BOMBAY HIGH COURT

Keshardeo Shrinivas Morarka

Vs

Commissioner of Income-Tax

(V.S. Desai and Y Tambe, J.)

21.06.1962

JUDGMENT

V.S. Desai, J.

1. In this reference under section 66(1) of the Income-tax Act, 1922, at the instance of the assessee, relating to his assessment for the year 1951-52, the following three questions are referred to this court by the Income-tax Appellate Tribunal :

> "(1) Whether the amount of loss to be carried forward under section 24(2) for the assessment year 1950-51 is the sum of Rs. 20,933 or that sum increased by the sum of Rs. 11,860 ?
>
> (2) Whether section 23A of the Income-tax Act, 1922, is ultra vires the legislature ?
>
> (3) Whether any appeal lies to the Appellate Assistant Commissioner against levy of penal interest correctly computed in accordance with the provisions of section 18A(6) ?"

2. So far as question No. 2 is concerned, the challenge which it sets up against the vires of the provisions of section 23A of the Income-tax Act, 1922, is set at rest by the decision of the Madras High Court in C. W. Spencer v. Income-tax Officer, Madras and the decision of the Supreme Court in Sardar Baldev Singh v. Commissioner of Income-tax (see observations at page 614). In view of these decisions, the said question has to be answered in the negative, and we answer it accordingly.

3. The facts necessary to be stated in considering question No. 1 are as follows : In the assessment year 1950-51, the assessee's total income was determined at a loss of Rs. 20,933 by the Income-tax Officer. During that assessment year, the assessee had an income of Rs. 16,729 including the dividend income which fell under section 12 as income from other sources. From an unregistered firm, in which the assessee was a partner, he had received as his share of the

profit, an amount of Rs. 11,860. He had also received an amount of Rs. 2,414 as the share of his profit from a registered firm in which he was a partner, and in another registered firm, in which he and his brother were partners, he had sustained a loss of Rs. 51,936. The Income-tax Officer calculated t he net result of the profit and loss of the business income of the assessee and determined it at Rs. 37,662 as the total business loss of loss to be carried forward. He seet off this total loss against the inome of Rs.16,729, which was the assessee's income from other source indirecly liable to be assessed in his hands, and thus forund Rs. 20,933 as the amount of loss to be carried forward. In the assessment order, which he passed, he ordered : "It (the said determined loss of Rs. 20,933) shall be carried forward to the following year in accordance with the provisions of section 24(2)." In the assessment for the assessment year 1951-52, the assessee contended that the amount of loss which he was entitled to carry forward under section 24(2) was not Rs. 20,933 but the said amount increased by an amount of Rs. 11,860. The contention of the assessee was that the Income-tax Officer had erred in determining the amount of loss to be carried forward at Rs. 20,933 because, in arriving at that figure, he had set off the loss sustained by the assessee in the business of the registered firm of himself and his brother against his share of profit in the unregistered firm, which he was not entitled to do. According to the assessee, the unregistered firm having been taxed, no tax was liable to be paid by the assessee in respect of the share of profit in the unregistered firm, which he was not entitled to do. According to the assessee, the unregistered firm having been taxed, no tax was liable to be paid by the assessee in respect of the share of profit which he had received from the unregistered firm, and the only purpose for which the said share of profit could be taken into consideration in his assessment was for the purpose of arriving at the total income for determining the rate at which the tax was to be paid. Setting off of the loss against the profits could only be against those profits or income which were liable to be taxed in the hands of the assessee. This contention of the assessee was negatived by the Tribunal, and the Tribunal held that the Income-tax Officer had correctly determined the loss to be carried forward at Rs. 20,933. Mr. B. A. Palkhivala, learned counsel appearing for the assessee, has argued that the view taken by the Tribunal is not sustainable in view of the decision of the Supreme Court in Seth Jamnadas Daga v. Commissioner of Income-tax and Commissioner of Income-tax v. Khushal Chand Daga. The contention of Mr. Palkhivala is correct and must be upheld. In Seth Jamnadas Daga v. Commissioner of Income-tax it has been held by the Supreme Court that the assessee would be entitled to carry forward his share of the loss in the registered firm to the succeeding year under section 24(2). It is clear from this decision that the said loss is not liable to be diminished by the amount of the profit from the unregistered firm which the assessee might have received in the said year. The profit from the unregistered firm, which is exempt from tax in the hands of the assessee, although it has to be included to ascertain his total income, in order to determine the rate applicable to his other income, cannot be taken to reduce the loss to be carried forward. The decision in Commissioner

of Income-tax v. Khushal Chand Daga is also to the same effect.

4. Mr. Joshi, learned counsel for the revenue, has argued that although in view of the Supreme Court decision referred to above, the view taken by the Tribunal would not be sustained, it is possible for him to argue that the conclusion of the Tribunal that the amount of loss which the assessee was entitled to carry forward in the assessment year 1951-52 could be only Rs. 20,933 is correct. Mr. Joshi's argument is that the amount of loss which the assessee was entitled to carry forward in the following year was determined by the Income-tax Officer in the assessee's assessment of the assessment year 1950-51. By his assessment order, he had notified to the assessee in writing the amount of the loss as computed by him under section 24(3) of the Income-tax Act. This order has been made appealable under section 30 of the Act. According to Mr. Joshi, the assessee had appealed from the assessment order passed by the Income-tax Officer for the assessment year 1950-51, but had made no challenge in that appealed from the assessment order passed by the Income-tax Officer of the loss to be carried forward. The said computation, therefore, at Rs. 20,933 was final and could not thereafter be agitated by the assessee in the assessment of the following year. In the assessment of the following year, i,e., of the assessment year 1551-52, the Income-tax Officer, therefore, was right in taking the loss to be carried forward in that year at Rs. 20,933.

5. Now, it must be stated in the first place that the contention urged by Mr. Joshi has not been dealt with by the Tribunal in its order. Mr. Palkhivala has urged that the contention does not arise on the Tribunal's order and, since it has not been agitated before the Tribunal, Mr. Joshi is not entitled to urge it on this reference. Mr. Joshi says that the Tribunal having decided in his favour on a different ground has not dealt with this contention, but that does not mean that it had not been raised before the Tribunal. Mr. Joshi says that, as a matter of fact, in opposing the assessee's application for reference on this question, the department had urged before the Tribunal that the said question does not arise inasmuch as the assessee, not having appealed from the order under section 24(3), was not entitled to agitate the computation of the loss to be carried forward in the assessment proceedings for the assessment year 1951-52. Neither in the statement of the case nor in the appellate decision of the Tribunal is there any indication that the contention, the form in which it is sought to be raised by Mr. Joshi before us, was raised before the Tribunal. Since the order of the Tribunal or the statement of the case did not make any reference to this contention or deal with the same, it will not be possible for us to entertain it on the present reference. It is a contention, which, in our opinion, requires certain facts to be established, which we do not find so established on the record before us. In order that the assessee may be precluded from agitating the question of computation of the loss to be carried forward in the present assessment proceedings by reason of his under section 24(3), it must first be establish that there was, in fact, such a notification. Mr. Joshi says that there was such a notification, because there was an order

made in the assessment of the previous year and the said assessment order was also communicated to the assessee. Mr. Joshi in this connection has referred to the statement of the case, wherein the Tribunal has stated that in the assessment for the year 1950-51, the Income-tax Officer ordered that the loss computed by him shall be carried forward to the following year in accordance with the provisions of section 24(2). It may also be that the assessee may have been served with the assessment order made by the Income-tax Officer in the assessment year 1950-51. It may also be that the assessee may have been served with assessment order for the year 1951-51 and it may also be, as Mr. Joshi says, that the assessee may have taken an appeal from the said assessment order without challenging the loss to be carried forward as computed by the Income-tax Officer. These facts, however, will not suffice to hold that there was a notification of computed loss as required by sub-section (3) if section 24, in view of the decision of the Supreme Court in Commissioner of Income-tax v. Kushal Chand Daga. A contention similar to the one raised by Mr. Joshi before us was raised in that case also. In negativing that contention, their Lordships have observed as follows :

> "As regards the first question, the only contention raised was that the loss which had been determined and ordered to be carried forward must be deemed to have become final, because no appeal was filed against that determination. But it appears that the procedure laid down by section 24(3) under which the Income-tax Officer has to notify to the assessee by order in writing the amount of the loss as computed by him for the purposes of that section was not followed. No doubt, under section 30 an appeal lies, if the assessee objects to the amount of loss computed and notified under section 24; but inasmuch as the Income-tax Officer had not notified the loss computed by him by order in writing, an appeal could not be taken on that point."

6. It appears from the facts stated in that case that the assessee had appealed from the assessment order, in which the loss to be carried forward in the following year had been determined, but had not questioned the said computation in that appeal, and had agitated the question of the loss to be carried forward during the assessment proceedings for the following year. The facts, therefore, which are on record are not sufficient to hold that there has been a notification to the assessee of the computed loss under section 24(3). In our opinion, therefore, the contention which has been raised by Mr. Joshi cannot be entertained and the answer to question No. 1, therefore, will be that the amount of loss to be carried forward under section 24(2) for the assessment year 1950-51 is the sum of Rs. 20,933 increased by the sum of Rs. 11,860.

7. Question No. 3 is also, in our opinion, concluded by the decision of this court in Commissioner of Income-tax v. Jagdish Prasad Ramnath, although Mr. Palkhivala has tried to urge that the said decision is not a binding authority in view of the Supreme Court decisions in C.

A. Abraham v. Income-tax Officer, Kottayam and Commissioner of Income-tax v. Bhikaji Dadabhai & Co. The facts necessary to be stated in connection with that question are these : The Income-tax Officer had served a demand notice on the assessee under section 29 for an advance payment of tax under section 18A(1) on the basis of the last completed assessment for 1948-49. In reply to this notice, the assessee informed the Income -tax Officer on 13th September, 1950, that during the tax year 1950-51, he had suffered a loss in his business and notice of advance payment of tax, therefore, should be waived. After completing the regular assessment for 1951-52, the Income-tax Officer charged interest in accordance with the provisions of section 18A(6), in view of the fact that no payment had been made by the assessee against advance tax demanded. After the assessment had been made, the Income-tax Officer had also made a reassessment when he found that there was certain secti on 23A dividend also to be included in the assessee's income and, at the time of the reassessment, he also made a consequent alteration in the a mount of the penal interest, computed by him. There was thus in all a total interest of Rs. 7,923 demanded as penal interest from the assessee by the income-tax department. In the appeal which the assessee filed against his assessment, he also challenged the item of penal interest. The Appellate Assistant Commissioner, however, did not entertain the appeal in so far as it related to the levy of penal interest on the ground that it was not appealable. The view of the Appellate Assistant Commissioner as to the maintainability of the appeal was confirmed by the Tribunal, relying on the decision of this court in Commissioner of Income-tax v. Jagdish Prasad Ramnath.

8. The provision relating to appeals from the order of the Income-tax Officer is contained in section 30 of the Income-tax Act. That section does not specifically provide for an appeal against the levy of a penal interest under section 18A(6) or 18A(8). It was, however, urged by Mr. Palkhivala that the penal interest levied under the said provision would be appealable, because it forms part of the assessment, and the person denying his liability to be assessed is entitled to appeal under section 30, sub-section (1), of the Act. Now, the question whether an assessee who merely denies his liability to pay penal interest can be said to be denying his liability to be assessed under the Income-tax Act was considered by this court in the decision referred to by us, viz., Commissioner of Income-tax v. Jagdish Prasad Ramnath, and the view taken by this court was that a challenge to the imposition of penal interest would not amount to a denial of the liability to be assessed. Mr. Palkhivala's argument is that, although the decision is directly in point and is against him, the reasoning on which the said decision is based has not been accepted by the Supreme Court in two later decisions and, therefore, the decision must be taken to have been impliedly overruled by the said decisions of the Supreme Court. Now in holding that an assessee who merely denies his liability to pay penal interest cannot be said to be denying his liability to be assessed within the meaning of section 30(1), this court took the view that although the expression "assessment" was sometimes used in the Act as meaning the whole of the procedure laid down in the Act for imposing liability upon the taxpayer, the liability referred to in

the said meaning was the liability to pay tax and not the liability to pay a penalty, that there was a clear distinction between tax and penalty and that the said distinction had been kept in mind by the legislature in laying down the provisions relating to appeals in section 30 of the Act inasmuch as wherein a right of appeal was intended to be given against an order levying a penalty such a right was specifically provided. Mr. Palkhivala has argued that the view of the court that the expression "assessment" would involve merely the liability to pay a tax and not the liability to pay a penalty cannot be regarded as the correct view because of the decisions of the Supreme Court inC. A. Abraham v. Income-tax Officer, Kottayam and in Commissioner of Income-tax v. Bhikaji Dadabhai & Co.In the first case the Supreme Court was concerned with the interpretation of the provisions of section 44 of the Act and the question which it had to consider was whether the expression "assessment" is used in section 44 in its widest connotation as meaning the entire procedure for declaration and imposition of tax liability and the machinery for enforcement thereof, that the penalty was in the nature of additional tax liability and, therefore, if, in the process of assessment of income, profits or gains, any other liability such as penalty or liability to pay penal interest was incurred, the same could be imposed, discontinuance of the business notwithstanding. In the other case the Supreme Court was considering the provisions of section 13(1) of the Finance Act of 1950. By the said provision the Hyderabad Income-tax Act, which was a law relating to income-tax and super-tax in a Part B State, was repealed "except for the purposes of levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922" and the question which the Supreme Court had to consider was whether it also included the provisions which related to the imposition of penalty. The argument advanced was that what was saved was the entire procedure for the imposition of liability to pay tax and for the collection of tax, but penalty not being tax, provisions relating to imposition and collection of penalty were not saved by the saving clause. The Supreme Court held that the true nature of penalty imposed on an assessee under a taxing statute for his dishonest or contumacious conduct was in the nature of an additional tax and the fact that under the Hyderabad Income-tax Act distinct provisions were made for the recovery of tax due and penalty did not alter the true character of penalty imposed under the Income-tax Acts of India and Hyderabad and that the expression "assessment" in its comprehensive connotation meant the entire procedure for the declaration and imposition of tax liability and the machinery for the enforcement thereof and hence the saving clause in section 13(1) of the Finance Act saved also the proceeding for imposing penalty which was initiated under section 40 of the Hyderabad Income-tax Act prior to its repeal by the Finance Act of 1950. Now, in so far as this court took the view that the expression "assessment" even in its widest connotation is confined to the imposition of the liability to pay tax and not the liability to pay a penalty, it can be said as urged by Mr. Palkhivala that the said view has not been accepted by the Supreme Court in the two decisions referred to

above. But that, in our opinion, is not sufficient to affect the correctness of the decision arrived at by this court or to regard the said decision as impliedly overruled by the court or to regard the said decision as impliedly overruled by the Supreme Court cases. All that can e said relying on the said cases is that the expression "assessment" or "liability to be assessed under the Act" is capable of having reference not only to the liability to pay tax but also to the liability to pay a penalty. But what we have to consider is whether the said expression as used in section 30(1) has that meaning. It is well settled that the expression "assessment" has been used in the Income-tax Act in different senses at different places. What is the correct connotation of the expression in a given provision must be determined on an examination of the said provision and the fact that the expression has been elsewhere used in a wider connotation will not mean that it is so used in the provision under examination. Now this court pointed out in Commissioner of Income-tax v. Jagdish Prasad Ramnath that the distinction between a tax and penalty has been borne in mind by the legislature in laying down the provision of appeals in section 30 inasmuch as, wherever a right of appeal against an order imposing penalty was included to be given, the same is specifically provided in the said section. The absence of a specific provision giving a right of appeal against an order imposing penal interest under section 18A(6) or 18A(8) in the scheme and context of the other provisions of section 30 would clearly indicate that no right of appeal was intended to be given against such order, and such right of appeal is not capable of being incorporated in the provisions of section 30 by pointing out that the expression "liability to be assessed under the Act" used in the said section is capable of including the liability to pay a penalty. It is true that penalty when imposed under a taxing statute would be in the nature of an additional tax but that does not mean that there is no distinction between tax and penalty. It cannot be denied that the Indian Income-tax Act has made distinct provisions for tax and penalty and it cannot also be denied that the said distinction has been borne in mind in making provisions for appeals in section 30 of the Act. In our opinion, therefore, the decisions of the Supreme Court referred to by Mr. Palkhivala do not enable him to urge successfully that the said decisions have impliedly overruled the decision of this court in Commissioner of Income-tax v. Jagdish Prasad Ramnath.

9. Mr. Palkhivala has then argued that the absence of a specific provision providing for an appeal against an order levying penal interest under section 18A(6) or 18A(8) should not be regarded as an indication of the intention of the legislature not to provide an appeal against such order because there is a reason why such specific provision has not been made. The penal interest under the said provision is made a part of the computation of tax in the assessment proceedings and is made a part of the assessment and is made a part of the assessment order. Since such order is made a part of the assessment and it is made at the time of making the assessment order and, since a right of appeal is given to the assessee "denying his liability to be assessed under the Act", which expression is capable of having a wide connotation including liability to pay penalty,

the legislature may not have provided a specific right of appeal against the order imposing penal interest. Now, that argument is not, in our opinion, tenable because it is not only that the penal interest under section 18A(6) is included in the assessment order, but it is also the penalty imposed under section 18A(9), 25(2), 28, 44E, 44F or 46(1) that is also added in the computation of tax and made a part of the total tax imposed and, in respect of the orders for these penalties, a specific right of appeal has been provided under section 30 of the Act. The argument, therefore, that the right of appeal has not been specifically provided for the imposition of penal interest because it is made part of the computation of tax under the assessment order is not tenable.

10. Mr. Palkhivala has then urged that one of the reasons given by this court in Commissioner of Income-tax v. Jagdish Prasad Ramnath for coming to the conclusion that there was no right of appeal against the order levying penal interest was because the computation of penal interest under section 18A(6) was automatic. He has pointed out that since after 1st April, 1952, there has been an amendment in the said provision, which makes the imposition of penal interest not wholly automatic, and it has now allowed a discretion to the Income-tax Officer either to reduce or waive interest payable by the assessee. If the discretion is permitted to be exercised by the Income-tax Officer, the assessee, according to Mr. Palkhivala, should have a right to question whether the discretion has been exercised judicially.

11. Now the circumstance that the discretion has been allowed to the Income-tax Officer either to reduce or waive the penal interest payable by the assessee will not by itself make the order of imposition of penal interest appealable. A right of appeal is created by the statute and, unless such right is given by the statute, no such right could be had by the party to the proceeding. It may be that the circumstance that the imposition of penal interest was automatic was a circumstance which supplied a reason why the legislature might not have thought it necessary to give a right of appeal to the assessee in respect of imposition of penal interest. By an amendment in the Act, the said circumstance can no longer be put forward as a reason why no right of appeal has been given to the party in the matter of imposition of penal interest. But we are not concerned with the reasons why the legislature has not given a right of appeal to the party. What we have to decide for a right of appeal. The argument, therefore, that the amendment of the provisions of section 18A(6) since after 1st April, 1952, is indicative of a right of appeal being made available to the assessee against an order imposing penal interest, cannot be accepted.

12. In our opinion, therefore, in view of the decision in Commissioner of Income-tax v. Jagdish Prasad Ramnath, which is in no way affected by the decisions of the Supreme Court, to which Mr. Palkhivala has invited our attention, the Tribunal's decision was right, and our answer to question No. 3 must be that no appeal lay to the Appellate Assistant Commissioner against the levy of penal interest correctly computed in accordance with the provisions of section 18A(6).

We answer it accordingly.

13. There will be no order as to costs.

Questions answered accordingly.