**(1962) 05 CAL CK 0011**

**Calcutta High Court**

**Case No:** IT Reference No. 100 of 1952

| | | |
|---|---|---|
| Kanailal Gatani | | APPELLANT |
| | Vs | |
| Commissioner of Income Tax | | RESPONDENT |

**Date of Decision:** May 18, 1962

**Acts Referred:**

- Income Tax Act, 1961 - Section 23(2), 23(4), 27, 28, 28(1)(c)

**Citation:** (1963) 48 ITR 262

**Hon'ble Judges:** G.K. Mitter, J; D.N. Sinha, J

**Bench:** Division Bench

**Advocate:** Nirmal Mukherjee and B. Banerjee, for the Appellant;E.R. Meyer and B.L. Pal, for the Respondent

**Judgement**

Sinha, J.

The facts in this case are shortly as follows: The assessee in this case is the firm of Messrs. Jaykissendas Kanailal, of which the proprietor is Kanailal Gatani. The assessment in question is for the year 1942-43. There was an assessment u/s 23(4), said to have been made ex parte. Against this assessment there was an appeal u/s 27 which was rejected. Against this refusal there was an appeal before the Appellate Assistant Commissioner of income tax, Calcutta A Range, who passed an order dated June 4, 1945, cancelling the income tax Officer''s order u/s 27 refusing to reopen the assessment and directed him to make a fresh assessment. Notice u/s 23(2) for fresh assessment was given. Against this, the assessee submitted a petition of objection dated November 14, 1946, through his advocate, Sri Nirmal Mukherjee. A copy of this petition is at page 5. While making the assessment it appeared to the income tax Officer that the assessee had concealed particulars of his income and a show-cause notice was issued u/s 28 of the income tax Act. After the assessment was reopened, two notices were issued, both dated 3rd March, 1947 (pages 24, 25). The first notice called upon the assessee to show cause by March 10, 1947, why a penalty u/s 28 of the income tax Act should not be

imposed because the assessee had concealed the particulars of his income deliberately. The second notice called upon the assessee to show cause by March 10, 1947, why a penalty u/s 16 of the Excess Profits Tax Act should not be imposed as the assessee had concealed the particulars of his income. On the 10th March, 1947, a written statement was filed on behalf of the assessee through Sri Nirmal Mukherjee before Mr. A De, the then income tax Officer in-charge of the file, a copy whereof is set out at page 23. It was stated therein that the assessee was lying ill at his native place and demanded a hearing as provided u/s 28. Time was allotted up to 24th March, 1947. On the 24th March, 1947, an extension of time was asked for and the case was adjourned to the 10th April, 1947. It was further adjourned to the 21st April, 1947, and on the 22nd April, 1947, notice was given to the effect that no explanation had been furnished and nobody appeared on behalf of the assessee on the 21st April, 1947, and that the assessee was required to furnish the explanation by 3rd May, 1947, and to appear on that date. On the 3rd May, 1947, Sri Nirmal Mukherjee appeared on behalf of the assessee and filed a written statement. He gave certain explanations denying the concealment and asking the penalty proceeding to be withdrawn. Apart from the written statement filed, Sri Mukherjee appeared before the income tax Officer, Mr. De, and the order-sheet shows as follows:

"Mr. Mukherjee, advocate, appears and has stated that beyond his written statement filed in this matter he has nothing to had.

(Sd.) A. De,

ITO"

Before the income tax Officer, Mr. A. De, could pass an order u/s 28 or section 16, he was transferred. But before he was transferred he applied to the Inspecting Assistant Commissioner for sanction for the imposition of a penalty. This was approved by the Inspecting Assistant Commissioner. In the amended statement of case, it is stated that the proposal for imposition of penalty was submitted by Mr. A De, the former officer, on 31st May, 1947, for approval of the Inspecting Assistant Commissioner and the same was approved by the said Inspecting Assistant Commissioner. The draft order for imposition of penalty was then prepared by Mr. A. De, but before he could complete the same, he was transferred and Mr. S.N. Roy came in his place. Mr. S.N. Roy looked into the draft order and after he had concurred therein, he sent it with a forwarding memo dated 25th February, 1948 to the Inspecting Assistant Commissioner, Range I, Calcutta. The application for sanction for imposition of penalty by Mr. S.N. Roy was in respect of a sum of Rs. 75,000 u/s 28(1)(c) of the income tax Act and Rs. 2,00,000 u/s 16 of the Excess Profits Tax Act. It appears that the sanction was given and Sri S.N. Roy passed two orders on 31st March, 1948, one imposing a penalty u/s 28 of the income tax Act to the extent of Rs. 75,000 (pages 11 to 15) and another u/s 16 of the Excess Profits Tax Act imposing a penalty to the extent of Rs. 2,00,000 (page 16). Against these two orders appeals were taken to the Appellate Assistant Commissioner. Amongst other points it was urged that the assessee had not been heard by Mr. S.N. Roy, as is mandatory u/s 28

of the income tax Act. It was held that the hearing as contemplated by that section had already been given and, in the circumstances, the order passed by Mr. Roy was quite in order. In the result, the appeals were dismissed and the penalties were confirmed (pages 17 to 21). Against these orders, appeals were taken to the Appellate Tribunal. The Appellate Tribunal held that there might have been some substance in the point mentioned above, if it was satisfied that the subsequent income tax Officer had not applied his mind to the proceeding on record but merely signed the order. The Tribunal, however, held that Mr. Roy had in fact applied his mind to the facts of the case and, therefore, there was nothing in law which could prevent him, as the successor to Mr. A. De, from carrying on the work from the stage at which his predecessor had left the same. The Appellate Tribunal, however, thought that the penalties imposed were excessive and reduced the penalty to Rs. 35,000 in the case of the income tax appeal and Rs. 75,000 in the excess profits tax appeal. Thereupon, the assessee made an application u/s 66(1) of the income tax Act for an order that several questions should be referred to the High Court. The Appellate Tribunal refused to make the reference. Thereupon, an application was made to the High Court and an order was made u/s 66(2), directing the Appellate Tribunal to refer the following questions:

"(1)Whether on the facts and in the circumstances of the case and in view of the mandatory provision of sub-section (3) of section 28 of the Indian income tax Act the imposition of penalty by the income tax Officer who did not hear the assessee was legal ?

(2)Whether on the facts and circumstances of the case the imposition of penalty by the Excess Profits Tax Officer who did not hear the assessee was legal ?"

2. The reference came up before a Bench presided over by Chakravartti C.J. On the 15th January, 1958, the learned Chief Justice held that a supplementary statement of the case was necessary, as the statement of case filed was not sufficient. The points upon which the supplementary statement of the case was to be filed are to be found at page 32 of the supplementary paper-book. A supplementary statement of the case has been filed. The matter has now come up before us for hearing. The first thing to be considered is the provision of section 28(3) of the income tax Act which reads as follows:

"No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard."

3. There is, therefore, no doubt upon the point that before an order of penalty can be imposed, the assessee must be heard. In the notice fixing the date of hearing on 22nd April, 1947 (page 22), the income tax Officer said as follows:

"In case, however, you intend to furnish any further explanation or to have a hearing, you are required to furnish the explanation by 3rd May, 1947, and appear on that date before me at 12 noon."

4. On the 3rd May, 1947, the assessee filed his explanation and appeared through his learned advocate and, upon being asked, the learned advocate stated that all his points were contained in the Written statement and he had nothing more to add. Therefore, the assessee had a complete hearing. The draft order for the imposition of penalty was prepared by Mr. A. De. Mr. Roy, who then came into the scene, looked into the papers and concurred with the imposition of the penalty and applied to the Inspecting Assistant Commissioner for sanction which was accorded and the order was signed by Mr. Roy, the order being dated 31st March, 1948 (pages 11 to 15). The question is as to whether, on the facts of this case, one officer could hear the case and draw up a draft order and a succeeding officer having satisfied himself on the materials, but without a further hearing, could make the order. In my opinion, the legal position is as follows:

5. A hearing of a case may be of many kinds. It usually involves the calling of witnesses, their examination and cross-examination and then arguments are addressed to the Tribunal. Where witnesses have been called and examined, or where arguments have been advanced, it is clear that one man cannot hear the case and another man pass judgment. The reason is that much may depend on the view that the Tribunal takes as to credibility of witnesses and his mind may be swayed one way or the other by the demeanour of witnesses and as a result of arguments. This is such an intangible and personal task, that it cannot be handed over to the successor. Where, however, no witnesses have been called and no arguments have been advanced, but the matter depends on written objections filed, then the successor is in the same position as the officer who originally was in the conduct of the case. Therefore, as long as the successor applies his mind to the materials before him, this is sufficient. As appears from the facts of this case, Mr. A. De had looked into the materials and had drawn the draft order imposing penalty. His successor, Mr. Roy, looked into the materials and the draft order, concurred in the conclusion arrived at by his predecessor and asked for the sanction of the Inspecting Assistant Commissioner and, having obtained it, subscribed his signature to the order, making it his own. In my opinion, the provisions of section 28 have been satisfied and nothing illegal has been done. Two cases have been cited before us. The first case is Calcutta Tanneries (1944) Ltd., Calcutta Vs. Commissioner of Income Tax, Calcutta, . In that case, what happened was as follows: The income tax Officer found that the assessee had concealed an income of Rs. 17,000 by giving wrong particulars about encashment of seventeen high denomination notes of Rs. 1,000 each. A penalty proceeding was started. During the proceeding, a written statement was filed denying liability and witnesses and books were examined by the income tax Officer and the argument of the pleader was heard. Such hearing concluded on September 29, 1951, but no order was passed on that date. About fourteen months after that date, the income tax Officer was succeeded by another income tax Officer who passed an order imposing a penalty of Rs. 9,900 on January 14, 1954. He did not hear the assessee any further. The order of penalty was challenged. It was held that the combined effect of section 5(7C) and section 28(3) of the income tax Act was to authorise the succeeding income tax Officer to pass an order upon the evidence produced before his predecessor in office. But the effect

is not to authorise the former to pass an order upon arguments advanced before the latter. Section 5(7C) was inserted by the Amending Act of 1953, with effect from 1st April, 1952. In my opinion, this judgment supports rather than destroys the proposition I have mentioned above. It would be observed that the order in this case was made prior to the amendment, but even prior to the amendment the position was not different. I may mention another authority cited before us, being a Bench decision of the Patna High Court in MURLIDHAR TEJPAL Vs. COMMISSIONER OF Income Tax, PATNA., . That case also deals with the effect of section 5(7C) of the income tax Act read with section 28(3). It was held that the combined effect of section 28(3) and section 5(7C) is that the succeeding income tax Officer has authority to pass an order upon the explanation of the assessee produced before his predecessor in office, if the assessee has failed to exercise his right u/s 5(7C) demanding that the proceeding should be reopened. In this case, we are not concerned with the provisions of section 5(7C), but the position seems to be as stated above, even under the income tax Act as it stood previous to the amendment. On the facts of the present case, I am of the opinion that Mr. Roy was entitled to make the order, having satisfied himself as to the correctness of it and, inasmuch as no witnesses had been called and no arguments advanced, he was in a position to make the order and that no illegality has been committed. I have decided this case upon the law as it stood before section 5(7C) was introduced by the amendment of 1953. There is a conflict of decision as to whether, under that sub-section, a re-hearing or fresh hearing is necessary unless demanded by the assessee. I must not be taken to have expressed any opinion upon that point. The result is that both the questions referred to us should be answered in the affirmative and the assessee must pay the costs of the reference. Certified for two counsel.

G.K. Mitter, J.

I agree.