

## **Guduthur Bros. vs Income-Tax Officer, Special Circle, ... on 22 March, 1960**

### **Equivalent citations: [1960]40ITR298(SC)**

#### **JUDGMENT**

HIDAYATULLAH, J. - This appeal has been filed with the special leave of this court against a decision of the High Court of Mysore, by which it dismissed in limine an application by the appellants under article 226 of the Constitution for a writ of prohibition or some other appropriate writ against the Income-tax Officer, Bellari, Special Circle, Bangalore.

The facts of the case are as follows. For the assessment year 1948-49, the appellants failed to file a return within the prescribed time and the Income-tax Officer, acting under section 28(1)(a) of the Indian Income-tax Act, issued a notice to them to show cause why penalty should not be imposed. In answer to this notice, the appellants filed a written reply and the Income-tax Officer proceeded to levy a penalty of Rs. 16,000, without affording a hearing to them as required by the third sub-section of section 28 of the Income-tax Act. The matter was taken up in appeal before the Appellate Assistant Commissioner of not granted to the appellants, held that the order was defective. He, therefore, set aside that order and directed the refund of the penalty if it had been recovered.

On receipt of the order, the Income-tax officer issued a further notice calling upon the appellants to appear before him, so that they might be given an opportunity of being heard. He also intimated that if no appearance was made, then he would proceed to determine the question of penalty, taking into consideration only the written statement which had been filed earlier. Before, however, the Income-tax Officer could decide the case, the appellants filed a petition under article 226 of the constitution for the issuance of the writs mentioned above. This petition was dismissed in limine by the High Court holding that the contention raised by the appellants may perhaps be raised before the Income-tax authorities. The appellants thereupon applied for special leave to this court and leave having been granted, this matter comes up before us.

There is no question here that the requirements of section 28(1)(a) of the Income-tax Act were not completely fulfilled. If the appellants had not filed their return, as they were required by law to do, the omission would attract clause (a) of sub-section (1) of section 28. We say nothing as to that. Sub-section (3) of section 28, however, requires that the penalty shall not be imposed without affording to the assessee a reasonable opportunity of being heard. This opportunity was denied to the appellants and, therefore, the order of the Income-tax officer was vitiated by an illegality which supervened, not at the initial stage of the proceedings, but during the course of it. The order of the learned Appellate Assistant Commissioner pointed out the ground on which the illegality proceeded and his order directing the refund of the penalty, if recovered, cannot but be interpreted as correcting the error and leaving it open to the Income-tax Officer to continue his proceedings from the stage at which the illegality occurred. No express remand for this purpose, as is contended, was

necessary.

Our attention was drawn to a decision of a learned single judge of the Kerala High Court reported in *Jos Chacko Poothokaran v. Income-tax Officer, Ernakulam Circle*, in which, in similar circumstances, it has been held that since an appeal was not taken by the Commissioner of Income-tax to the Appellate Tribunal under sub-section (2) of section 33, the order of the Appellate Assistant Commissioner became final and the Income-tax Officer could no longer proceed to reassess the penalty. The reason given is, in our opinion, beside the point. What the Appellate Assistant Commissioner did was to vacate the order and direct refund of the penalty in view of an illegality which had occurred during the course of the assessment proceedings. On receipt of the record it was open to the Income-tax officer to take up the matter from the point at which the illegality supervened and to correct his proceedings. It was pointed out in the course of the statement of the case by the appellants that such proceedings could only be taken during the course of assessment proceedings and those proceedings are concluded. In our opinion, the notice issued to the appellants to show cause why penalty should not be imposed on them did not cease to be operative because the Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding after it was lawfully initiated. That notice having remained still to be disposed of, the proceedings now started can be described as during the course of the assessment proceedings, because the action will relate back to the time when the first notice was issued.

In our opinion, the Income-tax Officer is well within his jurisdiction to continue the proceedings from the stage at which the illegality has occurred and to assess the appellants to a penalty, if any, which the circumstances of the case may require.

The appeal is accordingly dismissed with costs.

Appeal dismissed.