Commissioner of Income-Tax, Calcutta

Vs

Rai Bahadur Hardutroy Motilal Chamaria

Civil Appeal No. 535 of 1966

(J. C. Shah, S. M. Sikri, V. Ramaswami-I JJ)

07.04.1967

JUDGMENT

RAMASWAMI J.-

This appeal is brought by special leave from the judgment of the Calcutta High Court dated March 26, 1964 in Income-tax Reference No. 29 of 1961.

The respondent (hereinafter called the 'assessee') is an individual carrying on business in Jute, Cloth and films. The assessment year is 1952-53, the corresponding accounting year being the calendar year 1951 for all business except Katihar Cloth Importing Co. and the Jute Mills for which the accounting year is financial year ending March 31, 1952. During the year of account the assessee claimed that the had borrowed three sums of Rs. 2,50,000 1,50,000 and Rs. 30,000 from three parties from Nepal Kharag Bahadur Nepali, Jiwanmal Santockchand and Sohanlal Subhkaran respectively. The Income-tax Officer added these amounts to the total income of the assessee on the ground that the assessee had inflated the purchase of raw jute. The Income-tax Officer was not satisfied that these three loans were genuine loans but considered that they represented secret profits made by the assessee by inflating the purchase of raw jute. The Income-tax Officer noted that the assessee had withdrawn at Calcutta on March 31, 1952, a sum of Rs. 5,30,000 to his Forbesganj branch on the same day to enable that branch to make payments including the repayment of Rs. 2,85,000 to Sri Kharag Bahadur one of the alleged creditors noted above. The Income-tax Officer discussed the impossibility of the amount having reached Forbesgani branch in Bihar on the very same day in order to enable discharge of the creditors there on March 31, 1952. In regard to this amount of Rs. 5,85,00 the Income-tax Officer observed as follows :

> "On 31-3-1952 the Calcutta Office has withdrawn Rs. 5,30,000 form the Bank and has sent Rs. 5,85,000 to Forbesgani. How the cash has reached Forbesganj (in remote corner in North Bihar) on the same day to enable the branch to make payments (including the sum of Rs. 2,50,000 to Kharag Bahadur) is something difficult to understand even in these days of fast travel. Lloyds Bank in Calcutta would not have obliged the assessee by paying out cash before 10 A.M. on 31-3-1052 and the only available train leaves in the night. The journey including the ferry trip over the broad ganges takes over 24 hours. Hence the entries in the book cannot be taken to be genuine."

The assessee took the matter in appeal to the Appellate Assistant Commissioner and contended that the Income-tax Officer should not have added the three items of Rs. 2,50,000 Rs. 1,50,000 and Rs. 30,000 to the total assessable income. the Appellate Assistant Commissioner did not agree with this

contention and confirmed the addition of Rs. 4,30,000. At the same time, the Appellate Assistant Commissioner noticed the fact of the alleged transfer of Rs. 5,85,000 from Calcutta to Forbesganj on March 31, 1952 and its credit in the accounts books of the latter branch on the same date. The Appellate Assistant Commissioner considered that the amount of Rs. 5,85,000 should also be included in the total income of the assessee but before doing so be gave the assessee a deduction of Rs. 1,8,000 being the amount withdrawn earlier from the accounts of the two creditors, namely, Jiwanmal Santockchand and Sohanlal Subhkaran and added the balance of Rs. 4,05,000. This addition by the Appellate Assistant Commissioner amounted to an enhancement of the income which the Income-tax Officer had assessed. The assessee took the matter in further appeal to the Appellate Tribunal which held that the Appellate assistant Commissioner was justified in coming to the conclusion that the cash credits in the accounts were not explained satisfactorily and some of the payments made at Forbesganj branch on March 31, 1952 were not made form the remittance from Calcutta but from secret funds. The Appellate Tribunal pointed out that out of the payments claimed to have been made at Forbesganj payments to Kharag Bahadur Nepali amounting to Rs. 2,50,000 must also be excluded because it had been held by the Income-tax Officer and the Appellate Assistant Commissioner that the loan was not genuine; and since the loan was not genuine it was not logical to say that it required repayment from secret funds. The Appellate Tribunal accordingly reduced the enhancement to Rs. 1,55,000. In doing so the appellate Tribunal rejected the contention of the assessee that the Appellate assistant Commissioner had not authority to enhance the income on the ground that it was not the subject-matter of the assessment made by the Income-tax Officer. The Appellate Tribunal took the view that the subject-matter in respect of which the enhancement was made was, in fact, considered by the Income Tax Officer and accordingly the Appellate assistant Commissioner had jurisdiction to make the enhancement. At the instance of the assessee the Appellate Tribunal referred the following question of law for the opinion of the High Court under s. 66 (1) of the Income-tax Act, 1922 (hereinafter called the 'Act');

> "Whether on the facts and in the circumstance of the case the Appellate Assistant Commissioner was within his authority in enhancing the assessment of the assessee by Rs. 1,55,000 for the assessment year 1952-53 ?"

By as judgment dated March 26, 1964, the High Court answered the question in the negative and in favour of the assessee.

Section 31 of the Act is to the following effect :

> "31. (1) The Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal and may from time to time adjourn the hearing.
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> (2) The Appellate Assistant Commissioner may, before disposing of any appeal, make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income-tax Officer....
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> (3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment -
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> (a) confirm, reduce, enhance or annul the assessment, or
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> (b) Set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry a the Income-tax Officer thinks fit or

> the Appellate Assistant Commissioner may direct and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment....."

In Commissioner of Income-tax, Bombay v. Shapoorji Pallonji Mistry it was held by this Court that in an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income-tax Officer in the order appealed against. In that case, the assessee had received a sum of Rs. 50,000. In the proceedings for the assessment year 1946-47, this came to the notice of the Income-tax Officer. Since the receipt fell within the accounting year relative to the assessment year 1947-48, the Income-tax Officer did not assess the amount, making a note, "The question will however he considered again at the time of 1947-48 assessment. " In the return for the assessment year 1947-48, this amount was not shown by the assessee. The Income-tax Officer also overlooked the note at the end of his order in the previous year's assessment, with the result that this item was omitted from the assessment order. The assessee appealed to the Appellate Assistant Commissioner against his assessment for the year 1947-48. While the appeal was pending, the Income-tax Officer, wrote a letter to the Appellate Assistant commissioner requesting him to assess the amount of Rs. 40,000. The Appellate Assistant Commissioner, after issuing notice, assessed the amount and included it in the original assessment. The question which was debated before this Court was whether in an appeal filed by an assessee, the appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by s. 31 of the Income-tax Act. It was held by this Court that the powers of enhancement conferred on the Appellate Assistant Commissioner under s. 31 only extended to matters considered by the Income-tax Officer and if a new source has to the considered then the power of remand may be exercised and the Income-tax Officer should be required to deal with that new source of income At page 895 of the Report, Hidayatullah, J. speaking for the Court stated as follows :

> "The only question is whether in enhancing the assessment for any year he can travel outside the record, that it to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word 'assessment' here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words 'enhance the assessment' are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, like sections 34 and 33B, which enable escaped income from new occurs to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.
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> The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the for nearly 37 years. In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the

> assessment has been accepted by the legislature as the true exposition of the words of the section."

Reference may be made, in this connection to the decision in Narrondas Manordass, Bombay v. Commissioner of Income-tax, Central, Bombay in which the scope of the power of the Appellate Assistant commissioner under s. 31 (3) was considered by the Bombay High Court. In that case, the assessee carried on business at Rajkot and at Bombay, the accounting years at Rajkot and Bombay being different. With regard to the profits of Rajkot, the Income-tax Officer assessed them proportionately at R. 1,17,643. He also found that there were remittances to the extent of Rs. 4,00,000 from Rajkot to Bombay, but in view of the concession allowed by the Part B States Taxation Concession Order he did not include this amount in the assessable income. the assessee appealed with respect to the sum of Rs. 1,17,643 contending that the Rajkot business had not profits at all but only loss. The Appellate Assistant Commissioner thereupon set aside the assessment and remanded the mater to the Income-tax Officer for reassessment after enquiring into the matters contained in the second report. It was held by the Bombay High Court that the power conferred upon the Appellate Assistant Commissioner was not confined to the matter of Rs. 1,17,643 in respect of which the assessee had appealed, but he had power to revise the whole process of assessment once an appeal had been preferred, and the order remanding the case was not invalid in law. The decision of this case was approved by this Court in The Commissioner of Income-tax v. M/s McMillan & Co. The question to be considered in that case was whether it was open to the Appellate Assistant Commissioner in exercise of his powers under s. 31(3) of the Act to reject the method of accounting followed by the assessee and accepted by the Income-tax Officer, under the proviso to s. 13 of the Act, and compute the income, profits or gains of the assessee under Rule 33 of the Rules. It was held by this Court that the question must be answered in the affirmative and there was nothing in s. 31 read with the provision of s. 13 of the Act which prevented the Appellate Assistant Commissioner in an appeal preferred by the assessee from exercising the powers which the Income-tax Officer could exercise under the proviso to s. 13 of the Act and to enhance the taxable income of the assessee. At page 701 of the Report, S. K. Das J. quoted with approval the following passage from the judgment of Chagla, C.J. in Narrondas's case :

> "It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various income or deductions which came in for consideration of the income-tax Officer."

It is necessary to bear in mind, in this connection, that it is only the assessee who has a right conferred under s. 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not choose to appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under s. 33B of the Act. therefore, it would be wholly erroneous to compare the powers of the Appellate Assistant Commissioner with the powers possessed by a court of appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal. It is impossible to talk of a court of appeal when

only one party to the original decision is entitled to appeal and not the other party, and in view of this peculiar position the statute has conferred very wide powers upon the Appellate Assistant Commissioner once an appeal is preferred to him by the assessee. It is necessary also to emphasise that the statue provides that once an assessment comes before the Appellate Assistant Commissioner his competence is not restricted to examining those aspects of the assessment which are complained of by the assessee; his competence is not restricted to examining those aspects of the assessment which are complained of by the assessee; his competence ranges over the whole assessment and it is open to him to correct the Income-tax Officer not only with regard to a mater raised by the assessee but also with regard to a matter which has been considered Income-tax Officer and determined in the course of the assessment. It is also well-established that an assessee having once filed on appeal cannot withdraw it. In other words, the assessee having filed an appeal and brought the machinery of the Act into working, cannot prevent the Appellate Assistant Commissioner from ascertaining and setting the real sum to be assessed, by intimation of his withdrawal of the appeal. Even if the assessee refuse to appeal at the hearing the Appellate Assistant Commissioner can proceed with the enquiry and if he finds that there has been and under-assessment he can enhance the assessment [see Commissioner of Income-tax, Punjab v. Nawab Shah Nawaz Khan]. In this context reference may be made to the decision of the Court of Appeal in The King v. Income Tax Special Commissioner in which the taxpayer sought to withdraw a notice of appeal which had been given on his behalf against an additional assessment under Sch. D. the Commissioners of Inland Revenue were not satisfied that the assessment was adequate. The special Commissioners then proposed to proceed with the hearing of the appeal in the ordinary way. At that stage the taxpayer sought a writ of prohibition to prohibit to proceed with the hearing of the appeal in the ordinary way. At that stage the taxpayer sought a writ of prohibition to prohibit the Special Commissioners form hearing the appeal. It was held by the Court of Appeal that notice of appeal having once been given, the Commissioner were bound to proceed in accordance with the Income Tax Acts and determine the true amount of the assessment. At page 493 of the Report Lord Wright observed as follows :

> "in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. they are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case interprets; they are assessing or estimating the amount on which in the interests on the country at large the tax-payer ought to be taxed."

The principle that emerges as a result of the authorities of this Court is that the Appellate Assistant Commissioner has no jurisdiction under s. 31(3) of the Act, to assess a source of income which has not been processed by the Income-tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore the Appellate Assistant Commissioner cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under s. 31(3) of the Act is restricted to the subject-matter of assessment or the sources of income which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of the assessee. It was argued by Mr. Vishwanath Iyer on behalf of the appellant that by applying the principle to the present case, the Appellate Assistant Commissioner had jurisdiction to enhance the quantum of income of the assessee. It was pointed out that the fact of alleged transfer of Rs. 5,85,000 to Forbesganj branch was noted by the Income-tax Officer and also the fact that it did not reach Forbesganj on the same day. So it was argued that in

the appeal the Appellate Assistant Commissioner had jurisdiction to deal with the question of the taxability of the amount of Rs. 5,85,000 and to hold that it was taxable as undisclosed profits in the hands of the assessee. We are unable to accept the argument put forward on behalf of the appellant as correct. It is true that the Income-tax Officer has referred to the remittance of Rs. 5,85,000 from the Calcutta branch, but the Income-tax Officer considered the dispatch of this amount only with a view to test the genuineness of the entries relating to Rs. 4,30,000 in the books of the Forbesganj branch. It is manifest that the Income-tax Officer did not consider the remittance of Rs. 5,85,000 in the process of assessment from the point of view of its taxability. It is also manifest that the Appellate Assistant Commissioner has considered the amount of remittance of Rs. 5,85,000 from a different aspect, namely, the point of view of its taxability. but since the Income-tax Officer has not applied his mind to the question of the taxability or non-taxability of the amount of Rs. 5,85,000 the Appellate Assistant Commissioner had not jurisdiction, in the circumstances of the present case, to enhance the taxable income of the assessee on the basis of this amount of Rs. 5,85,000 or of any portion thereof. As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record i.e. the return made by the assessee or the assessment order of the Income-tax Officer with a view to find out new sources of income and the power of enhancement under s. 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability. In this context "consideration" does not mean "incidental" or "collateral" examination of any matter by the Income-tax Officer in the proves of assessment. There must be something in the assessment order to show that the Income-tax Officer allied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. In the present case it is manifest that the Income-tax Officer has not considered the entry of Rs. 5,85,000 from the points of view of its taxability and therefore the Appellate Assistant Commissioner had no jurisdiction in an appeal under s. 31 of the Act, to enhance the assessment.

For these reasons we hold that the High Court rightly answered the question in favour of the assessee an this appeal must be dismissed with costs.

G. C. Appeal dismissed.

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