proceedings in any Civil Court, where reliance was sought to be placed on the assessment. The section on the appellant's construction is robbed of all practical content.

Second, on the appellant's construction, in order to ascertain whether a Civil Court is barred by the section from reviewing an assessment brought before it, the legal merits of the assessment have first to be considered and decided. For if the assessment is determined to be right in law the jurisdiction of the Civil Court to entertain the suit is excluded. The assessment is on the appellant's construction made under the Act. If, on the other hand, the assessment is determind to be wrong, the jurisdiction of the Civil Court to entertain the suit arises. The result of an enquiry into the merits of the assessment

is, on the appellant's construction, to determine whether jurisdiction existed to embark on the enquiry at all. Jurisdiction is made to depend not on subject matter but on the correctness of the suitor's contention as respects subject matter. The language of the section is inapt to justify any such capricious method of determining jurisdiction.

In conclusion their Lordships would observe that the scheme of the Act is to set up a particular machinery by the use of which alone total income assessable for income tax is to be ascertained. The income tax exigible is determined by reference to the total income so ascertained and only by reference to such total income. Under the Act (Section 45) there arises a duty to pay the amount of tax demanded on the basis of that assessment of total income. Jurisdiction to question the assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment. The only doubt indeed, in their Lordships' mind, is whether an express provision was necessary in order to exclude jurisdiction in a Civil Court to set aside or modify an assessment.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

(55396) Wt. 8013—5 200 3/47 D.L. G. 338

In the Privy Council

THE RALEIGH INVESTMENT COMPANY LIMITED

v.

THE GOVERNOR-GENERAL IN COUNCIL

DELIVERED BY LORD UTHWATT

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