

## INCOME-TAX REFERENCE.

1940

Jan. 15.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
Mr. Justice Mya Bu, and Mr. Justice Dunkley.

IN RE THE COMMISSIONER OF INCOME-TAX,  
BURMA

v.

VED NATH SINGH.\*

*Income-tax—Mitakshara law—Devolution of father's property on only son—  
Error of assessing separately son's income and father's estate income—  
Income escaping assessment—Commissioner's action in revision—  
Deprivation of assessee's rights—Correct procedure—Burma Income-tax  
Act, ss. 23, 29, 33, 34.*

Where a Hindu who is subject to the *Mitakshara* law dies leaving a widow, a daughter and an only son the property of the father becomes the property of the son and the income therefrom is chargeable to income-tax as the income of the son.

*Kalyanji v. Commissioner of Income-tax, Bengal*, I.L.R. [1937] 1 Cal. 653, P.C., followed.

If the Income-tax Officer has made a separate assessment in respect of the son's income from another source and another assessment as regards the income from the father's property upon the son as administrator thereof as if it were the income of a Hindu undivided family, then these assessments are final under ss. 23 and 29 of the Burma Income-tax Act and cannot be reopened except in the circumstances detailed in s. 34 and within the time mentioned in that section.

*Commissioner of Income-tax, Bombay v. Khemchand*, I.L.R. [1938] Bom. 487, P.C., followed.

The Commissioner of Income-tax cannot, by purporting to act under s. 33 of the Act, take action under s. 34 and thereby deprive the assessee of his rights of appeal and revision. If the time within which action must be taken has not expired the Commissioner can direct the Income-tax Officer to take such action. This is not a case of under-assessment but of income that has escaped assessment, that is, income which has not been assessed in the assessment under consideration. It is immaterial that it has been assessed in some other assessment.

*Commissioner of Income-tax, Burma v. Burjorjee*, I.L.R. 9 Ran. 161; *Sheik Abdul Kadir v. Commissioner of Income-tax, Madras*, 2 I.T.C 379, referred to.

*Krishan Kishore v. Commissioner of Income-tax*, I.L.R. 14 Lah. 255; *Rajendranath v. Commissioner of Income-tax, Bengal*, I.L.R. 61 Cal. 285, distinguished.

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\* Civil Reference No. 12 of 1939.

*Clark* for the assessee. The assessee and his father were assessed separately to income-tax, and even after his father's death the son was assessed separately in respect of his own income and in respect of the father's joint family income which had devolved on him. The assessee has only a mother and sister living with him, and in view of the decision of the Privy Council in *Kalyanji Das v. Commissioner of Income-tax, Bengal* (1), it must be conceded that the assessee could be assessed in one assessment in respect of both the incomes. But the main submission in the present case is that the Commissioner of Income-tax erred in making the combined assessment in exercise of his powers under s. 33 of the Income-tax Act. The proper procedure would have been to direct proceedings to be opened under s. 34 of the Act for the assessment of escaped income in which case the assessee would have valuable rights of appeal and revision under the Act. These rights have now been taken away. Further the proceedings to assess escaped income should be within time. See *Ganesh Das v. The Commissioner of Income-tax* (2); *Krishan Kishore v. Commissioner of Income-tax* (3). Once a final assessment has been made it cannot be reopened except as provided by s. 34. *The Commissioner of Income-tax, Bombay and Aden v. Khemchand Ramdas* (4); *Sheik Abdul Kadir v. Commissioner of Income-tax, Madras* (5).

*Thein Maung* (Advocate-General) for the Crown. The assessee has in two different capacities, made two different returns one of which is now untenable in law. There can be no question of escaped income in such cases because the return in respect of the income

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(1) I.L.R. [1937] 1 Cal. 653.

(3) I.L.R. 14 Lah. 255.

(2) I.L.R. 8 Lah. 354.

(4) I.L.R. [1938] Bom. 487.

(5) 2 I.T.C. 372, 379.

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from his father's estate cannot be said to have escaped assessment in the assessment of his personal income. See *Rajendranath Mukerji v. Commissioner of Income-tax, Bengal* (1).

In *Krishan Kishore's* case the assessment was made on the undivided family with the assessee as its head; the Commissioner of Income-tax set aside the assessment and directed that a fresh assessment should be made on him in his personal capacity. It was held that s. 34 did not apply, and the present case is similar to that case.

The real question for decision is whether any returns have already been made which will be binding on the assessee. The incomes must be and have been disclosed to the income-tax department, and the returns had been made by a person who was in a position to make it. Another aspect of the case is the Commissioner has power to enhance the assessment by including in one assessment all the income that accrues to the assessee in his several capacities.

*Clark* in reply. In *Rajendra Mukerji's* case there were two proceedings but one assessment, and the case is therefore distinguishable. The assessments in the present case had become final, and cannot be reopened except as provided in s. 34. See *Commissioner of Income-tax, Burma v. N. N. Burjorjee* (2).

ROBERTS, C.J.—The questions referred to us are as follows :

“(a) Whether the Commissioner of Income-tax can in law in exercise of his power of revision under section 33 of the Burma Income-tax Act, assess to income-tax income alleged to have partially escaped assessment without causing proceedings to be initiated by the proper authority under section 34 of the Burma Income-tax Act ?

(1) I.L.R. 61 Cal. 285.

(2) I.L.R. 9 Ran. 161, 163.

(b) Whether the Commissioner of Income-tax has not erred in law in holding that the assessee described in the original assessment order of the Income-tax Officer, Magwe, Minbu Circle, for the year 1936-37 as 'Estate of the late Baij Nath Singh' is the same as the individual Ved Nath Singh and in combining the income of both and assessing as a single unit instead of separately as two units previously?

(c) Whether such assessments made separately on two units previously can in law be combined and assessed as a single unit on Ved Nath Singh by the Commissioner of Income-tax acting under section 33 of the Burma Income-tax Act without first setting aside the assessment alleged to be made on the wrong assessee, *i.e.* 'Estate of the late Baij Nath Singh', and directing action to be taken by the appropriate authority under section 34 of the Act?"

Mr. Ved Nath Singh, the assessee, was assessed to income-tax in his own name in respect of the income, profits or gains arising out of an oil refinery. His father, Mr. Baij Nath Singh, now deceased, was the owner of certain oil wells. Since his death, the income, profits or gains, arising out of these oil wells had been assessed to income-tax separately in the name of "Estate of the late Baij Nath Singh, by administrator Mr. Ved Nath Singh," as if the oil wells were the property of a Hindu undivided family, and was so assessed in the year now under consideration. Mr. Ved Nath Singh is the only son of the late Baij Nath Singh, although he has a mother and a sister still alive. Since the decision of the Privy Council in *Kalyanji Vithal Das v. Commissioner of Income-tax, Bengal* (1), it must be accepted that the income received from this estate should have been treated as forming part of his personal income. As appears from the judgment (at page 663)—

"By reason of its origin a man's property may be liable to be divested wholly or in part on the happening of a particular event,

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or may be answerable for particular obligations, or may pass at his death in a particular way; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income therefrom as his income, it is chargeable to income-tax as his, *i.e.*, as the income of an individual. In their Lordships' view it would not be in consonance with ordinary notions or with a correct interpretation of the law of the *Milakshara*, to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of his having a wife and daughters."

Mr. Clark agrees that the answer to the second question must be in the negative. But the mistake was made of making a separate assessment as regards the income from the father's estate upon the assessee as administrator thereof as if it were the income of a Hindu undivided family.

When the Commissioner came (in the words of the case stated) "to put the matter right" he issued a notice to the assessee

"to show cause . . . . why I should not in the exercise of my powers under section 33 of the Burma Income-tax Act include in your assessment for the year 1936-7 the income from the 'Estate of the late Baij Nath Singh' and also enhance the income from oil refinery business."

This notice was dated February 26, 1938, and is annexure D to the case stated. But a final assessment order in regard to the personal income of Ved Nath Singh from the oil refinery and also a final assessment in regard to the income of his father's estate from the oil wells had been made on November 30, 1936.

Now the judgment in *The Commissioner of Income-tax, Bombay and Aden v. Khemchand Ramdas* (1) shows what the true position in such a situation is. It is authority for the proposition that once a final assessment has been made under sections 23 and 29 of

the Act it cannot be reopened except in the circumstances detailed in sections 34 and 35 and within the time mentioned in those sections. Lord Romer said at page 500—

“In view of these express provisions of the Act, it is in their Lordships' opinion quite impossible to suppose that the Income-tax Officer may in every kind of circumstance and after any lapse of time make fresh assessments or issue fresh notices of demand ; or that the Commissioner can direct him so to do. In their Lordships' opinion the provisions of the two sections are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued.”

As was explained in *Sheik Abdul Kadir Maracaya v. Commissioner of Income-tax, Madras* (1), the revising authority can revise only the particular assessment under consideration, and can act only on the materials available in respect of that assessment. The Commissioner has expressed the view that in this case there has been an under assessment, and that he has authority under section 33 to rectify that matter. But, in my opinion, he has not assessed correctly what has hitherto been wrongly assessed, but has assessed income which has hitherto escaped assessment. Income has “escaped assessment,” within the meaning of section 34, when it has not been assessed in the assessment under consideration ; it is immaterial that it has been assessed in some other assessment. The Commissioner was therefore bound by the provisions of section 34.

The meaning of these words was carefully examined by Page C.J. in *Commissioner of Income-tax, Burma v. N. N. Burjorjee* (2). He said :

“Now, the question that falls for determination is, what is the meaning of the word ‘escaped assessment’ in section 34? On behalf of the assessee it is contended that assessment proceedings,

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(1) 2 I.T.C. 379.

(2) [1931] I.L.R. 9. Ran. 161, 163.

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at any rate up to the stage at which the order of assessment is passed under section 23 (4), must be completed before the end of the year of assessment, *i.e.*, the year in which the tax is payable, and that otherwise the assessment proceedings *ipso facto* abate. In our opinion this contention is unwarrantable, and cannot be accepted.

We are of opinion that section 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or, where an assessment has been made in the course of the year, but some portion of the income, profits or gains of such assessee for some reason or other has not been included in the order of assessment such income is income which has 'escaped assessment' in the year, and falls within the ambit of section 34 of the Act."

Here there are certainly two assessments in existence. The income from the father's estate has escaped from the assessment made in respect of Ved Nath Singh personally.

The learned Advocate-General contended that the decision in *Rajendranath Mukerji v Commissioner of Income-tax, Bengal* (1), was authority for the proposition that when an assessee had duly made a return for the purposes of income-tax in respect of any income, in whatever capacity he made that return, the income could not be said to have escaped assessment; and that in the present case Ved Nath Singh had made two returns, one in respect of his own oil refinery business and one in respect of the income from his father's estate, and that therefore the latter could not be said to have "escaped assessment" so far as his personal income was concerned. But the point of *Rajendranath Mukerji's* case was that there were two separate returns, one in respect of the income of Martin & Company and one in respect of the income of Burn & Company, and no assessment had been made on the return in respect of the income of Burn & Company,

and therefore it was still open to the Income-tax authorities to make an assessment in respect of this income. In the present case, two final assessments had been made, one in respect of Ved Nath Singh's personal return, and one in respect of the return relating to the income of the (supposed) Hindu undivided family. The income of the latter had therefore "escaped assessment" in the assessment on the former.

The case of *Krishan Kishore v. Commissioner of Income-tax* (1) must of course be read in the light of the subsequent decision of the Privy Council in *Commissioner of Income-tax, Bombay and Aden v Khemchand Ramdas* (2). At all events in *Krishan Kishore's* case (1) the whole of the incomes in dispute were before the Court in the one proceeding and if no part thereof was assessed it could not be said to have escaped assessment, but rather to have been released from assessment.

The Commissioner cannot in my opinion now "assess correctly what has hitherto been wrongly treated." If he says that no income has escaped assessment then the final assessment already made must stand except in so far as he may enhance the assessment on the income from the oil refinery. If on the other hand he says that some income has escaped assessment he cannot act outside the scope of section 34 of the Act. It is conceded that section 35 has no application.

The Commissioner cannot, by purporting to act under section 33 of the Act, take action under section 34, although he can, if the time within which such action must be taken has not expired, direct the Income-tax Officer to take such action. It is plain from the provisions of section 34 that under this section there must be a fresh notice under section 22 (2),

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requiring the assessee to make a new return of his income from all sources, and following thereon a fresh assessment under section 23. From such fresh assessment there would be a right of appeal under section 30 to the Assistant Commissioner, and under appropriate conditions a right of appeal under section 32 or application in revision under section 33 to the Commissioner. The Commissioner cannot deprive the assessee of these rights by acting in reality under section 34 in the guise of acting under section 33.

Accordingly in my opinion the answers to all the questions propounded should be in the negative. The Commissioner of Income-tax must pay the costs of the reference 25 gold mohurs and the deposit must be refunded to the assessee. We certify for two advocates.

MYA BU, J.—I agree.

DUNKLEY, J.—I agree.