

We make no order as to costs.

DAS, J.—I agree.

MYA BU, J.—I agree.

---

## INCOME-TAX REFERENCE.

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Baguley and  
Mr. Justice Mackney.*

### IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

1933  
Jan 10.

v.

### A.A.R. CHETTYAR FIRM.\*

*Income-tax Act (XI of 1922), s. 28—Assessment under s. 23 (4)—Imposition of penalty—Assessee's evidence of his real income to oppose or reduce penalty—Admissibility.*

The assessee declared a certain income for the 1930-31 assessment. The Income-tax Officer held that the assessee had concealed the particulars of their income, and made an assessment under s. 23 (4) of the Income-tax Act. The validity of the assessment was not challenged. The Income-tax Officer then imposed on the assessee, under s. 28, the maximum penalty, which was the difference between the tax on the income declared by the assessee and the tax on the income assessed. The assessee objected to the penalty, and desired to adduce evidence as to their actual income in the penalty proceedings; but the Income-tax Officer refused to allow them to do so.

*Held*, that in an enquiry whether a penalty ought to be imposed under s. 28, and if so to what extent, an assessee is entitled to be heard, and evidence adduced by him purporting to disclose his real income is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under s. 28.

*Young* for the assessee. The penalty sought to be imposed under s. 28 of the Income-tax Act must be the result of a judicial determination. If "in the course of any proceedings under this Act," the Income-tax

---

\* Civil Reference No. 12 of 1932.

1933

*In re* THE  
COMMISSIONER OF  
INCOME-TAX,  
BURMA  
v.  
A.A.R.  
CHETTYAR  
FIRM.

Authority comes to the conclusion that a deliberate concealment of income has been made or that inaccurate particulars have been furnished, he must suspend "estimating" the income of the assessee (when that course is contemplated) till the question of penalty is decided. The Act contemplates no separate penalty proceedings.

[BAGULEY, J. The effect of such a course would be to nullify the provisions of s. 23 (A).]

In s. 24 of the Act of 1918 the words "in the course of any proceedings" occurring in s. 28 of the present Act are not found. And the reason is that both the assessment and the penalty must be the result of one proceeding.

In order to determine the amount of the penalty the assessee must be given an opportunity to adduce evidence as to what his real income was; no such opportunity was given to him in this case.

*Butto Kristo Kamala Saha Firm v. Commissioner of Income-tax*, (1) referred to.

A. Eggar (Government Advocate) for the Crown. S. 28 intends that estimated incomes are to be regarded as "real incomes" for the purposes of that section and therefore the assessee, though given an opportunity of being heard in the penalty proceedings, was not allowed to adduce evidence as to his real income. To hold otherwise would result in all estimated incomes being re-opened if a penalty under s. 28 is contemplated.

[PAGE, C.J. S. 28 (3) provides that the assessee must be given a reasonable opportunity of being heard; but heard on what issue?]

The assessee may prove that he did not conceal any income, despite assessment under s. 23 (†), and that there is no justification for a penalty or that the penalty is too high.

*In the matter of Gur Charan Prasad* (1) shows that there is nothing in the contention that penalty and assessment must be the result of one proceeding. S. 28 applies to any proceeding whatever under the Income-tax Act.

PAGE, C.J.—This is a reference under s. 66 (2) of the Income-tax Act, 1922. The question that has been referred is :

“Whether the amount of tax which would have been avoided if the income returned by the petitioner had been accepted as correct was computed in accordance with the provisions of s. 28 of the Indian Income-tax Act, 1922.”

S. 28, so far as it is material, runs as follows :

“28. (1) If the Income-tax Officer, the Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that an assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of the income-tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income.

“(3) 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.”

The assessee carries on a money-lending business at Maubin, and for the purpose of the 1930-31 assessment they declared an income of Rs. 6,310. As set

1933

*In re* THE  
COMMISSIONER OF  
INCOME-TAX,  
BURMA  
v.  
A.A.R.  
CHETTYAR  
FIRM.

(1) I.L.R. 53 All. 445.

1933

*In re* THE  
COMMISSIONER OF  
INCOME-TAX,  
BURMA

*v.*  
A.A.R.  
CHETTYAR  
FIRM.

PAGE, C.J.

out in the reference "in the course of the assessment proceedings, the Income-tax Officer discovered that the accounts produced did not contain the whole of the assessee's money-lending transactions, and that the assessee had other accounts which were not produced. The Income-tax Officer in these circumstances made the assessment under s. 23 (4), estimating the income to the best of his judgment at Rs. 74,000. The validity of the assessment has not been challenged." The Income-tax Officer in the course of these proceedings further considered whether a penalty ought not to be imposed upon the assessee under s. 28, and the question which has been referred relates to his action in connection with those proceedings. In my opinion the maximum penalty that can be imposed under s. 28 (1) is a sum representing the difference between the tax on the income declared by the assessee and the tax on the income ascertained under the Income-tax Act in respect of which the assessment has been made. At the enquiry held to determine whether a penalty ought to be imposed under s. 28 the Income-tax Officer refused to allow the assessee to adduce evidence of the income that in truth and in fact had accrued to them in the course of the year of assessment.

Now, s. 28 relates not to an assessment of income for the purpose of income-tax, but to the imposition of a penalty for making a deliberately false return of income; and by taking proceedings under s. 28 the assessment of income for income-tax can neither be altered nor affected. Under s. 28, however, whether a penalty ought to be imposed, and, if so, the amount of penalty, are matters that, subject to ss. 30 to 32, lie within the discretion of the Income-tax Officer, and upon these questions the assessee is entitled to be heard (section 28, sub-section 3). In my opinion in such

an enquiry evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under s. 28.

In my opinion the Income-tax Officer was not justified in refusing to admit such evidence. For these reasons, and to this extent, the answer to the question propounded is in the negative.

BAGULEY, J.—I agree.

MACKNEY, J.—I agree.

---

## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Justice Mya Bu.*

BIMALANANDAN PRASAD

*v.*

THE UNITED REFINERIES, LIMITED,

AND OTHERS.\*

1933

*In re* THE  
COMMISSIONER OF  
INCOME-TAX,  
BURMA

*v.*  
A.A.R.  
CHETTYAR  
FIRM.

PAGE, C.J.

1933

Jan. 23.

*Execution—Notice to judgment-debtor and legal representative—Civil Procedure Code (Act V of 1908), O. 21, r. 22—Effect of sale without notice—Object of the rule—Conduct disentitling to benefit of rule—Statutory protection—Public policy—Intention of Legislature.*

A sale held in the course of execution proceedings without the issue of a notice to the legal representative of a party in a case to which Order 21, rule 22, of the Civil Procedure Code applies is irregular and inoperative as against such legal representative.

*Manmatha Nath Ghose v. Lachmi Debi*, I.L.R. 55 Cal. 96; *Raghunath v. Sundar Das*, 41 I.A. 251; *Rajagopala Ayyar v. Ramanujachariar*, I.L.R. 47 Mad. 288; *Srishchandra Nandi v. Rahatannessa Bibi*, I.L.R. 57 Cal. 825—*followed*.

---

\* Civil First Appeal No. 53 of 1932 from the order of the District Court of Hanthawaddy in Civil Execution No. 30 of 1931.