REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Dawson Miller, C.J. and Foster, J.

TRIKAMJI DIWAN DAS

1924.

Nov. 18.

v.

THE COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (Act XI of 1922), sections 34, 35 and 66—Rectification of assessment on ground of mistake, application for—mistake must be bona fide*—Order by High Court directing Commissioner to state a case, whether validity of the order can be questioned.*

Up to and including the year 1922-1923 five collieries were separately assessed to income-tax upon returns made in the names of certain persons who in those returns represented the collieries to be their properties. The assessments for 1922-1923 were accepted without protest and without appeal by the persons upon whom the assessments were levied. Of the five collieries three were alleged to belong to *C*, one to *B* and the fifth to *J*. The demands for payment of the tax were made on these persons between the 30th July and the 25th August, 1922. The assessees were given the option of paying the taxes in instalments and they paid about half the amount assessed. In August 1923 the Income-tax Officer received information that all the five collieries belonged to the same firm trading in the name of *J* whose principal place of business was in Bombay, and on the 13th *idem* he issued a notice on the firm calling upon them to show cause why they should not be assessed at a higher rate based on the total income of the five collieries. The notice purported to be under section 35 of the Income-Tax Act, 1922. Thereupon the firm filed a petition purporting to be under section 35 asking for rectification of the original assessments on the ground that their Bombay business, which appeared to have been separately assessed in Bombay, had shown in the previous year a loss exceeding the profits of the collieries. It was admitted that for at least three or four years before the year in question the

* Miscellaneous Judicial Case no. 57 of 1924.

five collieries were the properties of the firm. Their application for refund was refused by the Commissioner for income-tax and an application for review of the order of refusal was also rejected. An application under section 66(2) was then made to him for a reference to the High Court and this was also rejected, mainly on the ground that there had been no appeal from the assessment under section 31 or 32. The assessee then applied to the High Court under section 66(3) asking it to require the Commissioner to state a case and refer it. The High Court directed the Commissioner to state a case. *Held* (*i*) that the Commissioner's refusal to state a case under section 66(2) was right:

(*ii*) that it was doubtful whether in the circumstances of the case the order of the High Court was justified;

(*iii*) that where the High Court has issued an order directing the Commissioner to state a case the High Court cannot question the validity of the order;

(*iv*) that inasmuch as what had been done with a view to getting separate assessments upon the five collieries had been done deliberately, there was no "mistake" which the assessee was entitled to have rectified under section 35.

Reference under section 66 of the Income-Tax Act, 1922. The facts of the case material to this report are stated in the judgment of Dawson Miller, C.J.

K. P. Jayaswal, for the assessee.

Lachmi Narain Sinha, Government Pleader, for the Crown.

DAWSON MILLER, C. J.—This reference comes before us under an order passed by a Division Bench of this Court on the 12th May last directing the Commissioner of Income-Tax to state a case upon two points formulated in the order thus:

"*First*, as to whether an assessee is under the law entitled to apply for a refund under section 35 (of the Indian Income-Tax Act, 1922), without making any objection or appeal against the original assessment and demand under section 29 of the Act, and, *secondly*, the Commissioner having initiated proceedings under section 35 of the Act, if in the course of such proceedings it is discovered that the assessment was under

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a mistake and that no assessment ought to have been made at all, whether the assessee is entitled to a refund without any application being made on his part, and any other point that he may consider proper."

The second of the questions thus formulated for decision assumes first, that proceedings under section 35 were initiated by the Commissioner and, secondly, that the assessment was made under a mistake. But the Commissioner in the case stated has expressed the view that no proceedings under section 35 were initiated by him at all and has further found that there was no mistake apparent on the record within the meaning of section 35 of the Act. If these findings are accepted it would appear that the second question for decision becomes one of purely academic interest. Moreover, if the first question as formulated should be answered in the affirmative it would not determine the real dispute between the parties in this case. The findings are not, however, strictly mere findings of fact but involve mixed questions of fact and law. It will be necessary therefore to consider the facts somewhat in detail and to refer to the appropriate sections of the Act before we can arrive at any satisfactory conclusion upon the real question at issue between the parties.

There are five collieries in the district of Manbhum which, up to and including the year 1922-1923, were separately assessed to income-tax upon returns made in the names of certain persons who in those returns represented the collieries as their property. When the assessments for 1922-1923 were made by the Income-Tax Officer they were accepted without protest and without appeal by the persons upon whom the assessments were levied. Of the five collieries in question three were alleged to belong to Gopaldas Trikamjee, the fourth to Bisanjee Damodar and the fifth to Trikamjee Jiwan Das. The demands for payment of the income-tax assessed on these five collieries were made upon the persons whom I have named, between the 30th July and the 25th August, 1922. The financial year ends on the 31st March and the tax is assessed on the basis of the previous year's income.

The total amount payable upon these five properties was in round figures Rs. 58,000. The assessees were given the option of paying the taxes by instalments. They paid, again in round figures, Rs. 26,000, leaving a balance due of Rs. 32,000. This state of affairs continued up to August, 1923, when the Income-Tax Officer having received information that the five collieries all belonged to the same firm trading under the name of Trikamjee Jiwan Das, whose principal place of business is in Bombay, issued a notice on the firm, dated the 13th August, 1923, calling upon it to show cause why it should not be assessed at a higher rate based on the total income of the five collieries. The notice purported to be issued under section 35 of the Income-Tax Act, 1922. It should be mentioned that the rate of tax is levied upon an ascending scale according to the total income of the assessee. On receipt of this notice the firm of Trikamjee Jiwan Das filed a petition asking for a rectification of the original assessments on the ground that their Bombay business which is apparently unconnected with the colliery business and upon which they appear to have been assessed separately in Bombay had shown a considerable loss in the previous year, the amount of such loss exceeding the profits made by the collieries. This petition was also made under section 35 of the Act which provides as follows:

"35. (1) The Income-Tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion rectify any mistake apparent from the record of the assessment, and shall within the like period rectify any such mistake which has been brought to his notice by such assessee:

Provided that no such rectification shall be made having the effect of enhancing an assessment unless the Income-Tax Officer has given notice to the assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

(2) Where any such rectification has the effect of reducing the assessment, the Income-Tax Officer shall make any refund which may be due to such assessee.

(3) Where any such rectification has the effect of enhancing the assessment, the Income-Tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 29, and the provisions of this Act shall apply accordingly."

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In the case stated the Commissioner has pointed out that this section has really no application to the facts under which the Income-Tax Officer issued the notice and he states that he informed him of this at an early stage. He also points out that the proper section applicable for the recovery of income-tax which has escaped assessment or has been assessed at too low a rate is section 34 which provides the procedure for recovering income-tax which has either escaped assessment or has been assessed at too low a rate and limits the period within which a notice may be issued for the purpose of recovering such a tax to one year after the year of assessment. Whether the notice is to be taken as having been issued under section 34 or section 35 is of no importance in this case for it is clear that under section 35 even if the Income-Tax Officer takes no action himself he must within the time therein specified rectify any mistake apparent from the record of the assessment which has been brought to his notice by the assessee. If therefore section 35 is at all applicable to the circumstances of this case it would follow that the Income-Tax Officer was bound to rectify the mistake and if the assessment was thereby reduced to refund the excess to the assessee. It is admitted by Mr. *Jayaswal* who appears for Trikamji Jiwan Das, the petitioner in this case, that for at least three or four years before the year in question the five collieries were the property of this firm although the returns made during that period had been made in the names of different persons and assessed separately and there is nothing to show that before the year in question the firm's Bombay business had been working at a loss. It was only in August 1923 and after the original assessments had been accepted that the petitioner then for the first time, disclosed the fact that all five collieries were owned by the same person. The Commissioner in his case states :

"The representative of the firm virtually admitted to me that if they had been found liable to assessment in 1922-1923 in Bombay they would not have voluntarily disclosed the fact that all the five Manbhum collieries belonged to them."

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and he later on passed an order on the 7th January, 1924, rejecting the application for a refund but ordering the proceedings taken by the Income-Tax Officer nominally under section 35, but actually under the powers granted by section 34, to be dropped. The assessee shortly afterwards applied to him to review his order declining the refund but he refused to do so. An application was then made to him under section 66(*2*) for a reference to the High Court which was also rejected on the 7th February, 1924. This application was refused mainly on the ground that under section 66(*2*) the assessee may only apply in cases where there has been an appeal from an assessment by the Income-Tax Officer under section 31 or section 32 of the Act and that the assessment had been accepted without appeal in this case. In refusing to state a case for the opinion of the Court under that sub-section the Commissioner was undoubtedly right. The assessee then applied to the High Court under the provisions of section 66(*3*) asking it to require the Commissioner to state a case and refer it. When the matter came before the High Court the learned Judges considered that although no application was maintainable to the Commissioner under sub-section (*2*) of section 66, the Commissioner had nevertheless power under sub-section (*1*) of that section to state a case and relying upon the authority of *Alcock, Ashdown and Company, Limited* v. *The Chief Revenue Authority of Bombay*(1), directed the Commissioner to state a case. I have grave doubt whether in the circumstances the order of the High Court was justified. In the Bombay case cited, which was a decision of their Lordships of the Privy Council, section 45 of the Specific Relief Act, which gives the three High Courts in the presidency towns power to make orders in the nature of *mandamus* requiring specific acts to be done or forborne by persons holding a public office, was relied on, but that section does not confer the same powers upon this High Court; and section 66 of the Income-Tax Act, which differs

(1) (1926) I. L. R. 47 Bom. 742; L. R. 50 I. A. 227.

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in certain material respects from section 51 of the Act of 1918 which was in force when the case cited was decided, gives the High Court no power over the Income-Tax Commissioner except to the limited extent therein provided. The Court, however, by its order considered that it had jurisdiction and ordered the Commissioner to state a case which he has done and it is not competent to this Court now to question the validity of that order.

The real question for our determination is whether in the circumstances stated the petitioner was entitled under section 35 of the Act to require the Income-Tax Officer to rectify a mistake apparent from the record of the assessment and to make a refund of the amount paid thereunder. The Commissioner has pointed out that it is very far from being apparent from the records of the assessments of the five collieries in question that they all belonged to one firm. In my opinion he was justified in taking this view. Moreover, I think, on the facts disclosed he might have gone much further and said that from first to last there never was any mistake at all. What was done with a view to getting separate assessments upon these five collieries was done deliberately and it was only when this mode of being assessed turned out unprofitable to the petitioner that he first disclosed the fact that the properties were not separately owned but all belonged to him. In my opinion this was not a question of mistake at all and there was certainly no mistake apparent from the record of the assessment. I do not consider that section 35 has any application to the facts of the present case. Had there been a *bonâ fide* mistake as to the manner in which the assessment ought to be made different considerations might have applied. The only mistake which appears to me to be shown to have existed in this case is that the assessee failed to realize that in making returns to the income-tax authorities honesty may in the long run prove to be the best policy. I think that the Commissioner was perfectly justified in the circumstances in refusing to

make any rectification or to refund any sums paid under the assessments made. It is not, in the circumstances, necessary to answer categorically the questions referred because even if they are both answered in the affirmative that would not dispose of the real questions in issue between the parties. The real question is whether there was, in the circumstances of the case, any mistake apparent from the record of the assessment which would entitle the assessee to a refund. In my opinion there was not. The Commissioner of Income-Tax is entitled to the costs of this reference.

FOSTER, J.—I agree

APPELLATE CRIMINAL.

Before Adami and Bucknill, J.J.

BHAGWAT SINGH

v.

KING-EMPEROR *

1924.

Nov. 5, 6, 24.

Easement, scope of—ancient right, whether extinguished by change in the course of the river—Code of Criminal Procedure, 1898 *(Act V of* 1898*), sections* 342 *and* 360*—Omission by the magistrate to append the memorandum, whether vitiates the trial* per se*—section* 342*—duty of the magistrate.*

The owner of the dominant tenement had a right to take water from a river flowing by the servient tenement. In order to obtain the water the owner of the dominant tenement had for many years erected a *bandh* at a particular point for the purpose of raising the level of the water and taking it on to his own land. Subsequently the river changed its course and the owner of the dominant tenement finding it impossible to obtain water by making a *bandh* in the deserted bed of the river made a *bandh* across the newly-formed bed of the river. The tenants of the servient tenement armed with deadly weapons resisted the making of the *bandh* on the ground that the

* Criminal Revision no. 472 of 1924, from an order of G. J. Monahan, Esq., I.C.S., Sessions Judge of Monghyr, dated the 26th July, 1924, affirming the order of B. Raghunandan Pande, Deputy Magistrate of Monghyr, dated the 28th January, 1924.