Commissioner of Income-Tax, Andhra Pradesh

Vs

Bhikaji Dadabhai & Co.

Civil Appeal No. 434 of 1960

(J. C. Shah, M. Hidayatullah, J. L. Kapur JJ)

22.02.1961

JUDGMENT

SHAH, J. –

M/s. Bhikaji Dadabhai & Co - hereinafter called the assessees - owned an oil mill at Khammamath in the area of the former State of Hyderabad. For the year of assessment Fasli 1357 (October 1,1946, to September 30, 1947) the assessees returned an income of Rs. 50,384. The Income-tax Officer found that the books of account maintained by the assessees were unreliable and by his order dated February 10, 1950, he assessed their total income at Rs. 1,63,131. The Income-tax Officer had, before finalising the assessment, issued on December 22, 1949, a notice to the assessees under section 40 of the Hyderabad Income-tax Act requiring them to show cause why penalty should not be imposed upon them and by order dated October 31, 1951, directed the assessees to pay by way of penalty Rs. 42,000 in addition to the tax. This order was confirmed in appeal by the Appellate Assistant Commissioner. In appeal, the Income-tax Appellate Tribunal observed that by virtue of the provisions of section 13(1) of the Indian Fi

> "The Income-tax Officer may have been in error in imposing the penalty, but there was no appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner. Section 42(1) of the Hyderabad Income-tax Act gives a right to an assessee to appeal if he objects to an order under section 40 made by an Income-tax Officer. Section 40 ceased to have effect. There can, therefore, be neither an order under section 40 nor an appeal against the order if an order has been wrongly made. The remedy of the assessee lies elsewhere, and not by way of an appeal to the Appellate Assistant Commissioner",

and on that view dismissed the appeal. At the instance of the assessees, the following questions were referred by the Tribunal to the High Court of Judicature at Hyderabad :

> "1. Whether on October 31, 1951, the Income-tax Officer, Warrangal Circle, had the power to impose a penalty under section 40(1) of the Hyderabad Income-tax Act in respect of the assessment for the year 1357F. ?
>
> 2. Whether the assessee had a right to appeal against the order of the Income-tax Officer imposing the penalty ?
>
> 3. If the Appellate Assistant Commissioner did not have jurisdiction to hear the appeal, whether the order of the Appellate Assistant Commissioner is a nullity and,

> therefore, the order of the Income-tax Officer erroneous, though it may stand until lit is set aside by a competent authority ?"

The High Court answered the first and the third questions in the negative and the second question in the affirmative. The High Court observed that the Appellate Assistant Commissioner had power to entertain the appeal in which the question of the power entertain the appeal in which the question of the power of the Income-tax Officer to impose a penalty was challenged, and the decision of the Appellate Assistant Commissioner was not without jurisdiction. The High Court also proceeded in a petition separately filed by the assessees to direct the Income-tax Appellate Tribunal to set aside the order of the Income-tax Officer imposing a penalty as a logical consequence of the view the Tribunal had taken regarding the absence of power in the Income-tax Officer to levy a penalty. Against the order passed by the High Court, this appeal with special leave is preferred.

We are in agreement with the High Court that the appeal to the Appellate Assistant Commissioner was competent. Even if the Income-tax Officer committed an error in passing the order imposing penalty because the conditions necessary for invoking that jurisdiction were absent, an appeal against his order on the ground that he was not competent to pass the order did lie to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner is under the Act constituted an appellate authority against certain orders of the Income-tax Officer, and exercise of that jurisdiction is not made conditional upon the competence of the Income-tax Officer to pass the orders made appealable. The Appellate Assistant Commissioner had as a court of appeal jurisdiction to determine the soundness of the conclusions of the Income-tax Officer both on questions of fact and law and even as to his jurisdiction to pass the order appealed from.

We are, however, unable to agree with the High Court that because of the repeal of the Hyderabad Income-tax Act by the Finance Act, 1950, the power to impose a penalty in respect of the years preceding the date of repeal was lost. The State of Hyderabad merged with the Indian Union during the pendency of the proceedings before the Income-tax Officer. Thereafter the Indian Legislature enacted the Finance Act, 1950, which by sub-section (1) of section 13 in so far as it is material provided :

> "If immediately before the 1st day of April, 1950, there is in force in any Part B State....any law relating to income-tax or super- tax....that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922....."

Manifestly, by section 13, the Hyderabad Income-tax Act ceased to have effect as from April 1, 1950. But the operation of the Act in respect of levy, assessment and collection of income-tax and super-tax in respect of periods prior thereto for which liability to income-tax could not be imposed under the Indian Income-tax Act, 1922, was saved. The Judicial Committee of Privy Council in Commissioner of Income-tax v. Khemchand Ramdas observed :

> "One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer."

The Hyderabad Income-tax Act also used the expression "assessment" in different senses. In certain

sections, for instance sections 31 and 39, the expression is used as in the sense of mere computation of income; in other sections it is used in the sense of determination of liability and in certain other sections in the sense of machinery for imposing liability and procedure in that behalf. By the Finance Act, 1950, the Hyderabad Income-tax Act was expressly kept alive in respect of periods which include the assessment year in question for purpose of levy, assessment and collection of income-tax. The High Court expressed the view that the word "assessment" in section 13(1) included the whole procedure for imposing liability upon the taxpayer but not to the procedure for imposing a penalty. They thought that the Hyderabad Income-tax Act dealt with liability to pay income-tax and penalty in distinct provisions, both relating to imposition and recovery and that if the Legislature had intended to keep alive the H

The High Court proceeded upon the view that by saving the Hyderabad Income-tax Act for the purpose of levy, assessment and collection of income-tax, the entire procedure for imposing liability to pay tax and for collection of tax was saved, but penalty not being tax, provisions relating to imposition of and collection of penalty did not survive the repeal of the Hyderabad Income-tax Act.

This court considered in Abraham v. Income-tax Officer the question whether the expression "assessment" as used in section 44 of the Indian Income-tax Act included the procedure for imposition of penalty in respect of a dissolved firm and it was observed :

> "The expression 'assessment' used in these sections (provisions of chapter IV of the Indian Income-tax Act) is not used merely in the sense of computation of income and there is in our judgment no ground sense of computation of income and there is in our judgment no ground for holding that when by section 44 it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under section 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof.... By section 28 the liability to pay additional tax which is designated penalty is imposed in view of the dishonest or contumacious conduct of the assessee."

This court regarded penalty as an additional tax imposed upon a person in view of his dishonest or contumacious conduct. It is true that under the Hyderabad Income-tax Act, distinct provisions are made for recovery of tax due and penalty, but that in our judgment does not alter the true character of penalty imposed under the two Acts. Nor are we able to agree that because in respect of the Sea Customs Act, 1878, the Indian Tariff Act, 1934, the Land Customs Act, 1924, the Central Excise and Salt Act, and the Indian Post Offices Act, 1989, which were extended to the whole of India by section 11 of the Finance Act, 1950, and the provisions corresponding thereto were repealed by the proviso, and it was expressly provided that the previous operation of the corresponding law or any penalty, forfeiture or punishment ordered in respect of an offence committed against any such penalty forfeiture or punishment or any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such

The appeal will, therefore, be allowed and the answer to the first question will recorded in the affirmative. On the view taken by us, it is unnecessary to pass any orders on the petition under article 226 of the Constitution which was presented to the High Court. The appellant will be entitled to his costs of the appeal in this court and High Court.

Appeal allowed.

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