

(1961) 04 KL CK 0012

High Court Of Kerala

Case No: O. P. No. 277 of 1959

AUTO TRANSPORT UNION  
(PRIVATE) LTD.

APPELLANT

Vs

Income Tax OFFICER, ALWAYE.

RESPONDENT

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**Date of Decision:** April 10, 1961**Acts Referred:**

- Income Tax Act, 1922 - Section 45, 46

**Citation:** (1962) 45 ITR 103 : (1961) 5 KLJ 690**Hon'ble Judges:** M. S. Menon, J**Bench:** Division Bench

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### Judgement

M. S. MENON, J. - This petition challenges the validity of exhibit A, an order of the Income Tax Officer, Alwaye, dated 27th February, 1959. By that order penalties were imposed on the petitioner, Rs. 1,000 in respect of 1953-54, Rs. 2,000 in respect of 1954-55, Rs. 2,500 in respect of 1955-56 and Rs. 4,000 in respect of 1956-57.

The petitioner was assessed to a tax of Rs. 14,842-9-0 for 1953-54, Rs. 19,551-6-0 for 1954-55, Rs. 11,440 for 1955-56 and Rs. 21,291-12-0 for 1956-57, and demand notices u/s 29 of the Indian Income Tax Act, 1922, were issued to him. The petitioner then appealed to the Appellate Assistant Commissioner, Kozhikode, and by the orders in appeal the tax for 1953-54, 1954-55 and 1955-56 were reduced, for 1953-54, to Rs. 1,513-2-0, for 1954-55 to Rs. 3,458-0-0 and for 1955-56 to Rs. 847-15-0. There was no reduction of the tax for 1956-57.

Exhibit A, the order impugned before us, was subsequent to the dates of the orders in appeal. Fresh demand notices were not issued after the orders in appeal and the contention of the petitioner is that in the absence of such notices he cannot be considered as a defaulter within the meaning of section 45 of the Indian Income Tax Act, 1922. It is clear that if he cannot be treated as a defaulter u/s 45, no penalty can be imposed u/s 46, and that the order impugned cannot be sustained.

Section 45 (omitting the provisos and Explanation thereto) reads as follows :

"Any amount specified as payable in a notice of demand under sub-section (3) of section 23A or u/s 29 or an order u/s 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default,..."

The orders of the Appellate Assistant Commissioner u/s 31 of the Act did not specify any time, place or person as contemplated by the section. The only question for determination is whether any fresh notice of demand u/s 29 of the Act is necessary when an Appellate Assistant Commissioner reduces or confirms an original assessment.

Section 29 of the Indian Income Tax Act, 1922, provides :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income Tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

The order referring this petition to a Division Bench for decision mentions two cases as supporting the position taken up by the assessee : Metropolitan Structural Works Ltd. v. Union of India and Seghu Buchiah Setty v. Income Tax Officer, Kolar Circle. The former is a decision of the High Court of Calcutta and the latter of the High Court of Mysore.

According to Seghu Buchiah Setty v. Income Tax Officer the Calcutta decision is an authority for the proposition that the department was not entitled to treat an assessee as a defaulter in the absence of a fresh notice of demand after the Appellate Assistant Commissioner reduced the tax payable by him. The Calcutta decision was understood in the same way by Bose J. of the Calcutta High Court in an unreported case, Calcutta Cloth Agency v. Certificate Officer, 24-Parganas.

The decision in Metropolitan Structural Works Ltd. v. Union of India was rendered by Chakravartti C.J. sitting with Lahiri J. The learned Chief Justice, sitting with Das Gupta J., had occasion to consider the scope and ambit of the decision - in the light of the unreported decision of Bose J. - in a later case, Ladhuram Taparia v D.K. Ghosh. In that case he pointed out that his earlier decision had been misunderstood and that where a proper notice of demand had been given in respect of the tax determined by the assessment order and the subsequent order on appeal only reduced the amount of tax demanded, it is not necessary that a second notice of demand u/s 29 of the Act should be served on the assessee.

We are in agreement with the view expressed in Ladhuram Taparia v. D. K. Ghosh. The position should also be the same when an appeal is dismissed and the appellate

order only confirms the original order of assessment.

The answer to the controversy really depends upon the answer to the question : which is the order "in consequence of which" the tax is due ? Is it original order as confirmed or reduced in appeal, or is it the appellate order confirming or reducing the original assessment ? We think it is the former, and it must follow that no fresh notice is necessary u/s 29 of the Act.

In *George v. Income Tax Officer, Madras*, Rajagopalan J. of the Madras High Court had to deal with a similar question. The point for determination was whether a certificate forwarded by the Income Tax Officer to the Collector u/s 46(2) of the Indian Income Tax Act, 1922, should be treated as non est in law when the amount of tax due from the assessee was reduced in appeal. The learned judge said :

"The amount was reduced by the order of the Commissioner dated 7th January, 1954. Of course it is only the amount as finally revised by the Commissioner, Rs. 47,229-5-0, that can be lawfully collected from the assessee. The question however is whether that sum can be collected now on the basis of the certificate issued on 13th March, 1953, before the tax liability was reduced by the Commissioner in exercise of the jurisdiction vested in him. It was never the contention of the petitioner that the particulars entered in the certificate issued on 13th March, 1953, were not correct and were not in accordance with the orders of assessment in force then. The pendency of the appeal did not affect that correctness. The orders of the Commissioner were long after, on 7th January, 1954. A subsequent reduction lawfully effected of the liability of an assessee to pay a tax cannot, in my opinion, affect the validity of the certificate that was issued u/s 46(2)."

The Judge also quoted certain observations of Sinha J. of the Calcutta High Court in *Ladhuram Taparia v. D. K. Ghosh*.

A form for the notice of demand u/s 29 of the Indian Income Tax Act, 1922, is embodied in the Rules made u/s 29 of the Act, the Indian Income Tax Rules, 1922. The form is apparently intended to cover only a notice of demand after the initial assessment by the Income Tax Officer and not any subsequent demand consequent on orders in appeal either by the Appellate Assistant Commissioner u/s 31 of the Act or by the Tribunal u/s 33 of the Act.

There is a circular in the Central Board of Revenue dated the 18th February, 1954. It says :

"In the Boards Circular No. 35(XL-7) of 1952 dated the 12th August, 1953, instructions were issued to the effect that a fresh notice of demand is not necessary where the demand or penalty is reduced as a result of the order of the Appellate Assistant Commissioner of the Income Tax, Appellate Tribunal or the Commissioner. It has been represented to the Boards that a person in whose case a reduction had been made must know the final amount due from him as a result of the reduction. It

has, therefore, been decided by the Board that in such a case a copy of the computation of the reduction of tax in Form I. T. 15A should be issued to the assessee to enable him to check the amount of reduction made and refund, if any, allowed to him in consequence thereof.

The same procedure be followed where a reduction is due to an order u/s 35 of the Act. (See Income Tax Circulars by Romesh C. Sharma 1957-58 edition, page 83)".

According to counsel for the department the communications sent by the Income Tax Officer to the petitioner subsequent to the decision in appeal will do duty for notices of demand even if we take the view that fresh notices are required in cases where the original assessments are confirmed or reduced. The communication in respect of 1953-54 is dated 17th December, 1958. The last sentence in that communication directs that the tax should be paid immediately. To the same effect is the communication in respect of 1954-55 dated 17th November, 1958, and the communication in respect of the 1955-56 dated 17th December, 1958. We see considerable force in the submission made on behalf of the department.

In the light of what is stated above this petition had to be dismissed and we do so with costs. Advocates fee Rs. 150.

Petition dismissed.