
(1935) 09 AHC CK 0028

In the Allahabad High Court

Case No : The case has now been stated by the Commissioner which is the subject of Miscellaneous Reference No. 456 of 1933. Allied with this Reference is another Miscellaneous Reference No. 457 of 1933 in which under similar circumstances the question that arises f

RATANCHAND LALLUMAL, IN RE.

Date of Decision : 10-09-1935

Acts Referred:

Income Tax Act, 1961 — Section 14, 28, 66(1)

Citation : (1936) 4 ITR 189

Hon'ble Judges : Mulla, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

MULLA, J. - By an order dated February 16, 1934, passed by a bench of this Court the Commissioner of Income Tax was directed under the provision of section 66 (3) of the Indian Income Tax Act to state a case on certain questions, the Commissioner having refused to state the same on the application of the assessee u/s 66 (1). The questions formulated by this Court are :-

(1) Whether the payments made by M. K. Khanna from November 16, 1923, to September 9, 1927, were rightly taken into account in making the assessment for the year in question 1931-32 ?

(2) Whether in law the partition of the family was effected from the date of the decree or award, or from the year 1921 as held by the Assistant Commissioner of Income Tax ?

(3) Whether Rs. 44,611-9-9 realised from M. K. Khanna in Sambat 1980-81 is liable to Income Tax as the income or profit of the assessee, or is this sum exempt from Income Tax u/s 14 of the Income tax Act ?

(4) Whether on the facts found the assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of his income and is, therefore, liable to penalty u/s 28 of the Income Tax Act ?

In order to answer the questions satisfactorily it will be necessary to state a few facts. The Reference has arisen out of the assessment made in the year 1931-32. u/s 3 of the Act the assessment shall be in respect of all income, profits and gains of the previous year. The previous year in the case of the present assessee, according to the system of accounts maintained by him, would be the year beginning from Kuar Sambat 1986 to Kuar Sambat 1987. The assessee is a Hindu undivided family of Azamgarh which goes by the name of Messrs. Ratan Chand Lallu Mal of Azamgarh and Rai Bahadur Mukand Lal is the head of the family. As a matter of fact this family came into existence as a result of the disruption of a bigger Hindu undivided family known as Messrs. Sital Prasad Kharag Prasad of Calcutta and the head of this bigger family was the late Raja Sir Moti Chand of Benares, and one of the questions that we shall have to decide is as to when there was a partition of or separation in the bigger Hindu undivided family. The assessee began to be taxed from the year 1925-26 on the income of the previous year which ran from Kuar 1980 to Kuar 1981. The first and the most important question is whether the payments made by M. K. Khanna from November 16, 1923, to September 9, 1927, were rightly taken into account in making the assessment for the year in question 1931-32. It is clear that the assessment year being 1931-32 the income of the previous year 1930-31 ought to be ordinarily taken into consideration and the payments made or income received from November 1923 to September 1927 would be beyond the scope of assessment, but it is the case for the department that under the peculiar circumstances of this case the above income made in those years can also be taken into consideration.

It appears that on March 31, 1918, a loan of Rs. 2,00,000 was advanced by the late Sir Moti Chand to Mr. Maharaj Kishore Khanna. The amount due under this loan fell to the share of Ratan Chand Lallu Mal after partition in the bigger family to Sital Prasad Kharag Prasad. Payments were made by Mr. Khanna from time to Rai Bahadur Mukand Lal.

The first payment for the purpose of this case was made in November 1923 and the sum so paid was Rs. 10,000. In the assessment year for 1925-26 when this payment along with certain other payments made in the previous year 1923-24 ought to have been taken into consideration, the assessee did not show them in his return nor did the department assess any tax on those payments. It is, however, quite clear that as much as Rs. 44,611-9-9 was received by the assessee. The appellate order of the Assistant Commissioner dated March 28, 1933 shows that in the books of the assessee the entries are :-

On Katik Sudi Asthami Sambat 1980 as interest

10,000 0 0

On Katik Sudi 11 Sambat 1980 as interest

20,000 0 0

On Pus Badi 13 Sambat 1980 as interest

6,532 11 3

On Bhadon Badi 1 Sambat 1981 cheque on Benares Bank - the word interest not noted

8,000 0 0

On Bhadon Badi 13 Sambat 1981 corresponding to August 28, 1924, cheque - the word interest not noted

78 14 6

& nbsp;

44,611 9 9

In connection with the first three items the words "as interest" are noted definitely in the assessee's account books. These items were then transferred from the account of Mr. Khanna and the entries that were subsequently made in a separate account were to the effect that Rs. 40,150-7-3 were credited to the personal account of Raj Bahadur Makund Lal and Rs. 4,461-2-6 were credited to the Dharmada account. These entries were made on August 28, 1924 and this date corresponds with the last entry of Rs. 78-14-6 to which reference has already been made. By reason in the return furnished by him and the department also failed to scrutinise the account books carefully the whole of this income escaped assessment in the assessment year 1925-26.

In the assessment year 1926-27 the assessee was taxed on certain income which undoubtedly included the sum of Rs. 16,139-8-0 received from Mr. Khanna on Pus Sudi 7, 1981 and October 2, 1925. The learned Assistant Commissioner says, "that the appellant declared this income for the assessment of the year 1926-27 and it was actually included in the assessment of that year." We now come to the assessment year 1927-28 when the income for the previous year 1925-26 or Kuar Sambat 1982 to Kuar Sambat 1983 would be taken into consideration. In this year also the assessee received a sum of Rs. 16,521-8 6, but once again he did not show it in his return and the Revenue authorities also failed to detect it. It is not quite clear either from the statement of the case or from the orders of the Income Tax Officer and the Assistant Commissioner whether this sum was in the first instance credited in the account of Mr. Khanna as interest, although there is a stray passage in the judgment of the Assistant commissioner wherein he says that "this interest was not credited to the interest account." Now there are certain entries which require mention. We have stated above that on August 28, 1924 the sum of Rs. 44,611-9-9 was credited to the personal account of the assessee in the sum of Rs. 40,157-7-3 and to the Dharmada account in the sum of Rs. 4,461-2-6, but in the year 1982-83 the account books show that a sum of Rs. 54,611 which included the above sum of Rs. 44,000 odd and a sum of Rs. 8,000 received on Pus Sudi 7, 1981, was at first

credited to the interest account, then debited to the interest account and finally credited to the personal account of Mr. Khanna. Whether these entries escaped the attention of the Revenue authorities is not quite clear from the statement of the case, but from a passage in the judgment of the Income Tax Officer dated April 23, 1932 it would be reasonable to infer that the revenue authorities did come to know of these entries, for it is stated in the order just referred to while considering the entry of the sum of Rs. 52,611 that "it is not known how the cross entries of the interest account were explained away before Mr. S. M. Husain" As to the sum of Rs. 16,521-8-6 the entries are to the effect that this sum was credited to the account of the appellants son Indu Bhushan and from that account it was subsequently transferred to the account of Rai Bahadur Makund Lal. In the assessment year 1928-1929 which was for the income of the previous year 1926-27 corresponding to Kuar Sambat 1983-84 once again the assessee did not show any income from Mr. Maharaj Kishore Khanna. In the assessment year 1929-30 which related to the income of the previous year 1927-28 corresponding to Kuar Sambat 1984 to Kuar Sambat 1985 the assessee did not file any return but he produced certain accounts which, however, did not show any income received from Mr. Khanna and the assessment was made u/s 23 (4) according to the best of the Income Tax Officers judgment. In the assessment year 1930-31 which related to the income of the previous year 1928-29 corresponding to Kuar Sambat 1985 to Kuar Sambat 1986 the assessee did not show any income from Mr. Khanna and the Income Tax Officer assessed him on a certain income which was arrived at after making certain calculations.

It is not of any great importance to find out whether any income was received by the assessee from Mr. Khanna after September 9, 1927 till we come to the assessment year 1931-32 which relates to the income received in the previous year 1929-30 corresponding to Kuar 1986 to Kuar 1987, because the income received after September 9, 1927 is not to be considered in connection with the answer to question No. (1) It is also not necessary to state the circumstances under which the assessment year 1931-32, came to realise that certain income received by the assessee from Mr. Khanna in the years 1923 to 1927 escaped assessment. These circumstances have been stated in detail in the case prepared by the statement. From the order of the Income Tax Officer it appears that what he did was to add up the receipts from Katik Sudi 8, Sambat 1980 corresponding to November 1923 to August 11, 1930 which give the figure of Rs. 2,95,997-6-0. He then put down certain figures on the expenditure side and arrived at the total of Rs. 2,32,208. On the expenditure side he showed the amount received in consequence of the partition as principal at the figure Rs. 1,98,580 and a sum of Rs. 16,139-8-0, the amount which was actually assessed to Income Tax in the assessment year 1926-27. He then considered the difference between the two totals amounting to Rs. 63,789-6-0 as income received in the assessment year 1931-32 and levied a tax on the same.

The contention of the assessee is that the method adopted by the Income Tax Officer and confirmed by the Assistant Commissioner is objectionable and not

warranted by law. It is said that u/s 3 all that could be taxed was the income received during the previous year, namely 1929-30 corresponding to the period Kuar 1986 to Kuar 1987, and if that income alone is taken into consideration we can take into account only the last three figures on the receipt side mentioned at page 14 of the printed record and a deduction will have to be made therefrom or the return of the capital which would probably be represented by the first and the third item out of those three figures. It appears that Rai Bahadur Makund Lal brought a suit on the basis of the mortgage of March 31, 1918 and obtained a decree for Rs. 2,58,999 on November 21, 1929. He subsequently sold the same on April 25, 1930 to one Rai Krishna Das of Benares for Rs. 2,00,000 and this amount was received by the assessee in two sums, one on Phagun Sudi 11, 1986 and the other on August 11, 1930. It would therefore appear that if a sum of Rs. 2,00,000 representing the capital is deducted from the income received in the year 1929-30 all that the assessee received from Mr. Maharaj Kishore Khanna as interest amounted to about Rs. 3,000. The income Tax officer is of the opinion that with the exception of Rs. 16,139-8-0 the various sums that were received by the assessee from time to time during the period from November 16, 1923 to September 9, 1927 were not treated by him as interest and it comes with an ill grace from his mouth that these items are not assessable to Income Tax in the year in question because they were received prior to the previous year. Relying upon the Patna case of Rajs Raghunandan Prasad Singh v. The Commissioner of Income Tax, Bihar and Orissa the Income Tax Officer arrived at the conclusion that the income by way of interest received from M. K. Khanna was assessable in the year in question even though it had been received prior to the previous year-excluding of course the amount that had already been taxed. The learned Assistant Commissioner says that the natural inference is that the assessee treated the income of Rs. 44,611-9-9 as a part payment of the loan and that he did not treat the sum of Rs. 16,521-8-6 as income of the year 1926-27 on the assumption that the loan itself was doubtful and consequently when the loan was realised in full, that is, in the year 1930-31, the interest so derived from it became liable to be taxed. While giving his opinion the learned Commissioner of Income tax also refers to the Privy Council case of Commissioner of Income Tax, Bihar and Orissa v. Kameshwar Singh of Darbhanga. It might be mentioned Prasad Singhs case, was affirmed in appeal by the Privy Council and the report of the decision of their Lordships of the Privy Council is to be found in 1933 I L. L. J. 564 : 1933 ITR 113.

The question that we have got to decide is whether the decision to which reference has been made apply to the facts of the present case. We have made it clear that in spite of certain cross entries and reverse entries the sum of Rs. 44,000 odd could, on a little investigation, have been discovered as pertaining to the loan advanced to Khanna and as having been received as interest. Indeed the learned Assistant Commissioner definitely says that the income of Rs. 44,611-9-9 in dispute was received by the assessee on account of interest in the previous year Kuar 1980-81. The position taken by the department is that the

payments made by Khanna from November 16, 1923 to September 9, 1927 were kept in suspense and the receipts were treated as open receipts on the ground that the assessee was either not clear as to his position in connection with the partition that was being effected between himself and the bigger Hindu undivided family or that he was not hopeful of the loan being realised from M. K. Khanna and he was waiting to see how the loan would finally be. It might be mentioned that there two grounds were stated by certain servants of the assessee when the assessment for the year 1931-32 was being made and not at the time when the income was actually received. The facts, however, speak for themselves and it is not possible to attach any importance to such statements when they were made in order to explain away certain concealments made in previous years. There seems to be no room for doubt as to the real nature of the payments made by Mr. Khanna. We need not repeat what we have already said in an earlier portion of our judgment that the entries in the books show that most of these sums that were entered as interest in the books of the assessee were shown in the account of Mr. Khanna and were subsequently by means of cross entries or reverse entries transferred to the account of Rai Bahadur Makund Lal. This to our mind therefore is not a case where it can be said that the amounts were kept in suspense. The whole object of the entries was to evade the legitimate tax. The Income tax officer says that "in the have been made and the real income from interest." If, therefore, after a little investigation, the revenue authorities at the present moment are in a position to know the real object of entries it is their own fault if they could not detect this object at an earlier stage. It is nobodys case that the various account books which have enabled the authorities to come to this conclusion were not available to them in the earlier years. The statement shows that account books were summoned from the assessee and were produced.

We shall now consider whether there is anything in law to justify the procedure which the department has adopted in the present case. At one stage it was boldly argued by the counsel on behalf of the department that it was open to the Revenue authorities even if income was received in previous years to tax it in the assessment year when the transaction was finally closed. This is in the teeth of the provisions of section 3 of the Indian income Tax Act. The only question is whether the transaction having been closed in the assessment year it is possible for the authorities to take into consideration the receipts not only of the previous year but also those of years anterior to the previous year on the ground that they were in the nature of open receipts. In Raghunandan Prasad Singhs case all that was held by their Lordships of the Patna High Court was that where a person advances money on a mortgage and subsequently gets the interest added to the principal and takes a fresh mortgage for the consolidated amount but does not show the added interest separately as interest realised in his books of account of that year in the interest account or in his personal account, the inference is that the original bond is not extinguished from the point of view of the Income Tax administration since nothing is received by him as income, profit or gain in that

year. That is obviously correct because unless the accounts of the assessee are kept on the mercantile basis the interest which has not been actually received has only gone to swell the amount of the next transaction and it is not possible to say that the assessee made any profit or gain in the year when the fresh mortgage was drawn up. In this very case it also appeared that on the on the fresh mortgage the mortgagee brought a suit and after having obtained a decree purchased the property in execution of the decree. It was held that the mortgagee assessee could not be deemed to have received any income or its equivalent as long as the sale had not been confirmed. It was said that till then the position of the decree holder was not secure and it was open to the assessee to say that till then he did not propose to deal with the money as in any way belonging to him. We are in perfect agreement with this view and further we are bound by this view inasmuch as it was confirmed by their Lordships of the Privy council. But in the present case unless it can be argued that it is open to a money lender to treat every income which he receives from his debtor by way of interest as an item in suspense till the final account is closed the procedure adopted by the department cannot be countenanced nor do we think that it would be in the interest of the department to allow money lenders to treat all income received from their debtors in suspense till the account is finally closed either by payments made out of court or when the transaction has been made the subject of a suit and money realised in execution of a decree. In the case of *commissioner of Taxes v. The Meblourne Trust Ltd.*, Lord Dunedin observes :

"As regards the question of when a profit is earned their Lordships view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronizes with the realisation of the sums which swell the assets of the person or company, and which entering the account go to bring out the balance which is deemed profit."

In the particular facts of the case before their Lordships where the question was as to whether a certain company which had come into existence for the purpose of realising outstandings due to certain other companies which had gone into liquidation was liable to income tax on the surplus realized as profits it was held that the new company was entitled to keep certain sums in suspense. The facts of that case were entirely different, but even there the principle was affirmed that ordinarily profit synchronizes with the realisation of the sums which swell the assets of the assessee.

We have left for consideration the last case of *commissioner of Income Tax, Bihar and Orissa v. Kameshwar Singh of Darbhanga*. The facts of this case were that there was no well recognised method in which the account books of the assessee were kept. Their Lordships emphasise that "the questions which have arisen in the case are in large measure due to the assessee's method or want of method in recording his money-lending transactions". The system which he kept was a hybrid system, in the sense that he maintained a deposit register in which payments made by debtors were ordinarily first of all recorded but without any

allocation between principal and interest and subsequently if and when the allocation was made an entry in respect of the interest portion of these payments was made in the interest ledger as well as in the interest account of the general ledger but, this allocation was not necessarily made in the year in which the money was actually paid to the assessee. The deposit register was not made available to the revenue authorities and all that they had before them was the interest register. In the assessment year in question for the first time the deposit register came before the Income Tax authorities and on this occasion the Income Tax officer made his computation by taking first all the sums allocated to interest and entered in the interest register for that year, irrespective of the years in which these sums had actually been received by the assessee; he then resorted to the deposit register, noted the sums there shown actually received in that year by the assessee but from which no allocations to interest had been carried to the interest register, made his own calculation of the proportions of interest comprised in such sums and added the result to the sum of the entries in the interest, for that year.

It was pointed out that owing to the system on which the interest register was kept the assessee was in each year assessed not on the total of the sums actually received by him as interest during the preceding year but on such sums as the assessee chose during that previous year to allocate to interest and carry to his interest register out of payments received by him in that and former years. In this case it is obvious that the assessee cannot complain if he is treated as not having received any payment of interest in years in which he made no appropriations to interest out of sums received by him in these years and neither disclosed such receipts to the Revenue authorities nor made any return of any part of them as income.

The Income Tax Officer says that it comes with ill grace from the assessee's mouth that the sum of Rs. 52,611 was not assessable to Income Tax in the year in question because it had been received prior to the previous year, but this statement is not quite correct inasmuch as the mere fact that a certain income has not suffered tax because of a device adopted by the assessee would not enable the department to assess the same in subsequent years when the device becomes apparent to the department. It is only when according to a particular system adopted by the assessee allocations are made not in the year when the amount is received but in later years that the income so allocated can be said to be the income liable to be considered in the assessment year. From what we have stated above it is clear that the allocations were made by the assessee himself and all that the Income Tax officer did was to make certain calculations from the deposit register as well which became available to him when he was making the assessment.

In the present case it is common ground that no fresh allocations were made by the assessee either in the assessment year or in the previous year and as the learned the previous year and as the learned Commissioner says: "the accounts

had always been cast on what was known as the cash basis". Their Lordships of the Privy Council observe at the bottom of page 631 of the Reports, (1933 A. L. J.) :

"When an assessee keeps his books on a cash basis disclosed to the Revenue authorities and the officer accepts that basis it is clear that the calculation must be based on actual receipts in the year of computation".

In the case of this assessee therefore the calculation must be based on actual receipts in the year of computation. The learned Commissioner was conscious of this difficulty and therefore he observed :

"It is clear that the question resolves into one of the allocation of the amount of Rs. 2,03,397-3-0 admittedly received in the accounting year, but if this figure which was received in the accounting year be alone taken into consideration the figure of Rs. 63,779 on which the assessee has been taxed cannot possibly be evolved. A reference to page 14 shows that the figure of Rs. 63,779 was obtained by taking sums on the receipt side and on the expenditure side for a number of previous years".

We are therefore of the opinion that the payments made by Maharaj Kishore Khanna from November 16, 1923 to September 9, 1927 should not be taken into account in making the assessment for the year in question, 1931-32.

We now propose to consider the second question which relates to the time when the bigger family can be said to have separated. From what has been stated before us it is clear that there was a private partition in Sambat 1978 corresponding to October 1921 between Raja Sir Moti Chand, Babu Shiva Prasad Gupta, Babu Karakh Chand, Rai Bahadur Makund Lal and other members of the bigger family. The assessee had no separate entity before 1921. He had no business and no income of his own, but after that time he has been doing money-lending business, is in enjoyment of income from dividends and interest on securities and has a 9 annas share in a Gorakhpur firm. From the year 1925 he has been regularly assessed to income tax. The contention of the assessee that the separation of the family should be deemed to have come into existence on November 30, 1925 when certain arbitrators who had been appointed by the members of the family to effect a partition delivered their award or when the award was made a rule of Court on February 26, 1926 cannot be upheld inasmuch as all the circumstances point to the fact that the disruption of the family took place at an earlier date, namely, 1921 when the parties not only declared their intention to separate but started separate business of their own. As a matter of fact in the case of Shiva Prasad Gupta v. The Commissioner of Income tax, United Provinces, it was held that Mr. Shiva Prasad Gupta another member of the same bigger family, was separate from the time of the private partition. It is conceded by Mr. Kunzru on behalf of the assessee that the award itself says that the partition will take effect from Sambat 1978, that is, the year 1921 and the award and the decree say the same. In this state of affairs it is

clear that the partition or separation of the family was effected from the year 1921 as held by the Assistant Commissioner of Income Tax.

Coming now to the third question we are of the opinion that the income of Rs. 44,611-9-9 realised from Mr. Khanna in Sambat 1980 to 1981 cannot be exempted from Income Tax u/s 14 of the Income Tax Act. That provision says that the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family. The family did not remain a Hindu undivided family in the year 1980-81, the division having taken place in Sambat 1978 and the above mentioned sum could not be said to have been received by Rai Bahadur Makund Lal as a member of a Hindu undivided family. It is common ground that when we are speaking of a Hindu undivided family we are speaking of the bigger family of Sital Prasad Kharakh Prasad and not the smaller family of Ratan Chand Lallu Mal.

Our decision therefore is that question No. (1) should be answered in the negative, that the answer to question No. (2) is that the partition of the family was effected from the year 1921 as held by the Assistant commissioner of Income Tax and the answer to question No. (3) is that the sum of Rs. 44,611-9-9 realised from Maharaj Kishore Khanna in Sambat 1980-81 is liable to Income Tax as the income or profit of the assessee and is not exempt from Income Tax u/s 14 of the Indian income Tax Act. We are of the opinion that for the present assessment it cannot be taxed by reason of our answer to question No. (1).

We might now notice a preliminary objection that was advanced by Mr. Kunzru before the hearing of this case commenced. It was said that the learned Commissioner of Income Tax has not complied with Rule 7 of the Rules framed by this court u/s 66 of the Indian Income Tax having stated a draft case shall submit the same to the assessee or his counsel etc., etc. It is conceded that the case from page 1 to about 10 lines of page 9 of our printed record was submitted to the assessee. The opinion of the Commissioner on the various questions as given in gages 9 to 11 was not supplied and it is said that too is a part of the draft case and should have been supplied to the assessee. We are of the opinion that there is no force in this contention inasmuch as a reference to Section 66 of the Indian Income Tax Act clearly shows that the opinion of the Commissioner is something different from the statement of the case. In sub-Clause (1) it is provided that the Commissioner shall draw up a statement of the case and refer it with his own opinion thereon to the High Court and a similar provision exist in Sub-clause (2). This makes it quite clear that the opinion of the Commissioner is different from the statement of the case, and there was a complete compliance by the Commissioner with Rule 7.

A copy of our judgment under the seal of the Court and the signature of the Register will be sent to the Commissioner of Income Tax. We tax the fee of the counsel for the department at Rs. 200, and he is given a months time to file the necessary certificate. We award no costs to the assessee against the department because we are of the opinion that his conduct in trying to evade the Income Tax

for a number of years is most reprehensible.

Reference answered accordingly.