INCOME-TAX REFERENCE

Before S. K. Kapur and R. S. Narula, JJ.

GOPI LAL,—*Applicant.*

versus

THE C. I. T., DELHI AND RAJASTHAN,—*Respondent.*

I.T. Ref. No. 5 of 1963.

October 10, 1966.

Income-tax Act (XI of 1922)—Ss. 23, 31 and 33—Income-tax officer passing order of re-allocation of income amongst the partners of a firm in pursuance of the order of Income-tax Appellate Tribunal—Appeal from that order to Appellate Assistant Commissioner—Whether competent—Appellate Assistant Commissioner rejecting appeal as incompetent,—Appeal from that order to Income-tax Appellate Tribunal—Whether competent—Provisions relating to appeal—How to be construed.

Held, that section 33(5) of the Indian Income-tax Act, 1922, does not provide a source to the Income-tax Officer for making an order of assessment. The Tribunal, while giving direction under section 33(5), merely authorises the Income-tax Officer to amend any assessment made on any partner of the firm as a consequence of any charge made in the assessment of a firm. In carrying out that direction and amending the order of assessment in accordance therewith the Income-tax Officer merely makes an order under section 23 and consequently when a partner files an appeal, he, in effect, objects to the amount of income assessed under section 23. Again, if a partner is not satisfied with the re-allocation and says that the same is not in accordance with the direction of the Tribunal, he, in effect, denies his liability to be assessed under the Act to the extent to which he claims to have been wrongly assessed. Partial denial of liability to be assessed is comprised in the expression denying his liability to be assessed under this Act". If over-assessment is made in the hands of a partner as a result of re-allocation, the challenge to such an over-assessment by a partner would be a denial of liability. Lastly, under the second proviso to section 30 the partners of a film, who are individually assessable on their shares in the total income of the film, may appeal against any order of an Income-tax Officer apportioning the income of the film between the several partners. The grievances of the assessee being against the apportionment of income made by the Income-tax Officer, his appeal to the Appellate Assistant Commissioner would fall in terms under the second proviso to section 30 and would be competent.

Held, that an appeal to the Income-tax Appellate Tribunal is competent against the order of the Appellate Assistant Commissioner, rejecting the appeal as incompetent as such an order is under section 31 of the Act.

Gopi Lal *v.* The C.I.T., Delhi and Rajasthan (Kapur, J.)

Held, that the statutes pertaining to right of appeal have to be given a liberal construction since they are remedial. A right of appeal will not be restricted or denied unless such a construction is unavoidable. Our Courts recognise the rule that an appeal of a cause is a valuable right to a litigant and in the absence of unmistakable indications to the contrary, statutes regulating appeals are given liberal construction. It is also recognised that an appeal is a remedy that is favoured in law and an important right, which should never be denied, unless its forfeiture or abandonment is conclusively shown and in case of doubt, an appeal should always be allowed rather than denied.

A. R. WHIG, SENIOR ADVOCATE, for the Applicant.

HARDYAL HARDY, SENIOR ADVOCATE, WITH DALIP K. KAPUR, ADVOCATE, for the Respondent.

JUDGMENT

KAPUR, J.—By order dated 25th January, 1963, the Income-Tax Appellate Tribunal referred the following two questions to this Court under section 66(1) of the Indian Income-tax Act, 1922 :—

"(1) Whether in the particular facts of the case, an appeal lay to the Appellate Assistant Commissioner ? and

(2) If the answer to the first question is in the affirmative, whether a further appeal lay to the Appellate Tribunal in the circumstances of the case ?"

The relevant assessment year is 1948-49. Gopi Lal (hereafter referred to as the assessee) was a partner of a firm known as Messrs Behari Lal-Ghasi Ram, Delhi. The said firm went to the Income-tax Appellate Tribunal in appeal, being appeal No. 321 of 1956-57, and the question therein was whether a sum of Rs. 24,500 should be taxed in the hands of the firm of Gopi Lal. Gopi Lal, who was present at the time of hearing of the appeal before the Income-tax Appellate Tribunal, expressly stated that the said sum of Rs. 24,500 be included in his income and treated as his exclusive share. *Inter-alia* in pursuance of the said statement by Gopi Lal the Tribunal directed that "Gopi Lal's share of the profits in the firm be modified so as to include this sum of Rs. 24,500 in his hands alone. The share income of the other partners will also be accordingly modified and as a result of this, necessary modification will be made in the personal assessments of the partners". Consequent upon the order of the Tribunal, the Income-tax Officer re-allocated the profits of the firm

in the hands of its partners including the assessee. The assessee objected to the said re-allocation and appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner rejected the appeal on the ground that the same was not competent. Aggrieved by the order of the Appellate Assistant Commissioner, the assessee filed an appeal before the Income-tax Appellate Tribunal, which decided that no appeal was competent against the order of re-allocation before the Appellate Assistant Commissioner and consequently the appeal did not lie to the Tribunal as well. In these circumstances, the aforesaid two questions have been referred to us.

It appears that the direction to exclude Rs. 24,500 from the income of the firm was made under section 33(4) while the direction to re-allocate the profits in the hands of the partners under section 33(5) of the Indian Income-tax Act, 1922. Mr. Whig, the learned counsel for the assessee, has frankly pointed out that he has no grievance against exclusion of Rs. 24,500 from the income of the firm and its inclusion in the assessee's hands as his exclusive income. His grievance, however, is against the re-allocation made in the hands of the partners including the assessee, in pursuance of the directions of the Income-tax Appellate Tribunal. The order of the Income-tax Officer making the re-allocation has not been included in the record and Mr. Hardy could not find out any express order to that effect even in the original record. Whether or not an appeal under section 30 would be competent depends on the terms of the said provision as an appeal is always a creation of the statute. It is not disputed that it is a case where the partners of the firm are individually assessable on their shares in the total income of the firm. Mr. Whig, says that :—

(1) the order of re-allocation is an order made under section 23 of the said Act and the assessee's objection is consequently an objection to the amount of income assessed under section 23 within the meaning of section 30;

(2) in any case, it is a case of an assessee denying his liability to be assessed under this Act which term is wide enough to include denying the liability totally or partially; and

(3) every partner is, under the second proviso to section 30, entitled to appeal against the order of apportionment between the partners.

The powers of the Income-tax Officer to make assessment are derived from section 23. Whenever the Income-tax Officer has to make assessment, he has to look to section 23 unless there is any other express provision entitling him to do so. The question, therefore, is, does section 33(5) provide a source for making an order of assessment ? A more or less similar question arose before the Calcutta High Court in *Kooka Sidhwa and Co. Calcutta* v. *The Commissioner of Income-tax* (1). There the Tribunal had given the following directions :—

> "The result is that the three Income-tax appeals are allowed in part. We direct the Income-tax Officer to revise the assessments and authorise him to amend the assessments made on the partners if necessary. The excess-profits-tax appeals are dismissed."

In compliance with the above direction, the Income-tax Officer revised the assessments of income-tax and made certain major amendments in his original order. The assessee, a partnership firm, at the instance of which the Tribunal had given the above direction, being dissatisfied with the amendments made by the Income-tax Officer, preferred appeals to the Appellate Assistant Commissioner who entertained the same and decided them on merits. The assessee then preferred second appeals to the Tribunal for the second time in which a preliminary objection was taken that the same were not maintainable on the ground that the orders passed by the Income-tax Officer in pursuance of the directions of the Tribunal were not orders under section 23(3) of the Income-tax Act. The Calcutta High Court held that—

> "The order passed by the Income-tax Officer revising the assessment, made originally under section 23 of the Act, under the direction of the Appellate Tribunal, would partake the character of a fresh assessment order and would be no less an order as made under section 23(3) of the Act within the ordinary acceptation of the term from which an appeal would lie to the Appellate Assistant Commissioner."

Mr. Hardy sought to distinguish this case on the ground that there the Income-tax Officer had given effect to that part of the direction which was made under section 33(4) and the appeal was taken for

(1) A.I.R. 1964 Cal. 254.

the second time before the Tribunal by the firm itself. According to Mr. Hardy, the direction in this case is one made under section 33(5) and the order re-allocating the income is relatable to the exercise of power under that provision and not under section 23(3). Looking at the language of section 30 there appear to be three answers to the contention of the Revenue. Section 33(5) does not, in my opinion, provide a source to the Income-tax Officer for making an order of assessment. The Tribunal while giving direction under section 33(5) merely authorises the Income-tax Officer to amend any assessment made on any partner of the firm as a consequence of any change made in the assessment of a firm. In carrying out that direction and amending the order of assessment in accordance therewith the Income-tax Officer merely makes an order under section 23 and consequently when a partner files an appeal he, in effect, objects to the amount of income assessed under section 23. Again, if a partner is not satisfied with the re-allocation and says that the same is not in accordance with the direction of the Tribunal he, in effect, denies his liability to be assessed under the Act to the extent to which he claims to have been wrongly assessed. Partial denial of liability to be assessed is, I think, comprised in the expression "denying his liability to be assessed under this Act". In *Commissioner of Income-tax U.P.* v. *Kanpur Coal Syndicate* (2), their Lordships of the Supreme Court observed—

> "Under section 30 an assessee objecting to the amount of income assessed under section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner. It is said that an order made by the Income-tax Officer rejecting the plea of an association of persons that the members thereof shall be assessed individually does not fall under one or other of the three heads mentioned above. What is the substance of the objection of the assessee? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the members of the association shall be assessed only individually. The expression 'denial of liability' is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In one case the assessee says that he is not liable to be assessed to tax under

(2) (1964) 53 I.T.R. 225.

> the Act, and in the other case the assessee denies his liability to tax under the provisions of the Act if the option given to the appropriate Officer under the provisions of the Act is judicially exercised."

If over-assessment is made in the hands of a partner as a result of re-allocation, the challenge to such an over-assessment by a partner would, in my opinion, be a denial of liability. Lastly, under the second proviso to a section 30 the partners of a firm, who are individually assessable on their share in the total income of the firm, may appeal against any order of an Income-tax Officer apportioning the income of the firm between the several partners. As I have pointed out already, the grievance of the assessee is against the apportionment and, therefore, his appeal would fall in terms under the said second proviso. It should be remembered that statutes pertaining to right of appeal have to be given a liberal construction since they are remedial. A right of appeal will not be restricted or denied unless such a construction is unavoidable. Our Courts recognise the rule that an appeal of a cause is a valuable right to a litigant and in the absence of unmistakable indications to the contrary, statutes regulating appeals are given liberal construction. It is also recognised that an appeal is a remedy that is favoured in law and an important right, which should never be denied, unless its forfeiture or abandonment is conclusively shown and in case of doubt, an appeal should always be allowed rather than denied. Mr. Hardy also placed reliance on *Commissioner of Income-tax* v. *Arunachalam Chettiar* (3). That case is of no assistance to Mr. Hardy. There no appeal was taken to the Tribunal against the order of the Appellate Assistant Commissioner but the assessee had only made a miscellaneous application to the Tribunal. The Supreme Court took the view that the order of the Tribunal was not one passed under section 33(4) and consequently no reference under section 66(1) or 66(2) could be entertained. In these circumstances the answer to the first question must be in the affirmative and in favour of the assessee.

So far as the second question is concerned, the order made by the Appellate Assistant Commissioner rejecting the appeal as incompetent was an order made under section 31. In *Messrs Mela Ram and Sons.* vs. *The Commissioner of Income-tax Punjab* (4), the Appellate Assistant Commissioner declined to condone the delay for filing the appeal and dismissed the same as time-barred. The appellant preferred an appeal against the order of dismissal to the Tribunal under section 33 of the said Act. Their Lordships of the Supreme Court

(3) (1953) 23 I.T.R. 180.
(4) (1956) S.C.R. 166

held that section 31 was the only provision relating to hearing and disposal of the appeal and if an order dismissing the appeal as barred by limitation be one passed in appeal, it must fall within section 31. On the same process of reasoning it appears to me that the order of the Appellate Assistant Commissioner dismissing the appeal as incompetent would be an order passed under section 31. As a matter of fact, the order is itself described as one under section 31. That being so, the appeal before the Appellate Tribunal must be held to be competent. The answer to the second question must, therefore, be also in the affirmative and in favour of the assessee.

In the result, both these questions are answered in favour of the assessee. The assessee will have the costs of this reference.

R. S. NARULA, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before I. D. Dua and P. C. Pandit, JJ.

THE STATE OF PUNJAB,—*Petitioner.*

versus

LACHHMAN SINGH,—*Respondent.*

Civil Miscellaneous No. 664-C of 1966.
in
Regular First Appeal No. 136 of 1966.

October 14, 1966.

Limitation Act (XXXVI of 1963)—S. 5—"Sufficient cause"—Meaning of —Considerations to be kept in mind while condoning delay—Government—Whether entitled to special consideration.

Held, that section 5, Limitation Act, does not draw any distinction between the Government and a private party in their capacity of litigants before the Court. Both have to satisfy the Court of the existence of sufficient cause for not making the application within the prescribed period of limitation. The expression "sufficient cause" is of course not defined in the statute but it is certainly not intended to be equated with the mere word " cause" used simpliciter, and the judge of the sufficiency of the cause is the Court which has to apply its judicial mind to all the relevant facts and attending circumstances in which, in a given case, a suitor has failed to make the application within the prescribed period. Keeping in view the fact that expiry of the period of limitation clothes the impugned order with finality rendering it exempt from challenge on appeal, with the necessary consequence of