

PATNA HIGH COURT

Jagarnath Therani

Vs

The Commissioner of Income Tax

(Ross and K Sahay, JJ.)

15.01.1925

JUDGMENT

Ross, J.

1. Babu Jagarnath Therani carried on business at Kishanganj in the District of Purnea and had branches in Calcutta and Jalpaiguri. He used to make returns of his income in all three places and the Income Tax Authorities in Calcutta and Jalpaiguri reported their findings to the Income-Tax Officer at Purnea who then combined the figures and made an assessment to income-tax. In the year under consideration, 1922-23, the Income-Tax Officer at Purnea made the assessment without waiting for the reports from Calcutta and Jalpaiguri. It appears from the order of the Assistant Commissioner of Income Tax that after making his assessment he noted that assessment would be made on receipt of, the reports from the Income Tax Authorities at Calcutta and Jalpaiguri as heretofore.

2. The assessee appealed against the assessment to the Assistant Commissioner, who, while reducing the assessment on the business at Purnea, enhanced the assessment as a whole by including the income derived from the branch businesses in Calcutta and Jalpaiguri. Three items were included in arriving at this enhanced sum, viz., a sum of Rs. 25,000 which had been embezzled by a gamashta in Calcutta, a sum which was excluded from assessment by the Calcutta Authorities, and two sums of Rs. 2,939 and Rs. 361 on account of basa kharach and bidagri respectively which had also been excluded in Calcutta.

3. The Commissioner of Income Tax has stated a case to this Court on four points: (1) whether an Assistant Commissioner of Income Tax when hearing an appeal under Sections 30 and 31 of the Indian Income Tax Act can assess a source of income which was not assessed at all by the Income Tax Officer; (2) whether the sum of Rs. 25,000 embezzled by the gamashta of the assessee can be deducted from the assessable income; (3) whether the expenditure called basra kharach is an admissible allowance; and (4) whether bidagri is an admissible allowance. The case

on the last three points was stated by the Commissioner under the directions of this Court on the application of the assessee.

4. I shall deal first with the last three points as they are of minor importance. Under the provisions of Section 10 of the Act the tax is payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him and, in computing such profits or gains allowance is to be made inter alia in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The practice in En gland seems to be well-settled that sums embezzled are excluded from assessment: See Sanders' Income Tax and Super Tax, Second Edition, page 191:

Loss from embezzlement is deductible.

5. Murray and Carter's Guide to Income Tax Practice, Ninth Edition, page 263;

A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem and not one connected with, or arising out of, trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for income-tax purposes deemed an expense of the year in which it is written off in the books"; and Shilling's Dictionary of Income Tax and Super Tax Practice, Fifth Edition, page 231:

If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should, therefore, be allowed.

6. In my opinion this was not a loss in the nature of capital expenditure but was a loss incidental to the conduct of the business and allowance should be made on this account.

7. Basa kharach is stated by the Commissioner of Income Tax to be the boarding expenses, of servants and bidagri to be payment to a servant of his expenses incurred in going to his home from the place of employment and back again. These do not seem to me to be in any sense gratuities and it cannot be assumed that there is any charitable element in these payments. These payments are apparently made to servants in order to retain their services for the benefit of the business and to increase their efficiency. In my opinion these payments are made solely for the purpose of earning profits or gains and allowance should be made on account of these sums.

8. With regard to the principal question, the learned Counsel for the assessee contends that the jurisdiction to assess income-tax upon the businesses in Calcutta and Jalpaiguri was exercisable by the Income Tax Officer, and the passage quoted from the judgment of the Assistant Commissioner shows that this jurisdiction had been reserved by the Income Tax Officer to

himself and that he intended to exercise it. It would appear from the provisions of Section 64 that as Purnea is the principal place of business, the assessment should be made by the Income Tax Officer of that District, the authorities in Calcutta and Jalpaiguri reporting to him. It is argued that the so-called enhancement made by the Assistant Commissioner on appeal is illegal on three grounds: (1) Section 34 expressly provides for the assessment of sources of income that have escaped assessment by the Income Tax Officer; and, where there is an express provision of law applicable to the circumstances of the case, that procedure ought to have been followed. (2) By the procedure adopted by the Assistant Commissioner in assessing on appeal the income from the businesses at Jalpaiguri and Calcutta the assessee has lost the right of appeal on questions of fact relating to these sources of income. (3) By Section 31, the Assistant Commissioner in disposing of an appeal may, in the case of an order of assessment confirm, reduce, enhance or annul the assessment, It is contended that the "assessment means the assessment made by the Income Tax Officer which itself under Section 23 is based upon a return; but, in the present case, there was no such assessment so far as the business in Jalpaiguri and Calcutta was concerned and consequently the so called enhancement made by adding these new sources of income was not an enhancement of the assessment made by the Income Tax Officer.

9. In reply to these arguments the learned Government Pleader contended the terms of Section 31(3)(a) are general and give power without qualification to enhance the assessment. Now this section 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. To do so would not in reality be enhancing the assessment but adding a new assessment to' the old, the subject-matter being different.

10. I would, therefore, answer the points stated by the Commissioner of Income Tax in the manner indicated above. The petitioner is entitled to his costs. Hearing fee three gold mohurs.

11. The petitioner is entitled to the costs of the printing of the paper-book and to the refund of the deposit which he made before the Commissioner of Income Tax.

Kulwant Sahay, J.

12. I agree.