

PATNA HIGH COURT

Durgabati

Vs

Commissioner of Income-tax

Misc. Judicial Case No. 70 of 1953

(Das, C.J.)

04.04.1956

JUDGMENT

Das, C.J.

1. This case has come to me on a difference of opinion between my learned brethren Ramaswami, J. and Misra, J., with regard to one of the questions of law submitted to the High Court for opinion. The question on which there has been a difference of opinion between my learned brethren is :

"Whether in the facts and the circumstances of the case the orders passed by the Commissioner of Income-tax cancelling the orders of the Income-tax Officer granting registration of the firm and directing the Income-tax Officer to determine the tax payable by the firm on the basis that no registration had been granted to the firm, were valid in law".

Ramaswami, J. is of the opinion that this question should be answered in favour of the Department and against the assessee; Misra, J., is of the opinion that the question should be answered in favour of the assessee and against the Department. Three other questions were also submitted for the opinion of the High Court. With regard to the answers to those three questions my learned brethren agreed. I have, therefore, to record my opinion on the only question with regard to which my learned brethren differed. I propose now to do so in the following paragraphs.

2. A few facts must be stated first. In this case the assessment years are 1947-48, 1948-49 and 1949-50; the corresponding accounting periods were the calendar years 1946, 1947 and 1948. Two ladies, Srimati Durgabati and Srimati Narmadabala Gupta, were carrying on a coal mining business as co-owners till the assessment years 1942-43. The ladies were assessed to income-tax as "association of persons" On 21-4-1943, the two ladies entered into a partnership for carrying on the coal mining business and in para (o) of the partnership deed it was said that "the partnership will not dissolve by the death of any of the partners and that on the death of a partner

her sons and grandsons would automatically become partners and that the partnership would be deemed to be continuing and would continue". Srimati Durgabati died on 27-5-1943, leaving a will by which she bequeathed her half share in the partnership business to her two minor sons, Dina Nath Agarwala and Basudeo Prasad Agarwala, in equal shares. For the assessment year 1944-45 an application was made under Section 26A, Income-tax Act for registration of the firm. The application was made on behalf of Srimati Narmadabala Gupta having 8 annas share, Dina Nath Agarwala having 4 annas share and Basudeo Prasad Agarwala having 4 annas share. The application for registration was based on the partnership deed of 21-4-1943. The Income-tax Officer granted registration of the firm. For the assessment year 1945-43 the same persons applied for registration, but this time the application was rejected by the Income-tax Officer on the ground that the shares of the minor sons of Srimati Durgabati Devi were not stated in the deed of partnership. An appeal was then preferred to the Appellate Assistant Commissioner, and the latter allowed the appeal and directed that the partnership firm should be registered. For the assessment year 1946-47 the Income-tax Officer renewed the registration of the firm under Section 26A, Income-tax Act. For the assessment years in question the Income-tax Officer again renewed the registration of the firm and on that basis made an assessment of the income of the partnership firm under Section 23(5) of the Act. For two of the assessment years, 1947-48 and 1948-49, the order of the Income-tax Officer was dated 24-9-1949, and the relevant portion of the Order of the Income-tax Officer was in these terms :

"Application for renewal of registration under Section 26A filed. This being in order, registration is renewed. Assessed as above on a total income of Rs. 62,537/- under Section 23(3) and 23(5) (a), Income-tax Act. The income is shared by the partners as under :

(Then the income-tax Officer mentioned the share of each of the partners)." For the assessment year 1949-50 the order was passed on 21-12-1949, and was more or less in the same terms as the orders passed on 24-9-1949. It is to be noted that the orders passed by the Income-tax Officer on 24-9-1949 and 21-12-1949, were in the nature of composite orders, dealing both with registration of the firm under Section 26A and assessment under Section 23, Indian Income-tax Act. An appeal was preferred by the assessee to the Appellate Assistant Commissioner against the quantum of assessment. The appeal was decided by the Appellate Assistant Commissioner on 2-8-1950, and the assessments were either modified or affirmed. Sometime in 1951 the Commissioner of Income-tax exercising his powers under Section 33B, Income-tax Act called for the records of the assessments in question, and after giving notice to the assessee cancelled the registration of the firm made by the Income-tax Officer. The Commissioner of Income-tax held that there was no firm in the eye of law which could be registered. He took the view that the order of the Income-tax Officer was erroneous in law and that "the error has resulted in a considerable reduction in the amount of tax payable and on that account the order was prejudicial to revenue". The Commissioner of Income-tax cancelled the registration for all the three years and "directed the Income-tax Officer to determine the tax payable by the firm on the basis that no registration had been granted to the firm and on the total incomes already determined". The assessee then preferred an appeal to the Appellate Tribunal against the order of the Commissioner of Income-tax under Section 33B. The Tribunal dismissed the appeal and affirmed the order of the Commissioner of Income-tax. Thereafter, at the instance of the assessee, the Tribunal submitted four questions of law for the opinion of the High Court. I have already

stated that with regard to the answers to be given to three of the questions my learned brethren were agreed. They differed only with regard to the fourth question which I have indicated in the first paragraph of this judgment.

3. The answer to the question on which my learned brethren have differed depends on the true scope and effect of Section 33B, Indian Income-tax Act. That Section is in these terms :

"33B. (1) The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

2. No order shall be made under Sub-Section (1) –

- (a) to revise an order of reassessment made under the provisions of Section 34; or
- (b) after the expiry of two years from the date of the order sought to be revised.

3. Any assessee objecting to an order passed by the Commissioner under Sub-Section (1) may appeal to the Appellate Tribunal within 60 days of the date on which the order is communicated to him.

4. An appeal to the Appellate Tribunal under Sub-Section (3) shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a treasury receipt in support of having paid the fee of Rs. 100/-, and such appeal shall be dealt with in the same manner as if it were an appeal under Sub-Section (1) of Section 33". My learned brother Ramaswami, J., has rightly pointed out that there are three restrictions on the power given to the Commissioner under the aforesaid section; the first restriction is that the Commissioner has no power to revise an order of reassessment made under the provisions of Section 34; the second restriction is that the Commissioner has no power to revise an order after the expiry of two years from the date of the order sought to be revised; there is a third restriction embodied in Sub-Section (1) which states inter alia that the Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may pass such order thereon as the circumstances of the case justify, etc. In other words, the restriction is that the Commissioner can revise an order passed by the Income-tax Officer; he cannot revise an order passed by an Appellate Assistant Commissioner. In the case before us the first two restrictions mentioned above do not come into play and need not, therefore, be considered. The argument on behalf of the assessee is that the third restriction comes into play and that in effect the Commissioner set aside the order of Assessment passed by the Appellate Assistant Commissioner on 2-8-1950. It is contended that this the Commissioner had no jurisdiction to do under Section 33B, because he overstepped the limits of the third restriction.

4. There has been some argument before me as to whether each of the orders of the Income-tax Officer dated 24-9-1949 and 21-12-1949, really consisted of two separate orders, one relating to registration under Section 26A and the other relating to assessment under Section 23; or whether each of the orders was a composite and integrated order dealing primarily with assessment and with registration in the course of that assessment. My learned brother Misra, J. has drawn some distinction between an order of registration made as a separate order and an order of registration made in the course of assessment. I say this with respect, but I very much doubt if such a distinction can be made; and even if it can be made, whether it makes any difference in law. I do not, therefore, think that the answer to the question depends on whether each of the orders of the Income-tax Officer dated 24-9-1949 and 21-12-1949, is to be treated as consisting of two separate orders or not. The real point to consider is whether the third restriction of Section 33B, Indian Income-tax Act has been overstepped or not. My learned brother Ramaswami, J. has pointed out that the order of the Commissioner would indirectly affect the order of assessment passed by the Appellate Assistant Commissioner. He has said :

"It is true that the Commissioner's order would indirectly affect the order of the Appellate Assistant Commissioner passed in appeal, but that is not the test of the jurisdiction of the Commissioner conferred by Section 33B, Income-tax Act..... It was contended on behalf of the assessee that the Commissioner has no power under Section 33B to revise the order of an Income-tax Officer if the indirect result is that the order of the Appellate Assistant Commissioner would be affected. But I see nothing in the language or the context of Section 33B to warrant such an interpretation. The Section does not expressly say that the revisional jurisdiction of the Commissioner is confined only to such cases where the order of the Appellate Assistant Commissioner would not be indirectly affected".

It is here that I differ with great respect from my learned brother Ramaswami, J. The restrictions mentioned in Section 33B are real restrictions; they are not illusory in character. I am unable to subscribe to the view that in construing a taxing statute a construction should be adopted which would make one of the restrictions mentioned in Section 33B illusory or nugatory. It has not been disputed before me that the order of the Commissioner will have the effect of setting aside the order of assessment passed by the Appellate Assistant Commissioner. Under Sub-Section (5) of Section 23 when the assessee is a firm and the total income of the firm has been assessed, in the case of a registered firm the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined; this is the effect of clause (a) of Sub-Section (5) of Section 23. In the case of an unregistered firm, the Income-tax Officer has an option; and he may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including supertax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm. This is indicated in clause (b) of Sub-Section (5) of Section 23. It is clear, therefore, that the assessment order of the Appellate Assistant Commissioner would be affected in the case under our consideration if the order of the Commissioner stands. In other words, the Commissioner is in effect setting aside the order of assessment passed by the Appellate Assistant

Commissioner though he purports only to cancel the order of registration passed by the Income-tax Officer. The language of Section 33B does not permit the adoption of a construction which would allow the Commissioner to do indirectly which he could not have done directly. The Commissioner could not have directly set aside the order of assessment passed by the Appellate Assistant Commissioner and he cannot, in my opinion, indirectly do so by merely setting aside the order of registration passed by the Income-tax Officer.

5. It is true that under Section 30, Indian Income-tax Act, which my learned brother Ramaswami, J. has quoted in extenso, the Department had no right of appeal against the order of registration under Section 23A, Indian Income-tax Act. It is also obvious that the assessee could not have preferred an appeal against an order which was wholly in his favor. When, however, an appeal was preferred by the assessee to the Appellate Assistant Commissioner against the assessment made by the Income-tax Officer, the Appellate Assistant Commissioner had the power, in disposing of the appeal, to set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Appellate Assistant Commissioner might direct. This is clear from clause (b) of Sub-Section (3) of Section 31, Indian Income-tax Act. In the appeal before the Assistant Commissioner, the Department could have entered appearance and it was, in my opinion, open to the Department to challenge the legality of the registration of the firm, when the assessee preferred an appeal to the Appellate Assistant Commissioner against the order of assessment. The second proviso to Sub-Section (3) of Section 31 is in these terms :

"Provided further that at the hearing of any appeal against an order of an Income-tax Officer, the Income-tax Officer shall have the right to be heard either in person or by a representative". From the order of the Appellate Assistant Commissioner there is a right of appeal to the Appellate Tribunal, and the Commissioner, if he was aggrieved by an order of the Appellate Assistant Commissioner could prefer an appeal to the Appellate Tribunal. I do not agree that in the case under our consideration the question of registration was not connected with the subject of the appeal before the Appellate Assistant Commissioner preferred against the order of assessment passed by the Income-tax Officer.

The order of assessment in this case was indissolubly linked with the order of registration; and if the order of registration were cancelled, the order of assessment would also be inevitably affected. When, therefore, there was an appeal to the Appellate Assistant Commissioner, it was, I think, open to the Department to challenge the legality of the order of registration. The Department did not, however, do so. The Appellate Assistant Commissioner either affirmed or modified the assessments. Then the Commissioner, purporting to act under the power given to him by Section 33B, cancelled the order of registration. In doing so the Commissioner was really setting aside the orders of the Appellate Assistant Commissioner and this he had no jurisdiction or power to do. Therefore, my answer to the question on which my learned brethren have differed is that in the facts and the circumstances of the case the orders passed by the Commissioner of Income-tax cancelling the registration of the firm and directing the Income-tax Officer to determine the tax payable by the firm on the basis that no registration had been granted to it, are not valid in law. In the circumstances of this case the Commissioner had no jurisdiction

or power to pass such orders under Section 33B, Indian Income-tax Act.

6. Whatever little authority there is seems to be against the view canvassed for by the Department. In *Commissioner of Income-tax, Bombay North v. Tejaji Parasram*¹, it was observed :

"The Commissioner has been given no right of appeal from an order of assessment passed by the Income-tax Officer. The right of appeal is confined to the assessee; and before Section 33B was enacted the position in law was that if the assessee did not appeal from the order of the Income-tax Officer, that order became final and conclusive. But if the assessee appealed from the order of the Income-tax Officer the widest jurisdiction was given to the Appellate Assistant Commissioner in appeal. He had the power to confirm, reduce, enhance or annul the assessment, he had the power to direct the Income-tax Officer to make a fresh assessment, and the only limitation that was laid down on the exercise of his jurisdiction was that if he wanted to enhance the assessment, he must give the assessee a reasonable opportunity of showing cause against the enhancement.

From the decision of the Appellate Assistant Commissioner the right was given both to the Commissioner and to the assessee to appeal to the Appellate Tribunal..... Therefore, for the first time by reason of the enactment of Section 33B the orders of the Income-tax Officer become subject to a revision although the assessee might accept those orders and may not appeal from them to the Appellate Assistant Commissioner. But one important distinction between Section 33A and Section 33B may be immediately noticed. Whereas the power of revision conferred upon the Commissioner under Section 33A was against any order passed by any authority subordinate to him, the power of revision conferred upon the Commissioner under Section 33B was restricted to any order passed by the Income-tax Officer. Therefore in terms Section 33B conferred upon the Commissioner the power to revise only the orders of the Income-tax Officer. The Legislature advisedly did not confer upon the Commissioner the power to revise either the orders of the Appellate Assistant Commissioner or the Appellate tribunal". It is true that in that case the question was about capital gains; the Income-tax Officer took Rs. 25,000/- as capital gains under Section 12B, Indian Income-tax Act. In the appeal made to the Appellate Assistant Commissioner by the assessee one of the grounds of appeal was with regard to the computation of the capital gains at Rs. 25,000/-. The assessee's appeal was dismissed. Then the Commissioner of Income-tax, purporting to act under Section 33B of the Act, computed the capital gains at Rs. 10,00,000/-. It was observed that the order of the Income-tax Officer had merged in the order of the Appellate Assistant Commissioner, and the right of the Commissioner to revise the order under Section 33B continued so long as the order of the Income-tax Officer had not merged in the order of the Appellate Assistant Commissioner; but once the order had merged the Commissioner could not deal with the assessment of the assessee at all. I concede that the fact of that case are not exactly similar to the facts of the case under our consideration. But in *Commissioner of Income-tax, Bombay North v. Amritlal Bhogilal and Co*²., the facts are exactly similar except for one assessment year. In that case, for three assessment years, the Income-tax Officer made an assessment on the assessee which was registered as a firm under Section 26A; the assessee appealed and the Appellate Assistant Commissioner reduced the assessments for two years and kept the appeal for the third year pending before him. The Commissioner subsequently passed an order under Section 33B directing the Income-tax Officer

to cancel the registration of the firm under Section 26A and to assess the assessee as an unregistered firm for all the three years. Now, with regard to the two assessment years for which the Appellate Assistant Commissioner reduced the assessments, it was held that the question was concluded by the decision given in the earlier case and the Commissioner had no jurisdiction to pass any orders under Section 33B after the Appellate Assistant Commissioner had passed orders in appeal reducing the assessments. His Lordship Chagla, C.J. then went on to consider the assessment for the third year in which the appeal was still pending, and held that even when an appeal was pending the Commissioner had no jurisdiction to exercise his powers under Section 33B. In the case under our consideration it is unnecessary to consider whether the Commissioner can exercise his powers under Section 33B when an appeal against an order of assessment is pending. In the case under our consideration an appeal was preferred against the order of assessment and was dealt with by the Appellate Assistant Commissioner. In passing his order under Section 33B the Commissioner has in effect set aside the orders of the Appellate Assistant Commissioner. Clearly this was beyond the power of the Commissioner; under Section 33B, Indian Income-tax Act he could not directly or indirectly set aside an order of the Appellate Assistant Commissioner. The third restriction of Section 33B restricts the Commissioner to an order passed by the Income-tax Officer only.

7. Mr. R.J. Bahadur, appearing on behalf of the Department, has referred me to certain decisions where it was held that the Appellate Assistant Commissioner, in disposing of an appeal, could not travel beyond the subject-matter of the appeal. It was argued before me that the Appellate Assistant Commissioner could not deal with the question of registration in the appeal which was preferred by the assessee. I have already dealt with this aspect of the question when considering clause (b) of Sub-Section (3) of Section 31. My learned brethren considered the effect of clause (a) of Sub-Section (3) of Section 31. It seems to me that clause (b) of Sub-Section (3) of Section 31 is quite clear and it was open to the Appellate Assistant Commissioner to set aside the assessment and direct the Income-tax Officer to make a fresh assessment on the basis that the registration order was invalid. I do not agree that if the Appellate-Assistant Commissioner did so, he would be travelling beyond the subject-matter of the appeal. As I have already said, the order of registration in this case was indissolubly connected with the order of assessment; and after the Appellate Assistant Commissioner had disposed of the appeal with regard to the order of assessment, it was not open to the Commissioner to cancel the order of registration under Section 33B, Indian Income-tax Act.

8. I would accordingly answer the question (question No. 4) in favour of the assessee and against the Income-tax Department. The net result is that I am in agreement with my learned brother Misra J., though for reasons somewhat different from those given by him.

Order accordingly.

Cases Referred.

¹1954 Bom 93. (AIR 41)

²1954 Bom. 161 (AIR V 41)