

Chhotelal Gobardhan Das vs Commr. Of Income-Tax, U.P. And V.P. ... on 5 January, 1953

Equivalent citations: AIR1953ALL401, [1953]23ITR272(ALL), AIR 1953 ALLAHABAD 401

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. The question referred to us under Section 66 (2), income-tax Act, is as follows :

"Whether in an appeal under Section 33 (1), Income-tax Act, against an order passed under Section 23 (4), the validity of the assessment made under Section 23 (4), can be challenged when no second appeal against the order of the Appellate Assistant Commissioner confirming the order of the Income-tax Officer passed under Section 27 refusing to cancel the assessment so made was filed ?"

2. On 16-10-1942 the Income-tax Officer made an assessment under Section 23 (4), Income-tax Act, on an estimated income of Rs. 10,000. The assessee had made a return and had claimed that he had suffered a loss of Rs. 13,320-5-3. The Income-tax Officer thereafter issued notice to the assessee to produce his Sauda Bahi so that the Income-tax Officer may be able to ascertain whether the assessee's contention that he had suffered loss to the extent mentioned by him was correct. The assessee, however, did not produce the Sau a Bahi and the Income tax Officer made the assessment as stated above.

3. The assessee then made an application under Section 27, Income-tax Act, stating that ho was not able to produce the Sauda Bahi as he did not maintain it and praying that the Income-tax Officer might cancel the assessment order, dated 16-10-1942, and make a fresh assessment in accordance with the provisions of Section 23. This application was dismissed by the Income-tax Officer on 27-1-1943.

4. The assessee then filed two appeals before the appellate Assistant Commissioner of Income-tax one against the assessment order, dated 16-10-1942, and the other against the order, dated 27-1-1943, refusing to set aside the order of 16-10-1942, and make a fresh assessment. These two

appeals were heard separately by the Appellate Assistant Commissioner of Income-tax on different dates, On 5-8-1943, the Appellate Assistant Commissioner of Income-tax dismissed the appeal against the order, dated 27-1-1943 and on 7-8-1943, he partly allowed the appeal against the order dated 16-10-1942, and modified that order.

Against the order, dated 7-8-1943, an appeal was filed before the Income-tax Appellate Tribunal. At the time of the hearing of the appeal, however, it was argued that the assessment made under Section 23 (4) of the Act was wrong and that the application under Section 27 should, therefore, have been granted and a fresh assessment made in accordance with the provisions of that section. The Tribunal said as follows :

"But no appeal against the Appellate Assistant Commissioner's order under Section 31 confirming the Income-tax Officer's order under Section 27, having been brought up to the Tribunal and the present appeal being one relating to the merits of the assessment, we cannot go into the question about the propriety of the assessment having been made under Section 23 (4)."

The assessee thereafter made an application praying that the point of law may be referred to this Court and the question mentioned above has been referred to us for opinion.

5. Learned counsel admitted that there is no direct authority on the point. We have, however, examined the provisions of the Income-tax Act and are satisfied that the Tribunal was right in its views that no appeal having been filed against the order refusing to make a fresh assessment, it was not open to it to go into that question. The Income-tax Officer has a right under Section 23 (4) of the Act to make a best judgment assessment under the circumstances mentioned in that subsection which are to the following effect:

"if any person fails to make the return required by any notice given under Sub-section (2) of Section 22 and has not made a return or a revised return under Sub-section (3) of the same section or fails to comply with all the terms of a notice issued under Sub-section (4) of the same section or, having made a return fails to comply with all the terms of a notice issued under Sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment"

6. Against a best judgment assessment under Section 23 (4) of the Act, previous to the amendment made in 1939, there was no appeal. The assessee, however, had no right to make an application under Section 27, explaining the reasons for his default and in case the Income-tax Officer was satisfied that the assessee was prevented by sufficient cause, he was entitled to set aside his previous order, cancel the assessment and proceed to make a fresh assessment, but in case he was not satisfied and refused the application under Section 27 of the Act, an appeal to the Appellate Assistant Commissioner of Income-tax was provided under Section 30 (1), Income-tax Act.

By the Amending Act of 1939, however, an appeal was provided against a best judgment assessment also with the result that, after the said amendment, Section 30 of the Act provided for the appeals--one against an assessment order passed under Section 23 (4) and the other against an order passed under Section 27, Income-tax Act, refusing to make a fresh assessment. An assessee may under Section 30 (1) appeal against an order of refusal to make a fresh assessment under Section 27 but where the Income-tax Officer has made an assessment under Section 23 (4) of the Act, or, has made a fresh assessment under Section 27, the assessee can appeal under Section 30 (1) and object to the amount of income assessed or the amount of loss computed or, to the amount of tax determined.

The scope of the two appeals is, therefore, entirely separate and while, in the case of one, the question for consideration is whether sufficient cause had or had not been made out for a fresh assessment in the other it is accepted that the Income-tax Officer was entitled to make the assessment under Section 23 (4) and the dispute merely relates to the merits of the case, i. e., whether the amount assessed was in excess, or, whether the right amount of income-tax had been imposed on the assessee. In the case of *Naba Kumar Singh v. Income-tax Commr.*, A. I. R. 1945 cal. 104 at p. 105 (A), it was observed that "On repealing the proviso in the old section the Legislature has expressly limited the manner in which appeals may be allowed against decisions under Section 23 or Section 27, and by inserting the words applicable to Section 23 or Section 27 with the word 'amount' they have definitely intended that the assessee's right of appeal under Section 30 should be limited as regards those sections to the quantum of the assessment or tax."

7. In the appeal against the order, dated 27-1-1943 the Appellate Assistant Commissioner of Income-tax was concerned with the determination of the question whether the assessee was justified in refusing to comply with the notice requiring him to produce the Sauda Bahi. In the appeal against the order, dated 16-10-1942, the Appellate Assistant Commissioner of Income-tax was concerned with the question whether the amount assessed was correct in view of the facts and circumstances of the case. Both these appeals were separately disposed of by separate orders.

8. Section 33 (1), Income-tax Act, provides for an appeal by an assessee "objecting to an order passed by an Appellate Assistant Commissioner." The Appellate Assistant Commissioner of Income-tax had, in this case, passed two orders under Section 31. The assessee had filed an appeal against the order, dated 7-8-1943, which dealt only with the question of quantum of the tax payable. He had filed no appeal against the order, dated 25-8-1943, which dealt only with the question whether the assessee had made out a sufficient case for a fresh assessment after setting aside the previous assessment order.

The Income-tax Appellate Tribunal, therefore, had before it only an appeal against the order dealing with the quantum of the tax payable and it was, no doubt, entitled to "pass such orders thereon as it thought fit" (see Section 33 (4) of the Act). The words 'such orders thereon as it thought fit' are no doubt, very wide but they must relate to the matters that arise in the appeal before the Income-tax Appellate Tribunal. The appeal in this case, as we have already said, related to the quantum of the tax payable and in that appeal, the question whether there was sufficient cause for not complying with the previous notice did not arise, no appeal having been filed against the order under Section

27 though an appeal was provided for by the Income-tax Act.

9. In the circumstances of this case, the view taken by the Income-tax Appellate Tribunal appears to us to be correct and the answer to the question referred to us is, therefore, in the negative.

10. The assessee must pay the costs to the Department which we assess at Rs. 300.