

(1968) 02 AHC CK 0012

In the Allahabad High Court

Case No : Income Tax Reference No. 717 of 1963

SANTOSH KUMAR

APPELLANT

Vs

COMMISSIONER OF Income Tax, U.P.

RESPONDENT

Date of Decision : 20-02-1968

Acts Referred:

Income Tax Act, 1922 — Section 66(1)

Citation : (1969) 71 ITR 253

Hon'ble Judges : V. G. Oak, C.J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

V. G. OAK C.J. - This is a reference u/s 66(1) of the Indian Income Tax Act, 1922. Santosh Kumar is the assessee. He filed a return for the assessment year 1957-58. The Income Tax Officer made a provisional assessment u/s 23B of the Act. The assessee's liability was fixed at Rs. 12,477. On January 21, 1960, a demand notice accompanied by the assessment form was issued. The notice was served on the assessee's minor brother, Suresh Kumar. The assessee had not given any specific authority to his minor brother to accept service of notice on behalf of the assessee. On January 29, 1960, an application was made to the Income Tax Officer raising objections against the assessment order u/s 23B. On February 11, 1960, another application was moved on behalf of the assessee through his advocate asking for time for payment. That application was rejected by the Income Tax Officer. Penalty of Rs. 1,500 was imposed u/s 46(1) of the Act on the ground that no tax had been paid by the assessee. On March 25, 1960, and on March 31, 1960, fresh orders were passed by the Income Tax Officer imposing further penalties of Rs. 3,000 each. Against these orders dated March 25, 1960, and March 31, 1960 two separate appeals were filed by the assessee before the Appellate Assistant Commissioner. They were dismissed on the ground that tax had not been paid and the appeals were incompetent. The assessee appealed to the Income Tax Appellate Tribunal, Patna Bench, Camp Allahabad.

The Appellate Tribunal accepted the view taken by the Appellate Assistant Commissioner and dismissed the two appeals filed by the assessee. The assessee moved before the Tribunal two applications under sections 66(1) of the Act for reference to the court. The assessee proposed a number of questions. The Tribunal agreed to refer only one of these questions to the court. The question so referred is :

"Whether, on the facts and circumstances of the case and having regard to the first proviso to section 30(1), the order of the Tribunal confirming the order of the Appellate Assistant Commissioner that no appeal lay to him as the tax had not been paid was right in law ?"

The Appellate Assistant Commissioner held that the two appeals before him were incompetent by virtue of the first proviso to section 30 of the Act. Section 30 provides for appeal against assessment under the Act. Sub-section (1) of section 30 states :

"Any assessee objecting to the amount of income assessed... or denying his liability to be assessed under this Act... or objecting to any penalty imposed by an Income Tax Officer under sub-section (6) of section 44E... or sub-section (1) of section 46... may appeal to the Appellate Assistant Commissioner...

Provided that no appeal shall lie against an order under sub-section (1) of section 46 unless the tax has been paid..."

The question is whether the appeals filed by the assessee before the Appellate Assistant Commissioner were liable to be dismissed under the first proviso to sub-section (1) of section 30 of the Act.

Section 46 of the Act deals with the mode and time of recovery. Sub-section (1) of section 46 is :

"When an assessee is in default in making a payment of Income Tax, the Income Tax Officer may in his discretion direct that in addition to the amount of the arrears a sum not exceeding that amount shall be recovered from the assessee by way of penalty."

Sub-section (1A) of section 46 provides :

"For the purposes of sub-section (1), the Income Tax Officer may direct the recovery of any sum less than the amount of the arrears any may enhance the sum so directed to be recovered from time to time in the case of a continuing default, so however that the total sum so directed to be recovered shall not exceed the amount of the arrears payable."

In the instant case the Income Tax Officer acted under sub-section (1) and (1A) of section 46 of the Act. So, prima facie, the first proviso to sub-section (1) of section 30 of the Act was attracted. But Mr. R. K. Gulati appearing for the assessee urged before us that, in the circumstances of the present case, the proviso was not attracted. He urged that, in the present case, there was no

notice served upon him u/s 29 of the Act.

The Tribunal has found the service of notice on Suresh Kumar was not proper service on the assessee. But, on receiving notice threatening penalty proceedings, the assessee, through his duly authorised advocate, applied to the Income Tax Officer for time to pay the tax.

In *Kamdar Brother of Jaharia v. Commissioner of Income Tax*, pending an appeal to the Appellate Tribunal against an assessment to at a tax of Rs. 15,000 the Income Tax Officer imposed a penalty upon the assessee for failure to pay the tax because by that time the assessee had paid Rs. 13,000 only. The assessee presented on appeal from the order of penalty on February 5, 1951. Subsequently and before the appeal was heard, the Appellate Tribunal reduced the tax payable by the assessee to a sum of about Rs. 9,000. It was held by the Patna High Court that the appeal preferred by the assessee against the order imposing penalty was competent on April 24, 1952, the date of hearing of the appeal as the amount of tax that was had been fully paid on that date. In that case the amount of tax that was ultimately found due against the assessee had been fully paid up by the time the appeal came up before the Appellate Assistant Commissioner. In the instant case the assessee did not pay the tax even up to the time of the hearing of the appeal before the Appellate Assistant Commissioner. The facts of the present case are different from those before the Patna High Court.

In *Moti Lal Purshottam Das v. Income Tax Officer, Dist II(ii), Kanpur*, it was held by this court that no recovery proceedings of any nature could be taken against any person under the Income Tax Act unless first a notice of demand was served on that person. In that case the court was not called upon to investigate the scope of the first proviso to sub-section (1) of section 30 of the Act. The court was concerned in that case with the competence of recovery proceedings.

In *Raja of Venkatagiri v. Commissioner of Income Tax*, the assessee appealed to the Appellate Assistant Commissioner. During the pendency of the appeal the assessee obtained an order from the commissioner of Income Tax for payment of the balance due in instalments. It was held that the expression "tax has been paid" in the proviso to section 30(1) of the Act does not mean the entire tax assessed but the tax which has become due. In the present case the assessee did not succeeding obtaining any concession as was the case in *Raja of Venkatagiri v. Commissioner of Income Tax*. So, that decision is of no assistance to the present assessee.

In *Commissioner of Income Tax v. Filmistan Ltd.* it was held by the Supreme Court that the meaning of the words "no appeal shall lie" in the first provisos to section 30(1) of the Income Tax Act is not that no memorandum of appeal can be presented. All that the proviso means is that the appeal will not be held to be a properly filed appeal until the tax has been paid. In the present case the assessee did not pay tax even by the time the appeal was disposed of by

Appellate Assistant Commissioner. So the principle laid down by the Supreme Court in the case of Filmistan Ltd. does not assist the present assessee.

It is true that the proceeding for service of notice upon the assessee in the instant case was defective. But the Tribunal has found that the assessee through his duly authorised advocate applied to the Income Tax Officer for time to pay the tax. That conduct of the assessee implies that he was aware of his liability to pay the tax. Under these circumstances, it is impossible to accept the contention of the assessee that no tax was due from him.

Mr. Gulati urged that, in view of the defective service of notice, the Appellate Assistant Commissioner should have invited the assessee to pay the tax before disposing of the appeal. No such responsibility lay on the Appellate Assistant Commissioner. It was for the assessee to pay up the dues if he was anxious to avoid the prohibition of the proviso to sub-section (1) of section 30 of the Act.

The two appeals in question were filed by the assessee under sub-section (1) of section 30 of the Act. In order to attract the first proviso, two conditions are necessary : firstly the appeal must be against an order under sub-section (1) of section 46. Secondly, the appellant must have failed to pay the tax. In the instant case the assessee was challenging the two orders passed under sub-section (1) of section 46 of the Act. The tax had not been paid even up to the time the appeals were disposed of by the Appellate Assistant Commissioner. Thus both the conditions mentioned in the process were fulfilled. The Appellate Assistant Commissioner was right in holding that the two appeals fell within the prohibition contained in the process to section 30(1) of the Act, and that the two appeals were incompetent.

Our answer to the question referred to the court is in the affirmative and against the assessee. The assessee shall pay the Commissioner of Income Tax, U.P., costs of the reference which we assess at Rs. 200. The fee of the standing counsel for the department is also assessed at Rs. 200.