COMMISSIONER OF INCOME-TAX, ANDHRA PRADESH

v.

M/S. BHIKAJI DADABHAI & CO.

1961

February 22.

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income-tax—Assessment proceedings pending—Hyderabad Income-tax Act repealed—Penalty, whether an additional tax—If could be imposed—Appellate Assistant Commissioner—Jurisdiction—Assessment, meaning of—Hyderabad Income-tax Act, s. 40—Indian Income-tax Act, 1922 (XI of 1922)—Finance Act, 1950 (XXV of 1950), s. 13.

The Income-tax Officer found that the respondents' books of accounts were unreliable and after assessing income for Fasli year 1357, corresponding to the year 1946-47, issued notice to the respondents on December 22, 1949, under s. 40 of the Hyderabad Income-tax Act to show cause why penalty should not be levied in addition to the tax and by an order dated October 31, 1951, directed payment of the said penalty. The State of Hyderabad merged with the Indian Union during the pendency of the proceedings before the Income-tax Officer and by s. 13 of the Finance Act, 1950, the Hyderabad Income-tax Act ceased to have effect from April 1, 1950, but the operation of that Act in respect of levy, assessment and collection of income-tax and super-tax in respect of periods prior thereto for which liability to income-tax could not be imposed under the Indian Income-tax Act, was saved. The question was whether (a) the Income-tax Officer had power on October 31, 1951, to impose a penalty under s. 40(1) of the Hyderabad Income-tax Act and (b) whether the assessee had a right to appeal against the order of the Income-tax Officer imposing penalty and whether the Appellate Assistant Commissioner had jurisdiction to hear appeals or whether his order was a nullity.

Held, that the power of the Income-tax Officer to impose a penalty under s. 40(1) of the Hyderabad Income-tax Act in respect of the year preceding the date of the repeal of the Hyderabad Income-tax Act was not lost because by s. 13 of the Finance Act, 1950, for the operation by the Hyderabad Income-tax Act in respect of levy, assessment and collection of income-tax and super-tax in respect of periods prior to April, 1951, for which liability to income-tax could not be imposed under the Indian Income-tax Act, was saved and so the proceedings for imposing the penalty could be continued after the enactment of s. 13(1) of the Indian Finance Act, 1950.

Held, that the appeal against the order of the Income-tax Officer on the ground that he was not competent to pass the order did lie to the Appellate Assistant Commissioner, whose jurisdiction was not made conditional upon the competence of the

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Income-tax Officer to pass the orders made appealable; as a court of appeal he had jurisdiction to determine the soundness of the conclusions of the Income-tax Officer both on the question of fact and law and even as to his jurisdiction to pass the order appealed from, and his order was not a nullity.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 434 of 1960.

Appeal by special leave from the judgment and order dated October 4, 1956, of the Hyderabad High Court in I.T.R. No. 116/5 of 1954-55.

K. N. Rajagopal Sastri and *D. Gupta*, for the appellant.

A. V. Viswanatha Sastri, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for the respondents.

1961. February 22. The Judgment of the Court was delivered by

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SHAH, J.—M/s. Bhikaji Dadabhai & Co.—hereinafter called the assessees—owned an oil mill at Khammamath in the area of the former State of Hyderabad. For the year of assessment Fasli 1357 (October 1, 1946, to September 30, 1947), the assessees returned an income of Rs. 50,384/-. The Income-tax Officer found that the books of account maintained by the assessees were unreliable and by his order dated February 10, 1950, he assessed their total income at Rs. 1,63,131/-. The Income-tax Officer had, before finalising the assessment, issued on December 22, 1949, a notice to the assessees under s. 40 of the Hyderabad Income-tax Act requiring them to show cause why penalty should not be imposed upon them and by order dated October 31, 1951, directed the assessees to pay by way of penalty Rs. 42,000/- in addition to the tax. This order was confirmed in appeal by the Appellate Assistant Commissioner. In appeal, the Income-tax Appellate Tribunal observed that by virtue of the provisions of s. 13 (1) of the Indian Finance Act, 1950, the Hyderabad Income-tax Act had ceased to have effect and as the power to impose penalty under s. 40 of the Hyderabad Income-tax Act was not saved, the order imposing penalty was without jurisdiction. The Tribunal observed;

"The Income-tax Officer may have been in error in imposing the penalty, but there was no appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner. Section 42(1) of the Hyderabad Income-tax Act gives a right to an assessee to appeal if he objects to an order under s. 40 made by an Income-tax Officer. Section 40 ceased to have effect. There can therefore be neither an order under s. 40 nor an appeal against the order if an order has been wrongly made. The remedy of the assessee lies elsewhere, and not by way of an appeal to the Appellate Assistant Commissioner,"

and on that view dismissed the appeal. At the instance of the assessees, the following questions were referred by the Tribunal to the High Court of Judicature at Hyderabad:

1. Whether on 31-10-1951, the Income-tax Officer, Warrangal Circle, had the power to impose a penalty under s. 40(1) of the Hyderabad Income-tax Act in respect of the assessment for the year 1357 F.?

2. Whether the assessee had a right to appeal against the order of the Income-tax Officer imposing the penalty?

3. If the Appellate Assistant Commissioner did not have jurisdiction to hear the appeal, whether the order of the Appellate Assistant Commissioner is a nullity and therefore the order of the Income-tax Officer erroneous, though it may stand until it is set aside by a competent authority?

The High Court answered the first and the third questions in the negative and the second question in the affirmative. The High Court observed that the Appellate Assistant Commissioner had power to entertain the appeal in which the question of the power of the Income-tax Officer to impose a penalty was challenged, and the decision of the Appellate Assistant Commissioner was not without jurisdiction. The High Court also proceeded in a petition separately filed by the assessees to direct the Income-tax Appellate Tribunal to set aside the order of the Income-tax Officer imposing a penalty as a logical

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consequence of the view the Tribunal had taken regarding the absence of power in the Income-tax Officer to levy a penalty. Against the order passed by the High Court, this appeal with special leave is preferred.

We are in agreement with the High Court that the appeal to the Appellate Assistant Commissioner was competent. Even if the Income-tax Officer committed an error in passing the order imposing penalty because the conditions necessary for invoking that jurisdiction were absent, an appeal against his order on the ground that he was not competent to pass the order did lie to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner is under the Act constituted an appellate authority against certain orders of the Income-tax Officer, and exercise of that jurisdiction is not made conditional upon the competence of the Income-tax Officer to pass the orders made appealable. The Appellate Assistant Commissioner had as a court of appeal jurisdiction to determine the soundness of the conclusions of the Income-tax Officer both on questions of fact and law and even as to his jurisdiction to pass the order appealed from.

We are, however, unable to agree with the High Court that because of the repeal of the Hyderabad Income-tax Act by the Finance Act, 1950, the power to impose a penalty in respect of the years preceding the date of repeal was lost. The State of Hyderabad merged with the Indian Union during the pendency of the proceedings before the Income-tax Officer. Thereafter the Indian Legislature enacted the Finance Act, 1950, which by sub-section (1) of s. 13 in so far as it is material provided:

> "If immediately before the 1st day of April, 1950, there is in force in any part B State . . . . any law relating to income-tax or super-tax . . . . that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922..."

Manifestly, by s. 13, the Hyderabad Income-tax Act ceased to have effect as from April 1, 1950. But the operation of that Act in respect of levy, assessment and collection of income-tax and super-tax in respect of periods prior thereto for which liability to income-tax could not be imposed under the Indian Income-tax Act, 1922, was saved. The Judicial Committee of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden* v. *Messrs. Khemchand Ramdas* (1) observed:

> "One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer."

The Hyderabad Income-tax Act also used the expression "assessment" in different senses. In certain sections, for instance ss. 31 and 39 the expression is used as in the sense of mere computation of income; in other sections it is used in the sense of determination of liability and in certain other sections in the sense of machinery for imposing liability and procedure in that behalf. By the Finance Act, 1950, the Hyderabad Income-tax Act was expressly kept alive in respect of periods which include the assessment year in question for purposes of levy, assessment and collection of income-tax. The High Court expressed the view that the word "assessment" in s. 13 (1) included the whole procedure for imposing liability upon the taxpayer but not to the procedure for imposing a penalty. They thought that the Hyderabad Income-tax Act dealt with liability to pay income-tax and penalty in distinct provisions, both relating to imposition and recovery and that if the Legislature had intended to keep alive the Hyderabad Income-tax Act for all purposes including the levy of penalty with respect to any particular year or years of assessment, it could have said so in terms clear and unambiguous instead of limiting the operation only to "levy, assessment and collection." In the view of the High Court, imposition of penalty

(1) (1938) L.R. 65 I.A. 236; [1938] 6 I.T.R. 414.

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was not a necessary concomitant or incident of the process of assessment, levy and collection of tax.

The High Court proceeded upon the view that by saving the Hyderabad Income-tax Act for the purposes of levy, assessment and collection of income-tax, the entire procedure for imposing liability to pay tax and for collection of tax was saved, but penalty not being tax, provisions relating to imposition of and collection of penalty did not survive the repeal of the Hyderabad Income-tax Act.

This Court considered in *C. A. Abraham* v. *The Income-tax Officer, Kottayam* (1) the question whether the expression "assessment" as used in s. 44 of the Indian Income-tax Act included the procedure for imposition of penalty in respect of a dissolved firm and it was observed:

> "The expression 'assessment' used in these sections (provisions of Ch. IV of the Indian Income-tax Act) is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by s. 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income under s. 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof .....By s. 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest or contumacious conduct of the assessee."

This court regarded penalty as an additional tax imposed upon a person in view of his dishonest or contumacious conduct. It is true that under the Hyderabad Income-tax Act, distinct provisions are made for recovery of tax due and penalty, but that in our judgment does not alter the true character of penalty imposed under the two Acts. Nor are we able to agree that because in respect of the Sea Customs Act, 1878, the Indian Tariff Act, 1934, the Land Customs Act, 1924, the Central Excise and Salt Act, 1944, and the Indian Post Offices Act, 1898, which were extended

(1) [1961] 2 S.C.R. 765.

to the whole of India by s. 11 of the Finance Act, 1950, and the provisions corresponding thereto were repealed by the proviso, and it was expressly provided that the previous operation of the corresponding law or any penalty, forfeiture or punishment ordered in respect of an offence committed against any such law or any investigation, legal proceeding or remedy in respect of such penalty, forfeiture or punishment or any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act had not been passed, that under sub-s. (1) of s. 13 it was intended to prohibit the authorities otherwise competent in that behalf from commencing or continuing the proceeding for levying penalty even if the circumstances justify such a course. The scheme of the statutes specified in s. 11 and which are repealed by sub-s. (2) of s. 13 are somewhat different from the scheme of the Indian Income-tax Act. Because by sub-s. (1) of s. 13 of the Finance Act, 1950, the Hyderabad Income-tax Act was to cease to operate as on April 1, 1950, except for the purposes of levy, assessment and collection of income-tax and super-tax, whereas in respect of other Acts specified in s. 11 substantially provisions similar to those contained in s. 6 of the General Clauses Act were enacted, an intention that proceedings for penalty may be commenced and continued under the Acts specified in s. 11, whereas no such proceedings may be commenced or continued under the Hyderabad Income-tax Act is not indicated. We are of the view that the High Court erred in holding that the proceedings for imposing the penalty could not be continued after the enactment of s. 13 (1) of the Finance Act, 1950.

The appeal will therefore be allowed and the answer to the first question will be recorded in the affirmative. On the view taken by us, it is unnecessary to pass any orders on the petition under Art. 226 of the Constitution which was presented to the High Court. The appellant will be entitled to his costs of the appeal in this Court and in the High Court.

Appeal allowed.