

**(1991) 03 KL CK 0038**

**In the High Court Of Kerala**

**Case No :** Income-tax Reference No's. 43 to 46 of 1988

Commissioner of Income Tax

APPELLANT

Vs

M. Sreedharan

RESPONDENT

---

**Date of Decision :** 05-03-1991

**Acts Referred:**

Income Tax Act, 1961 — Section 129, 271(1), 274

**Citation :** (1991) 2 ILR (Ker) 864 : (1991) 190 ITR 604

**Hon'ble Judges :** K.S. Paripoornan, J;K.P. Balanarayana Marar, J

**Bench :** Division Bench

**Advocate :** P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant; N. Sukumaran and S. Ananthasubramonyan, for the Respondent

---

## **Judgement**

K.S. Paripoornan, J.—These are connected cases. At the instance of the Revenue, the Income Tax Appellate Tribunal (in short, "the Tribunal") has referred the following two questions of law for the decision of this court in the above cases :

"1. Whether, on the facts and in the circumstances of the case and on an interpretation of Section 129 of the Income Tax Act, the Tribunal is right in interfering with the penalty order by confirming the order of the Appellate Assistant Commissioner ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee cannot be deemed to have declined to avail of the opportunity by demanding to have a rehearing or reopening of the case, nor could he be deemed to have waived it ?"

2. The same assessee is the respondent in all the four referred cases. Common questions arise for consideration in the connected cases. They relate to the assessment years 1973-74, 1974-75 and 1975-76. The respondent is an assessee to Income Tax. For the assessment years 1973-74 and 1974-75, the Income Tax Officer initiated proceedings u/s 271(1)(c) of the Income Tax Act, 1961, for alleged concealment of the particulars of income. For the assessment

year 1975-76, the Income Tax Officer initiated proceedings u/s 271(1)(c) of the Act for late filing of the return and u/s 271(1)(c) of the Act for concealment of the particulars of income. That is why for the three assessment years, there were four proceedings and four appeals. Two appeals relate to the assessment year 1975-76. For all the years, penalties were levied by the Income Tax Officer u/s 271(1)(c) of the Act and for the year 1975-76, penalty u/s 271(1)(c) of the Act was also levied. In the appeals filed by the assessee, the Appellate Assistant Commissioner held that the Income Tax Officer, who levied the penalty in all the four cases, is different from the Income Tax Officer who had completed the assessments and initiated the penalty proceedings and the officer who levied the penalty did so without giving an opportunity to the assessee of being heard or even without issuing a notice to the assessee. The Appellate Assistant Commissioner held that when a successor-officer takes up the penalty proceedings for disposal, it is only fair and proper that he gives an opportunity to the assessee of being heard and if he fails to do so and levies the penalties without giving an opportunity to the assessee, the penalty orders will be bad in law. He relied on the decision of the Calcutta High Court in COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE., . All the four appeals filed by the assessee were allowed and the penalties levied were cancelled. The Revenue carried the matter by way of appeals before the Tribunal. All the four appeals were considered together and a common order was passed by the Tribunal, dated July 7, 1983, After advertng to the rival pleas put forward before it and after advertng to Section 129 and Sections 271(1)(a), 271(1)(c) and 274(1) of the Income Tax Act and the decisions of the Andhra Pradesh High Court in Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyerabad, and of the Calcutta High Court in COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE., , the Tribunal held that, whenever any Income Tax authority is succeeded by another, the successor may continue the proceedings from the stage at which the proceeding was left by his predecessor and, in such a case, the assessee has a right to demand that, before the proceeding is so continued, the previous proceedings or any part thereof should be reopened. The Tribunal further held that it is implicit in the Section that the succeeding authority should intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. In the absence of any opportunity provided for the exercise of his right or without the knowledge That such opportunity exists, the assessee cannot be deemed to have declined to avail of the opportunity by demanding a rehearing or reopening of the case, nor could he be deemed to have waived it. On the basis of the above view of the law, the Tribunal held that the successor-income tax Officer, in the instant case, has no authority to pass an order u/s 271(1)(a) and (c) of the Income Tax Act, without giving the assessee a fresh opportunity of being heard and the Appellate Assistant Commissioner was justified in cancelling the penalties, following the decision in COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE., . The orders passed by the Appellate Assistant Commissioner were confirmed by the Tribunal. It is thereafter at the

instance of the Revenue that the two questions of law, formulated herein-above, have been referred for the decision of this court.

3. We heard counsel for the Revenue, Mr. P. K. R. Menon, and also counsel for the respondent-assessee, Mr. N. Sukumaran. Admittedly, in these cases, in pursuance of the notices issued by the Income Tax Officer u/s 271 read with Section 274 of the Act, the assessee filed his objections. Subsequently, there was a change in the incumbent of the office. The successor-income tax Officer, without any further notice to the assessee or hearing him, levied penalties u/s 271(1)(c) for all the three years and also u/s 271(1)(a) for the year 1975-76. The short question that arises for consideration is whether, in a case where the assessee has already filed his objections to the notices proposing to levy penalties, the change in the incumbent of the office necessitates a fresh notice to be given to the assessee or an opportunity for hearing. The Andhra Pradesh High Court, in *Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, has held that it is necessary for the succeeding-income tax Officer to intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor ; and, in the absence of such intimation, the assessee cannot exercise the right conferred on him u/s 129 of the Income Tax Act. In other words, a change in the incumbent of the office necessitates that the succeeding authority should intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. The absence of the knowledge of the assessee, that the assessing authority has been succeeded by another and that the successor proposes to pass the penalty order, is a vital factor to be borne in mind. The above decision has been followed in *Commissioner of Wealth-tax Vs. Smt. Azizunnissa Begum*, . The decision of the Calcutta High Court in *COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE*., is also in accord with the said view.

4. Counsel for the Revenue placed reliance on the following decisions and contended that the statement of the law enunciated in *Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad*, and followed in *Commissioner of Wealth-tax Vs. Smt. Azizunnissa Begum*, and in *COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE*., has been very widely stated and all that is necessary for compliance with Section 271 read with Section 274 of the Act is that the assessee should be heard, or should be given a reasonable opportunity of being heard before the penalty is imposed. The fact that the assessee was given an opportunity to file his representations and he did so in the instant case is sufficient compliance with the provisions of Section 271 read with Section 274 of the Income Tax Act. Counsel for the Revenue argued that this is not a case where the predecessor-income tax Officer took any oral evidence or that, on the change of the incumbent in the office, the assessee prayed for a rehearing of the matter and, in the absence of such eventualities, the Tribunal was in error in holding that the failure of the succeeding-income tax Officer to afford an opportunity to the assessee of being heard before the actual imposition of

penalty, will render the proceedings illegal. Reliance was placed on the following decisions :

Kanailal Gatani v. CIT [1963] 48 ITR 262 , Mahendra Rambhai Patel Vs. Controller of Estate Duty, Gujarat State, , A. C. METAL WORKS Vs. COMMISSIONER OF Income Tax, DELHI AND RAJASTHAN., and Commissioner of Wealth-tax Vs. Umrao Lal, . Counsel for the assessee, supporting the decision of the Appellate Assistant Commissioner and the Tribunal, placed strong reliance on the decisions in Anantha Naganna Chetty Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyerabad, , Commissioner of Wealth-tax Vs. Smt. Azizunnissa Begum, , COMMISSIONER OF Income Tax, WEST BENGAL-IV Vs. SMT. CHITRA MUKHERJEE., and Ram Saran Dass Kapur Vs. Commissioner of Income Tax, Patella,

5. It will be useful to extract Section 271(1) (a) and (c) and Sections 274 and 129 of the Income Tax Act :

"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals), in the course of any proceedings under this Act, is satisfied that any person-

(a) has without reasonable cause failed to furnish "the return of total income which he was required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or ...

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income ..."

"274. Procedure.--(1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard ..."

"129. Change of incumbent of an office.--Whenever in respect of any proceeding under this Act an Income Tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the Income Tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor :

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be reopened or that before any order of assessment is passed against him, he be reheard."

6. The fundamental question that arises for consideration is what is meant by the expression that the assessee has been "heard" or has been given "a reasonable opportunity of being heard?" Is an "oral hearing" contemplated in all cases ? The

question is whether the assessee should be given an opportunity of being heard "orally" in all cases, or is it sufficient if the assessee is given an opportunity to file his objections ? So far as this case is concerned, the succeeding Income Tax Officer did not intimate at all to the assessee in terms of Section 129 read with Section 274 of the Act and so the more fundamental question as to whether the opportunity contemplated u/s 274(1) of the Act necessarily means an "opportunity of being heard orally" does not really arise. We may indicate that judicial opinion is not uniform on this aspect of the matter. De Smith, in *Judicial Review of Administrative Action*, 4th Edn., at page 201, has stated thus :

"It must be pointed out, however, that when the words "hearing" or "opportunity to be heard" are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered ...

In the absence of clear statutory guidance in the matter, one who is entitled to the protection of the *audi alteram partem* rule is now *prima facie* entitled to put his case orally ; but in a number of contexts the courts have held natural justice to have been satisfied by an opportunity to make written representations to the deciding body, and there are still many situations where a person will be able to present his case adequately in this way."

7. One of us had occasion to deal with the matter in detail in *Indian Transformers Ltd. v. Asst. Collector* [1983] KLT 861. Apart from the decisions referred to therein, we may also refer to a decision of the Supreme Court in *Travancore Rayon Ltd. Vs. Union of India (UOI)*, It is trite law that, before a person is condemned or an adverse order is passed against him, he should be given an opportunity to be heard. It is in conformity with the principles of natural justice. It is "fairness in action". But the content of "natural justice" or "fairness" may be indicated in specific words in particular statutes. In cases where the statute requires that the party "should be heard" or "afforded an opportunity of being heard", will it be sufficient in all cases and in all situations, only to afford an opportunity to file objections or representations against the proposed action ? We should say that it may not be so. Circumstances wherein a "personal hearing" will be required are very many. Some illustrative cases have been detailed in *Indian Transformers Ltd. 's case* [1983] KLT 861. The Supreme Court has indicated other circumstances in which oral hearing may be necessary in *Travancore Rayon Ltd. Vs. Union of India (UOI)*, . Considering the importance or gravity of the matter, there may be many cases or circumstances wherein an oral hearing will be necessary in order to comply with the principles of natural justice or to comply strictly with the requirements of the statutory language, that the assessee should be given a "reasonable opportunity of being heard",--meaning thereby "an opportunity to be heard orally." The view expressed by Professor De Smith, quoted *supra*, has great relevance in this context. See also *The Concept of Natural Justice* comment (M. P. Jain) (1972) 14 JILI 602. "

8. Kanga and Palkhivala in the *The Law and Practice of Income Tax*, 8th Edn., Vol. 1, at page 1657, have summarised the scope and effect of the decisions

referred to in paragraph 4 supra, in dealing with the requirements of Section 274 of the Act, thus :

"Where an Assessing Officer is succeeded by another, the succeeding officer can pass an order of penalty without giving the assessee an opportunity of being heard, if the case was fully heard by his predecessor and the assessee does not demand reopening of the penalty proceedings u/s 129 ; but not if the case was not fully heard or if the assessee had rested his case on a personal hearing or if the assessee is not aware that the Assessing Officer has been succeeded by another and that the successor proposes to pass the penalty order."

9. Commenting on Section 129 of the Income Tax Act, the learned authors, at page 1066 of the book, have stated thus :

"This section provides that whenever during the pendency of any proceeding an Income Tax authority is succeeded by another, the successor may continue the proceeding from the stage at which the proceeding was left by his predecessor. In such a case the assessee has the right to demand that before the proceeding is so continued, (i) the previous proceeding or any part thereof should be reopened, e.g., a witness should be examined afresh, and (ii) the assessee should be reheard before any order of assessment is passed against him. To enable the assessee to exercise this right, it is implicit in the section that the succeeding authority should intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. The time taken in reopening the proceeding or in rehearing the assessee, is to be excluded in computing the period of limitation for the purposes of Section 163 (Explanation 1(i) to Section 153), Section 263(2) (Explanation to Section 263) and Section 275 (Explanation (i) to Section 275)."

10. We are aware that the decisions referred to in paragraph 4 supra, have expressed in different terms the scope and content of Section 271 read with Section 274 and Section 129 of the Act. On a careful analysis of the relevant decisions, we are of the view that the statement of the law by Kanga and Palkhivala at pages 1066 and 1657 (extracted hereinabove) represents the correct legal position. We adopt the same as our own.

11. In this batch of cases, it cannot be denied that the succeeding assessing authority did not intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. There is no plea or proof in this case that the assessee was aware that the assessing authority has been succeeded by another and that the successor proposed to pass the penalty order. In these circumstances, we are of the view that the Appellate Assistant Commissioner was justified in holding that the successor-assessing authority had acted illegally and unreasonably in imposing the penalties without intimating to the assessee his intention to continue the proceedings from the stage at which it was left by his predecessor. There has been a breach of the valuable rights of the assessee, specified in Section 274(1)

read with Section 129 of the Income Tax Act. The Appellate Assistant Commissioner was justified in cancelling the penalties and the Tribunal was justified in confirming the said cancellation orders. We hold that the Tribunal was justified in affirming the decision of the Appellate Assistant Commissioner in all the four cases.

12. We, therefore, answer question No. 1 in the affirmative, against the Revenue and in favour of the assessee. We hold that the penalty orders were justifiably cancelled by the Appellate Assistant Commissioner and the Tribunal was justified in affirming the orders passed by the Appellate Assistant Commissioner. We answer question No. 2 also in the affirmative, against the Revenue and in favour of the assessee. We hold that it was the duty of the succeeding-income tax Officer to intimate to the assessee his intention to continue the proceeding from the stage at which it was left by his predecessor. The questions referred to this court are answered as above.

13. Counsel for the Revenue submitted that the Tribunal was in error in simply affirming the orders passed by the Appellate Assistant Commissioner cancelling the penalties without giving a consequential direction that the matter may be reconsidered by the assessing authority after affording notice and opportunity to the assessee. No question touching on the above aspect has been referred to us, but we should state that if an order passed by a statutory authority is held to be illegal or void for non-compliance with the principles of natural justice, the proceedings do not come to an end. They will stand restored to the stage before the order was passed. This position is well-settled in law--See Superintendent (Tech. I) Central Excise, I.D.D. Jabalpur and Others Vs. Pratap Rai, and GUDUTHUR BROS. Vs. Income Tax OFFICER, SPECIAL CIRCLE, BANGALORE., . We do not think that the Tribunal committed any error in not giving the consequential direction which is already the position in law. It needs no repetition.

14. A copy of this judgment under the seal of this court and the signature of the Registrar will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.