P.C. Dwadash Sherni And Co. Ltd. vs Commr. Of Income-Tax, U.P. And V.P., ... on 1 April, 1953

Equivalent citations: AIR1953ALL693, [1953]23ITR432(ALL), AIR 1953 ALLAHABAD 693

Author: V. Bhargava

Bench: V. Bhargava

ORDER

1. The question referred to us for deci sion under Secton 66 (1), Income-tax Act, runs as follows :

> "Whether, in the proceedings under Section 28, an assessee is entitled to an opportunity to prove either that he had no income liable to tax or that his income liable to tax is less than the income on which it has been finally assessed under Section 23 (4)?"

The Question does not clearly bring out the point In controversy between the parties. It was not the contention of the assessee that, in an appeal against the proceedings for imposition of penalty under Section 28, Income-tax Act it could have the assessment made under Section 23 (4) of the Act re-opened but its contention was that it should have been given an opportunity, only for purposes of imposition of penalty, to show cause why a penalty should not be imposed on it. That is what the income-tax Appellate Tribunal meant when they referred the question to us for opinion but they have not clearly brought out what they meant. The assessee wanted the following question to be referred to us :

> "Whether, under the circumstances of the case proviso (b) to Section 28 (1) entitles an assessee who has failed to comply with a notice under Sub-section (2) of Section 22 to prove that he has no income liable to tax or his income is below the assessable limit?"

Learned counsel for the Department agrees that the question as framed by the assessee is appropriate and may be answered by the Court.

2. The assessee is a limited company. A notice was served on the assessee under Section 22 (2), Income tax Act, requiring it to file the return for the assessment year 1944-45, but the assessee failed to make a return. The Income-tax Officer thereupon made a best judgment assessment under Section 23 (4) of the Act. After having made a best judgment assessment, the Income-tax Officer proceeded to impose a penalty. He passed an order imposing a penalty of Rs. 8,943/- under Section 28 (1) (a) of the Act. The assessee filed an appeal against that order before the Appellate Assistant Commissioner of Income-tax who came to the conclusion that the Income-tax Officer should have,

before imposing the penalty, given an opportunity to the assessee to show cause why a penalty should not be imposed. He, therefore, set aside the order of the Income-tax Officer and sent the case back to him for re-imposition of the penalty, if any, after giving the assessee an opportunity to put forward his contentions. There was an appeal filed by the Commissioner of Income-tax before the Income-tax Appellate Tribunal. The Tribunal held that the Appellate Assistant Commissioner of Income-tax was wrong in his view that the assessee must necessarily be given an opportunity to prove that he had no income liable to tax before any penalty under Section 28 (1)(a), Income-tax Act, could be imposed. The Tribunal differed from a decision of a Pull Bench of the Rangoon High Court in -- 'Commr. of Income-tax, Burma v. A. A. R. Chettiar Concern, Maubin', AIR 1933 Rang 30 (PB) (A). In the result, they allowed the appeal, set aside the order of the Appellate Assistant Commissioner of Income-tax and restored the appeal to his file for determining it on its merits according to law. The assessee then applied that a reference be made to this Court.

3. It has been urged on behalf of the assessee that though the assessment order passed under Section 23(4) of the Act may have become final and it may not be open to the assessee to adduce fresh materials to prove that it should not have been assessed at all or it should have been assessed at a lower income, yet, for purposes of imposition of penalty under Section 28, it should be given an opportunity to prove whether a penalty ought to have been imposed at all and, if so, what should have been the amount of penalty imposed on it.

4. The language of Section 28, Income-tax Act, makes it abundantly clear that, before imposing the penalty, the Income-tax Officer should give the assessee an opportunity to show cause. In the statement of the case, the first two provisos to Section 28(1) have been quoted as follows:

> "Proviso (a) -- No penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under Sub-section (2) of Section 22.
>
> (b) Where a person has failed to comply with a notice under Sub-section (2) of Section 22 or Section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be penalty not exceeding twenty-five rupees."

The two provisos quoted above clearly show that the assessee has a right to show that his income was less than Rs. 3,500/- or that he had no income liable to tax. Further Sub-section (3) of Section 28, which provides that "no order shall be made under Sub-section (1) or Sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard"

> makes it clear that, before a penalty is imposed, the assessee should be given a reasonable opportunity of being heard. The Income-tax Appellate Tribunal was, therefore, not correct in their view that the penalty could be imposed without giving the assessee an opportunity to show cause. We agree with the decision of the Full Bench of the Rangoon High Court in 'AIR 1933 Rang 30 (FB) (A)'.

5. Shri Das on behalf of the Department has urged that, under Section 31, Income-tax Act, on an appeal, the appellate Assistant Commissioner of Income-tax may, before disposing of an appeal himself, make such further enquiries as he thinks fit, or, cause further enquiries to be made by the Income-tax Officer and, having had these enquiries made, he can pass only one of the orders mentioned in Sub-section (3) of that section. The relevant provision pointed out by the learned counsel runs as follows.

"31(3) -- * * * * * *

or, in the case of an order under Section 28.

(f) confirm or cancel such order or vary it so as either to enhance or reduce the penalty."

Learned counsel has urged that the Appellate Assistant Commissioner of Income-tax had no right to remand the case and the Income-tax Appellate Tribunal was right in cancelling that order and all that the Appellate Assistant Commissioner could do was either to give an opportunity himself to the assessee to show cause or ask the Income-tax Officer to make a fresh report after giving an opportunity to the assessee to show cause and could then pass final orders either confirming the order passed under Section 28, or cancelling it, or varying it so as either to enhance or reduce the amount of penalty as he deemed fit. Sri Kalbe Abbas for the assessee has, however, contended that the order passed by the Assistant Commissioner is not an order of remand and is in fact an order cancelling the imposition of the penalty and is thus valid under Section 31(3) (f) quoted above. We are not really concerned with this part of the argument. We are only entitled under Section 66, Income-tax Act, to answer the question referred to us.

6. Our answer to the question as framed by the assessee and agreed to by learned counsel for the Department is in the affirmative.

7. The assessee is entitled to its costs which we assess at Rs. 300/--.