

KERALA HIGH COURT

Kelpunj Enterprises

Vs

Commissioner of Income-Tax

I.T.R. No. 91 of 1974

(P. Govindan Nair C.J. and K. Bhaskaran, J.)

02.06.1976

JUDGMENT

P. Govindan Nair C.J.

1. The question referred to this court by the Income Tax Appellate Tribunal, Cochin Bench, reads as follows:

"Whether, on the facts and in the circumstances of the case, the Commissioner of Income Tax could pass an order under Section 263 of the Income Tax Act, 1961, setting aside the Income Tax Officer's order when an appeal has been filed by the assessee against the same order of the Income Tax Officer and it was pending before the Appellate Assistant Commissioner for disposal?"

2. The assessment year is 1964-65 and the corresponding accounting period is the financial year 1963-64. There were credit entries in the accounts of the assessee during the accounting period. These entries may be divided into two groups; one group adding up to Rs. 75,000 and another to Rs. 20,000. The assessing authority questioned the correctness of those entries but eventually accepted the explanation of the assessee in relation to the sum of Rs. 75,000 but did not accept the explanation regarding the sum of Rs. 20,000. The income of the assessee was ultimately fixed by the Income Tax Officer at Rs. 1,68,920 as against the income of Rs. 25,880 returned by the assessee. The assessee appealed before the Appellate Assistant Commissioner on March 7, 1969. While the appeal was pending the Commissioner of Income Tax after examining the records of the case was satisfied that the order of the Income Tax Officer was prejudicial to the revenue in that certain hundi banker's loans were not properly investigated, and without such investigation accepted as genuine by the Income Tax Officer. The Commissioner, therefore, issued notice under Section 263 and after hearing the assessee passed an order, setting aside the Income Tax Officer's assessment order and holding that the Income Tax Officer had not properly

investigated the genuineness of the hundi loans, A direction was, therefore, given to the Income Tax Officer to investigate the genuineness of the loans and pass fresh orders. In view of the order of the Commissioner the Appellate Assistant Commissioner dismissed the appeal as infructuous as the assessment order appealed against had already been set aside. The assessee appealed to the Tribunal against the Commissioner's order and raised two grounds: (1) that the Commissioner of Income Tax had no material to hold that the Income Tax Officer's order was prejudicial to the interest of the revenue; and (2) that when an appeal to the Appellate Assistant Commissioner was pending the Commissioner had no jurisdiction to pass an order under Section 263 of the Act. Regarding the first ground the Tribunal found that there was sufficient material before the Commissioner and that question is no more alive for the purpose of this reference. Regarding the second contention, the Tribunal held that the order of the Commissioner under Section 263 was validly passed as the section enabled the Commissioner to pass such an order even during the pendency of an appeal.

3. Counsel for the assessee submitted before us that the order of the Tribunal is erroneous. It was contended that the assessment order having been appealed against and since the appellate authority has power to enhance the assessment if necessary, the proper and the correct procedure to follow even if the Commissioner had found out errors in the assessment order while investigating the correctness of that order pursuant to his powers under Section 263, is to instruct the department to agitate the matter before the appellate authority where the appeal was pending and obtain relief from that authority. In support of this argument counsel relied on the observations of Chief Justice Chagla in the decision in *Commissioner of Income Tax v. Amritlal Bhogilal and Co^l*. The learned judge observed therein that the revisional power which is meant to safeguard the interest of revenue should be exercised only in cases where its interest would otherwise be jeopardised. It was held therein that when an appeal had been taken before the Appellate Assistant Commissioner there will be no such jeopardy in that the department could seek enhancement of the assessment before the Appellate Assistant Commissioner who has been conferred jurisdiction to enhance the tax if necessary. So it was held that the Commissioner could not exercise his power of revision under Section 33B of the Indian Income Tax Act, 1922, during the pendency of an appeal This is a line of reasoning which is appealing. The exercise of a revisional power under Section 33B should not have the effect of depriving the appellate authority created by statute from dealing with the appeal which it was seized of. We would have been persuaded to accept this argument but for the fact that we have to read Section 263 of the Income Tax Act, 1961, along with Section 264. While Section 263 of the above Act deals with the power of the Commissioner to revise an order of the Income Tax Officer, Section 264 is wider in that the Commissioner has the power to deal with an order of any subordinate authority and, therefore, that of an Appellate Assistant Commissioner as well. Section 264 is wider in another sense in that it does not say that the Commissioner should be satisfied that the order is prejudicial to the revenue. But, there are limitations in the power conferred by Section 264 on the Commissioner. Sub-section (4) provides:

"264. (4) The Commissioner shall not revise any order under this section in the following cases-

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of

¹(1953) 23 ITR 420

appeal; or

(b) where the order is pending on an appeal before the Appellate Assistant Commissioner; or

(c) where the order has been made the subject of an appeal to the Appellate Tribunal....."

It is significant that there is no such restriction in the exercise of power conferred by Section 263 on the Commissioner to revise an order of the Income Tax Officer. The vital departure in the language employed in the two sections has to be given its due weight. The restriction in the powers of the Commissioner in terms provided by Sub-section (4) of Section 264 contrasts with the wider and apparently unlimited power given by Section 263. We have, therefore, to respect the intent of the legislature which appears to us to be obvious that the power under Section 263 is not inhibited by the pendency of any appeal before the Appellate Assistant Commissioner. If the appellate authority had disposed of the appeal before the Commissioner could pass an order under Section 263 another question may arise on the ground of merger of the order of the Income Tax Officer in the appellate order. But that question does not arise before us for the interference in this case had been during the pendency of the appeal and before it was disposed of by the Appellate Assistant Commissioner. We must not, therefore, examine that question.

4. Further, different considerations may arise where the subject-matter of the two proceedings, one under Section 263 and the other before the Appellate Assistant Commissioner are different. This has been emphasized by the Supreme Court in the appellate decision from the decision in *Commissioner of Income Tax v. Amritlal Bhogilal & Co*², on appeal (1958) 34 ITR 130 (SC). The relevant facts of the case were that there was an order granting registration to the firm which was the assessee. That order was not appealable. The assessment orders for more than one year relating to that firm were appealed against and, thereafter, the Commissioner purported to exercise his powers under Section 33B of the Indian Income Tax Act, 1922, and set aside the order granting registration to the firm. The Supreme Court in the appellate decision held that the order granting registration was a separate and distinct order from the assessment order and that the subject-matter of the order granting registration was different from the subject-matter of the appeal taken from the assessment order before the Appellate Assistant Commissioner. It was, therefore, held that there was no error of jurisdiction or lack of authority on the part of the Commissioner in setting aside the order granting registration by exercising his power under Section 33B. It was noticed that such setting aside of the order granting registration would have repercussions on the assessments that had been made. Such repercussions, it was held, was

immaterial in relation to the question of the power to revise under Section 33B. This decision of the Supreme Court is not helpful in answering this reference. But the ruling in *Ramlal Onkarmal v. Commissioner of Income Tax, Assam*³, is directly in point and that decision is against the assessee. The decision of the Patna High Court in *Durgabati and Narmadabala Gupta v. Commissioner of Income Tax*⁴, is distinguishable as contended by counsel for the assessee in that the order interfered with by the Commissioner under Section 33B of

²(1953) 23 ITR 420 (Bom)

⁴(1956) 30 ITR 101 (Pat)

³(1952) 44 ITR 578

the Indian Income Tax Act, 1922, was the order granting registration. The reasoning that appealed to the Assam High Court in *Ramlal Onkarmal v. Commissioner of Income Tax, Assam*⁵, was that noticed by us: the contrast between the language in Section 33A as compared to that in Section 33B of the Act of 1922 Their Lordships observed (pages 581, 584):

"In my opinion, therefore, the contrast between the two sections brings out clearly that the powers under Section 33B are not circumscribed except to the extent mentioned in that section itself."

The same point was emphasized by repeating it later in the judgment.:

"As I have endeavored to show by a contrast between the provisions of Section 33A and Section 33B of the Act, the powers under Section 33B could be exercised even where an appeal is pending from the order of the Income Tax Officer and the powers given under Section 33B could be exercised on the conditions mentioned in that section being fulfilled and it is not permissible for the court to introduce into the section other conditions like those which are mentioned in Section 33A."

5. In the light of the above discussions, we answer the question referred to us in the affirmative, that is, in favor of the department and against the assessee. We direct the parties to bear their respective costs.

6. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal, Cochin Bench.

⁵(1962) 44 ITR 578