

Income-Tax Officer, Kolar Circle, and Another

Vs

Seghu Buchiah Setty

Civil Appeals Nos. 221 and 222 of 1963

(A. K. Sarkar, J. C. Shah, M. Hidayatullah JJ)

11.03.1964

JUDGMENT

SARKAR J. –

The question in these two appeals is whether certain proceedings for the recovery of tax from the assessee under the Income-tax Act, 1922, were invalid and should be quashed as the assessment orders on which they were based had been revised in appeal. The High Court of Mysore held them to be invalid and quashed them. The revenue authorities have now appealed to this court against that decision.

I think it will be helpful to set out the facts chronologically. The tax sought to be realised became due under two assessment orders passed by an income-tax Officer on March 23, 1955, in respect of the years 1953-54 and 1954-55 finding that the assessee's income for the earlier year was Rs. 61,000 on which a tax of Rs. 19,808-1-0 was due and that for the other year was Rs. 1,21,000 creating a tax liability of Rs. 66,601-3-0. Notices of demand under section 29 of the Act were issued in respect of these dues. The assessee filed appeals to the Appellate Assistant Commissioner against the assessment orders but did not pay the tax as demanded by the notices. On such failure to pay, the Income-tax Officer some time in September, 1955, sent certificates to the Deputy Commissioner, Kolar, under section 46(2) of the Act for recovery of the tax as arrears of land revenue and the latter in the course of the same month attached various properties of the assessee under the Revenue Recovery Act. Thereafter, on December 1

The contention of the assessee is that in view of the orders of the Appellate Commissioner, the earlier orders, notices of demand and certificates must be deemed to have been superseded and the attachments therefore ceased to be effective from the date of the appellate orders and could no longer be proceeded with. He contends that the Income-tax Officer had to start afresh by serving a new notice of demand and taking the necessary further steps afresh by serving a new notice of demand and taking the necessary further steps thereon for realisation of the tax which then was due only under the appellate orders. These contentions were accepted by the High Court. The revenue authorities, on the other hand, contend in short that the Act does not provide for any such supersession.

Now, the scheme of the Income-tax Act for realisation of moneys becoming due under it appears to be this. The tax becomes due on the making of an assessment order or an order imposing penalty or requiring interest to be paid. Thereafter a notice of demand in respect of that amount has to be served. This is provided by section 29 which is set out below.

"29. When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

The form mentioned contains directions as to the time within which the person to whom and the place at which the payment is to be made.

The consequences that follow a non-compliance with a notice of demand served under section 29 are set out in section 45 which so far as material is in the following term :

"45. Any amount specified as payable in a notice of demand under subsection (3) of section 23A or under section 29 or an order under section 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of."

It will be noticed that this section is not confined to the effect of a failure to comply with the terms of a notice of demand issued under section 29 but makes the same consequence arise on the failure to carry out the terms of a notice under section 23A(3) and orders under sections 31, and 33. That consequence is that the assessee is to be deemed to be in default. It is after an assessee is so in default that coercive processes for realisation of the amount due start. Provision for this is made in section 46 to which I will immediately come. Before doing so, however, I wish to observe that section 45 gives an Income-tax Officer on an appeal being filed a discretion to treat an assessee as not in default. An argument has been founded on this aspect of the section and to it I will later refer.

Passing on now to section 46, it will be enough for the purpose of these appeals to refer only to subsection (2) of that section. This provides that "the Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue". It was under this provision that in the present case the Income-tax Officer sent the certificates to the Deputy Commissioner and the latter effected the attachment thereafter under the Revenue Recovery Act.

Now there is no dispute that all steps taken in the present case by the revenue authorities were valid when taken for the appellate orders had not till then been made. The only question is as to the effect of the appellate orders. It is contended on behalf of the revenue authorities that the Act does not provide that the consequences of a default incurred under the Act does not provide that the consequences of a default incurred under the Act cease to be available to the revenue authorities for realisation of the amount due in case the order which was the basis of the default was later revised in appeal. It is, therefore, said that those consequences are not affected by the revision of the order except where it is annulled and hence all notices and attachments remain in force and can be acted upon for recovering the tax due.

I am unable to agree with this proposition. It may be that the Act contains no express provision stating what would happen to the default already incurred when the order under which it was

incurred was later revised in appeal. But I think there is enough in the Act to indicate that in some of these cases at least the default comes to an end. If it does, it seems to me to follow inevitably that the consequences of the default also disappear.

I would first refer to section 45 which says that when an order under section 31 specifies an amount as payable and the amount is not paid within the time, at the place and to the person mentioned on the order or where no time is mentioned in it within the time specified in the section itself, the assessee so failing to pay shall be deemed to be in default. The order under section 31 as payable in his order and mentions the time when, the place where and the person to whom the payment is to be made then non-compliance with that order would create a default. Now this order is made in an appeal from an order made by the Income-tax Officer. Suppose there is already a default as a result of non-compliance with a notice under section 29 given in respect of the Income-tax Officer's order. As clearly there could not be two defaults for there was one liability, the Act must in such a case be taken to have provided by necessary implication that the default incurred as a result of non-compliance with the notice to pay the

It was, however, said that the Act nowhere requires the appellate order to state the amount payable or to specify the time, when, the place where and the person to whom it is to be paid. That may be so but that does not affect what I have said. Section 45 clearly contemplates the appellate order setting out these things and there is nothing in the Act to prevent the Appellate Commissioner from setting them out. Since section 45 cannot be read as contemplating an impossibility, it must be held that the Appellate Commissioner may in his order specify the amount payable and state the other particulars about time of payment, etc. If he can do so, that would be enough for my present purpose and it is not necessary for it that the Act must in every case require him to do so. In case where the appellate order specifies an amount as payable, the Income-tax Officer's order must be deemed to have superseded.

One other argument to which I have to refer at this stage is that if the assessee's contention be correct, then the discretion given to the Income-tax Officer by section 45 not to treat an assessee in default becomes infructuous for then in every case on the making of the appellate order the default earlier incurred must disappear. This does not seem to me to put the position accurately. It is not in dispute that the filing of an appeal does not stay the operation of the original order. So if before the appellate order is made, the amount due is realised by the coercive process following the default, then those steps do not become invalid. There may be a liability to refund but none the less what was done was legal when done. Again it would, in my view, depend on the terms of the appellate order whether the earlier default was wiped out or not. If for example, the appellate order confirms the original order, then the default already incurred may not be affected. In both these cases the discretion to treat the

How then does the matter stand? It seems to me that the crux of it is the effect of the appellate order on the original order. If the original order has been destroyed or replaced by the appellate order, then the notice of demand and all other steps based upon the original order must be deemed to have become ineffective. In such a case the default earlier incurred must be taken to have disappeared and cannot support further action for recovery of any tax. Now the general proposition is that an original order merges in the appellate order : cf. *Madan Gopal Rungta v. Secretary to the Government of Orissa*. But in the present case, it is not necessary to rely on that proposition. Section 31(3) of the Act seems to me to make express provision on the subject. It states that in the case of an appeal from an order of assessment, which is the kind of order with which we are now concerned, the Appellate Commissioner may "(a) confirm, reduce, or enhance or annul the assessment, or (b) set

aside the assessment and direct

It may be that when an appellate order confirms the original order, the default earlier incurred and all steps taken pursuant thereto remain unaffected, for such an order may maintain intact the original order. Now it is not in dispute that when the appellate order annuls the earlier order, the default disappears. It is said that is because the debt ceases to exist. I do not quite follow this. It has never been questioned that the debt becomes due when demand is made under section 29 and section 45 of the Act: see *Doorga Prosad Chamaria v. Secretary of State*. Therefore if a debt is to cease to exist it must be because the source from which it sprang, namely, the original order, has been annihilated by the appellate order annulling it. In fact section 31(3)(a) contemplates an annulment of the original assessment order itself; the demand under section 29 or section 45 is not annulled directly by it. Therefore, in the case of an order of annulment under section 31 the original order of assessment is itself destroyed

I now come to an appellate order enhancing the assessment. With regard to it, it has not been disputed that a fresh notice of demand must issue. If this notice has to be in respect of the entire amount, then clearly the default earlier incurred for the smaller amount found due by the original order must have gone for the liability was one and there could not be two defaults in respect of it. But it was said that the notice has to be issued in respect of the enhanced amount only. Indeed in some of the cases cited at the bar it has been so said. I have very grave doubts about the correctness of this view. The notice of demand can only issue in respect of the amount due in consequence of an order. Unless, therefore, the appellate order specifies only the enhanced amount as due I do not see how a notice in respect of that amount can be issued under section 29. The appellate order has to specify an amount due. If it specifies the entire amount due including the enhancement, then it cannot be said that under it th

But assume I am wrong in this. Assume that an appellate order of enhancement may be confined to the amount of the enhancement only. Even so I am wholly unable to agree that the appellate order cannot specify the entire enhanced amount due. There is nothing in the Act to prevent this being done. When this is done then at least the original order and the notice must be deemed to have been put out of existence along with the default arising from the non-compliance with the latter and all its consequences.

That leaves only the case of an appellate order reducing the amount. It seems to me that it would be somewhat curious if in all other cases excepting the case of a confirmation, the appellate order destroys the original order it does not do so in the case of a reduction. An order confirming may be different for it confirms and, therefore, does not destroy. It has, however, been said that "If subsequently the demand is modified on appeal and the amount of the tax payable is reduced, all that happens is, the liability sought to be imposed by the notice of demand, in respect of the amount by which the assessment is in respect of the remainder which stands unaffected by the appellate order remains" and also that "...where a notice of demand has, in fact, been issued in respect of a larger amount, as determined by the assessment order, it has been issued even in respect of the smaller amount which is ultimately found to be the tax properly payable. That being so, the assessee was under an obligation to pay it b

The order of reduction must, in my opinion, necessarily have the effect of setting aside the original order as a whole. It does not simply strike out a few of the figures appearing in the original order. That would really be a case of rectification for which provision is made in section 35 of the Act. What an appellate order does in a case of reduction is, as in the present case, to go into all the

figures and arrive afresh at the assessable income which replaces the amount of the income arrived at by the Income-tax Officer. Therefore it seems to me that in all cases of an appellate order reducing the assessment the original order goes and if it goes, of course, the notice of demand also falls to the ground and the default based thereupon also ceases to be default any more. Suppose the appellate order itself stated that a smaller amount of tax was payable after it had reduced the figure of the assessable income at which the Income-tax Officer had arrived. Indeed I cannot imagine how else it can be expressed.

Therefore, I think that on the Income-tax Officer's order being revised in appeal, the default based on it and all consequential proceedings must be taken to have been superseded and fresh proceedings have to be started to realise the dues as found by the revised order.

Coming now to the present case, in view of the order made in it, it seems to me impossible to contend that the original default continued. What happened in the present case was that on December 17, 1955, the Appellate Commissioner reduced the assessable income of the assessee as found by the Income-tax Officer by a larger sum and directed him to recompute the tax due on the basis of the assessable income stated in the appellate order. The assessee was not informed about the recomputed amount of tax till February 14, 1956. The assessee had not paid the tax mentioned in the Income-tax Officer's order. If he had done that then he would under the express terms of the appellate order have become entitled to a refund. What then was the position between these two dates? If the revenue authorities are right, then the assessee continued to be in default even after the appellate order. But what was the amount in respect of which he was so in default? Clearly he could not have continued to be in default in respect of t

If the effect of an appellate order reducing the assessment as in the present case did not wipe out the original order, a most anomalous situation would, in my view, arise. Under section 46(1) of the Act after a default has been committed in terms of section 45(1) the Income-tax Officer may impose a penalty not exceeding the amount of the tax due in respect of which the default has occurred. This penalty may be recovered in the same way as the tax due, that is to say, by a notice under section 29 and thereafter by a certificate issued under section 46(2). Now suppose the penalty for the full amount of the tax found due by the Income-tax Officer has been imposed and thereafter the appellate order reduces the amount of the tax. What happens to the order of penalty then? Obviously, it does not automatically stand reduced to the reduced amount of the tax. It would again be absurd if the penalty could be recovered for the full original amount. The only sensible view to take in such a case would be that the order

For these reasons I have come to the conclusion that the decision of the High Court was right and I would, therefore, dismiss the appeals.

HIDAYATULLAH J. –

These appeals by special leave arise from a common order in two writ petitions under article 226 of the Constitution passed by the High Court of Mysore on April 16, 1959. The Income-tax Officer, Kolar, and the Commissioner of Income-tax, Bangalore, are the appellants before us. The assessee, Seghu Buchiah Setty, who is the respondent, is a merchant of Srinivaspur, Kolar District. The appeals relate to the assessment years 1953-54 and 1954-55 in respect of which assessments were made under section 23(4) of the Income-tax Act. For the assessment year 1953-54, the assessee's income was estimated to be Rs. 61,000 and the tax levied was Rs. 19,808-1-0. For the second year, his income was estimated to be Rs. 1,21,000 and the tax levied was Rs. 66,601-3-0. The assessee

applied under section 27 of the Income-tax Act for the cancellation of these assessments, but his applications were rejected. It was stated before us that other proceedings were pending in this behalf; but I am not concerned with th

On December 17, 1955, the Appellate Assistant Commissioner, "A" Range, Bangalore, before whom the assessments were challenged by appeal, passed his order and assessed the income for the two years to be Rs. 28,000 and Rs. 46,000 respectively. The Income-tax officer did not issue any fresh notices of demand under section 29 of the Act but wrote a letter demanding the reduced tax for the two years which now stood reduced to Rs. 4,215-9-0 and Rs. 13,346-8-0 respectively. It is significant that the reduction in the tax was from eighty-tax thousand rupees to seventeen thousand rupees. It appears that the assessee took further appeals to the Income-tax Appellate Tribunal and the matter was said to be pending there.

The assessee then applied to the High Court under article 226 of the Constitution for quashing the old certificates issued under section 46(2) by the Income-tax Officer on the ground that as no fresh notices of demand were issued against him in respect of the reduced tax, he was not in default. The High Court accepted this contention and the necessary writs quashing the proceedings were issued. After the decision of the High Court, fresh notices of demand for the reduced tax were issued to the assessee on May 8, 1959, and those proceedings were also pending. The preliminary objection which is based on the pendency of the other proceedings and particularly the last fact is really of great force, because these appeals do not now appear to serve any tangible purpose. However, the appeals were heard at length and I must express my decision on the point mooted before us.

In these appeals the department contends that the original notices of demand issued in September, 1955, had not become inoperative after the order of the Appellate Assistant Commissioner. The reason advanced is that there is nothing in the Income-tax Act which requires that a fresh notice of demand must issue every time the amount of tax is reduced in appeal. It is pointed out that if a previous notice of demand is not complied with, the assessee becomes a defaulter and it is submitted that he continues to be defaulter, in respect of the balance. It is however conceded that where the Appellate Assistant Commissioner increases the assessment, a fresh notice of demand must issue. It is urged that proceedings for recovery which may have commenced are likely to become useless if fresh notices were compulsory, and it is submitted that all that is necessary is to inform the assessee and the Collector by letters what the reduced amount is and as the default still continues, the reduced amount can straight way be re

The High Court accepted the assessee's contention following a decision of the Calcutta High Court in Metropolitan Structural Works Ltd. v. Union of India. The appellants contend that the true view of the law is contained in a later decision of the Calcutta High Court reported in Ladhuram Taparia v. D. K. Ghosh, where the earlier case was explained. The appellants rely further on Municipal Board, Agra v. Commissioner of Income-tax, Auto Transport Union (Private) Ltd. v. Income-tax Officer, Alwaye and Hiralal v. Income-tax Officer for support.

In Metropolitan Structural Works Ltd. v. Union of India, there were successive demand notices after the Appellate Assistant Commissioner and the Tribunal reduced the assessment and the Income-tax Officer finally sent a certificate under section 46(2) of the Act. The assessee in that case, relying upon the seventh sub-section of section 46, claimed that the proceedings were barred as according to it, the period of one year could only be calculated from the last day of the financial year in which demand was made and this could only be the first demand. It was contended by the assessee that the Act did not provide that a fresh notice should issue after revision of assessment, though it was

admitted that there was no prohibition. Chakravarti C. J. and Lahiri J. observe :

"The real point, however, is whether a second or a third notice of demand is at all permissible under section 29, even when an assessment is altered in a first or a second appeal. It appears to me that the necessity of issuing a fresh notice of demand in such circumstances is beyond argument."

The learned Chief Justice gave illustrations of those cases in which the earlier notice becomes "inappropriate". Addressing himself to the necessity of new notice, the learned Chief Justice observe :

"In my view the answer to that question can only be the affirmative."

The difference between the words "in consequence of any order" used in the Act and "in consequence of any assessment order in pursuance of this Act" which, he pointed out, could have easily been used, was next stressed and he held that the orders of the Appellate Assistant Commissioner and the Tribunal answered the former description. He expressed in conclusion thus :

"If so, when there is some tax due in consequence of an order passed by the Appellate Assistant Commissioner or in consequence of an order passed by the Appellate Tribunal, a clear occasion arises under the words of the section to serve a notice of demand upon the assessee. That such fresh notice should be issued when the assessment is altered is but common sense and I see no reason to construe the section against reason and against the actual necessities of realisation."

In the next case, *Ladhuram Taparia v. D. K. Ghosh*, the facts were the converse. There a demand notice was issued and the tax was reduced. The assessee contended that there should be a fresh notice of demand before he was deemed to be in default. Chakravarti C.J. and Das Gupta J. held that on reduction of assessment nothing further was required beyond an intimation to the assessee and the Collector of the reduction of the tax. The reason given was that the demand in respect of the excess stood "eliminated" and the demand for the balance remained. It was held that a case of enhancement was different and it needed a fresh notice of demand. It was however not pointed out whether the fresh demand should be for the excess amount or the whole of the amount. Nor was it shown why a letter to the assessee and the Collector would not do in that case also. In either case, speaking arithmetically, a portion of the demand is saved, but speaking legally, the demand notice, to quote the words of the earlier judgment, "b

Whether the learned Chief Justice was right on the first occasion or on the second can only be said after discussing the relative sections of the Income-tax Act, but this much I must say (and I say it with considerable hesitation and diffidence since I have always held the learned Chief Justice in high esteem) that he has not been able to get clear of the words used by him on the earlier occasion. It seems anomalous that if the tax is increased from Rs. 10,010 a fresh notice of demand must go, that is to say the earlier default is wiped off; but if it is reduced from Rs. 10,010 to Rs. 10 a fresh notice is not required and the assessee must be deemed to be in default for Rs. 10 with all the evil consequences of default because he did not pay an extra ten thousand rupees with the ten rupees. But it may be said, there is no room for logic and mathematics if the Act so requires and the true answer can only be furnished by what the law requires. Before dealing with the pertinent sections to determine how the matter

It is contended that there is no provision that a second or third notice of demand must issue. There is no need that the Act must expressly authorise the issue of fresh notices of demand. Even if such a power is not expressly included, it flows from section 14 of the General Clauses Act under which a power can be exercised as often as the occasion demands. I am, however, of the opinion, that (except in cases of de minimis) the Act does contemplate that a fresh notice of demand shall issue. There are two reasons for it. The first is the language of section 29 and the other is the consequences following the issuance of a notice of demand. I shall deal first with the second ground.

After the demand is made, the tax, penalty and interest become a debt due to the Government. This was decided a long time ago by the Privy Council in *Doorga Prosad v. Secretary of State*. Further, by issuing a notice of demand, the period of limitation for appeals under section 30 of the Act starts in many cases. Further still, when the notice of demand is not complied with, the assessee can be treated as a person in default and he is liable to pay a penalty equal to the tax debt under section 46(1) of the Income-tax Act. Lastly, on the failure of the assessee to pay after a notice of demand is issued, the recovery proceedings can be started within a time limit and the amount of tax can be stated within a time limit and the amount of tax can be treated as an arrear of land revenue.

It follows, therefore, that the notice of demand is vital document in many respects. Disobedience to it makes the assessee a defaulter. It is a condition precedent to the treatment of the tax as an arrear of land revenue. It is the starting point of limitation in two ways and the breach of obedience to the notice of demand draws a heavy penalty. The notice of demand which is issued must be in a form prescribed by rule 20 and the form includes the following particular : it shows the amount which has to be paid and indicates the person to whom, the place where and the time within which it has to be so paid. Compare with it section 45 of the Income-tax Act which provide :

"Any amount specified as payable in a notice of demand..... under section 29 or an order under section 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of :"

(Proviso and Explanation omitted).

From this section, it follows that an assessee is deemed to be in default if he disobeys either a notice of demand under section 29 or an order under section 31 and 33. The contents of the notice of demand may be included in these orders and the order then serves the purpose of a notice of demand as well. In both cases, if time is not mentioned, the assessee must pay the tax on or before the first day of the second month following the date of the service of the notice or order. Once a default is incurred, it continues and the filing of an appeal does not save the assessee from the default. The Income-tax Officer can start and continue the proceedings for recovery of the tax notwithstanding the filing of the appeal. It is however to be seen that he has been given the power to treat the assessee as not in default as long as the appeal is undisposed of. This power is conferred, because section 46(1) provide :

"When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that,.... a sum not exceeding that amount shall be

recovered from the assessee by way of penalty."

To save an assessee from penalty, the Income-tax Officer may treat him as not in default but if he does not, he is within his rights.

Now take a case in which an assessee is considered to be in default after a notice of demand is served. Assume that the tax which is due is Rs. 10,010. The Income-tax Officer, can, in his discretion, add another Rs. 10,010 by way of penalty and issue a certificate against him for recovery as arrears of land revenue of a sum of Rs. 20,020. Suppose the assessment is then reduced and his tax liability is found to be Rs. 10. To say that the old proceedings for the recovery of Rs. 20,020 can still be pursued in respect of Rs. 20 and the petty amount recovered as arrears of land revenue, when, if a notice of demand for Rs. 10 were sent, the assessee would have paid the sum readily, is to make the law operate very harshly without any advantage. To say again that the assessee whose tax is enhanced must receive a fresh notice of demand because the old notice becomes inappropriate is to make the lot of person whose tax is reduced worse than that of a person whose tax is increased. At least the contumacy of the latter

It is said that all that is necessary is that the Income-tax Officer should write a letter informing the assessee that the tax is reduced from Rs. 10,010 to Rs. 10. The question is, why not send him a fresh notice of demand? If there is no provision in the Income-tax Act to send a fresh notice there is none authorising the sending of letters. No doubt, the old proceedings for recovery of the tax might become out of date and inappropriate, but it is one thing to use coercion to recover an amount which the assessee did not but probably could not pay, and another to recover an amount which the assessee could and would pay readily. However, if the law requires that a notice of demand need not go, that would be the end of the matter; but, in my opinion, section 29 in its terms is extremely clear and indicates that a notice of demand must always issue. It read :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

The learned Chief Justice of the Calcutta High Court, if I may say respectfully, was perfectly right in pointing out its meaning in his first case. I cannot add to what he said and I adopt all he said. But I would add a few words. The mandatory part of the section is quite. "The Income-tax Officer shall serve a notice of demand upon the assessee" are emphatic words and the earlier part show that he has to do it when tax is due in consequence of "any order". Any order means not only an order passed by himself, but also an order passed by reason of the success of an appeal which the assessee may file and in which the old assessment is set aside. In view of the consequences that ensue, it is clear to me that when an assessment is gone through a second time and the amount of tax is reduced, the Income-tax Officer must intimate to the assessee the reduced amount of tax and make a demand and give him an opportunity to pay before treating him as a defaulter. This is incumbent because the assessment resulting in the

It is said that the Income-tax Officer can send a letter but the law says that he "shall serve upon the assessee a notice of demand in the prescribed form." When the law requires that a notice of demand should issue, the mode of compliance by a letter is excluded. It may be that the letter is a good substitute for a notice of demand but the section demands that it should be "in the prescribed form". If a letter is to be written, why not a notice of demand? In other words, when the assessment is

altered, whether it is reduced or it is increased, by reason of any order under the Act, it is the duty of the Income-tax Officer to issue a notice of demand in the prescribed form and serve it upon the assessee. The learned Chief Justice of the Calcutta High Court clearly was of the view in the first case that there was only one answer to the question and I respectfully agree with him. He could only depart from his earlier view by finding fault with his drafting of section 45. I regret I cannot agree with him there.

I would therefore dismiss these appeals and all the more readily because a fresh notice of demand has issued in this case. If it is disobeyed, the Income-tax Officer, amend it and bring it in line with the tax now demandable and return it to him for continuing the recovery proceedings.

I would dismiss the appeals but in the circumstances of the case, I would make no order about costs;

SHAH J. –

The Income-tax Officer, Kolar Circle, Kolar, assessed Sehgu Bunchiah Setty - respondent in this appeal - to income-tax under section 23(4) of the Indian Income-tax Act, 1922, for the year 1953-54 on an estimated income of Rs. 61,000 and for the year 1954-55 on an estimated income of Rs. 1,21,000 and served notices of demand under section 29 of the Act for the tax due under the two orders of assessment. On the respondent failing to comply with the notices of demand within the period specified, the Income-tax Officer treated the respondent as in default and sent certificates under section 46(2) of the Act to the Deputy Commissioner, Kolar, for recovery of the tax determined by the orders of assessment. The Deputy Commissioner attached certain properties belonging to the respondent. In appeals filed by the respondent against the orders of assessment the Appellate Assistant Commissioner reduced the income assessed for the year 1953-54 to Rs. 28,000 and for the year 1954-55 to Rs. 46,000. The Income-tax

The question which falls to be determined in this appeal is about the legal effect of the reduction of the assessable income by the order of the Appellate Assistant Commissioner on the notices of demand previously issued by the Income-tax Officer. The respondent contends that by the modifications made in the orders of assessment the notices of demand issued by the Income-tax Officer must be deemed cancelled or superseded and he cannot be regarded as in default unless fresh notices of demand are issued by Income-tax Officer must be deemed cancelled or superseded and he cannot be regarded as in default unless fresh notices of demand are issued by Income-tax Officer specifying the amount payable pursuant to the appellate order. The respondent says that there was at the material time no outstanding demand notice or order specifying the amount payable, failure to comply with which may be regarded as constituting a default. The respondent strongly relies upon the observations made by Chakravarti, C.J. in his judgment

The respondent therefore submits that an order of the Appellate Assistant Commissioner in appeal not only supersedes the order of assessment against which the appeal is carried, but also the notice of demand issued by the Income-tax Officer and all proceedings taken for recovery of tax in pursuance of the notice of demand and, therefore, default which has resulted from the failure to comply with the notice of demand becomes inoperative when the Appellate Assistant Commissioner passes his order in appeal against the order of assessment, whether such order is of confirmation or variance. The Income-tax Officer may, submits the respondent, issue a certificate under section 46 if there be a fresh default resulting from non-compliance of the order of the appellate authority. If this submission is true, the demand notices must be issued and all steps pursuant to an order of assessment for recovery must be completed before the appeal against the order of assessment is

disposed of. If the proceedings are not complet

We may examine the correctness of the plea raised by the respondent in the light of the scheme for recovery of tax, penalty or interest due under the provisions of the Act. After the income of an assessee is computed, and liability to pay tax, penalty or interest is determined in the manner provided by the Act, proceedings for recovery of the amount commence. A notice of demand is the foundation of such proceedings and of the jurisdiction to collect the tax. It is the notice of demand which converts the liability determined by the order of assessment into a debt due by the assessee to the State. There must therefore be a valid order of assessment, on which a notice of demand may be founded. Section 29 invests the Income-tax Officer alone with jurisdiction to issue a notice of demand and no other officer out of the hierarchy of revenue officers has that jurisdiction. It provide :

"When any tax penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

The notice of demand has to be in the form prescribed under rule 20 which requires that the amount demanded and the person to whom together with the place where it is to be paid, must be stated in the notice. Section 45 of the Act provides that the amount specified as payable in the notice of demand or an order under section 31 or section 33 shall be paid within the time, at the place and to the person mentioned therein, or if no time be so mentioned, then on or before mentioned therein, or if no time be so mentioned, then on or before the first day of the second month following the date of the service of the notice or order and if the assessee fails to pay the tax he shall be deemed to be in default unless the assessee has presented an appeal under section 30 of the Income-tax Act and the Income-tax Officer in his discretion treats the assessee as not being in default as long as such appeal is undisposed of. Section 45 therefore prescribes the conditions under which a person may be treated as in default. Sec

By the determination of tax under section 23, or imposition penalty in circumstances mentioned in section 18A(4), (6), (7) or (8) obligation to pay the tax, penalty or interest arises, and upon service of a notice of demand under section 31 or section 33, the tax, penalty or interest becomes due and payable, and if the tax is not paid within the time specified, the assessee must, unless the Income-tax Officer otherwise directs, be treated as in default. Against the assessee in default, the Income-tax officer may take appropriate steps for recovery of tax as prescribed in clauses (2) to (6) of section 46. But the legislature has not enacted that steps taken by the Income-tax Officer for recovery of tax will lapse or be superseded when the appeal against the order of assessment passed by the Income-tax Officer is disposed of by the appellate authority. Section 45 in terms provides that when an assessee is served with the notice of demand and has failed to comply with the notice, he shall, unless otherwise order.

It is clear therefore that when tax, penalty or interest is determined and demanded, proceedings shall be commenced for recovery and these proceedings may be commenced and continued notwithstanding the presentation of an appeal. By failing to comply with the demand the assessee becomes a defaulter and it is not provided that he shall cease to be a defaulter on the disposal by the appellate authority of the appeal against the order of assessment. In the absence of such a provision, it is difficult to perceive any ground for holding that the proceedings commenced against a defaulting taxpayer for recovery of tax must be abandoned and fresh proceedings commenced for

recovery of tax pursuant to the order of the appellate authority. If on the passing of an order by the appellate authority, the notice of demand previously issued is deemed to be cancelled or superseded, an assessee must be treated as absolved from the consequence of his default even if the appellate authority confirms the order of the Income-tax Officer

It was urged that a person can be said to be in default in payment of tax, when he fails to comply with a demand for a specific amount and when the amount payable by him is reduced in appeal, he is no longer in default because he has had no opportunity to meet the reduced demand. But the status of a defaulter under the Act is a condition for initiation of proceedings for recovery and by the reduction of liability in appeal the status is not altered. Even if the amount due is modified, the status persists, but the process for recovery will be adjusted according to the modified demand including the imposition of penalty under section 46(1). It is true that the Act contains no express provisions which enables the Income-tax Officer to modify the certificate which is issued to the Collector, but the absence of such a provision does not detract from the duty of the Income-tax Officer to give information to the recovering authority about the reduction in the liability for tax, penalty or interest made by the appeal

Counsel for the respondent urged that it is open to the Appellate Assistant Commissioner to specify by his order the time and place at which the tax determined by him is to be paid and the person to whom it is to be paid. If the Appellate Assistant Commissioner does so specify the amount, the person to whom and the place at which the payment is to be made, the order of the Income-tax Officer would be deemed to be superseded and it would be the duty of the assessee then to pay the tax determined pursuant to the order of the appellate authority after a fresh notice is served upon him and he cannot be deemed to be in default unless he has failed to comply with the directions of the Appellate Assistant Commissioner refer to the amount specified in an order passed under section 31 which deals with the procedure and the power of the Appellate Assistant Commissioner hearing an appeal from the order of the Income-tax Officer - and to the amount specified in an order under section 33 dealing with the procedure and th

The Appellate Assistant Commissioner and the Tribunal have power to impose penalty in the conditions specified in clause (a), (b) or (c) of sub-section (1) of section 28 of the Income-tax Act. But these orders are passed in exercise of their appellate jurisdiction conferred by sections 31 and 33 of the Act and where the Appellate Assistant Commissioner imposes penalty he may specify the amount of penalty. To such cases the provision relating to default arising on failure to comply with the directions to pay may apply if the person to whom, and the place at which it is to be paid are specified.

The assumption that section 45 of the Income-tax Act requires the appellate authority to specify the amount payable in the order therefore, seems to be unwarranted and the fact under certain circumstances, having regard to the nature of the order appealed from, the appellate authority may specify in the order such particulars, does not justify the interpretation either that the Income-tax Officer has the power to issue the notice of demand only in those cases where by inadvertence the Appellate Assistant Commissioner or the Tribunal have failed to specify the amount payable or that the passing of orders by the Appellate Assistant Commissioner or the Tribunal deciding the appeal has the effect of superseding the notices of demand issued by the Income-tax Officer. In the absence of any provision imposing an obligation upon the Income-tax Officer to issue successive notice of demand from time to time for recovery of the amount due during the process of assessment it must be held that the notice of demand issued

Observations made by Chakravarti C.J. in the case in Metropolitan Structural Works Ltd. case do lend support to the argument that the issue of a fresh notice on modification by the appellate authority was a "matter of reason" and "based on the actual necessities of realisation" and that it is obligatory upon the Income-tax Officer to issue such a notice on every occasion when the assessment was modified. But the learned Chief Justice himself explained the observations in his judgment in Ladhuram Taparia v. D.K. Ghosh and pointed out that in Metropolitan Structural Works Ltd.'s case the sole question which fell to be determined was as to the commencement of the period of limitation under section 46(7) for enforcement of a notice of demand when successive notices of demand were in fact issued by the Income-tax Officer, and that the earlier judgment was not intended to lay down and did not lay down that the Income-tax Officer was under an obligation to issue a fresh notice of demand merely because the Appellat

"To say that was not to say that a necessary modification of the demand could only be made by issuing a second notice under section 29 and could not be made in any other way, or to put it in other words, it was not to say that the necessity of issuing a fresh notice of demand was an invariable and imperative necessity... I am altogether unable to see how that decision can be construed as having laid down that whenever an assessment order was modified by an appellate order, an obligation arose to issue a second notice of demand under section 29, if the modified amount was sought to be made payable and if it was sought to establish that a default in respect of the modified demand has been committed."

The observations of Charavartti C.J. in Metropolitan Structural Works Ltd.'s case relating to the necessity of issuing a fresh notice on the modification of the assessment were somewhat wide and literally read may support the argument advanced by the counsel for the respondent in this case, but they were, in my judgment, unnecessary for the purpose of deciding the case and did not correctly interpret the provisions of sections 29, 45 and 46. The view which has been expressed by Chakravarti C.J., in Ladhuram Taparia's case has been adopted in other cases as wel : Auto Transport Union (Private) Ltd. v. Income-tax Officer, Alwaye and Hira Lal v. Income-tax Officer and Mali Ram v. Collector, Bhilwara. In my view the validity of a certificate issued under section 46(2) to the Collector for recovery of tax must depend upon the power of the Income-tax Officer to issue that notice. That power may be exercised only if the assessee is a defaulter, and the proceedings are commenced within the period provided in section.

The appeal will therefore be allowed and the petition filed by the respondent will stand dismissed with costs in this Court and the High Court.

ORDER. –

By order of the majority, the appeals are dismissed. But there will be no order as to costs.

Appeals dismissed.

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