

PATNA HIGH COURT

Bishwanath Prasad Bhagwat Prasad

Vs

Commissioner of Income Tax

Misc. Judicial Case No. 631 of 1953

(Das, C.J. and Kanhaiya Singh, J.)

28.07.1955

JUDGMENT

Kanhaiya Singh, J.

1. This is a reference under Section 66(1) of the Income-tax Act by the Income-tax Appellate Tribunal, Patna Branch, asking the opinion of this Court upon the following question:

"Whether in the re-assessment made by the Income-tax Officer in pursuance of the order of the Appellate Assistant Commissioner dated 27-6-1950, he was competent to include the sum of Rs.64,000 or any portion thereof, in the total income of the family?"

2. The assessee Bishwanath Prasad Bhagwat Prasad, Siwan, was assessed to income-tax for the assessment year 1946-47 corresponding to the accounting year October, 1944 to October 1945. Bishwanath Prasad and Bhagwat Prasad, sons of Phagoolal, constitute along with their sons a joint Hindu family. Phagoolal, and his two brothers, Ganeshlal and Bhagilal were at one time members of a joint Hindu family. Phagoolal separated from his two brothers long before 1944. The assessee family had acquired a half share in the firm of Bihar Ginning Factory and Oil Mills, Siwan, for Rs.64,000 during the accounting year. Then, the firm's books showed net cash credit of Rs.18,730 in favour of the assessee. In the course of the original assessment for 1946-47 the Income-tax Officer had asked the assessee to explain the nature and the source of the two sums, one of Rs.64 000 and the other of Rs.18730. The assessee explained by saying that their father Phagoolal was the karta of the family consisting of himself and his two brothers, Ganeshlal and Bhagilal, and during the period of his kartaship he had misappropriated out of the family funds a sum of Rs.84,000 and the assessee was possessed of this amount at the time of purchase of the half share in the Bihar Ginning Factory and Oil Mills and that the purchase price of Rs.64,000 and the cash credit of Rs.18,730 formed part of the same defalcated amount. The Income-tax Officer accepted the explanation so far as it concerned Rs.64,000 but did not accept it regarding the source of the net cash credit of Rs.18,730 in the personal account of the family in the firm's books.

He accordingly included the sum of Rs.18,730 in the assessment of the family. An appeal from

this assessment was taken to the Appellate Assistant Commissioner. After hearing the party, the Appellate Assistant Commissioner was not satisfied with the explanation regarding the source of the said sum of Rs.64,000 and asked for a report from the Income-tax Officer after thorough investigation as to the circumstances in which a differentiation between the two amounts was made in the assessment and whether both the amounts should not be accorded a similar treatment.

After necessary investigation, the Income-tax Officer reported that it had not been proved that Phagoolal had misappropriated Rs.80,000 as contended by the assessee and that no other evidence had been adduced to indicate the source of the sum of Rs.64,000. On receipt of this report, the Appellate Assistant Commissioner of Income-tax set aside the assessment and remanded the case for re-assessment in the following terms:

"The facts above would show clearly that there was absolutely no justification for making any discrimination in regard to the two sums above. If the absence of the Home Chest account was to be the handicap in respect of one, it could not cease to be so in regard to the other. If, on the other hand, the existence of Rs.80,000 with assessee was to be a plausible explanation, both the amounts must be covered, and not only one. The Income-tax Officer was therefore, called upon to submit an explanation as to why similar treatment to both the amounts was not to be accorded.

The present Income-tax officer (Shri N. Dutta) has submitted his report after a perusal of the connected Court papers, and he says that the assets, that were adjudicated in assessee's share, were confined to Rs.5,000 only in shape of ornaments and 1/3rd of total assets of the old family, i.e., Rs.31,334 only, which may not all be in cash.

It is apparent that very little of the two sums, aggregating to Rs.60,000 plus Rs.18,730 or rupees 78,730 invested by the assessee in the partnership, will be covered, if at all, by the source to which the assessee has referred, even though the absence of a Home Chest Account and of the account of agricultural income be not objected to. That the assessment has not proceeded on right lines is manifest." The assessee did not appeal against the order of the Appellate Assistant Commissioner setting aside the assessment and directing a re-assessment. In due course the Income-tax Officer made the re-assessment for 1940-47 under Section 23(3) of the Income-tax Act read with Section 31 of the Act and determined the total income of the assessee family at Rs.86,308 which included the two disputed sums of Rs.64,000 and Rs.18,730, after disallowing the objection that they formed part of the misappropriated sum of rupees 80,000. After an unsuccessful appeal to the Appellate Assistant Commissioner against the re-assessment, the assessee appealed to the Income-tax Appellate Tribunal. Before the Tribunal it was contended that the Appellate Assistant Commissioner was not competent to set aside the original assessment and direct an enquiry to be made concerning the sum of Rs.64,000 and further that as the appeal to the Appellate Assistant Commissioner concerned the sum of rupees 18730, the Income-tax Officer had no authority to include in the course of the re-assessment the sum of Rs.64,000/- in the total income of the assessee. The Tribunal overruled both these contentions.

It held that under Section 31(2) of the Income-tax Act, the Appellate Assistant Commissioner was competent to make such further enquiry as he thought fit or cause further enquiries to be made by the Income-tax Officer, and that Section 31(3)(b) of the Act conferred powers on the Appellate Assistant Commissioner to set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as he thought fit or the Appellate

Assistant Commissioner might direct, if on perusal of the enquiry report he was not satisfied about the correctness of the assessment. It further held that Section 31(3)(b) empowered the Income-tax Officer to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment. On the application of the assessee, the Income-tax Appellate Tribunal referred the question, above set forth, to the High Court.

3. The question as framed by the Appellate Tribunal does not reflect precisely the actual point involved in this reference. The question as framed is whether in the re-assessment made by the Income-tax Officer in pursuance of the order of the Appellate Assistant Commissioner dated 22-6-1950, he was competent to include the sum of Rs.64,000/-, or any portion thereof, in the total income of the family. The competency of the Income-tax Officer to include, on fresh assessment, any amount he thought proper in the assessable income of the assessee family cannot be doubted. The question really raises the point whether in remanding the appeal and directing re-assessment, the Appellate Assistant Commissioner was competent to direct fresh enquiries regarding the sum against which there was no appeal before him. It will be recalled that the Income-tax Officer had accepted the explanation regarding the source of the sum of Rs.64,000/- and had assessed to income-tax only the second disputed sum of Rs.18,730/-. The real point for determination, therefore, is whether the Appellate Assistant Commissioner had powers to order fresh assessment by inclusion in the assessable amount of any sum against which no appeal had been taken to him.

4. There is no dispute, rather it is conceded by Mr. S.N. Dutt appearing on behalf of the petitioner, that Section 31 of the Income-tax Act confers authority on the Appellate Assistant Commissioner to set aside the assessment and remand the case to the Income-tax Officer for fresh assessment. The point taken by him, however, is that in disposing of the appeal by remand, the Appellate Assistant Commissioner cannot travel beyond the grounds taken before him in appeal and permit the Income-tax Officer to include in the re-assessment any sum which was not originally considered chargeable to income-tax, and against which no appeal had been taken in such a way as to work adversely to the assessee. It is contended that the remand should be made according to the usual and known canons which govern remand in an appeal. Reliance was placed on the case of *'Motor Union Insurance Co. Ltd. v. Commissioner of Income Tax, Bombay'*, In that case the Bombay High Court was considering the powers not of the Appellate Assistant Commissioner, but of the Appellate Tribunal. The Bombay High Court held that on a proper interpretation of sub-section (4) of Section 33, the powers of the Appellate Tribunal are restricted to the grounds urged in the memorandum of appeal. Sub-section (4) of Section 33 of the Act provides that the Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner. The expression "thereon" means, and there seems to be no doubt about that, "on the appeal", in other words, on the grounds taken by the appellant in his memorandum of appeal. No such limiting words occur in Section 31 of the Income-tax Act, which defines the powers of the Appellate Assistant Commissioner in the appeal before him. The powers conferred by this section on the Appellate Assistant Commissioner are of a very wide character. Sub-section (3), clause (a) of Section 31 empowers the Appellate Assistant Commissioner to confirm, reduce, enhance or annul the assessment. The Appellate Tribunal does not possess the power of enhancement. Clause (b) of sub-section (3) in terms provides that in disposing of an appeal, the Appellate Assistant Commissioner may

"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."

In my opinion, the powers of the Appellate Assistant Commissioner are much wider than those conferred on the Appellate Tribunal by Section 33 of the Act. On the plain reading of sub-section (3), clause (b) of Section 31, the limitation which Mr. Dutt wants us to read in this section is not justified. The Appellate Assistant Commissioner possesses unfettered power to set aside the assessment and direct the Income-tax Officer to make fresh assessment after making such enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct. The Appellate Assistant Commissioner, therefore, may direct the Income-tax Officer to include in the fresh assessment any sum which, in his opinion, may be chargeable to tax independent of the question whether or not that sum was the subject-matter of appeal before him. The argument of Mr. Dutt in this respect is unsound. The considerations which ordinarily govern remands in civil matters or appeals under the Income-tax Act before the Appellate Tribunal cannot apply to Appellate Assistant Commissioner exercising powers under Section 31 of the Income-tax Act. It is well to remember that there is no provision for an appeal to the Appellate Assistant Commissioner by the Department against the assessment made by the Income-tax Officer. Under Section 33, a right of appeal to the Appellate Tribunal is given on the order made by the Appellate Assistant Commissioner. That right is given both to the assessee and to the Commissioner. If the assessee feels aggrieved, he has a remedy by way of appeal to the Appellate Assistant Commissioner a remedy which the Department does not possess. It is true that the Commissioner has powers of revision both under Sections 33(a) and 33(b). If the Department felt aggrieved, they could move the Commissioner for appropriate order. That is, however, a different question. The important fact is that the Department has no right to appeal against the order of assessment made by the Income-tax Officer to the Appellate Assistant Commissioner. It is one of the main reasons why such wide powers have been conferred on the Appellate Assistant Commissioner, so that he may pass suitable orders so as to provide relief to both the parties. The position of the Appellate Tribunal is entirely different. Both parties have got right of appeal, if they are aggrieved by the order of the Appellate Assistant Commissioner. If one of the two parties appeals and the other party does not file any cross-appeal or cross-objection, he must be deemed to be satisfied with the decision of the Appellate Tribunal. In that view of the matter, he is not entitled to raise before the Appellate Tribunal any matter which is settled by the order of the Appellate Assistant Commissioner and against which no appeal has been taken to the Appellate Tribunal. When remedy in law is available and the party affected does not avail of the remedy so provided by law, it cannot at a late stage turn round and raise a plea which takes the appellant by surprise and will operate harshly against him. These principles cannot be invoked to restrict the powers of the Appellate Assistant Commissioner to matters actually before him in appeal, when the words defining his powers are comprehensive enough to embrace powers to direct fresh assessment by the Income-tax Officer after making such enquiry as the Income-tax Officer thinks fit or he himself may direct. In view of the scheme of the Act, it is difficult to accept the contention strenuously urged by Mr. Dutt on behalf of the assessee that the Appellate Assistant Commissioner had no authority to direct the Income-tax Officer to make fresh assessment and to determine the amount of tax payable by including therein the sum of Rs.64,000/- which was not involved in appeal before the Commissioner. There is an authority for

this proposition of law in the case of *Sri Gajalakshmi Ginning Factory Ltd., Palladam v. Commissioner of Income-tax, Madras*², The Madras High Court held as follows:

"Whether the Appellate Assistant Commissioner was hearing an appeal against the order of assessment in the first instance or was hearing an appeal which was remanded by the Appellate Tribunal, he has finally to dispose of the appeal in the manner indicated in Section 31 of the Act; and under sub-section (3) of Section 31, he is empowered in disposing of an appeal against an order of assessment either to confirm the order, to reduce, enhance or annul the assessment.

The power, therefore, conferred upon the Appellate Assistant Commissioner by this clause is undoubtedly wider and is not restricted to the subject-matter of the appeal. Even though no appeal was preferred by the Commissioner in respect of that portion of the order of assessment of the Income-tax Officer which contained an adverse decision against the Department, in disposing of an appeal by the aggrieved assessee, though the appeal was confined in the subject-matter to a portion of the order, it would be open to the Appellate Assistant Commissioner to deal with the whole of the assessment order of the Income-tax Officer, even to enhance the assessment. It was held that when once an appeal was preferred by an assessee, it would not be open to the assessee to withdraw the appeal so as to prevent the Appellate Assistant Commissioner from enhancing the assessment under Section 31(3)(a) of the Act. Vide- '*Commissioner of Income Tax, Punjab v. Sha Nawaz Khan*³', 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." A similar view was taken by the Allahabad High Court in the case of '*Commissioner of Income Tax v. Bijli Cotton Mills Ltd.*⁴.'. It follows quite clearly that the Appellate Assistant Commissioner has powers to set aside the entire assessment and remand the case directing the Income-tax Officer to make fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct. On receiving the case on remand the Income tax Officer has powers to make fresh assessment as directed by the Appellate Assistant Commissioner and to determine afresh the amount of tax payable on the basis of such fresh assessment. Therefore, the direction of the Appellate Assistant Commissioner to make fresh assessment by including the sum of Rs.64,000/- in the amount of tax payable was perfectly legal and valid.

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1. I, therefore, answer the question in favour of the Income-tax Department and against the assessee. The Income-tax Department is entitled to their costs. Hearing fee Rs.200/- only.

Das, C. J.

2. I agree.

Answer in the affirmative.

Cases Referred.

- ¹ AIR 1945 Bom 285
- ² AIR 1953 Mad 343
- ³ AIR 1941 Lah 741
- ⁴ AIR 1953 All 232