## MISCELLANEOUS CIVIL.

1931 February, 26.

*Before Mr. Justice Mukerji and Mr. Justice Bennet.*

IN THE MATTER OF HAR KRISHNA DAS.*

*Income-tax Act (XI of 1922), sections 28 and 31 (3) (d)—Penalty imposed by Income-tax Officer—Appeal to Assistant Commissioner—Enhancement of penalty in appeal—Whether order enhancing penalty valid—Interpretation of statutes.*

An Assistant Commissioner of Income-tax, while hearing an appeal against an order of the Income-tax Officer imposing a penalty under section 28 of the Income-tax Act, is not authorised by section 31(3)(*d*) of the Act to enhance the amount of penalty.

As a matter of general principle, a penalty is not to be enhanced in appeal, in the absence of express provision therefor, by a mere implication of language. Further, the Income-tax Act is a fiscal enactment and, in accordance with the well-known principle, such an Act is, in case of an ambiguity, to be construed in favour of the subject and not in favour of the Crown.

The fact that section 31(3)(*d*) uses the word "vary" but not the word "enhance", although the latter word is used in another part of the same section, together with the facts that no provision was made for hearing the assessee before enhancing the penalty or for giving him a further appeal against an enhancement of penalty although such provisions were made for the case of an enhancement of assessment, make it at least ambiguous whether the word "vary" was meant to include enhancement, and so the word should be construed in favour of the assessee.

Dr. *K. N. Katju* and Mr. *M. N. Raina*, for the assessee.

The Government Advocate (Mr. *U. S. Bajpai*), for the Crown.

MUKERJI and BENNET, JJ. :—The learned Commissioner of Income-tax has stated a case at the instance of one Rai Sahib Har Krishna Das under the following circumstances.

The firm Vaishnav Das Jiwan Das, of which Rai Sahib Harkrishna Das is the head, has been assessed

*Miscellaneous Case No. 590 of 1930.

1931

IN THE MATTER OF HAR KRISHNA DAS.

to an enhanced assessment and was made to pay a penalty of Rs. 1,000 by the Income-tax Officer. It appears that a return was made which was found to be inadequate. The return shows an income of Rs. 12,000 and odd, while it was later found that the income was Rs. 90,000 and odd. Thereupon the Income-tax Officer made an assessment of Rs. 8,000 and odd as income-tax and Rs. 900 and odd as super-tax. In addition to this enhanced taxation a penalty of Rs. 1,000 was imposed. The firm appealed against the assessment to the Assistant Commissioner of Income-tax and that learned officer dismissed the appeal so far as the assessment was concerned, but increased the penalty to a sum of Rs. 5,000. The penalty under the law, namely section 28 of the Indian Income-tax Act, could have been imposed to the maximum limit of the amount of assessment, namely Rs. 8,000 and odd. The amount of penalty imposed by the Assistant Commissioner was therefore within the limit.

A further appeal was taken to the Commissioner and it was contended before him that the Assistant Commissioner was not authorised in law to enhance the penalty.

In the case stated, two questions have been formulated and the first question that we have to answer is "whether, when a penalty has been imposed under section 28 by the Income-tax Officer, and an appeal has been filed against the imposition of the penalty, the Assistant Commissioner, having regard to the wording of section 31(1) (*d*), has power to enhance the penalty?" [The figures and letters "31(i) (*d*)" in the order of the Commissioner of Income-tax are, we take it, a slip for the figures and letters, 31(3)(*d*)].

The argument in favour of the assessee is as follows. In section 31, sub-section (3), clause (*a*) provision has been made for enhancement of assessment. When this provision for enhancement has been made, the clear

word, "enhancement," has been used. Again, in the last clause of section 31 the provision has been made that no enhancement of assessment shall be made until the assessee has had a reasonable opportunity of showing cause against such an enhancement. We do not find in the case of enhancement of penalty any similar provision of hearing the assessee. It is argued that the legislature, if it had meant to authorise the Assistant Commissioner to enhance the penalty, would have also provided for hearing the assessee before the penalty was raised. It is further argued that where an assessment is enhanced by the Assistant Commissioner hearing an appeal, a further appeal is provided for under section 32 of the Act, but no such appeal is provided for in the case of an enhancement of penalty, if such penalty could be enhanced by the Assistant Commissioner on appeal. Another argument has been based on the language of the Civil Procedure Code, order XLI, rule 31. We do not propose to consider this last mentioned argument, because we cannot really read one Act by the help of another Act.

On behalf of the Commissioner the learned Government Advocate has urged that the powers of the Assistant Commissioner hearing an appeal are defined by the words, "affirm, cancel or vary." He argued and with great deal of force that the word "vary" would mean both 'reduce' and 'enhance'.

We have to choose between these two alternative arguments. Before we read the language of sections 31 and 32 again, we might state, as a matter of general principle, that a penalty is not, as a rule, to be enhanced, in appeal, by mere implication of language. When a person is made subject to a penalty and a right of appeal is given, he appeals in the hope that he would be able to have his sentence or punishment reduced. Where the appellate authority is given a power to enhance that penalty, one would expect that that power would be given to

1931

IN THE MATTER OF HAR KRISHNA DAS.

that authority in clear language. We can recall the provisions in the Criminal Procedure Code,—not the language of the Criminal Procedure Code, but the principles on which the provisions are founded. The exceptional power of enhancing a sentence in a criminal case is given to the High Court and that, too, on hearing the convicted person. Ordinarily when an appeal is filed before a Sessions Judge or before the High Court, the Code provides for altering the sentence, but takes care to say that the alteration should not amount to an enhancement. It is only in the exercise of its revisional power that the High Court could enhance the sentence. As we have said, it is a very exceptional power given to the High Court.

We find that section 31 is not oblivious of the fact that there is the word 'enhance' or 'enhancement' in the English language and does not fail to use it when the idea was that the assessment should be enhanced. If we see that the legislature has not used that word 'enhance' or 'enhancement' while dealing with a case of penalty, we can easily say that some different intention was intended to be conveyed. It is true that the word "vary" has been used in conjunction with the word "order" in clause (*d*) of sub-section (3) of section 31. But the idea could have been easily expressed by altering the sentence and using the unambiguous word "enhance" with respect to penalty. The fact that no provision was made for hearing the assessee before enhancing the penalty is a clear argument in support of the contention of the counsel for the assessee. The fact, again, that a further appeal is provided for in the case of an enhancement of assessment, but no further appeal is provided for in the case of an enhancement of penalty, is another argument against the view that a penalty could be enhanced.

Section 28, last paragraph of sub-section (1), provides that where a penalty is imposed, there shall be no

prosecution for an offence committed relating to income-tax. This shows that a choice lay between prosecution and imposition of penalty. The penalty must therefore be in the nature of a fine imposed by a criminal court.

The Income-tax Act is a fiscal enactment, and in the case of an ambiguity it is to be construed by the well known principle in favour of the subject and not against the subject. At best, the word "vary," used shortly after the word "enhance" in the same section, is not conclusive of the idea that the penalty may be enhanced. In the case of an ambiguity the Act will have to be construed in favour of the subject and not in favour of the Crown.

We notice that no provision is to be found within the four corners of the Income-tax Act by which the department may ask, by way of an appeal, any authority to enhance a penalty which has been imposed by the Income-tax Officer. This shows that if the assessee decides not to file an appeal against an order imposing penalty, the department cannot seek to have the penalty enhanced. It was therefore not likely that the legislature meant that an opportunity might be taken of an appeal to enhance the penalty.

For all these reasons we are of opinion that the Assistant Commissioner had no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under section 28 of the Income-tax Act.

This is our answer to the first question. The second question (whether the Assistant Commissioner's finding that the assessee had concealed his income was based on evidence) must be answered in the affirmative as the learned counsel for the assessee has agreed that that must be the answer to be given to that question.