

There is one word which I should like to say in conclusion and that is that it has been represented that there is some serious difficulty in knowing what should be done under such peculiar circumstances as these where one has to face an unexplained disappearance of a person about whose death nothing is known. It seems to me that there are two possible alternative courses which might be utilized: One might be that if the circumstances were such as would justify a prudent person in coming to the conclusion that death was extremely probable, an application might be made to the proper Court upon affidavit showing the circumstances and asking leave to presume the death; or, in the alternative, if the Court did not think that the evidence produced before it was sufficient upon which it could prudently be said that death could be presumed, then in such cases the Court could and should appoint some person to look after the affairs of the individual who had disappeared until his return or until his death can properly be presumed. These two courses—and I have known both adopted—seem to me to be remedies for or rather solutions of the very practical difficulty which has arisen in this case.

The appeal therefore will be allowed with costs in both the Courts. The case will now go back to the Munsif to be dealt with according to law.

Ross, J.—I agree.

Appeal allowed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Ross and Kulwant Sahay, J.J.

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1924.

Jan., 5, 13.

Income-Tax Act, 1922 (Act XI of 1922), sections 10, 22, 23, 30, 31 and 34—Assistant Income-Tax Commissioner,

* Miscellaneous Judicial Cases nos. 64 and 66 of 1924.

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power of, to assess new sources of income on appeal—boarding and journey allowances, and sum embezzled by an employee, whether can be deducted from assessable income.

Under section 31 of the Income-Tax Act, 1922, an Assistant Income-Tax Commissioner has power to enhance an assessment made by the Income-Tax Officer, but he is not empowered to make a new assessment in appeal by adding new sources of income which were not the subject-matter of the appeal.

A sum embezzled by an employee in the course of the business, is a loss incidental to the conduct of the business and should be deducted in calculating the assessable income.

Where an assessee incurs expenditure in the nature of boarding (*basa-kharach*) and travelling (*bidagri*) allowances to employees in order to retain their services for the benefit of the business and in order to increase their efficiency, these payments being made solely for the purpose of earning profits, should be deducted in calculating the assessee's taxable income.

The facts of the case material to this report are stated in the following statement of the case by the Commissioner of Income-Tax.

19th May, 1924. 1. The question for determination by the High Court is whether an Assistant Commissioner of Income-Tax, when hearing an appeal under sections 30 and 31 of the Indian Income-Tax Act, can assess a source of income which was not assessed at all by the Income-Tax Officer.

2. The facts are as follows: The assessee, Babu Jagarnath Thirani, filed a return under section 22 of the Act showing his income in the district of Purnea only. The Income-Tax Officer assessed him on the income in that district and after completing that assessment began to take steps to assess also the assessee's income in Jalpaiguri and Calcutta of which he was previously unaware. Meanwhile the assessee filed an appeal and the Assistant Commissioner in his order assessed the appellant on his total income in Calcutta, Purnea and Jalpaiguri districts.

3. The assessee contends that the word "enhance" in section 31 covers only the increasing of the original assessment and not the inclusion of other sources of income not assessed at all in the order appealed against.

4. In my opinion the wording of section 31 is sufficiently wide to cover the order of the Assistant Commissioner. Though it is not stated in so many words, that the appellate authority has all the powers of assessment conferred on an Income-Tax Officer, this is clearly the intention of the section, the words "confirm, reduce, enhance and

annul " naturally meaning any possible order that could be passed in modification of the original assessment order. It would be altogether anomalous if the Assistant Commissioner had power to enhance an assessment on one source of income and yet had no power to include any income which had not been assessed previously. In effect, to enhance means to include some income which had escaped and the fact that the income which escaped occurred in a different district is immaterial.

Manuk (with him *Guru Saran Prasad*), thereafter moved the High Court for the reasons stated in the following order:—

DAWSON MILLER, C. J. AND FOSTER, J.—This is an application under section 66(3) of the Indian Income-Tax Act of 1922, asking us to order the Commissioner of Income-Tax to state a case for the opinion of the Court with regard to three points. A case has been stated in respect of the petitioner's income, but it did not include the three points which we are now asked to order the Commissioner of Income-Tax to deal with. The first is whether a sum of Rs. 25,000 embezzled by the petitioner's *gomashta* in the ordinary course of business may be deducted from the assessable income. There is apparently some authority in favour of the proposition contended for by the applicant, but it seems to be a question of some doubt.

The second point is whether a sum of Rs. 2,939 paid under the name of *basa-kharach* to the petitioner's staff in Calcutta should also be deducted from the assessable income either as expenditure incurred as salary for the purpose of earning profits or for some other reason and, thirdly, whether a sum of Rs. 361 given to the servants for good service under the name of *bidagri* is also a fit subject for deduction. I think sufficient cause has been shown why we should order the Income-Tax Commissioner to state the case on these three points.

The application will be granted as prayed in the petition.

The Commissioner of Income-Tax thereupon made the following supplementary statement of the case:—

The High Court has called for a reference to itself on three points. The first is whether a sum of Rs. 25,000 embezzled by the *gomashta* of the assessee's can be deducted from the assessable income. The assessee apparently contends that this was a loss in the ordinary course of business, and is, therefore, deductible. The exact circumstances in which the embezzlement took place have not been proved, but it appears that the *gomashta* was taking some money to pay to a creditor of the assessee and embezzled it. He was prosecuted criminally and acquitted, and his defence was that he was robbed of the money.

In my opinion it was not a permissible business expense whether it was lost by robbery or by embezzlement. The only provision under which it can possibly be made to come is clause ix(2) of section 10 "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making profits and gains." In the first place, there is a difference between a loss through accident or negligence and between expenditure deliberately incurred, and when the law speaks of an expenditure incurred for a definite purpose of earning profits it cannot be held to have intended to include also what may be

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called accidental losses. If the sum of Rs. 25,000 had been deposited in a bank which stopped payment, its nature as a capital loss would be clear and the fact that it was lost either by embezzlement or by robbery does not alter the fact that this was a loss of a capital nature and therefore not allowable.

The second and third points are whether expenditure called *basa-kharach* and *bidagri* are admissible allowances. No evidence has been offered as to the exact nature of these expenses but it appears that *basa-kharach* is the boarding expenses of servants and *bidagri* the payment to a servant for his expenses incurred in going, to his home from his place of employment and back again. Such payments appear to me to be in the nature of voluntary gifts or allowances to the servants in addition to their salaries. There is no evidence that such payments are regarded by custom as part of the salaries and, in the absence of such evidence, those payments can only be treated as voluntary gifts over and above the salary and consequently not deductible.

K. P. Jayaswal, for the petitioners: There are four points in this case: (1) A sum given to a servant as a travelling allowance to enable him to go to and from his home (*bidagri*) is expenditure deductible from the profits. (2) Similarly, *basa-kharach*, or the boarding expenses of servants, should also be deducted. My submission is that anything which is spent by the trader with the object of earning profit is allowable. A trader, by inducing his old servants to come back by giving them an allowance, gets the benefit of their experience which means a greater efficiency and a larger profit as well as a larger tax to the Crown. Unless the payment is charitable, it cannot be disallowed. It makes no difference whether the payment is voluntary or otherwise. The criterion is the motive of the trader in making such payments. See Sander's Income-Tax, 2nd edition, pages 81-92. Catering to servants is allowed in England. See Snelling, 5th edition, page 358, and Emery, 1st edition, page 163. The same principle should apply in India.

The third point for consideration is whether a sum embezzled by a servant whose business is to handle money should be deducted before calculating profits for the assessment of income-tax. Section 10 lays down that in "Business" profits or gains only are to be taxed. As "Profit" is not defined anywhere in the Act, it should be taken in its ordinary meaning.

Embezzlement is one of the ordinary risks of business and the profits are calculated by the trader after allowing such losses. In *Usher's Wiltshire Brewery, Limited v. Bruce* (1), it was held by Lord Parmoor that in computing the profit the ordinary principles of commercial trading are to be accepted, and Lord Parker held that where a deduction is necessary to ascertain the balance of profits or gain it ought to be allowed. An embezzled sum is allowed in England as a lawful deduction. See Snelling, 5th edition, page 231; Sanders, 2nd edition, page 191; Murray and Carter, 9th edition, page 263. The fourth point for decision is whether an Assistant Commissioner of Income-Tax can, on appeal, bring in sources of income not included in the assessment by the Income-Tax Officer. Under sections 22 and 23 the Income-Tax Officer is the only person authorized to make an original assessment. If any part of the income has escaped an assessment, the remedy is provided by section 34, under which the Income-Tax Officer alone can take proceedings. The Assistant Commissioner has power only to hear appeals by the assessee under sections 30 and 31. He can deal only with the assessment made by the Income-Tax Officer under sections 22 and 23 and forming the subject-matter of the appeal. As the Statute gives a specific power to a special officer, it cannot be said that it is exercisable by others also, unless otherwise expressly provided. The Assistant Commissioner can undoubtedly enhance an assessment made by the Income-Tax Officer, but he cannot make an original assessment by adding new sources of income. The reasons are, first, that no assessment can be made without a return which forms the very basis of an assessment, and, secondly, that if the Assistant Commissioner were to exercise the powers of an Assistant Officer, I lose the right of appeal, which under the law I am always entitled to assert.

Lachmi Narayan Singh, Government Pleader, for the Income-Tax Commissioner : Section 31, clause (a),

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does not restrict the enhancement to the original sources of income. If there had been an intention to restrict the enhancement, there would have been an express provision to that effect. In the absence of any such restriction, the scope of section 31 cannot be limited.

With regard to the sum embezzled there is no evidence on the record to show that it was lost in the ordinary course of business. It is a question of fact and cannot be gone into by this Court. In order to make such loss deductible it must be proved that it was incurred in the ordinary employment of money in the business. The nature of the loss has not been proved by the petitioner.

Lastly, in order that *basa-kharach* (boarding allowance) and *bidagri* (expenses incurred in going home and coming back) may be lawfully deducted from the taxable income there must be proof of the existence of a contract that the employees shall get such allowance over and above their actual remuneration. This sort of payment is a voluntary payment; and before an allowance can be made, the petitioner has to prove that he was bound to make such payments.

K. P. Jayaswal, in reply: Section 30 exists for the assessee's benefit and unless the statute expressly gives authority to the Assistant Commissioner he cannot be said to possess the same jurisdiction as the original court. My right of appeal cannot be taken away by any act of the Assistant Commissioner. Proceedings could have been taken under section 34 without impairing my right of appeal; but the Assistant Commissioner cannot usurp the powers of an original court under section 31.

S. A. K.

Jan., 13.

Ross, *J.*—Babu Jagarnath Therani carried on business at Kishanganj in the district of Purnea and had branches in Calcutta and Jalpaiguri. He used to make returns of his income in all three places and the income-tax authorities in Calcutta and Jalpaiguri

reported their findings to the Income-tax Officer at Purnea who then combined the figures and made an assessment to income-tax. In the year under consideration, 1922-23, the Income-tax Officer at Purnea made the assessment without waiting for the reports from Calcutta and Jalpaiguri. It appears from the order of the Assistant Commissioner of Income-tax that after making his assessment he noted that assessment would be made on receipt of the reports from the income-tax authorities at Calcutta and Jalpaiguri as heretofore.

The assessee appealed against the assessment to the Assistant Commissioner, who, while reducing the assessment on the business at Purnea, enhanced the assessment as a whole by including the income derived from the branch businesses in Calcutta and Jalpaiguri. Three items were included in arriving at this enhanced sum; *viz.*, a sum of Rs. 25,000 which had been embezzled by a *gomashta* in Calcutta, a sum which was excluded from assessment by the Calcutta authorities, and two sums of Rs. 2,939 and Rs. 361 on account of *basa-kharach* and *bidagri* respectively which had also been excluded in Calcutta.

The Commissioner of Income-tax has stated a case to this Court on four points: (1) whether an Assistant Commissioner of Income-tax when hearing an appeal under sections 30 and 31 of the Indian Income-tax Act can assess a source of income which was not assessed at all by the Income-tax officer; (2) whether the sum of Rs. 25,000 embezzled by the *gomashta* of the assessee can be deducted from the assessable income; (3) whether the expenditure called *basa-kharach* is an admissible allowance; and (4) whether *bidagri* is an admissible allowance. The case on the last three points was stated by the Commissioner under the directions of this Court on the application of the assessee.

I shall deal first with the last three points as they are of minor importance. Under the provisions of section 10 of the Act the tax is payable by an

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assessee under the head "Business" in respect of the profits or gains of any business carried on by him; and, in computing such profits or gains allowance is to be made *inter alia* in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The practice in England seems to be well-settled that sums embezzled are excluded from assessment: see Sanders' Income-Tax and Super-Tax, Second Edition, page 191,

"Loss from embezzlement is deductible";

Murray and Carter's Guide to Income-Tax Practice. Ninth Edition, page 263,

"A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem, and not one connected with, or arising out of, trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for income-tax purposes deemed an expense of the year in which it is written off in the books";

And Snelling's Dictionary of Income-Tax and Super-Tax Practice, Fifth Edition, page 231.

"If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed."

In my opinion, this was not a loss in the nature of capital expenditure but was a loss incidental to the conduct of the business and allowance should be made on this account.

Basa-kharach is stated by the Commissioner of Income-tax to be the boarding expenses of servants, and *bidagri* to be payment to a servant of his expenses incurred in going to his home from the place of employment and back again. These do not seem to me to be in any sense gratuities and it cannot be assumed that there is any charitable element in these payments. These payments are apparently made to servants in order to retain their services for the benefit of the business and to increase their efficiency. In my opinion these payments are made solely for the purpose of earning profits or gains and allowance should be made on account of these sums.

With regard to the principal question, the learned Counsel for the assessee contends that the jurisdiction to assess income-tax upon the business in Calcutta and Jalpaiguri was exercisable by the Income-tax Officer, and the passage already quoted from the judgment of the Assistant Commissioner shows that this jurisdiction had been reserved by the Income-tax Officer to himself and that he intended to exercise it. It would appear from the provisions of section 64 that as Purnea is the principal place of business, the assessment should be made by the Income-tax Officer of that district, the authorities in Calcutta and Jalpaiguri reporting to him. It is argued that the so-called enhancement made by the Assistant Commissioner on appeal is illegal on three grounds—(1) Section 34 expressly provides for the assessment of sources of income that have escaped assessment by the Income-tax Officer; and, where there is an express provision of law applicable to the circumstances of the case, that procedure ought to have been followed; (2) by the procedure adopted by the Assistant Commissioner in assessing on appeal the income from the businesses at Jalpaiguri and Calcutta the assessee has lost the right of appeal on questions of fact relating to these sources of income; (3) by section 31 the Assistant Commissioner in disposing of an appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment. It is contended that “the assessment” means the assessment made by the Income-tax Officer which itself under section 23 is based upon a return; but, in the present case, there was no such assessment so far as the business in Jalpaiguri and Calcutta was concerned and, consequently, the so-called enhancement made by adding these new sources of income was not an enhancement of the assessment made by the Income-tax Officer.

In reply to these arguments the learned Government Pleader contended that the terms of section 31 (3)(a) are general and give power without qualification to enhance the assessment. Now this section

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relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income. To do so would not in reality be enhancing the assessment but adding a new assessment to the old, the subject-matter being different.

I would therefore answer the points stated by the Commissioner of Income-tax in the manner indicated above. The petitioner is entitled to his costs.

KULWANT SAHAY J.—I agree.

Jan., 25.

ROSS AND KULWANT SAHAY, JJ.—The petitioner is entitled to the cost of the printing of the paper books and to the refund of the deposit which he made before the Commissioner of Income-Tax.

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 17, 18, 19,
 22, 23.

Before Jwala Prasad and Adami, J.J.

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Indian Registration Act, 1908 (Act XVI of 1908), section 28—scope of—conveyance of several parcels—title to one parcel defective, effect of.

In a proceeding for registration of a document title to property cannot be gone into.

Section 28 of the Indian Registration Act, 1908, does not require anything more than the existence of a property

* Appeal from Original Decree no. 58 of 1921, from a decision of B. Suresh Chandra Sen, Special Subordinate Judge of Palamau, dated the 6th December, 1920.