

(1988) 04 PAT CK 0029

In the Patna High Court

Case No : Taxation Case No's. 114 and 115 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Smt. Pushpa Devi

RESPONDENT

Date of Decision : 05-04-1988

Acts Referred:

Income Tax Act, 1961 — Section 119, 143, 143(1), 143(3), 263

Citation : (1988) 70 CTR 148 : (1988) 173 ITR 445 : (1988) 40 TAXMAN 375

Hon'ble Judges : Uday Sinha, J; Krishna Ballabh Sinha, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and S.K. Sharan, for the Appellant; K.N. Jain, L.N. Rastogi and N.P. Agrawal, for the Respondent

Judgement

Uday Sinha, J.—The points falling for consideration in these references had been answered earlier in Commissioner of Income Tax Vs. Pushpa Devi, and Commissioner of Income Tax Vs. Smt. Rambha Devi, . Mr. K. N. Jain, learned counsel for the assessee, has once again agitated the same questions. Out of deference to him, I proceed to a reconsideration of his submissions. It only needs to be stated that the present assessee, Pushpa Devi, is different from the assessee, Pushpa Devi, in the decision referred to above.

2. In these references, we are concerned with the assessment years 1972-73 and 1973-74. The questions referred to us for our opinion are as follows:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the assessment orders, having been passed by the Income Tax Officer after necessary enquiries in pursuance of the scheme "to help the new taxpayers in the small income groups" launched by the Government, were not erroneous so as to enable the Commissioner of Income Tax to assume jurisdiction u/s 263(1) of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the impugned order of the Commissioner of Income Tax is based

upon mere surmises and conjectures and is, therefore, not valid ?

3. Whether, in view of the decision of the Tribunal, Patna, in the case of Rambha Devi v. ITO (income tax Appeals Nos. 1713 to 1715 (Pat) of 1974-75), the Tribunal has rightly held that the Commissioner of Income Tax, acting u/s 263(1) of the Income Tax Act, 1961, could not legally set aside an order of assessment made u/s 143(1) in pursuance of the scheme " to help the new taxpayers in the small income groups " evolved by the Government ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal has rightly held that the Commissioner of Income Tax acted in a mechanical manner in setting aside the assessment order for the assessment year 1973-74 and so his order for that year is invalid ?

5. Whether, on the facts and in the circumstances of the case, the Tribunal has rightly cancelled the consolidated order passed by the Commissioner of Income Tax u/s 263(1) of the Income Tax Act, 1961, for the assessment years 1972-73 and 1973-74 ? "

3. Question No. 1 mentioned above was question No. 1 in the earlier Commissioner of Income Tax Vs. Pushpa Devi, . Question No. 2 of these references was question No. 3 in the earlier case. Question No. 3 of these references was question No. 4 in the earlier case. Question No. 4 was question No. 5 in the earlier case and question No. 5 was question No. 6 in the earlier case. A Bench of this court had answered all the questions in the negative, in favour of the Revenue and against the assessee. The Commissioner had disposed of the revisions by a consolidated order in terms of section 263(1) of the Income Tax Act. The Tribunal disposed of the two appeals by a common judgment. We have heard the references together and they will be disposed of by this common judgment.

4. In October, 1972, the Central Board of Direct Taxes, came out with a scheme for mass communication, with a view to encouraging new assesseees in small income groups, to furnish their returns of income voluntarily. This scheme was launched in exercise of powers u/s 119 of the Income Tax Act. The scheme covered assesseees where the borrowed capital did not exceed Rs. 25,000 and the returned income did not exceed Rs. 15,000. The assessment of the assesseees, who fall within these two limits, was to be effected in terms of Section 143(1) of the Act. There was, however, a severe rider that returns of income filed in the names of minors and ladies should not be accepted without proper inquiries. Such assesseees, in terms of the scheme, would not be liable to penalty. Where the income exceeded Rs. 15,000, after making adjustments in terms of Section 143(1)(b) of the Act, the assessee would not be entitled to waiver of penalty. The Income Tax Officers were directed by the scheme to advise the assesseees whose income exceeded Rs. 15,000 to apply to the Commissioner of Income Tax u/s 271(4A) of the Act and in such cases, paragraph 7 of the scheme was to be followed. The scheme was to be given wide publicity. In the implementation of

the scheme, a lot of publicity was given by the Revenue Department. Income Tax Officers visited different places under the instructions of their Commissioner and their Inspecting Assistant Commissioner. The assessee, who had taxable income, were requested and persuaded to file their returns under the scheme which were accepted by the Income Tax Officers u/s 143(1) of the Act.

5. In the implementation of the scheme, a large number of ladies and minors filed returns. The Income Tax Officer assessed the present assessee and all the ladies and minors straightaway u/s 143(1) of the Act. The present assessee showed an investment of Rs. 12,000 and returned income of Rs. 5,100 in each of the assessment years. In some cases, a show of inquiry was made by the Income Tax Inspector submitting four sentence stereotype reports. After the assessments had been made, the Commissioner of Income Tax perused some of the assessment records and by perusing some of them, he found that the assessments of ladies and minors should not have been done in terms of the scheme u/s 143(1) of the Act. In his view, the assessment orders were irregular, erroneous and prejudicial to the Revenue. He, therefore, set aside the assessments by a consolidated order. After having set aside the assessments, he remanded the matter to the Income Tax Officer to restore the matter to his file and to make fresh assessment after making a close scrutiny as to the extent of initial capital, if any, and the actual income earned by the assessee.

6. The present assessee, being aggrieved by the order of the Commissioner setting aside the assessments made by the Income Tax Officer, preferred appeals to the Income Tax Appellate Tribunal. The Tribunal, after hearing the parties, cancelled the order of the Commissioner and allowed the appeals. In allowing the appeals, the Tribunal rested its decision on the earlier decision of the Tribunal in the case of *Ramba Devi v. ITO, The Commissioner of Income Tax*, being aggrieved by the order of the Tribunal, took steps for making a reference to this court. Hence, the present references u/s 256(1) of the Income Tax Act before us.

7. The core question in the references is whether the Income Tax Officers had to assess ladies and minors in terms of Section 143(3) of the Act or whether they were to be assessed in terms of Section 143(1) of the Act. If the assessments had to be made in terms of Section 143(3) of the Act, a detailed inquiry was a must. In that connection, the question would be whether the so-called inquiry was really an inquiry or not. The other questions are merely incidental or fall out of the core question. In order to resolve the core question, we must have a look at paragraph 4 of the scheme which reads as under (at p. 642 of 164 ITR):

" 4. New cases where the returned income does not exceed Rs. 15,000 and the capital invested including the borrowed capital does not exceed Rs. 25,000 should ordinarily be completed u/s 143(1). Returns of income filed in the names of minors and ladies should not, however, be accepted without proper enquiries. Where, however, after making the adjustment set forth in Section 143(1)(b), the assessable income exceeds Rs. 15,000, the assessee will not be entitled to the waiver of penalty in terms of the Board's order u/s 119(2)(a) and he may be

advised to make an application to the Commissioner of Income Tax u/s 271(4A) of the Income Tax Act and the procedure outlined in para. 7 may be followed. The above instructions will also apply in relation to the "First year's assessment" and to that extent, the direction of the Board contained in para. 2(iv) of Instruction No. 289 (F. No. 285/32/71-IIB) dated April 30, 1971, as revised by para. 2(ii) of Instruction No. 426 (F. No. 233/1/72-A& PAC) dated the 14th June, 1972, stands modified during the operation of this scheme. "

8. It will be observed that the scheme spelt out an exception for the Income Tax Officer in assessing minors and ladies. It enjoined that their returns should not be accepted without proper inquiries. The purpose behind this injunction was to test whether the income was really of the minors or ladies or whether they represented someone else's income which should be taxed at a higher rate. That someone could be the spouse or it may be the firm in which the income/capital had been deposited. Section 64(1), so far as relevant, reads as follows :

" (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly-

(i) to the spouse of such individual from the membership of the spouse in a firm carrying on a business in which such individual is a partner;

(ii) to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest. "

9. It will be appreciated that the scheme was not meant to cover various categories of assessees. In regard to ladies and minors, there was special injunction. In my view, therefore, the scheme was that the assessments should be made on the pattern indicated in Section 143(1) of the Act but that should not be followed in the case of ladies and minors. This, by implication, meant that the pattern spelt out in Section 143(3) should be followed in their case. I am, therefore, of the view that the scheme did not apply to ladies and minors. If the assessments had to be done in terms of Section 143(3), no scheme was called for. That is the usual mode of assessment specially in the case of first assessee. It follows, therefore, that in the case of ladies and minors, Section 143(1) of the Act would not be applicable and thus the scheme did not apply to them.

10. Mr. N. P. Agrawal, learned counsel for the assessee, contended that if the Scheme did not apply to ladies and minors, there was no point in referring to them in the Scheme. He drew our attention to the mention of ladies and minors in the Scheme quoted earlier. It was contended that it would not be right to hold that the Scheme did not apply to ladies and minors. I regret I have some difficulties in accepting the submission. Special mention was made of ladies and minors. As if it had not been stated, the case of ladies and minors would also have received the same treatment in terms of Section 143(1) of the Act as other assessees. This was not in the contemplation of the Central Board of Direct Taxes. There was no intention that the real assessees should slip off through the

liberalised scheme. In that view on the matter, I regret I am unable to see any substance in the submission urged by Mr. N. P. Agrawal.

11. Mr. K. N. Jain, learned counsel for the assessee, submitted that the law is that if an assessee fails to account for an investment or for the income returned, it would be taken to be the income of the assessee. Reliance was placed upon Section 69 of the Income Tax Act, which lays down that where the assessee has made investments which are not recorded in the books of account, if maintained by him, for any source of income and the assessee offers no explanation or the explanation offered is not satisfactory, the value of the investment may be deemed to be the income of the assessee of such financial year. On that footing, it was submitted that the assessee having failed to explain the source of its investment--on the assumption that it had not been explained--the said sum of Rs. 12,000 should be taken as the income of the assessee.

12. I regret this submission fails to take note of Section 64(1) quoted earlier which lays down that the total income of an individual shall include the income which arises directly or indirectly to his/her spouse from the membership of the spouse in a firm carrying on a business in which the individual is a partner. It further lays down that the income shall include also such income as arises to the spouse of that individual by salary, commission, fees or any other form of remuneration in cash or in kind. The proviso thereto is an exception to the rule of clubbing of income of the spouse with the income of an individual. The whole matter seen from this angle emerges like this. A lady shows an investment. No books are maintained. No satisfactory explanation is offered for the investment. One of the inferences possible therefrom would be that it was the income of the husband. I dare say, in law, it cannot necessarily be relatable to the husband. The whole world can be the source of that investment but it cannot be denied that the husband also may be one of the sources. That is why an inquiry in terms of Section 143(3) is necessitated.

13. Learned counsel for the assessee drew our attention to an observation in the case of Commissioner of Income Tax Vs. Pushpa Devi, , where it has been stated that where a lady fails to account for the source of investment, it would be justified in concluding that the funds must have been provided by the husband. Relying upon Commissioner of Income Tax Vs. Shantilal Agarwalla, , it was contended that there is no such presumption that the assets standing in the name of a wife are assets of the husband. The bald proposition is unexceptionable. The observation, however, in the case of Commissioner of Income Tax Vs. Pushpa Devi, , was made on the basis of the facts of that case. It is correct that it must be held in that situation that the funds had been provided by the husband but it is not too difficult to think on the lines that the funds may have been provided by the husband. If there was scope for that, there was scope for a proper inquiry into the sources of capital investment of the spouse. That is all that the Commissioner had emphasised in his order. That is the aspect which I was highlighting in the earlier decision.

14. The Commissioner did not record a concluded finding, and in my view rightly, that the initial investment came from the assessee's husband but his observation that "such income was clearly shown only to accommodate and assist someone else who would have been assessed at a higher rate of tax", is clearly unexceptionable. The situation called for a detailed inquiry.

15. When the assessment order was passed on December 28, 1972, the inquiry report submitted by the Income Tax Inspector read as follows:

" Enquired into the business activity of the lady. From inquiry it was learnt that the lady was married in a rich family and she received cash from her relations and parents. It was also learnt that she was carrying on pawnbroking and casual money-lending business since long and had saved sufficient amount of money or capital from this business. The capital disclosed and income shown by the lady seem to be correct. "

16. The inquiry report did not mention the amount of cash which the assessee had received from her relations and parents. If the idea was to convey that the cash shown had come in cash form at the time of her marriage, a pertinent question to be inquired into would be where was the cash amount kept when she had been married seventeen years earlier ? Does it necessarily follow that the cash amounts received seventeen years earlier were kept locked as a dead asset ? I would be loath to assume that it was so done. In fact, the second sentence of the report indicates that the cash in her possession was being utilised in pawnbroking and money-lending. I would not expect maintenance of any register of money-lending as required by the Bihar Money Lenders Act, 1958, but I would certainly expect in a detailed inquiry of a first assessee, a disclosure of some of the borrowers. The acceptance of a bald statement that the assessee was carrying on pawnbroking business and carrying on money-lending business was not an inquiry contemplated by Section 143(3) of the Act. It is true that the assessee was married in a rich family but we do not know the financial condition of the family in which she was born and which gave her in marriage. It does not necessarily follow that if a girl is married in a rich family, she will receive a bounty from her parental family or her husband's family. Something more was required to be disclosed or at least something more was required to be inquired into. The situation in this case is worse than the situation in the earlier case of Commissioner of Income Tax Vs. Pushpa Devi, . In that case, there were three affidavits to support the stand of the assessee. In this case, there was none except the ipse dixit of the assessee. In her show-cause before the Commissioner, the assessee disclosed that she had received about Rs. 12,000 by way of cash gift from her parents' side and from her father-in-law's side at the time of the marriage and thereafter up to March 31, 1971. That she was receiving cash gifts even seventeen years after her marriage has to be considered in the broad perspective of happenings in a family. I do not intend to comment upon it. But the main question is how far that cash amount was kept for seventeen long years. In her show-cause, she also took the stand that

pawnbroking was very much prevalent amongst ladies of middle class family in the area in which she resided. She had offered in her show cause to furnish further materials in proof of the source of her capital and income earned but none was produced before the Commissioner. In paragraph 7 of her show-cause, she has stated that the petitioner's husband derived income from a partnership business with M/s. Bombay Cloth Emporium and is assessed at a marginal taxable income. The books of the Bombay Cloth Emporium also need to be scrutinised where they showed cash credit by the assessee with that firm. All that I am emphasising is that there was a case for a proper inquiry. The inquiry conducted was not proper. The further inquiry ordered by the Commissioner may reveal materials supporting the assessee's stand but that can be done only after proper inquiry in terms of Section 143(3) of the Act. In my view, therefore, the order of the Commissioner was unexceptional. The Income Tax Officer in assessing ladies and minors forgot one important aspect of the matter which was succinctly spelt out by the judges in *Shakuntala Devi Vs. Commissioner of Income Tax*, in the following words at page 429 :

"As we have observed before, the acquisition of the initial capital is a link, and a crucial link at that, in the chain of the assessee's explanations with regard to the incomes that she had received."

17. I cannot improve upon it nor can it be over-emphasised. I would once again repeat the observation of the Supreme Court in *Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta*, , where it was observed that where an income has not been earned and is not assessable, merely because the assessee wants it to be assessed in order to assist someone else who would have been assessed to a larger sum, the assessment so made will be erroneous and prejudicial to the Revenue. In that situation, the Commissioner, acting in terms of Section 263 of the Income Tax Act, would have jurisdiction to cancel the assessment and proceedings for assessment may be initiated under the provisions of the Act against some other assessee, who according to the Income Tax authorities, might have earned the income. In my considered opinion, there were materials or circumstances before the Commissioner to support the view he adopted or setting aside the order of the Income Tax Officer.

18. Mr. K. N. Jain, learned counsel for the assessee, contended that an Income Tax Officer has the jurisdiction to assess in terms of Section 143(1) or in terms of Section 143(3). The discretion, according to learned counsel for the assessee, is of the Income Tax Officer. If the latter has decided to proceed in terms of Section 143(1) and not in terms of Section 143(3), his order of assessment cannot be said to be erroneous. I regret this submission loses sight of the injunction of the scheme that in the cases of ladies and minors, assessments should not be done without proper inquiries. This rider clearly means that assessment in such cases had to be done in terms of Section 143(3) of the Act. The submission advanced on behalf of the assessee in this behalf must, therefore, be rejected

19. Learned counsel for the assessee also submitted that assuming that the

assessee had failed to give any satisfactory explanation about the nature and source of acquisition of the money, it was free to accept it as the income of the assessee. Section 69A of the Act lays down that where in any financial year, the assessee is deemed to be the owner of any money and that money is not recorded in the books or if recorded, he/she fails to give satisfactory explanation about the nature and source of acquisition of the money, the said money may be deemed to- be the income of the assessee. The submission is attractive in the first instance, but it is devoid of substance. This is making the problem too simple as to make it almost ridiculous. The question is whether the money was of the assessee or of somebody else. Proceeding in terms of Section 69A as contended, it would mean accepting the assessee's statement without any scrutiny. That is not the purpose of Section 69A of the Act. The Income Tax authorities have to investigate whether there was any attempt to palm off tax liability of someone else. In my view, Section 69A of the Act cannot be of any assistance to the assessee.

20. Learned counsel for the assessee contended that in order to exercise jurisdiction u/s 263 of the Act, it was not enough for the Commissioner to hold that the order was erroneous but he had also to find that the order was also prejudicial to the Revenue. In my view, on the facts and circumstances of this case, if an inquiry is called for but no inquiry is done, the Revenue, by letting someone else escape the rigour of taxation, will cause loss to the Department as a whole. It was, therefore, prejudicial to the Revenue. The submission is that, after all, by the assessment, tax had been paid by the assessee. He had not been let off and that the Revenue had in fact gained is fallacious. If the income was of someone else who could be taxed at higher rate, the Revenue gathering would be greater than certain amount escaping taxation through spouse or anyone else. Where the Revenue could get rupees hundred, it may have got only rupees ten. If that be the case, the assessment would obviously be prejudicial to the Revenue. I have already referred to the decision of Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, , which supports my proposition that in some situation where an order is erroneous, it will necessarily be prejudicial to the Revenue. The present is one such and I am, therefore, definitely of the view that the order was not only erroneous but was also prejudicial to the Revenue.

21. Learned counsel for the assessee submitted that the order of the Commissioner was based on surmise as he had not found any material to show that the initial capital was of the husband. The Commissioner has not found that the initial capital was of the assessee. He has only held that the matter calls for inquiry and the initial capital may be of the husband. He has only repelled the contentions urged on behalf of the assessee in answer to the notice to show cause. He has not recorded any concluded finding. In paragraph 5 of his order, he has observed as follows:

" After considering the whole matter, I am of the opinion that the activities of the

assessee need be probed into especially in view of the fact that there is no proof of the initial capital and that the income returned and assessed is absurdly high with the obvious purpose to accommodate or assist her husband who would have been assessed to a much higher rate of tax and they represent either undisclosed income of her husband or the firm."

22. The above is not a finding that the initial capital was of the husband. It only means that the manner in which the assessment was done was erroneous and that if the inquiry had been conducted as provided in section 143(3) and in the scheme, the finding in regard to initial capital may not be in favour of the assessee.

23. Learned counsel for the assessee submitted that the mere fact that an assessee had been assessed by an officer who had no jurisdiction to assess him was by itself no ground for setting it aside by the Commissioner in exercise of powers u/s 263(1) of the Income Tax Act. Reliance was placed upon Commissioner of Income Tax Vs. Shantilal Agarwalla, in this behalf and it was submitted that that case had not been appreciated in its true perspective in the case of Commissioner of Income Tax Vs. Smt. Rambha Devi, . I regret once again having to observe that the case of Commissioner of Income Tax Vs. Shantilal Agarwalla, has no application to the present situation. That was a case where the assessee had been assessed by the Income Tax Officer who had no jurisdiction. That is not the situation here. The Income Tax Officer in this case certainly had the jurisdiction to assess but the exercise of his jurisdiction was tainted by illegality. Here the question was whether the assessment should have been done in terms of Section 143(1) or of Section 143(3) of the Act. I am not for a moment suggesting that wherever the order of the Income Tax Officer is found to be erroneous, it must be presumed that the order was also prejudicial to the Revenue. I am only suggesting that there may be some case where prejudice may be accepted if the order is erroneous. The present case and like cases fall in this latter category. The present case, in that view of the matter, falls within the ken of the decision of the Supreme Court in Rampyari Devi Saraogi Vs. Commissioner of Income Tax, West Bengal and Others, , since neither the income from money-lending had been spelt out nor had the assessee disclosed the names of any of the borrowers. Thus, on the facts as well as in law the case of Commissioner of Income Tax Vs. Shantilal Agarwalla, stands on an entirely different footing. In my view, therefore, the decision of Commissioner of Income Tax Vs. Shantilal Agarwalla, can be of no avail to the assessee.

24. Reliance placed upon S.N. Ganguly Vs. Commr. of Income Tax, is misplaced. True it is that there is no presumption in law that an amount standing in the name of the wife belongs to the husband. That was a case where the husband was the assessee and certain sums standing in the name of the wife were said by the Revenue to be that of the husband. In that situation, it was observed that there was no presumption in law that the property standing in the name of the wife belonged to the husband. The difference between the case of S.N. Ganguly

Vs. Commr. of Income Tax, and the instant case is that, in that case, findings had been recorded by the Assessing Officer. In the instant case, the necessary inquiry and necessary-finding have still to be recorded. When an inquiry u/s 143(3) of the Act is launched, the finding will not depend only upon presumption. We would, however, only like to observe that the onus of proof cannot be cast entirely upon the Revenue. The question of onus will devolve on the Revenue only if the assessee produced some material to show that what he or she states may be correct. The Revenue cannot be expected to launch a police investigation not to exclude the possibility of money having come to the assessee from all known or unknown sources in the whole world. If the assessee himself does not give some proof of the source of the initial capital, it may be difficult for the taxing officer to accept the ipse dixit of the assessee. The materials produced by the assessee himself may provide some materials for the Revenue to disprove the assertion of the assessee. In my view, the case of S.N. Ganguly Vs. Commr. of Income Tax, cannot be of much assistance to the assessee.

25. Relying upon Jamnaprasad Kanhaiyalal Vs. Commissioner of Income Tax, M.P., Bhopal, , it was contended that credits appearing in the books of account of an assessee, if unexplained, may be treated as the income of the assessee from undisclosed sources in terms of Section 68 of the Act. The question of entry in the books of the present assessee does not arise as she had not maintained any accounts. In my view, therefore, this case also is of no assistance to the assessee.

26. Having given my utmost considered consideration to the submissions advanced on behalf of the assessee, once again I am not convinced that the earlier case of Commissioner of Income Tax Vs. Pushpa Devi, was decided erroneously. The present case, as that of other similar cases, must be decided on the ratio of Smt. Tara Devi Aggarwal Vs. Commissioner of Income Tax, West Bengal, Calcutta, and of Rampyari Devi Saraogi Vs. Commissioner of Income Tax, West Bengal and Others, . I am thus firmly of the view that the assessment of the assessee, a lady, had to be done in terms of Section 143(3) of the Income Tax Act. That not having been done in that manner, the assessment was rightly held as erroneous. As the exercise had not been done in proper perspective, it was prejudicial to the Revenue in the present case.

27. Admittedly, the scheme was not operative for the assessment year 1973-74. The Income Tax Officer was, therefore, in the wrong in accepting the return of the assessee in terms of the scheme without proper enquiries. The assessments for both the years were thus erroneous and prejudicial to the Revenue.

28. The Tribunal was not right in the view that it took in setting aside the Commissioner's order. All the questions, therefore, must be answered in favour of the Revenue and against the assessee.

29. The references are thus answered with consolidated costs of Rs. 250 payable by the assessee to the Revenue.

30. Let a copy of this judgment be transmitted to the Assistant Registrar, Income Tax Appellate Tribunal, Patna, in terms of Section 260 of the Income Tax Act.

Krishna Ballabh Stnha, J.

I agree.