

A COMMISSIONER OF INCOME TAX, U.P.

v.

GURBUX RAI HARBUX RAI

August 24, 1971

[K. S. HEGDE AND A. N. GROVER, JJ.]

B *Excess Profits Tax Act, 1940, ss. 10A and 15—Scope of.*

C Section 10A of the Excess Profits Act, 1940, deals with transactions designed to avoid or reduce liability to excess profits tax and empowers the Excess Profits Tax Officer to make appropriate adjustments as respects liability to excess profits tax. But before any action can be taken under the section, there should be pending a proceeding for assessment or re-assessment of excess profits tax. Under s. 15, if in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that the profits of any chargeable accounting period have escaped assessment, he may serve a notice on the assessee and proceed to assess the profits liable to excess profits tax.

D In the present case, the Appellate Assistant Commissioner, in appeal from the Income-tax Officer order, stated that there was a partial partition in the family of one of the partners of the assessee. On the basis of that order, the Excess Profits Tax Officer started proceedings under s. 10A. He issued notices to the assessee under both ss. 15 and 10A on the same day, but the notice under s. 15 was ordered to be issued first. After considering the reply of the assessee the Excess Profits Tax Officer passed an order under s. 15 modifying the original assessment.

E On the questions : (1) whether the Excess Profits Tax Officer was competent to apply the provisions of s. 10A and make the revised assessment under s. 15, and (2) whether there was any definite information by virtue of which the Excess Profits Tax Officer was competent to re-open the original assessment.

F HELD : (1) Though the notices under ss. 15 and 10A were issued on the same date, the requirements of law were satisfied, because, the Excess Profits Tax Officer had initiated proceedings under s. 15, before issuing notice under s. 10A by ordering the notice under s. 15 to be issued first. The assessee also did not take any objection in his reply to the notice under s. 10A that the notice under s. 15 had not been issued before the notice under s. 10A was issued. [365 F; 366 B—C]

G (2) The information which came into the possession of the Excess Profits Tax Officer of partial partition having been effected was relevant for the purpose of s. 15 and once he had initiated proceedings under that section, he was competent and had jurisdiction to examine for the purpose of s. 10A whether partial partition had been effected for avoidance or reduction of liability to excess profits. [367 B—C]

H (a) The Appellate Assistant Commissioner in the proceedings relating to the assessment of income tax of the assessee had stated the fact of partial partition which was certainly information which came into the possession of the Excess Profits Tax Officer. It was information received from the decision of superior authorities and not a mere change of opinion by himself. [366 F—G]

(b) The proceedings before the Appellate Assistant Commissioner related only to assessment of income tax. Therefore, it could not be said, that because he did not consider whether the object of the partition was to reduce liability to excess profits, there was no escapement for purposes of excess profits tax. [367 A]

Bansilal v. C.I.T., M.P., 70 I.T.R. 74 (S.C.) and *Asstt. Controller of Estates Duty, Hyderabad v. H.E.H. Nizam of Hyderabad*, 72 I.T.R. 376(S.C.), applied.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1225 and 1226 of 1967.

Appeals from the judgment and decree dated May 22, 1964 of the Allahabad High Court in Income-tax Reference No. 189 of 1953.

S. T. Desai, *R. N. Sachthey* and *B. D. Sharma*, for the appellant (in both the appeals).

M. C. Chagla and *A. N. Goyal*, for the respondent (in both the appeals).

The Judgment of the Court was delivered by

Shah, C. J. Gurbux Rai Harbux Rai—hereinafter called 'the assessee'—is a registered firm carrying on a business in piece goods and commission agents. It has its head office at Kanpur and a branch office at Farrukhabad. During the chargeable accounting periods July 4, 1943 to June 21, 1944 and June 22, 1944 to July 10, 1945 Gurbux Rai and Harbux Rai (each representing his joint family) were the two partners of the assessee with equal shares in the profit and loss. In proceedings for assessment of tax under the Excess Profits for Act 1940 for the two chargeable accounting periods the assessee informed the Tax Officer that the joint family of Gurbux Rai had been dissolved and there was a reconstitution of the business of the partnership with effect from July 4, 1943. According to the assessee the constitution of the firm after partition was that in the firm at Kanpur the former two partners were interested, their share being equal, but in the business of the firm at Farrukhabad there were three partners—Harbux Rai with -/8/- share, Chameli Devi with -/4/- share and Gopaldas with -/4/- share.

In assessing tax under the Indian Income-tax Act, 1922 for the assessment year 1944-45 relevant to the account year ending June 21, 1944 the Income-tax Officer held that the case set up by the assessee that there was partition amongst the members of the family of Gurbux Rai could not be accepted. In the view of the Income-tax Officer, an attempt was made "to avoid proper incidence of taxation as an after-thought to create evidence for camouflaging the Farrukhabad business as a separate unit of assessment". The Income-tax Officer directed that the income be assessed as

A the income of the assessee and not as the income of a separate firm. The excess profits tax assessment being consequential upon the income-tax assessment, the Excess Profits Tax Officer assessed the entire income of the two businesses at Kanpur and at Farrukhabad, in the hands of the assessee firm.

B Against the order passed by the Income Tax Officer the assessee appealed to the Appellate Assistant Commissioner who by his order dated October 10, 1947 observed :

C “ . . . that partial partition in respect of movable property of Gurbux Rai was effected on a date somewhere near *Asadh Samvat* 2000, from which date Farrukhabad was conducted by a separate firm consisting of Harbux Rai, Mst. Chameli and Gopaldas”.

D Pursuant to this order the Income-tax Officer modified the assessment with respect to the Income-tax assessment of the assessee for the assessment years 1944-45 and 1945-46. The Excess Profits Tax Officer however started proceedings under s. 10-A by notice dated February 6, 1951 calling upon the assessee to show cause why appropriate adjustments should not be made in the assessment, and passed orders in that behalf for both the chargeable accounting periods holding that the main purpose of the partial partition of the family business of Gurbux Rai was avoidance of excess profits tax liability. By order dated February 21, 1951 passed

E under s. 15 of the Excess Profits Tax Act the Excess Profits Tax Officer modified the original excess profits tax assessment. In the revised assessment in pursuance of orders under s. 10-A he included the income of the branch shop at Farrukhabad in the total income of the assessee for purposes of excess profits tax assessment. The assessee appealed against the order of additional assessment contending that the Excess Profits Tax Officer was not competent to

F re-open the case under s. 15 as he had no definite information coming into his possession to enable him to discover that the profits of the chargeable accounting period had escaped assessment. The assessee contended that all the materials in the case were before the Excess Profits Tax Officer at the time of his original assessment and no new information came into his possession thereafter.

G The assessee also contended that the Excess Profits Tax Officer was not competent to pass any order under s. 10-A merely to make an adjustment in the revised assessment under s. 15. The Income-tax Appellate Tribunal held that the Excess Profits Tax Officer had received definite information regarding the state of the law in pursuance of the appellate order of the Appellate Assistant Commissioner who had held that the family of Gurbux Rai was partially partitioned. The Tribunal also held that the Excess Profits Tax Officer was competent to pass an order under s. 10-A, of the

H Excess Profits Tax Act.

The Tribunal thereafter referred the following questions to the High Court of Allahabad under s. 21 of the Excess Profits Act read with s. 66 (1) of the Income-tax Act, 1922 :

- “(1) Whether on the facts and in the circumstances of this case there was any definite information within the meaning of s. 15 by virtue of which the Excess Profits Tax Officer was competent to re-open the excess profits tax assessments ?
- (2) Whether in the circumstances of this case, the Excess Profits Tax Officer was competent to apply the provisions of s. 10-A and make necessary adjustments in pursuance thereto in the revised assessment under s. 15 ?”

The High Court of Allahabad held that since the Excess Profits Tax Officer purported to re-open the assessment under s. 15 of the Excess Profits Tax Act “only because of the order of the Appellate Assistant Commissioner of Income-tax holding that the Farrukhabad business was no longer the business of the assessee and that the family of Gurbux Rai had partitioned its movable property, all of which proceeded upon material which was already initially before the Excess Profits Tax Officer and to which he had applied his mind when he made the original assessment, it was not a case where the Excess Profits Tax Officer can be said to have discovered”, in consequence of definite information which had come into his possession, that profits chargeable to excess profits tax had escaped assessment. The High Court accordingly answered the first question in the negative.

The High Court then observed that if the Excess Profits Tax Officer was not competent to take proceedings under s. 15 of the Excess Profits Tax Act, it was not open to him to apply the provisions of s. 10 in the proceedings upon re-opening the assessment under s. 15, for, in the view of the High Court an order under s. 10-A may be passed only where the Excess Profits Tax Officer is seized of jurisdiction in a pending assessment proceeding. As the proceedings initiated by the Excess Profits Tax Officer under s. 15 were void, he had no power to make an order under s. 10-A of the Act. The High Court accordingly answered the second question also in the negative.

Against the order passed by the High Court, these two appeals are preferred.

A parallel proceeding which had come before this Court in Civil Appeals Nos. 741-743 of 1966 *Gurbux Rai Harbux Rai v. The Commissioner of Income-tax, U.P.* decided on August 2, 1968 may also be referred to. It may be recalled that the Excess

- A** Profits Tax Officer at Kanpur had served a notice under s. 10-A of the Excess Profits Tax Act requiring the assessee to show cause why appropriate adjustments as respects liability to excess profits tax should not be made so as to counteract the avoidance or reduction of liability to excess profits tax by converting the business in the name of Pussulal Jangalal—the Farrukhabad firm
- B** —into a separate business. The contention of the assessee that the disruption of the family was a genuine and *bona fide* transaction was rejected by the Excess Profits Tax Officer. The case was then taken to the Income-tax Appellate Tribunal. The Tribunal confirmed the order of the Excess Profits Tax Officer. But at the instance of the assessee the Tribunal referred the following question to the High Court of Allahabad :
- C**

“Whether on the facts and circumstances of this case, the transaction in question was one which could be avoided under s. 10-A of the Excess Profits Tax Act?”

- D** The High Court by order dated July 31, 1969 answered the question in the affirmative. Against the order passed by the High Court no further proceedings has been taken by the assessee challenging the conclusion of the High Court and that order has become final.
- E** The High Court has held in the judgment under appeal that action taken under s. 15 of the Excess Profits Tax Act was not competent and on that account the Excess Profits Tax Officer had no jurisdiction in the matter. But in the judgment of the High Court in Income-tax Reference No. 118 of 1962 decided on July 31, 1969 no question of jurisdiction arose. The Court had only answered the question whether the transaction of partial partition was one which could be avoided under s. 10-A of the Excess Profits Tax Act. The decision of the High Court (which had become final) about the authority of the Excess Profits Tax Officer to take action taken under s. 10-A does not affect the maintainability of the present appeal.
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- G** Section 10-A of the Excess Profits Tax Act, insofar as it is relevant, provides :

“(1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction . . . was . . . effected . . . was the avoidance or reduction of liability to excess profits tax, he may, . . . make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counter-

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act the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction

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Section 15, insofar as it is relevant provides :

“If in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 13. and may proceed to assess or reassess the amount of such profits liable to excess profits tax”

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The High Court in the judgment under appeal held that proceeding under s. 10-A may be commenced only if there be a valid proceeding under the Excess Profits Tax which was pending for assessment or re-assessment of excess profits which had escaped assessment and not otherwise. In our opinion the High Court was right in so holding. S. 10-A does not contemplate an independent proceeding. Section 10-A merely confers power upon the Excess Profits Tax Officer to make adjustments with respect to liability to excess profits tax : it confers power which the Excess Profits Tax Officer may exercise in the course of the original assessment or in the course of re-assessment.

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It is necessary therefore to determine whether an order was made under s. 10-A in a pending proceeding for assessment of Excess Profits tax. But the question whether there was a pending proceeding under s. 15 in the course of which an order under s. 10-A could be made cannot be ascertained on the materials available before us. The High Court had decided that the proceeding under s. 15 was not valid, because there was no definite information with the Excess Profits Tax Officer and on that account proceeding under s. 10-A was not valid. It has been assumed that there was a pending proceeding under s. 15 in the course of which an order under s. 10-A was made. Expression of that opinion of the High Court is challenged. We are of the view that in the interests of justice, it is necessary that a supplementary statement of the case should be called for on the question whether there was any proceeding pending under s. 15. On the question whether the proceeding under section 15 if pending was valid, we express no opinion at this stage.

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We direct the Tribunal to submit a supplementary statement of the case on the question whether the proceeding under

- A s. 10-A was started in the course of assessment or re-assessment proceeding commenced under s. 15. The supplementary statement to be submitted to this Court within three months from the date on which the papers reach the Tribunal. At this stage we express no opinion on the question whether the High Court was right in holding that the proceeding under s. 15 was not competent.
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[The following judgment was delivered after the Tribunal submitted the supplementary statement as directed.]

- C **Grover, J.** In these appeals this Court by an order dated January 21, 1971 directed the Income tax Appellate Tribunal to submit a supplementary statement of the case on the question whether the proceedings under s. 10-A were started in the course of assessment or reassessment proceedings commenced under s. 15 of the Excess Profits Tax Act 1940, hereinafter called the "Act".

- D The facts set out in the supplementary statement of the case may be recapitulated. M/s. Gurbux Rai Harbux Rai hereinafter referred to as the "assessee" is a registered firm carrying on business in piece goods. During the chargeable accounting period July 4, 1943 to June 21, 1944 and June 22, 1944 to July 10, 1945 Gurbux Rai and Harbux Rai (each representing his joint family) were the two partners of the assessee with equal shares.
- E In the proceedings for assessment of tax under the Act for the above two chargeable accounting periods the assessee informed the Tax Officer that the joint family of Gurbux Rai had been partitioned and there had been a reconstitution of the business of partnership with effect from July 4, 1943. According to the assessee the constitution of the firm after the partition was that
- F in the firm at Kanpur the former two partners were interested, their share being equal but in the business of the firm at Farrukhabad there were three partners, namely, Harbux Rai with a share of 8 annas, Mst. Chameli Devi with a share of 4 annas and Gopal Das with a share of 4 annas. In assessing tax under the Indian Income Tax Act, 1922 for the assessment year 1944-45
- G corresponding to the accounting year from October 19, 1942 to October 7, 1943 the Income Tax Officer held that the partition set up by Gurbux Rai could not be accepted as the same had been made to avoid proper incidence of taxation. He, therefore, assessed the income as that of the assessee and not as the income of a separate firm. The excess profits tax being consequential upon the income tax assessment, the Excess Profits Tax Officer
- H assessed the entire income of the two businesses at Kanpur and Farrukhabad in the hands of the assessee. Against the order passed by the Income Tax Officer in the income tax assessment

the assessee appealed to the Assistant Commissioner. On October 10, 1947, that Officer held that only partial partition had been effected in the joint family of Gurbux Rai. This is what he held :—

“ that partial partition in respect of movable property of Gurbux Rai was effected on a date somewhere near Asadh Samwat at 2000, from which date Farrukhabad business was conducted by a separate firm consisting of Harbux Rai, Mst. Chameli and Gopal Das.”

The income tax assessments were consequently modified for the two assessment years 1944-45 and 1945-46. The Excess Profits Tax Officer also started proceedings under s. 10-A of the Act by serving a notice dated February 3, 1951 on the assessee. The notice required the assessee to show cause why proper adjustment should not be made on the footing that the main purpose of the partial partition of the family of Gurbux Rai was the avoidance of the excess profits tax liability. By an order dated February 21, 1951 passed under s. 15 of the Act the Excess Profits Tax Officer modified the original assessment for both the chargeable accounting periods. In the revised assessment he included the income of the branch shop at Farrukhabad in the total income of the assessee for the purpose of assessment of Excess Profits tax.

The assessee went up in appeal against the orders of the Excess Profits Tax Officer to the Appellate Assistant Commissioner. These appeals were dismissed. The Appellate Tribunal confirmed the order of the departmental authorities. Thereafter the Tribunal referred the following two questions of law to the Allahabad High Court under s. 21 of the Act read with s. 66(1) of the Income Tax Act, 1922.

- (1) “Whether on the facts and in the circumstances of this case there was any definite information within the meaning of s. 15 by virtue of which the Excess Profits Tax Officer was competent to reopen the excess profits tax assessments ?
- (2) Whether in the circumstances of this case, the Excess Profits Tax Officer was competent to apply the provisions of s. 10-A and make necessary adjustments in pursuance thereto in the revised assessment under s. 15.”

The High Court answered both the questions in the negative.

Pursuant to our previous order dated January 21, 1971 the Tribunal has submitted the necessary material to enable us to give our decision. It has stated that the notices under s. 15 of

- A** the Act were issued for both the chargeable accounting periods and they were served on the assessee on February 3, 1951. According to these notices the assessee was called upon to show cause why provisions of s. 10A of the Act should not be invoked. The assessee submitted a written reply objecting to the applicability of s. 10-A. The Excess Profits Tax Officer obtained approval of the Inspecting Assistant Commissioner and passed an order under s. 10A on February 21, 1951. According to the Tribunal the proceedings under s. 15 were pending for both the chargeable accounting periods when the proceedings under s. 10A of the Act were started by the Excess Profits Tax Officer. It has been added that the notices under s. 15 and under s. 10 were issued on the same date, namely, February 3, 1951 but from the order-sheet it was clear that notice under s. 15 was issued first and the notice under s. 10A was issued thereafter.

- It is abundantly clear from the annexures to the supplementary statement of the case that on February 3, 1951 the assessee's counsel and K. S. Kalra and Gurbux Rai were present before the Excess Profits Tax Officer. Receipt of a notice alleged to have been issued under s. 10A of the Act previously was denied by them. The Tax Officer proceeded to record the following order :

“Issue notice u/s 15 requiring the return to be filed within 60 days of the date of service.

E Sd. E.P.T.O.

Also issue notice u/s 10A as per draft.

Sd. E.P.T.O.”

- The order-sheet further shows that on February 15, 1951 reply to the notice was received along with the return and it was directed that the same be placed on the record. It is common ground that no objection was taken in this reply that the notice under s. 15 had not been issued before the notice under s. 10A was issued.

- Section 15 of the Act provides that if in consequence of definite information which has come into the possession the Excess Profits Tax Officer he discovers that profits of any chargeable accounting period have escaped assessment, etc., he may at any time serve a notice containing all or any of the requirements which may be included in a notice under s. 13 and may proceed to assess or reassess the amount of such profits liable to excess profits tax. The power so conferred can be exercised in the course of the original assessment or reassessment. It is essential, according to the law laid down by this Court, that before any action can be taken or an order made under s. 10A there should be a proceeding which should be pending for assessment or reassessment of

excess profits tax. In other words in the present case before the provisions of s. 10A could be applied the Tax Officer was bound to initiate proceedings under s. 15. According to what the Tribunal has said in the supplementary statement of the case the proceedings under s. 15 had been commenced before action was taken under s. 10A. We have already referred to the orders which were made on February 3, 1951. It is true that the orders to issue notices under s. 15 and s. 10A were made at the same time but the notice under s. 15 was ordered to be issued first. Thus the Tax Officer had initiated proceedings under s. 15 before the notice was issued under s. 10A and it would be a mere hyper-technicality to say that simply because the notice under s. 15 and the notice under s. 10A were issued on the same date the requirements of the law were not satisfied. The finding of the Tribunal also is to the effect, as noticed before, that proceedings under s. 15 were pending when the proceedings under s. 10A were taken. The second question, therefore, had to be answered against the assessee and in favour of the Revenue.

On the first question the submission of Mr. M. C. Chagla for the assessee is that there was no definite information which had come into possession of the Tax Officer from which it could be said that he had discovered that profits of the relevant chargeable accounting period had escaped assessment. We are unable to agree. The Appellate Assistant Commissioner had made an order on October 10, 1947 in the proceedings relating to the assessment of income tax of the assessee that there had been only a partial partition in respect of the movable property (business) of Gurbux Rai. That was certainly an information which came into the possession of the Excess Profits Tax Officer not because of any change of opinion by himself but because of the decision of the Appellate Assistant Commissioner in the income tax proceedings. This Court has consistently held that the Income Tax Officer would have jurisdiction to initiate proceedings under s. 34 (1)(b) of the Income Tax Act, 1922, which is *in pari materia* with s. 15 of the Act if he acted on information received from the decision of the superior authorities or the court even in the assessment proceedings. (See *R. B. Bansilal Abirchand Firm v. Commissioner of Income Tax, M.P.*⁽¹⁾ and *Assistant Controller of Estate Duty, Hyderabad v. Nawab Sir Osman Ali Khan Bahadur, H.E.H. The Nizam of Hyderabad & Others.*⁽²⁾) It has next been urged that the alleged object of having a partial partition, namely, of reducing the liability to excess profits tax had never been examined by the Appellate Assistant Commissioner in the Income tax proceedings and therefore it could not be said that there had been escapement of income as a result of information

(1) 70 I.T.R. 74.

(2) 72 I.T.R. 376

- A** derived from his order. The Appellate Assistant Commissioner apparently did not go into that question because the proceedings before him related to assessment of income tax. Section 10A of the Act is a special provision which deals with the transactions designed to avoid or reduce liability to excess profits tax. The information which came into possession of the Excess Profits Tax
- B** Officer of partial partition having been effected was relevant for the purpose of s. 15 and once he had initiated proceedings under that section he was perfectly competent and had jurisdiction to examine for the purpose of s. 10A whether partial partition had been effected for avoidance or reduction of liability to excess profits tax. The first question, therefore, should have been
- C** answered against the assessee and in favour of the Revenue.

The appeals succeed and are allowed with costs. The answers to both the questions are returned in favour of the Revenue. One hearing fee.

V.P.S.

Appeals allowed.