**Mohammadi Begum and anr. Vs. Commissioner of Income-tax**

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**Court** : Andhra Pradesh

**Decided On :** Jan-29-1985

**Reported in** : (1985)49CTR(AP)90; [1986]158ITR662(AP)

**Judge** : K. Ramaswamy and ;P.A. Choudhary, JJ.

**Acts** : Income Tax Act, 1961 - Sections 2(8), 64, 143(1), 143(2), 144, 146, 147, 153(3), 261, 264, 264(3) and 275

**Appeal No.** : Referred Case No. 54 of 1979

**Appellant** : Mohammadi Begum and anr.

**Respondent** : Commissioner of Income-tax

**Advocate for Def.** : M. Suryanarayana Murthy, Adv.

**Advocate for Pet/Ap.** : Y. Rathnakar, Adv.

**Judgement** :

P.A. Choudary, J.

1. The assessee is a partner of a firm called M/s. Karkhana Zinda Tilismath. The assessee, Hafeezunnissa Begum, had her minor children-Hashimuddin and Asgharunnisa-admitted to the benefits of partnership. In the return filed for the assessment year 1964-65, she did not include the share income of the minors. The Income-tax Officer completed the assessment under section 143(1) of the Income-tax Act, 1961, and included the share income of the minors in her assessment. He followed the same process for the assessment year 1965-66. But, in no case, he gave notice to the assessee. Hafeezunnissa Begum filed a revision before the Commissioner of Income-tax under section 264 contending that the Income-tax Officer should not have completed the assessment under section 143(1) of the Income-tax Act, by including the share income of the minors, without notice to her. The Commissioner of Income-tax, agreeing with this contention, passed orders under section 264, setting aside both the assessments and directing the Income-tax Officer to make fresh assessments in accordance with law. Pursuant to those directions, the Income-tax Officer issued a notice under section 143(2) of the Income-tax Act and completed the assessments on February 8, 1973. The assessments for the years 1964-65 and 1965-66 ought to have been completed by March 31, 1969, and March 31, 1970, respectively. The assessee had, therefore, objected before the Income-tax Officer that he had no jurisdiction to assess in the year 1973, because they were barred by time. The Income-tax Officer did not agree with this contention and completed the reassessments including the share income of the minors under section

143(2) of the Act. The Income-tax Officer did the same in the case of Mohammadi Begum, the second assessee in this case. Having been aggrieved by the orders of assessments passed by the Income-tax Officer, the assessees went up in appeal before the Appellate Assistant Commissioner and, finally, to the Income-tax Appellate Tribunal. They unsuccessfully contended before these authorities that the reassessments made by the Income-tax Officer in the year 1973 were barred by limitation of four years prescribed by section 153(1) of the Act. This argument has been rejected by the Appellate Tribunal and, at the instance of the assessees, the following questions of law have been referred to this court for its opinion :

'1. Whether, on the facts and in the circumstances of the case, the assessments for the assessment years 1964-65 and 1965-66 are barred by limitation and are, therefore, invalid

2. If the answer to question No. 1 is in the negative, whether, on the facts and in the circumstances of the case, the Income-tax Officer was correct in including in the total income of the assessee under section 64(ii) of the Income-tax Act, 1961, the share income arising to the assessee's minor children by reason of their admission to the benefits of partnership ?'

2. The facts which have been stated above are just sufficient to answer the questions which have been referred for the opinion of this court. This is a case where the assessee's total income should include the income of the minors under section 64(iii) of the Act. There is no dispute about that. What the Income-tax Officer has done is exactly what section 64 requires him to do. But, in doing so, he committed a procedural error. He has failed to give notice to the assessees which is required of him under section 143(2) of the Act. It was for that reason that the assessee made complaints to the Commissioner under section 264 of the Act. The Commissioner, by his order dated July 15, 1971, had not only set aside the assessments complained against by Hafeezunnissa Begum, but also directed the Income-tax Officer to make fresh assessments as per the provisions of law. It is in pursuance of those directions, the Income-tax Officer had made the assessments. some time in the year 1973, which is the subject-matter of this case.

3. Sri Rathnakar, learned counsel for the assessees, argued that the assessments which have been made in the year 1973 were barred by limitation and are not saved by the provisions of section 153(3) of the Income-tax Act. It may be noticed that it is sub-sections (l) and (2) of section 153 which raise a bar of limitation against passing any order of assessment under section 144 or 147. Section 153(3) lifts this bar of limitation in certain circumstances. Clauses (i) and (ii) of section 153(3) lay down that the provisions of sub-sections (1) and (2) shall not apply to assessments, reassessments and recomputations which may be completed at any time-(i) where a fresh assessment is made under section 146; (ii) where the assessment, reassessment or recomputations is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 264 (or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act).

4. A bare perusal of the language of sub-section (3) of section 153 would show that where the assessment was made in order to give effect to any finding or direction made under section 264 of the Income-tax Act, such an order cannot be hit by the provisions of limitation contained in sub-sections (1) and (2) of section 153 of the Act.

It may be mentioned that in principle, the law of limitation does not bind the Crown, unless it is imposed by a statute. Barring a statutory provision like sub-sections (1) and (2) of section 153, tax payable to the Crown can be quantified and recovered, at any time. It is only a legislative enactment that can prevent the quantification of a tax amount and its collection. Now, sub-sections (I) and (2) of section 153 do indicate such limits of time on the right of the State to make an assessment, but they are made subject to and are over-ridden by sub-section (3) of that section. Sub-section (3) of that section clearly provides that an assessment or reassessment made beyond the period of limitation, in order to give effect to a finding or direction contained in an order made under section 264, is not hit by the provisions of limitation contained in sub-sections (1) and (2) of section 153. However, Sri Rathnakar Rao, learned counsel for the assessees, argued that sub-section (3) of section 153 will be available to the Revenue only where a finding or direction made under section 264 of the Act by the Commissioner can be carried out by the Income-tax Officer without violating the bar of limitation. He has cited the judgments of Addl. CIT v. N. V. Ganapathi Rao : [1978]115ITR277(AP) , CIT v. Bhudhar Singh and Sons : [1983]143ITR322(All) , Narinder Singh Dhingra v. CIT : [1973]90ITR110(Delhi) (all under the Income-tax Act) and Smt. Lucy Kochuvareed v. Commr. of Agrl. : [1971]82ITR845(Ker) under the Kerala Agricultural Income-tax Act, 1950.

5. Before referring to these cases, we may see that this argument cannot be accepted because the express language of sub-section (3) of section 153 attempts to take away the orders of assessments and reassessments made by reason of findings and directions under section 264 out of the clutches of the limitation prescribed by sub-sections (1) and (2) of section 153 of the Act. In our view, the bare language of sub-section (3) of section 153 provides a complete and an effective answer to the contention of the learned counsel. But, in view of the fact that the learned counsel has referred to the aforementioned judgments of the various High Courts, we may, as well, consider his submissions in the light of those judgments. Doing so, we find that both the cases, Ganapathi Rao : [1978]115ITR277(AP) and Bhudhar Singh & Sons : [1983]143ITR322(All) , are cases which are concerned not with section 153 of the Income-tax Act, but with section 275 of the Act. Now, section 275 of the Income-tax Act imposes total prohibition on levying penalty beyond the prescribed period of time mentioned therein. There is no language in section 275 of the Act, similar to the language to be found in sub-section (3) of section 153 of the Act removing the bar of limitation in the way of the Revenue imposing penalty. It is, therefore, wholly right to hold on the basis of the prohibition language of section 275 that no penalty under the Act can be imposed beyond the period of time prescribed under section 275 of the Act. For that reason, both the judgments in the cases of Ganapathi Rao : [1978]115ITR277(AP) and Bhudhar Singh & Sons : [1983]143ITR322(All) should he held to be inapplicable to the construction of section 153 of the Act. But that much is not seriously disputed even by the learned counsel for the assessees. But, what Mr. Rathnakar prominently argued is that there were observations made by a Division Bench of this court in the case of Ganapathi Rao : [1978]115ITR277(AP) to the effect that what construction would apply to section 275 would also apply to section 147 of the Income-tax Act. He relied upon the passage occurring at page 283 which reads as follows :

'The language of section 275 is clear and explicit. It is mandatory. Therefore, the question of pushing the language so as to result in irrational conclusions does not arise in this case. If we are to go by what the Bombay High Court had said, it will result in this. The period of limitation, as contended by the learned counsel for the

Revenue, will apply not only to the first order of the first authority but also to the second order of the first authority after remand. We are, therefore, unable to agree with the learned judges of the Bombay High Court that the bar of limitation under section 33B(2)(b) applies only to the orders passed by the Commissioner in revision suo motu and not to the orders which he may be required to pass in pursuance of the orders of any higher authority.'

6. The decision of the Bombay High Court in CIT v. Kishoresinh Kalyansinh Solanki : [1960]39ITR522(Bom) was a case that related not to the imposition of penalty but imposition of tax. The order was made in order to give effect to the findings and directions of the Commissioner passed under section 33B of the 1922 Act. The Bombay High Court relied upon the language of the second proviso to section 34(3) of the 1922 Act corresponding to the language of section 153(3) of the present Act and held that because assessment was being made to give effect to a finding or a direction of the revisional authority, the bar of limitation would not apply. It is obvious that the Division Bench of our High Court in the case of Ganapathi Rao : [1978]115ITR277(AP) had no occasion to deal with the question of assessments and was only concerned with the question of imposition of penalties. In that context, the observations made by our Division Bench disagreeing with the Bombay judgment in Kishoresinh Kalyansinh Solanki : [1960]39ITR522(Bom) must be considered as mere obiter. The further fact that the Division Bench has not considered, though noticed, is the statutory difference in the language between section 275 and section 153(3) of the Act. This is also a ground to hold that the case of Ganapathy Rao : [1978]115ITR277(AP) cannot be taken to be a binding decision on the interpretation of section 153(3) of the Act. There are no similar observations made by the Allahabad High Court in Bhudhar Singh & Sons : [1983]143ITR322(All) which is a judgment applicable only to the interpretation of section 275 of the Income-tax Act. The Allahabad decision did not consider section 153(3) of the Act. The case Narinder Singh Dhingra : [1973]90ITR110(Delhi) was a case where the Bench construed that the first assessment made by the Income-tax Officer itself was void and that the directions given by the Commissioner could not empower the Income-tax Officer to save the period of limitation which as barred by his default. Then remains the judgment of the Kerala High court in Smt. Lucy Kochuvareed : [1971]82ITR845(Ker) . In that case, the Full Bench has ruled that the Agricultural Income-tax Commissioner's directions and findings, which the Income-tax Officer should give effect to, cannot be made beyond the period of limitation. The judgment does not disclose on what basis this conclusion was reached.

7. Now, the language of section 264 of the Act empowers the Commissioner of Income-tax to dispose of the revisions filed by the assessee and empowers him to pass such orders thereon as he thinks fit not being orders prejudicial to the assessee. There is no limitation of time fixed for the exercise of the revisional powers by the Commissioner [under section 264(3)]. It is not easily conceivable that the law, in normal circumstances, should impose a strict time-limit for the disposal of these matters by the Commissioner under a threat of penalty to invalidate the orders made by him after that period. In any case, we do not find any language in section 264 to warrant that submission. Accordingly, we are not in agreement with the contention of the learned counsel, that the Commissioner should exercise his powers of revision under section 264 only within the period of limitation, fixed for the exercise of powers not for the Commissioner under section 264 but for completing assessments by the Income-tax Officer. This argument if accepted makes the working of the Act difficult, if not, impossible. Machinery provisions should not be read that way. There is no

obligation on the Income-tax Officer to pass his orders of assessment, sufficiently in advance before the end of four year period of limitation, so that the revisional powers may be worked out within that period of four years' time. What should happen to the exercise of revisional power setting aside an order of assessment by the Income-tax Officer one month before the expiry of the four year period and remanding it to the Income-tax Officer. Accepting the contention of the learned counsel for the assessees, in those circumstances, would mean that the appellate and the revisional powers and the ample authority which those powers confer on the revisional authority, would all become ineffective and unworkable.

8. For the above reasons, we are of the opinion that the major argument of the assessees that the revisional powers of the Commissioner under section 264 of the Income-tax Act should be exercised within the period of limitation fixed by the statute for the Income-tax Officer to complete his assessment cannot be accepted.

9. The next contention which has been urged by the learned counsel is that the section 153(3)(ii) is applicable only to cases of assessment, reassessment and recomputation and not to a case of fresh assessment. In support of this argument, the learned counsel referred to the inclusive definition of the word 'assessment' contained in section 2(8) of the Act. This argument of the learned counsel is based upon the premise that the assessment which has been made by the Income-tax Officer in the present case in order to give effect to the directions of the Commissioner is neither an assessment nor a reassessment but is only a fresh assessment. Learned counsel sought to derive support for this contention from the language of the order of the Commissioner. We are unable to agree with this contention. It is, no doubt, true that the Commissioner's order uses the words 'fresh assessment' but not in the same meaning in which section 153(3)(i) uses these words. The fresh assessment which is spoken of by the statute is a fresh assessment under section 146 of the Act. The fresh assessment which is spoken of under section 146 of the Act deals with reopening of assessment at the instance of the assessees. Obviously, that is not the situation which is contemplated now by the order passed by the Commissioner. The assessment which is now made is not a fresh assessment within the meaning of section 153(3)(i). In truth and in reality, it is a case of assessment or reassessment which falls under section 153(3)(ii). There is nothing in the inclusive language of section 2(8) of the Act defining assessment to suggest otherwise. In the circumstances, we reject this argument also.

10. It is then argued by the learned counsel that there is no positive finding or direction within the meaning of section 153(3)(iii) for making the reassessment. His argument is that the language of section 264 of the Act read with section 153(3) of the Act contemplates that the Income-tax Officer can give effect to the overriding the period of limitation only when the Commissioner makes a positive direction. The learned counsel argues that in this case, the Commissioner did not make any positive direction. It is not possible to appreciate this argument. The direction issued by the Commissioner runs as follows :

'The Income-tax Officer is directed to make the fresh assessment as per the provisions of law.'

11. Now, this direction can only mean that the Income-tax Officer is bound to make fresh assessment. In the matter of making fresh assessment, the direction does not leave any discretion to the Income-tax Officer, and it does not mean that the Income-

tax Officer has been left with any discretion to decide whether he may or may not make a fresh assessment as per the provisions of law. The Income-tax Officer has no choice left with him. His duty is to do what the Commissioner told him without asking how or why. What the Income-tax Officer should do was decided by the Commissioner and an appropriate direction was issued to the Income-tax Officer to that effect. We, therefore, hold that it is a positive direction and falls within the language of section 153(3) and saves limitation. CIT v. Ram Baran Ram Nath : [1976]104ITR691(All) , which is cited by Sri Rathnakar, is a case where the Tribunal directed the Inspecting Assistant Commissioner to make a fresh order imposing penalty if he could make it in law. That was a case where the imposition of penalty was barred by the period of limitation and no fresh order could be made by the Inspecting Assistant Commissioner. The Income-tax Appellate Tribunal directed the Assistant Commissioner without deciding the question of limitation to pass a fresh order 'as he thinks expedient in accordance with law if need be'. It is that order which the learned judges construed as not being positive, because the question of limitation which was staring in the face of the Revenue was not decided by the Commissioner. Similarly, in Rajinder Nath v. CIT : [1979]120ITR14(SC) , which is cited by the learned counsel, the direction issued was that the Income-tax Officer was free to take action to assess the excess in the hands of the co-owner. But that direction was described by the Supreme Court as no direction falling within the scope of section 153(3). Their Lordships said such a finding was not necessary for the disposal of the particular case. In this case, the direction issued by the Commissioner is clearly warranted by the facts and the contentions therein. We are, therefore, of the opinion that this contention should also fail.

12. The next argument of the learned counsel is that the direction to make fresh assessment is not a direction which is necessary for the disposal of the revision petition and that, therefore, issuing of such a direction is not within the jurisdiction of the Commissioner. This contention is even more difficult to appreciate. The assessee made an application to the Commissioner under section 264 of the Income-tax Act to revise the orders of assessment passed by the Income-tax Officer, on the ground that the incomes of her minor children were clubbed with her income under section 64 of the Act without giving notice. Having accepted that contention, the Commissioner can only direct the Income-tax Officer to reassess the income of the assessee according to law, which means giving notice to them. To say that the giving of such a notice is not necessary for the purpose of the disposal of the assessee's revision or that it is prejudicial to the assessee's interests, is no less than claiming tax immunity from the provisions of the Income-tax Act. This argument cannot, therefore, be accepted. A Division Bench of the Calcutta High Court in Cachar Plywood Ltd. v. ITO : [1978]114ITR379(Cal) observed that section 153(3) confers powers on the appropriate authority to pass appropriate directions in regard to the assessment, reassessment or recomputation which can be made and completed at any time in consequence of any finding of court or to give effect to its direction as may be made. Apart from that statutory power, the Division Bench noted that the courts on their own have jurisdiction to extend the period of limitation in the absence of any express provision in that regard. If the learned counsel's argument is to be accepted, the result would be that the revision which has been filed under section 264 of the Act can only end with the orders passed by the Commissioner under that section without any further proceedings being taken by the Income-tax Officer. In our opinion, this would be a denial of the very basis of judicial administration based on hierarchy of tribunals. In any system where there is a hierarchy of tribunals set up, an appellate or revisional authority should necessarily have the power to give directions to the

original authority to deal with the matter in accordance with the judgment of the higher authority. We must note that section 264 is not a provision of law dealing with the question of imposition of liability on the assessee. It is only a part of a machinery section. Such a remedial provision cannot be stultified by putting such a narrow construction which is opposed, in our view, to the basic canons of judicial administration. We are, therefore, not in a position to agree with this contention of the learned counsel. The decision of the Calcutta High Court in Goombira Tea Co. P. Ltd. v. ITO : [1980]125ITR260(Cal) is distinguishable on the ground that an amendment to section 153(3) made in the year 1964 was not brought to their Lordship's notice. For all these reasons, we are unable to agree with this contention of the learned counsel for the petitioner.

13. The last and final contention of the assessee is that the first order made by the Income-tax Officer assessing the assessee including the income of her minor children but without giving notice to her, is a void order and that, therefore, there was no order in the eye of law made by the Income-tax Officer within the period of limitation fixed by the statute. For that reason, the learned counsel argued that the directions which had been issued by the Commissioner under section 264 of the Act would not enable the Income-tax Officer to start the assessment proceedings for the first time after the period of limitation. In support of this contention, the learned counsel has relied upon a judgment of the Kerala High Court in Ponkunnam Traders v. Addl. ITO : [1972]83ITR508(Ker) . It is a generally accepted proposition of law that any administrative action taken in violation of the principles of natural justice is a nullity. It is an equally accepted proposition of law that such an order can create no legal obligations nor alter any legal relations. The argument is that the order passed by the Income-tax Officer in this case without giving notice to the assessee being non est, and the period of limitation fixed by the statute having overtaken his powers to reassess meanwhile, the process of reassessment cannot now be restarted by the Income-tax Officer. The question is whether this administrative law principle of judge-made law is acceptable to the Income-tax Act. The decisions of the Supreme Court in Estate of Late Rangalal Jajodia v. CIT : [1971]79ITR505(SC) and Director of Inspection of Income-tax v. Pooran Mall & Sons : [1974]96ITR390(SC) furnish a complete answer to this contention. In Estate of Late Rangalal Jajodia v. CIT : [1971]79ITR505(SC) it was laid down (headnote) :

'The lack of notice to her only made the assessments defective.... An assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected.'

14. In Director of Inspection of Income-tax v. Pooran Mall & Sons : [1974]96ITR390(SC) ), the Supreme Court, dealing with the question of seizure, observed at page 395 :

'But, in the circumstances of a case, the court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by the circumstances like failure to observe the principles of natural justice, the court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a court quashes an order because the principles of natural justice have not been complied with, it should not while passing that order permit the Tribunal or the authority to deal with it again irrespective of the merits of

the case.'

15. The effect of these two decisions of the Supreme Court is to hold that an order passed by the Income-tax Officer in violation of the principles of natural justice is still an order under the Act though liable to be corrected for the reason of its having been passed in violation of the principles of natural justice. The Supreme Court did not agree with the contention that it is a void order. The contention of the petitioner should fail for that reason.

16. In addition, the learned counsel also argued that the Commissioner's direction to the Income-tax Officer to make a fresh assessment is prejudicial to the assessee and that he has no powers to make such a direction. We do not think that this argument merits any consideration. We are, therefore, of the opinion that the first question referred to us should be answered in favour of the Revenue and against the assessee.

17. In view of our answer to the first question, the second question, viz., whether, on the facts and in the circumstances of the case, the Income-tax Officer was correct in including in the total income of the assessee under section 64(ii) of the Income-tax Act, 1961, the share income arising to the assessee's minor children by reason of their admission to the benefits of partnership, is answered in favour of the Revenue and against the assessee.

18. The two questions referred to us are accordingly answered against the assessee and in favour of the Revenue. No costs.

19. The learned counsel for the assessee asked for a certificate under section 261 of the Income-tax Act that we may certify that this is a fit case for appeal to the Supreme Court. In view of the fact that we have merely followed the plain language of the statute and the authoritative pronouncements of the Supreme Court, we cannot certify that this is a fit case to be heard and decided by the Supreme Court. The oral application is accordingly rejected.