(1976) 12 BOM CK 0012

Bombay High Court

Case No: Income-tax Reference No. 34 of 1967

Commissioner of Income Tax, Poona		APPELLANT
	Vs	
Bashirkhan Ismailkhan		RESPONDENT

Date of Decision: Dec. 7, 1976

Acts Referred:

- Income Tax Act, 1922 - Section 23(3), 34(1)
- Income Tax Act, 1961 - Section 147, 2(8), 271(1), 297(2)

Citation: (1977) 109 ITR 629

Hon'ble Judges: V.D. Tulzapurkar, J; Desai, J

Bench: Division Bench

Advocate: R.J. Joshi, for the Appellant; S.J. Mhaispurkar, for the Respondent

Judgement

Desai, J.
The following question has been referred to us for our consideration by the Income Tax Appellate Tribunal u/s 256(1) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case and on a proper interpretation of section 297(2)(g) of the Income Tax Act, 1961, penalty could be imposed u/s 271(1)(c) of the said Act in respect of assessments completed u/s 23(3) read with section 34(1)(a) of the 1922 Act ?"

2. We are concerned in this reference with four assessment years, viz., 1954-55 to 1957-58. In respect of these years the assessments of the assessee, an individual, were completed between 29th March, 1956, and 25th February, 1960. Subsequently, the Income Tax Officer reopened the assessments u/s 34. For all the four years the reassessments were completed on 21st January, 1963, i.e., after commencement of the Income Tax Act, 1961. During the course of the reassessment proceedings the Income Tax Officer came to the conclusion that penalty proceedings were attracted and,

accordingly, action was initiated u/s 271(1)(c). Inasmuch as the amounts of penalty would exceed Rs. 1,000, the proceedings were subsequently taken up by the Inspecting Assistant Commissioner, who by his orders dated 19th January, 1965, imposed penalties of Rs. 1,401, Rs. 2,689, Rs. 8,007 and Rs. 9,191, respectively, for each of the four assessment years in question.

3. The assessee, thereafter, appealed to the Tribunal. The Tribunal was of the view that there was no proceeding under the 1961 Act and the condition precedent for the Inspecting Assistant Commissioner assuming jurisdiction u/s 271(1)(c), therefore, did not exist. The Tribunal accordingly held that the orders of penalty passed under the provisions of the 1961 Act by the Inspecting Assistant Commissioner, who derived his power to levy penalty only under the new Act, were ab initio void. Accordingly, the penalties were cancelled. Before the Tribunal the assessee''s representative had argued about the quantum of penalty on the footing that it was not possible to contend that no penalty at all was leviable. The only argument urged, therefore, was that the quantum for the levy of penalty equivalent to 100% of the additional tax levied was excessive. This contention on the quantum of penalty was not gone into by the Tribunal in the view that it took, viz., that the Inspecting Assistant Commissioner had no jurisdiction and his orders, therefore, were void ab initio.

4. Before us Mr. Joshi on behalf of the Commissioner relied on the provisions contained in section 297(2)(g) of the Act of 1961. On behalf of the assessee the learned counsel submitted but not very strenuously that the said provision was not applicable but that the case would be governed by the provisions contained in clause (f) of section 297(2). Both these provisions may be fully set out :

"297(2) Notwithstanding the repeal of the Indian Income Tax Act, 1922 (11 of 1922) (hereinafter referred to as the repealed Act), ...

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act; ....."

5. In this connection, having regard to the provision contained in the definition section, viz., section 2(8) of the Act of 1961, which defines "assessment" as inclusive of reassessment, we are of opinion that the proceedings would be governed by the later section, i.e., section 297(2)(g), and not by section 297(2)(f) as contended by the learned advocate for the assessee. It is also important to bear in mind that the provisions for penalty would not have been attracted but for the Income Tax Officer issuing notices u/s

34, thereafter, reopening the assessments and ultimately rejecting the assessee"s contentions and passing the reassessment order including in the disclosed income additional income which had originally not been shown. In our opinion, therefore, there is nothing in the context of these provisions viz., clauses (f) and (g) of section 297(2), to warrant that the expression "assessment" can only refer to the original assessment and not to "reassessment" after notice u/s 34 or section 147, as the case may be. On the other hand, the context would seem to suggest that the expression "assessment" included in these two provisions should be given the meaning as is to be found in the definition section, viz., section 2(8), and must include reassessment.

6. We are also referred by learned counsel for the Commissioner to the decision of the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, in which the impact of this provision of section 297(2)(g) has been considered. In the light of this statutory provision as interpreted by the Supreme Court, we are of opinion that the Tribunal was in error in holding that the Inspecting Assistant Commissioner had no jurisdiction and the proceedings were ab initio void.

7. Accordingly, the question referred to us will have to be answered in the affirmative and in favour of the revenue. The parties will, however, bear their own costs of the reference.