

BOMBAY HIGH COURT

Narrondas Manordass

Vs

Commissioner of Income-Tax

(Chagla, C.J. Tendolkar, J.)

13.02.1957

JUDGMENT

Chagla, C. J.

1. This reference raises a rather important and interesting question as to the powers which the Appellate Assistant Commissioner can exercise when an appeal is preferred by an assessee against an assessment made by the Income-tax Officer.

2. The assessee was carrying on a business in Bombay and in Rajkot and the accounting year of the Bombay and Rajkot business were different and therefore there was some overlapping of income. With regard to the profits of Rajkot, the Income-tax Officer assessed them proportionately at Rs. 1,17,643. He also considered the remittances made from Rajkot to Bombay and determined the amount at Rs. 4,00,000. He considered whether this remittance was liable to tax and came to the conclusion, in view of the concession allowed in Part B States Concession Order, that this sum was not liable to tax. The appeal of the assessee was confined to the profit of Rs. 1,17,643 and its case was that the Rajkot business had suffered a loss of Rs. 61,071. The Appellate Assistant Commissioner disagreed with the Income-tax Officer in his view that the profit should be ascertained on a proportionate basis and he directed that he should ascertain the actual profit for the relevant period earned by the business at Rajkot and he remanded the matter to the Income-tax Officer. On this order of remand a report was made by the Income-tax Officer on the 25th February 1953 which accepted the figure given by the assessee that the loss at Rajkot was Rs. 61,071, but reduced the amount, owing to certain considerations with which we are not concerned, to Rs. 35,988. The Income-tax Officer pointed out that no assessment order from the Income-tax Officer at Rajkot in respect of the earlier income was produced before him. He made a second remand report on the 21st July 1954 and in this report he stated that the order for assessment of the Rajkot income had been produced before him. He further pointed out that since the assessment had come up before the Appellate Assistant Commissioner in appeal and since the appeal was still pending, he would like to point out to the

Appellate Assistant Commissioner that there was some error on the part of the Income-tax Officer in the interpretation of the Part B States (Taxation Concession) Order, 1950, and the assessment for 1950-51 should be enhanced by a sum of Rs. 4,00,000 being the remittance from Saurashtra as being chargeable to tax and having been erroneously excluded from assessment. On this the Appellate Assistant Commissioner passed an order setting aside the assessment and remanding the matter to the Income-tax Officer for re-assessment. It is this order that is now challenged by the assessee as beyond the competence of the Appellate Assistant Commissioner.

3. Now, in order to understand what the competence of the Appellate Assistant Commissioner is and what are the powers conferred upon the Appellate Assistant Commissioner, it is necessary to bear in mind certain salient facts. It is only the assessee who has a right conferred upon him to prefer an appeal against the order of assessment passed 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 might have under Section 33-B of the Income-tax Act. Therefore, it would be wholly erroneous to try and 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 in the sense in which that expression is understood in the Civil Procedure Code. 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 occupied by the Appellate Assistant Commissioner, the Legislature, as we shall presently point out, has conferred very wide powers upon the Appellate Assistant Commissioner once an appeal is preferred to him by the assessee. If the assessee chooses to remain content with the order of the Income-tax Officer there is nothing that the Appellate Asst. Commissioner can do, however erroneous the assessment may be. But if the assessment is opened up by the action of the assessee himself, then the powers conferred upon the Appellate Assistant Commissioner are much wider than the powers of an ordinary Court of Appeal. The Statute 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 ranges over the whole assessment and it is open to him to correct the Income-tax Officer not only with regard to a matter raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the course of the assessment.

4. Now, the section we are concerned with is Section 31 (3) and that sub-section provides:

"In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment -

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as 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."It will be immediately noticed that in giving the power of enhancing the assessment, the Legislature has strikingly deviated from the ordinary principles that govern the Court of Appeal. Although the Department cannot appeal against the order of the Income-tax Officer and although the appeal is only by the assessee, even so the Legislature confers upon the Appellate Assistant Commissioner the power to make an order which is obviously to the prejudice of the appellant. Therefore, although the appellant may only complain of particular points in the assessment and he may be satisfied with regard to the rest of the assessment, the Appellate Assistant Commissioner's powers are not confined to consider only those points about which the assessee has a grievance but he may consider those points about which the assessee is satisfied and order the enhancement of the assessment. Now, it is clear that going by the plain words used by the Legislature there are no words of limitation or qualification upon the power of the Appellate Assistant Commissioner in enhancing the assessment or setting aside the assessment and directing a fresh assessment to be made by the Income-tax Officer. But what Mr. Kolah says is that words of qualification and limitation have been read into this sub-section by judicial interpretation, and he also says that from the very nature of the fact that the Appellate Assistant Commissioner is exercising powers of appeal, certain limitations must be imposed upon his powers, and what Mr. Kolah contends is that the power of the Appellate Assistant Commissioner is confined to the subject matter of the appeal. In other words, the Appellate Assistant Commissioner cannot travel outside the questions raised by the assessee by his grounds of appeal, and Mr. Kolah also contends that the only assessment with which the Appellate Assistant Commissioner can deal is the assessment in the sense of the income of the assessee actually assessed to tax. So that what Mr. Kolah would have us hold is that if the Income-tax Officer has dealt with a particular income of the assessee and come to the conclusion that that income is not liable to tax, the Appellate Assistant Commissioner cannot reverse the decision of the Income-tax Officer. Mr. Kolah would go further and say that even if dealing with the same source of income the Income-tax Officer has come to the conclusion that a particular receipt is not liable to tax, the Appellate Assistant Commissioner cannot go behind the decision of the Income-tax Officer because the assessee was only complaining against the receipt which has been brought to tax. Such an interpretation of Section 31 (3) would not only completely clip the powers of the Appellate Assistant Commissioner, but would fail to give effect to the object that the Legislature had in conferring this rather extraordinary power upon the Appellate Assistant Commissioner. 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 incomes or deductions which came in for consideration of the Income-tax Officer.

5. Turning to the authorities, we find that the position we have just stated is amply borne out. Mr. Kolah cited certain authorities on which he relied for a more limited purpose. His contention was that even if he is not right in the contention that he made and the powers of the Appellate Assistant Commissioner are wider, even so they are confined to this that if an assessee goes in appeal complaining of an assessment under a particular head, then it may be open to the Appellate Assistant Commissioner to enhance the assessment under that head, but it is not open to him to deal with another head in respect of which the assessee has not appealed and in respect of the assessment of which head the assessee has been content. On this limited submission what is urged by Mr. Kolah is that here the remittance would fall under Section 12 under the head of "Other Sources". Under that head the assessment order has assessed dividends and not assessed the sum in dispute, viz., Rs. 4,00,000/-. The assessee's appeal was only with regard to assessment under Section 10 under the head "Business". Therefore, according to Mr. Kolah, it was open to the Appellate Assistant Commissioner to enhance the assessment quae the head of "Business", but it was not open to him to set aside the assessment quae the head "Other Sources" under Section 12 and direct the Income-tax Officer to go into the question of Rs. 4,00,000/- when the assessee himself did not appeal with regard to the assessment under that head. In our opinion, on a careful consideration of the authorities relied upon by Mr. Kolah, he is in error even in this limited submission.

6. The first decision relied upon by Mr. Kolah is very early decision of the Patna High Court reported in *Jagarnath Therani v. Commr. of Income-tax*¹, The assessee had three businesses, one at Purnea, another at Jalpaiguri, and the third at Calcutta, and in the year of account the Income-tax Officer assessed him in respect of his income from Purnea and the assessee preferred an appeal to the Appellate Assistant Commissioner, and while the appeal was pending the Income-tax Officer began to take steps to assess the income in Jalpaiguri and Calcutta and the Appellate Assistant Commissioner in the appeal assessed the appellant on his total income in Calcutta, Purnea and Jalpaiguri, and the question that arose before the Patna High Court was whether the Appellate Assistant Commissioner was competent to enhance his assessment in respect of businesses at Calcutta and Jalpaiguri, and the Court held that the Appellate Assistant

Commissioner was not competent to do so, and the reason why the Patna High Court came to that conclusion is stated in the judgment at p. 8 (of ITC) : (at p. 410 of AIR) :

"Now this section (Section 31 (3)) relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject matter. The appellate authority has no power to travel beyond the subject-matter of the assessment, and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income."

The principle which clearly emerges from these observations is that the Appellate Assistant Commissioner cannot travel beyond the subject-matter of the assessment. Note that it is not the subject-matter of the appeal but the subject matter of the assessment, and when the learned Judges say that the Appellate Assistant Commissioner is not entitled to assess new sources of income, this expression is not used in the sense in which Mr. Kolah wants us to use it, but in the sense that a source from which income may spring may not have been considered by the Income-tax Officer at all, and if that be the position then it would not be open to the Appellate Assistant Commissioner to assess the assessee with regard to that source. It is in this sense that the source is looked upon by the Patna High Court as a new source.

7. The same view is taken by the Madras High Court in *Gajalakshmi Ginning Factory v. Commissioner of Income-tax*, , we find the following observation :

"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject matter of consideration for purposes of assessment by the Income-tax Officer."

Therefore, if an income is the subject matter of consideration by the Income-tax Officer, and even though the Income-tax Officer may come to the conclusion that that income is not subject to tax, it would be open to the Appellate Assistant Commissioner to take a different view and to bring that income to tax. That is exactly the position here. The income of Rs. 4,00,000/- was the subject-matter of consideration by the Income-tax Officer for the purpose of assessment. It is true that the Income-tax Officer came to the conclusion that it was not liable to tax, but that does not prevent the Appellate Assistant Commissioner from coming to a contrary conclusion.

8. The Patna High Court, again, in a very recent judgment, has accepted the same position in law and has relied on the judgment of the Madras High Court, to which reference has just been made, as enunciating the correct principle of law. See *Bishwanath Prasad Bhagwat Prasad v.*

Commissioner of Income-tax, . It is true that on the facts of that case the enhancement by the Appellate Assistant Commissioner was confined to the same head in respect of which the appeal was preferred. The facts briefly were that the question in issue before the Income-tax Officer was whether two cash receipts of Rs. 18,730/- and Rs. 64,000/- should be brought to tax. The Income-tax Officer held that Rs. 18,730/- was liable to tax and accepted the contention of the assessee in regard to Rs. 64,000/-, and on appeal the Appellate Assistant Commissioner set aside the order of the Income-tax Officer and came to the conclusion that the other receipt should also be brought to tax and remanded the case to the Income-tax Officer for re-assessment, and it is at p. 758 (of ITR): (at p. 493 of AIR), that we find the Patna High Court setting out the passage from the judgment of the Madras High Court and the passage contains the important words to which we have already drawn attention, viz., "Of course it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer."

Therefore, though the facts may seem to support Mr. Kolah's contention, the principle which the Patna High Court has accepted is the same as was accepted by the Madras High Court and by the Patna High Court in the earlier decision.

9. Then there is an unreported judgment of this Bench in Shariff Jiwa and Co. Ltd., Mombassa v. Commissioner of Income-tax, Bombay City, Income-tax Reference No. 10 of 1950, delivered on 9-10-1950 (D). There also we have explained the power of the Appellate Assistant Commissioner in practically the same language and this is what we said :

"When the Appellate Assistant Commissioner exercises his power of enhancement, he is dealing with the subject-matter of appeal before him, and enhancement is confined to the sources or items in respect of which the assessment has been made by the Income-tax Officer."

Therefore, the appeal is not confined to the subject-matter of the appeal as restricted by the appellant himself, but the power of the Appellate Assistant Commissioner extends to considering all sources and items in respect of which the assessment is made, and the expression "assessment is made" does not carry the meaning that the sources and items have been brought to tax. In this case assessment was made in respect of Rs. 4,00,000/- in the same sense that it was considered by the Income-tax Officer and not brought to tax.

10. Then there are two other judgments of this Court to which reference might be made. They are Commissioner of Income-tax v. Tejaji Parasram Kharawala, (E) and Commissioner of Income-tax v. Amritlal Bhogilal and Co. . What arose for our consideration in those two cases was the

power of the Commissioner under Section 33-B of the Income-tax Act, and in these two cases we held that whether an appeal was pending before the Appellant Assistant Commissioner or whether an appeal had been disposed of by the Appellate Assistant Commissioner, if it was open to the Commissioner to raise a particular contention before the Appellate Assistant Commissioner then it was not competent to him to deal with that matter under the extra ordinary power conferred upon him under Section 33-B, and what Mr. Joshi relied upon is the concession made by Sir Nusserwanji which appears at p. 419 (of 1TR): (at p. 95 of AIR) that once an appeal is preferred by the assessee it was open to the Commissioner to raise before the Appellate Assistant Commissioner any matter dealing with the assessment of the assessee, and it appears that we held, giving effect to this concession, that an order by the Income-tax Officer registering a firm could be challenged by the Commissioner before the Appellate Assistant Commissioner if the assessee has preferred an appeal. Mr. Kolah drew our attention to the fact that this decision may have to be reconsidered because it does not appear that there is any power conferred upon the Appellate Assistant Commissioner to reverse an order passed by the Income-tax Officer registering a firm. But whether the decision is correct with regard to this actual decision, if we might say so, the ratio of the decision still holds good, and the ratio is this that to the extent that the Commissioner can agitate a matter before the ordinary Tribunal set up by the Income-tax Act, viz., the Appellate Assistant Commissioner, it is not open to him to exercise his extraordinary powers under Section 33-B. But neither of these two decisions really help us to decide the question before us, because the question is not what are the powers of the Commissioner under Section 33-B, but what are the powers of the Appellate Assistant Commissioner. To the extent that the Appellate Assistant Commissioner has a particular power, that power is taken away from the Commissioner under Section 33-B if the assessee appeals and permits the Appellate Assistant Commissioner to reverse an order passed by the Income-tax Officer. Of course, there are observations in these two judgments which go to show how wide and unfettered the powers of the Appellate Assistant Commissioner are. We do not think it can be seriously disputed that those powers are very wide but the only question before us is whether there is any limitation upon those powers, and if there is a limitation, what is the nature and character of that limitation, and in the course of our judgment we have sought to indicate the nature and character of that limitation. It is not as if the Appellate Assistant Commissioner has completely unqualified powers; his powers are limited to the subject-matter of the assessment and we have attempted to define what the subject-matter of the assessment is.

11. Two questions have been submitted to us. We will take question (2) first, viz., "Whether in the circumstances of the case the order of the Appellate Assistant Commissioner remanding the case to the Income-tax Officer for re-assessment is valid in Law?" Our answer will be in the affirmative. Question (1) really does not arise because it is not correct to say that the Appellate

Assistant Commissioner has enhanced the assessment with regard to Rs. 4,00,000/-. All that he has done is to have remanded the matter to the Income-tax Officer for his consideration.

12. The assessee to pay the costs of the reference.

13. No order on the notice of motion. No order as to costs.

14. Answer accordingly.

Cases Referred.

12 ITC 2: (AIR 1925 Pat 408) (A)