

(1963) 11 AHC CK 0006

In the Allahabad High Court

Case No : Agricultural Income Tax Reference No. 16 of 1960 associated with
Agricultural Income Tax Reference No. 365 of 1955

RAJA YADVENDRA DATT DUBE

APPELLANT

Vs

STATE OF UTTAR PRADESH.

RESPONDENT

Date of Decision : 28-11-1963

Acts Referred:

Uttar Pradesh Agricultural Income Tax Act, 1948 — Section 24(4)

Citation : (1964) 54 ITR 506

Hon'ble Judges : M. C. Desai, C.J

Bench : Division Bench

Judgement

M. C. DESAI C.J. - This is case referred u/s 24(4) of the Uttar Pradesh Agricultural Income Tax Act by the Revision Board at the assessee's instance, the question requiring this court's answer being :

"Whether on the facts and having regard to the provisions of section 25 of the Act, the Board could on the 15th October, 1952, direct a fresh assessment to be made ?"

The facts as they appear from the statement are as follows ? : The gross agricultural income of the assessee is of more than one lakh of rupees and the Collector and not the Sub-divisional Officer is his assessing authority : vide section 14. Section 15(3) lays down that "in the case of any person whose total agricultural income is, in the opinion of the assessing authority, such amount as to render such person liable to payment of agricultural Income Tax in any year, he may be served in that year a notice in the proscribed form requiring such person to furnish within such period, not being less than thirty days as may be specified in the notice, a return in the proscribed form..... setting forth his total agricultural income during the previous years." If the assessing authority is satisfied that return made u/s 15 is correct and complete it is to assess the agricultural income of the assessee and determine the tax payable by the person. If it finds the return to be incorrect or incomplete it should serve on the person a

notice requiring him to attend its office or to produce evidence on a certain date and the it should pass an assessment order assessing the agriculture income and determining the tax payable by the person. If the person fails to make a return or fails to comply with the notice issued under sub-section (2) or to produce evidence under sub-section (3) of section 16 it is required to make the assessment to the best of its judgment. This is the gist of section 16. There is some difficulty in giving effect to the provisions of section 16(3) and 14(2). Who is an assessing authority depends upon the gross income but what is the gross income can be determined only when it is assessed u/s 16 after the issue of a notice u/s 15(3). The notice u/s 15(3) is required to be issued by the assessing authority; it is not understood how, before it is known what the gross agricultural income of the assessee is going to be, it can be said whether a Sub-Divisional Officer is the assessing authority or the Collector and how without its being determined at this stage who is going to be the assessing authority a notice can be issued at all. However, in this case a notice u/s 15(3) was issued by a Sub-Divisional officer of the assessment year 1356 Fasli. He found that the gross income of the assessee was of more than one lakh and still assessed him on May 14, 1949, though on the net amount of Rs. 72,000 and odd. On December 23, 1949, the Collector issued a notice contemplated by section 25 to the assessee stating that some income of his had remained unassessed. This provision reads as follows :

"25. If for any reason any agricultural income.... has escaped assessment for any year.... the assessing authority may, at any time within one year of that year, serve on the person liable.... a notice..... and may upon service of such notice proceed to assess or reassess such income, and the provisions of this Act shall, so far as may be, apply according as if the notice were a notice issued u/s 15(3) and (3B)."

The assessee contested the notice and the Collector assessed him on June 9, 1950, on a certain additional income. He appealed to the Commissioner against the assessment order and on March 5, 1952, the Commissioner allowed the appeal, held that the assessment orders passed by the Collector on June 9, 1950, and by the Sub-Divisional Officer on May 14, 1949, were without jurisdiction, set them aside and ordered that the "whole case shall be reopened by the Collector and fresh assessment of the whole of the income for 1355 F. shall be made by the Collector after giving a notice to the assessee and after giving reasonable opportunity for production of evidence, if any, as required by section 16(2) and according to the provisions of law." The assessee went up in revision against this order and on October 15, 1952, the Revision Board held that the Commissioner had no jurisdiction to set aside the assessment order passed by the Sub-Divisional Officer on May 14, 1949, and that since it was without jurisdiction and the fact that it was so was brought to its notice, it should in exercise of its revisional jurisdiction set it aside, whole maintaining the order passed by the Commissioner, itself set aside the Sub-Divisional Officers assessment order as being without jurisdiction and directed that "fresh

assessment will be made according to law." Since the Board passed the order more than six years after the end of the assessment year the question arose whether it could be passed at all or not.

In the connected case three questions have been referred to this court by the Revision Board, they being :

"1. Whether having regard to the provisions of section 25 of the Agricultural Income Tax Act, 1948, the Revision Board was entitled in law to entertain a revision application and direct fresh assessment thereon after the lapse of more than one year from the end of the assessment year (1356 Fasli which corresponds to the period July 1, 1948, to June 30, 1949) ?

2. Whether the applicant is entitled to set off losses determined u/s 6(2)(b) against income arrived at u/s 5 of the Act ?

3. Whether on the facts of the case 60% of the income from shade trees of the tea garden for the period April 15, 1948, to June 30, 1949, could be assessed as the applicants income ?"

In question No, 3 "June 30, 1949," is obviously is mistake for June 30, 1948; the question before the Board was regarding income for the year ending June 30, 1948, and it had nothing to do with the period of July 1, 1948, to June 30, 1948. The question, therefore, will be answered in respect of the period April 15, 1948, to June 30, 1948, only. The facts giving rise to them are as follows : The gross income of the assessee is of more than one lakh of rupees. On July 22, 1949, the Collector passed an assessment order on certain income for the assessment year 1356 Fasli ending on June 30, 1949. The State made an application to him subsequently alleging that some income had escaped assessment and praying for proceedings u/s 25. The Collector rejected the application. The State applied in revision to the Board against the assessment order dated July 22, 1949, and the revision application was allowed by the Board on September 18, 1951, and it passed the following order :

"The result is that the application is allowed, the assessment order is set aside and the case is remained for fresh assessment in the light of the observations made above."

The assessee then applied to the Board for reference of the question whether it could order fresh assessment after the expiry of one year from the end of the assessment year but the Board rejected the application. He then applied to this court u/s 24(4) and this court directed the Board to refer the case to it. The Board thereupon referred the case to this court. It did not frame proper questions in the beginning and this court called for a supplementary statement of the case and now the Board has referred the questions set out above.

There is only one question referred to this court in the instant reference and it is whether the Board could direct a fresh assessment to be made more than one year after the expiry of the assessment year. There could arise other questions

such as whether the assessing authority referred to in section 25 is the assessing authority that had passed the original assessment order resulting in escape or may be a different assessing authority and whether which assessing authority is competent to issue a notice u/s 25 depends on the amount of the escaped income or on the aggregate of the the amounts of the income already assessed, if at all, and the escaped income. The original assessment order was passed by a Sub-Divisional Officer but the notice u/s 25 was issued not by him but by the Collector. The Collector issued notice u/s 25 on the ground that a net income of Rs. 7,000 and odd had escaped assessment; if the amount of the escaped income alone was to be considered in determining who can issue a notice u/s 25, the Sub-Divisional Officer, and not the Collector, could issue it. Further, if once an assessment order was passed by an assessing authority only, it can issue a notice u/s 25; again the notice in this case could have been issued only by the Sub-Divisional Officer. But if the law is that if an assessment order is passed by a Sub-Divisional Officer wrongly, i.e., without jurisdiction, a notice u/s 25 can be issued by the Collector notwithstanding the fact that the amount of the escaped income is of less than one lakh of rupees, the notice was rightly issued by the Collector. None of these questions has, however, been raised on behalf of the assessee.

Section 25 applies only when agricultural income has escaped assessment (I am ignoring the case of agricultural income being assessed at too low a rate). What amounts to escape of income has not been explained either in the U. P. Agricultural Income Tax Act or the U.P. sales Tax Act or in the Indian Income Tax Act, all of which contain provisions in respect of escaped income or turnover chargeable to tax. As I said in *Kishanlal Gopikrishna v. Commissioner of Sales Tax* (Miscellaneous Case No. 397 of 1961, decided on July 30, 1963), an escape arises : (1) when the time limit for passing an assessment order expires; or (2) when an assessing authority erroneously refuses to tax income for any reason whatsoever. The Agricultural Income Tax Act does not prescribe the period within which an assessment order must be passed or on the expiry of which it cannot be passed. Section 15(3) requires the assessing authority to issue to a person liable to pay tax a notice in the assessment year but does not require it to pass an assessment order within any fixed time; once a notice has been issued in the assessment year an assessment order can be passed at any time. Section 16 which deals with assessment order does require it to be passed within a certain time. Section 25 fixes the period within which a notice can be issued but does not fix any period within which an assessment order in pursuance of the notice must be passed. Provided a notice u/s 25 is issued within one year of the expiry of the assessment year the escaped income can be assessed at any time. As no time has been fixed for the passing of an assessment order it is not possible to say that on the expiry of certain time there has resulted an escape of income. Here escape resulted from the failure on the part of the Sub-Divisional Officer to tax income from a certain class of land; when passing the assessment order he refused or neglected to include the income in the taxable income. When he

assessed the remaining income it amounted to the income from certain class of land having escaped assessment and notice u/s 25 would be issued. The Collector issued the notice within one year of June 30, 1949, the last date of the assessment year. It was, therefore, in order. Once it was in order when issued, it was to be acted on as if it were notice issued u/s 15 and an assessment order could be made at any time. No order passed by the Collector taxing the escaped income u/s 25 could be challenged on the ground that it was made after the expiry of a certain time.

It has not been contended before us that the order passed by the sub-divisional Officer was within his jurisdiction. The gross income found by him was of more than one lakh of rupees and, therefore, he lacked the jurisdiction to pass it even though he assessed tax on a smaller sum. Section 15(3B) requires an assessing authority to send along with a notice referred to in sub-section (3)a statement showing a provisional estimate of the assessee's agricultural income. The statement of the case does not mention what income was mentioned by the Sub-Divisional Officer in the statement which he ought to have sent to the assessee along with the notice. If it itself showed a provisional estimate of more than one lakh of rupees, it was clear case of his having no jurisdiction to issue the notice and to assess the assessee. If on the other hand it showed a provisional estimate of less than one lakh of rupees, it could be argued that he had jurisdiction to issue the notice, even though during the assessment proceedings he found that the gross income exceeded one lakh of rupees, but in that event he would lose his jurisdiction to proceed further on arriving at this finding. So he had no jurisdiction to pass the assessment order even if he had jurisdiction to issue a notice u/s 15(3).

What the Board has done in the instant case is that it set aside the Sub-Divisional Officer's order on the ground that it was without jurisdiction. The Collector's order had already been set aside by the Commissioner and this part of the Commissioner's order was upheld by the Board. As the assessment orders were set aside the Board directed fresh assessment orders to be passed by the Collector. The Commissioner had ordered that the Collector should give a fresh notice to the assessee and proceed as laid down in section 16; he did not explain what notice was to be given. There were two possible notices, one referred to in section 15(3) and the other referred to in section 25. A notice u/s 15(3) must be served in the assessment year and a notice u/s 25 must be served within one year of the expiry thereof. Neither of the notices can be served after the expiry of one year from the end of the assessment year. Here the Commissioner passed the order in 1952, after more than a year from the end of the assessment year and, therefore, either of the notices could be issued by the Collector and the Commissioner had no jurisdiction to direct him to issue either of the notices. The Board did not set aside the Commissioner's order and directed fresh assessment to be made according to law. "According to the law" means according to all the law relating to assessment, including the law relating to a notice by which assessment proceedings are commenced. Since it was too late to issue any

notice, no proceeding, whether u/s 16 or u/s 25, could be started by the Collector.

The Commissioner did not go into the question whether the notice issued by the Sub-Divisional Officer u/s 15(3) was within his jurisdiction or not. He did not expressly hold it to be within his jurisdiction. Since he was of the view that the assessment proceeding should have been initiated by the Collector and directed him to issue a notice, he seems to have ignored the notice issued by the sub-divisional officer. He ordered that the "whole case should be sent back for fresh assessment after compliance with the provisions of law"; this suggests that he did not intend to save the notice given by the sub-divisional officer u/s 15(3). If he had intended that the Collector should proceed to assess on the basis of the notice given by the Sub-Divisional Officer u/s 15(3), he would have said so clearly. If he had upheld the notice he would not have called upon the Collector to give "another" notice to the assessee.

If one has regard to the provisions of section 15 and 16 the only answer to the question is that the Board could not on October 15, 1952, direct a fresh assessment to be made by the Collector after issuing a fresh notice. But it was contended before us that the Board's powers u/s 22 are wide and are not circumscribed by any conditions. Section 22 simply provided that the Board may "call for the record of any proceeding under this Act... and after such inquiry as they deem necessary, may pass such orders as they think fit." Though the words "such orders as they think fit" are wide enough to include any order, they have to be read in the context of the other provisions of the Act. The Board is as much bound by the provisions of the Act as the assessing authority and the Commissioner. If a certain order cannot be passed by an assessing authority the Board has no power to direct it to pass it. What cannot be done directly cannot be done indirectly. The condition that an order that the Board intends to pass must be in accordance with the law is implied in its jurisdiction. Its jurisdiction is revisional, that is, to correct errors of law committed by the subordinate authorities; it is not to confer power upon them to contravene or commit errors of law. It cannot be said that the Board has jurisdiction to ask the assessing authority to charge tax at a rate other than that mentioned in section 3 of the Act or the tax agricultural income even though it is less than Rs. 4,200 or is of a person who cultivates not more than 30 acres of land. In the same way it has no jurisdiction to ask the assessing authority to issue a notice u/s 15(3) or section 25 when the period prescribed therefore has expired. This view is confirmed by *Commissioner of Income Tax v. Khemchand Ramdas*, in which Lord Romer observed at page 180 :

"The Commissioners powers u/s 33 only be exercised subject to the provisions of the Act, of which the provisions in section 34 and 35 are in this respect of the greatest importance... it is... quite impossible to suppose that the Income Tax officer may in every kind of circumstance and after any lapse of time make fresh assessment or issue fresh notices of demand; or that the Commissioner can

direct him so to do... the provisions of the two section are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued."

State of U.P. v. Jaipuria Brothers Ltd. did not decide anything to the contrary as I would show presently. u/s 33A of the Indian Income Tax Act the revisional jurisdiction of a Commissioner of Income Tax is expressly made "subject to the provisions of this Act" but it does not follow that in the absence of these words the revisional jurisdiction is absolute and unrestricted by the provisions of the Act. If an order can be passed only within a certain period according to a statutory provision and is passed within that period but an appellate or revisional court sets it aside, a question will arise whether if it sets it aside and remands the case for a fresh order before the expiry of the prescribed period, the inferior court acquires jurisdiction to pass it even after the expiry of the period. In such a case it can be argued that the inferior court is governed by the remand order which was valid when it was passed and that it must comply with it and when complying with it is not subject to the limit within which it was required to pass the order under the statutory provision. It can be argued that ?in such a case the inferior court acquires jurisdiction from the remand order passed by the appellate or revisional court and not from the particular provision of the statute imposing the time-limit. No such argument is open to the State in the instant case because the Commissioner and the Board both called upon the Collector to issue a notice, which could not then (i.e., on the date of the Boards order) be issued by him without infringing the provisions of section 15(3) or section 25 of the Act.

If an assessment order is required to be passed within a certain period, it may again be open to argument that this limit applies to an assessment order passed by the assessing authority in the first instance and not to an order passed by an appellate court or a court of revision on appeal or revision. The time-limit that is prescribed for passing an assessment order in the first instance can certainly not hold good for all subsequent orders to be passed in pursuance of it such as appellate and revisional orders. If an assessment order is required by the legislature to be passed within that period. It may be said that the appellate or revisional order relates back to the date of assessment order passed in the first instance or that the limit of time placed on the passing of an order is on the passing of an order in the first instance by the assessing authority and not on the passing of an order by an appellate court or a court of revision or reference. In State of U.P. v. Jaipuria Brothers Ltd., Dayal and Misra, JJ. said at page 706 with reference to an appellate order passed by a judge (Appeals) u/s 9 of the Sales Tax Act :

".... the appellate authority could, after setting aside the assessment, direct the assessing authority to pass a fresh order... there is no limit fixed for the disposal of the appeal. When the Sales Tax Officer is competent to make the assessment on the last date of limitation according to the provisions of section 21, it is obvious that the order of the appellate authority would be made beyond that

period three years; and that if the provisions of section 21 be interpreted as the learned judge has interpreted them, then this power of the appellate authority will be of no effect in such cases in which the appeal itself could not be disposed of within the limited period prescribed by section 21. The provisions of the various enactments in the same Act should as far as possible be so interpreted that none becomes ineffective or inconsistent with the other provisions.... any assessment of the turnover which had escaped assessment, in pursuance of the directions of the appellate authority be held not to be subject to the period of limitation within which the fresh assessment is to be made. The limitation of time is with respect to the assessment by the sales tax officer in the first instance..... and is not on any reassessment or fresh assessment under the directions of the appellate authority."

The facts in the instant case are however quite different; the time-limit under consideration is not on the passing of an assessment order but on the issue of a notice. While the legislature can be said to have contemplated that an appellate or revisional assessment order can be passed even after the expiry of the period fixed for an original order, it cannot be said to have contemplated that a notice referred to in section 15(3) or section 25 can be issued after the expiry of the period fixed for an original order, it cannot be said to have contemplated that a notice referred to in section 15(3) or section 25 can be issued after the expiry of the period prescribed therefore in pursuance of an order passed by an appellate or revisional authority. Provision prescribing a period within which a notice can be issued to commence a proceeding is not governed by the considerations which govern a provision prescribing a period within which an assessment order subject to an appeal and then to a revision and reference can be passed.

The view that I take finds support from *Province of Bihar v. Khetra Mohan Kumar* in which Agarwala, C.J. and Meredith J. had to deal with section 26 of the Bihar Agricultural Income Tax Act which is in practically the same words as section 25 of the Uttar Pradesh Agricultural Income Tax Act. The facts in that case were that a Commissioner on appeal reduced the agricultural income of the assessee but on revision the Board restored the agricultural income assessed by the assessing authority, but by then more than a year had elapsed since the expiry of the financial year. The learned judges held that the order passed by the Board was without jurisdiction. section 24(2), which is similar to section 25 of the Uttar Pradesh Agricultural Income Tax Act, contains the words "subject to the provisions of this Act" but the decision did not turn on the use of these words.

The answer to the question is, therefore, in the negative.

In the associated Reference NO. 365 of 1955, the Board directed the Collector more than a year after the end of the assessment year to reassess the assessee afresh; what it meant was that he should assess the assessee u/s 25, because it passed the order in revision from an order of the Collector rejecting the assessee's application for assessment of certain so called escaped income u/s 25.

The Collector proceeding u/s 25 only within one year of the end of the assessment year. Therefore, on the date on which the Board passed the order it became too late for him to issue a notice section 25 and, therefore, the Board had no jurisdiction to pass the order. Question No. 1 should, therefore, be answered in the negative.

"Agricultural income" as defined in section 2 consists of income under several heads. One of the heads is of rent derived from land let out to tenants, another is of income derived by agriculture or sale of produce and the third is of income derived from buildings. The assessee has for the purpose of computing his income from agriculture or sale of produce elected in favour of the mode mentioned in section 6(2)(b) of the Act. The collector found that the assessee derived income from two heads : (1) of rent of the land let out to tenants and (2) of income from building, and suffered a loss under two heads, one of income from tea estates and the other of income from cultivation. He arrived at the figure of taxable income by deducting the losses under two heads from the aggregate of the incomes under the other two heads and assessed the assessee on the balance. In other words in calculating the taxable income he set off losses under some heads against positive income under other heads. The Board held that the taxable income was the aggregate of the incomes from the two heads of rental income was the aggregate of the incomes from the two heads of the rental income and building income without deduction therefrom of the losses suffered under the remaining two heads of tea estates and cultivation. It is "the total agricultural income" of every person that is to be charged with agricultural Income Tax : vide section 3. "Total agricultural income" is defined in section 2(16) to mean "the aggregate of the amount of agricultural income of the different classes specified in section 5 and 6. .. and includes all receipts of the description specified in clauses (a), (b) and (c) of sub-section (1) of section 2". There is no provision in the act or the Rules for the loss under one head being set off against income from another head. One can arrive at the total agricultural income only by adding incomes from different head. If there is no income under a head but there is a loss, it is a case of nil income and nothing is to be added to the income from other heads. Even though there is a loss it is a case of nil income and "nil" is to be added. It cannot be argued that it is a case of minus income and that something must be deducted from the income from other heads. Addition does not include subtraction and one cannot add up two figures by subtracting one from the other. Section 2(1), 3, 4A, 5, 6, etc., deal with positive income, e.g. income actually derived, realised or received. Nothing that is not realised can be said to be income; much less can it be said to be minus income. Even when there is a loss, it is a case of nil income and not of minus income. Even when there is a loss, it is a case of nil income and not of minus income. The words "derived" used in the definition of agricultural income and "realised" used in section 5 dealing with computation of income from rent of land let out to tenants make it clear that there must be a positive or actual income and not an algebraical income which may even be a loss. Agricultural Income Tax

is to be paid on the actual income and not on minus income or loss and an assessee suffering agricultural loss instead of deriving agricultural income is not liable to pay minus tax, i.e., entitled to get from the State Government what he would have paid as agricultural Income Tax if the amount of the loss had been an amount of gain. Just as in section 3 total agricultural income means positive income so also in other sections it means positive income. Therefore, only positive incomes are to be added up to arrive at the total income and negative incomes are to be treated as nil incomes and are not to be added by subtraction. If an agriculturist has suffered a loss of, say, X rupees and is asked what his agricultural income was, he will say "nil" and not "minus ?X rupees". There cannot be income when there is a loss and X is the amount of his loss and not of income.

In the Indian-tax Act there are express provisions for deducting losses under some heads from incomes under other heads. The Uttar Pradesh Legislature deliberately refrained from enacting a similar provision permitting deduction of loss under one head from income under another head, indication that it did not approve of any such deduction. The answer to question No. 2 should, therefore, be in the negative.

The assessee was the Ruler of the State of Sirmur which merged in the State of Himachal Pradesh on 15th April, 1948, that is, during the previous year. There were certain tea gardens belonging to Sirmur State and after the merger they were treated as the private property of the assessee with effect from April 15, 1948. Up to 14th April, 1948, they were the property of Sirmur State according to the decision of the Government of India. The assessee realised in the previous year income of Rs. 51,000 and odd from the trees out of which income of Rs. 862-5-6 only was realised during the period April 15, 1948, to June 30, 1948. The Collector did not include any income from the trees in computing the total agricultural income of the assessee. The Board held that 60% of it was liable to assessment under the Agricultural Income Tax Act, the remaining 40% being liable under the Indian Income Tax Act. The question framed, however, is only in respect of the income for the period from April 15, 1948, to June 30, 1948. It has not been shown that the income for this period is not liable to be included in the total income of the assessee it is his income and it is agricultural income and the answer to the question should be in the affirmative.

Our answer to the question framed in the instant case, No. 16 of 1960, is "no".

A copy of this judgment should be sent to the revision Board under the seal of the court and the signature of the Registrar as required by section 24(7) of the Uttar Pradesh Agricultural Income Tax Act. The assessee shall get his costs of the reference, which we estimate at Rs. 50, from the State. Counsel's fee is assessed at Rs. 50.