Srinivasa Metal Works Vs. Income-tax Officer

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Court : Income Tax Appellate Tribunal ITAT Hyderabad

Decided On : Dec-31-1986

Reported in : (1987)20ITD768(Hyd.)

Judge : K Viswanathan, T R Rao, J Member

Appellant : Srinivasa Metal Works

Respondent : income-tax Officer

Judgement :

1. These two appeals are against the consolidated order of the Commissioner under Section 263 of the Income-tax Act, 1961 ('the Act') setting aside the assessments made by the ITO under Section 147 of the Act and directing him to redo the same afresh. The prejudice caused to the revenue was on account of the omission of the ITO to consider whether two businesses done under the names of Pillai Enterprises and Sagar Enterprises were the concerns of the assessee or not. We are asked to decide in substance one question of law, that is, (7) whether the Commissioner had jurisdiction to revise assessment order admittedly made under Section 147 and (2) a question of fact whether there were materials report that two businesses really belong to the assessee.

2. The original assessments for these two years had a chequered history. The assessment for the year 1971-72 was made on 11-11-1971.

The income declared by the assessee-firm was accepted as correct.

However, this assessment was reopened under Section 147 by notice issued on 5-7-1975. The reopening was the consequence of the belief entertained by the ITO that the assessee-firm had done business in these other names also like Filial Enterprises, Sagar Enterprises, etc.

This assessment was completed on 28-3-1980 under Section 144 of the Act. The ex parte assessment was because the assessee had not complied with the some of the requirements of the notices of the ITO. This assessment under Section 144 was, however, reopened by the ITO under Section 146 of the Act. The order under Section 146 passed on 9-7-1980 accepted that the assessee had reasonable cause for not complying with the notices. Thereafter, the assessee was given several opportunities to produce the evidence. But again there were, according to ITO, defaults. With the result that he made another ex parti assessment on 9-2-1983. This assessment was also reopened under Section 146 by his order dated 15-3-1983. Thereafter, the ITO gave a hearing to the assessee and completed the assessment by his order dated 26-10-1983. In this order, unlike the original ex parte orders, he did not include any income of businesses run under different trade names like Sagar Enterprises, Pillai Enterprises, etc.

3. The fate of the assessments for the year 1972-73 were identical.

Here also, the original assessment was completed on 11-10-1972. But, it was reopened later and the reassessments were made ex parte only to be reopened under Section 146. Again there was ex parte

assessment followed a reopening and a final assessment in which the income from the concerns mentioned above were not included.

4. The Commissioner called for the records of the assessee for the two years as he was of the opinion that the assessments finally made were erroneous and prejudicial to the interests of revenue. We may mention here that this firm was dissolved as early as 1972 and, therefore, the proceedings had to be taken against those who were partners at the time of dissolution. There were during these two years six partners. The Commissioner had issued notices to these six partners. Four of the partners have represented their case by a common chartered accountant.

These four partners were Balaraj, Laxmaiah, Sambaiah and Abdul Aziz.

Two partners did not respond. They were Sathaiah and Ganesh. After hearing the parties, the Commissioner gave a prima facie finding that there were materials in the records which would show that the assessee had income other than what was disclosed like two enterprises in the name of Pillai Enterprises and Sagar Enterprises and the ITO had not properly appreciated these evidences. At this stage, it is not necessary to go into the detailed reasonings of the Commissioner. We will deal with this at a later occasion when we go into the merits of his findings. It is enough for the present that the assessments were cancelled and the ITO directed to redo the same.

5. The first contention of Shri Satyanarayana appearing for the assessee was that the Commissioner has no jurisdiction to revise an assessment done under Section 147. In order to appreciate this contention some dates may be recalled. Taking the assessment year 1971-72, the original assessment was made on 11-11-1971 and the assessments were reopened by issue of notice under Section 148 of the Act dated 5-7-1975. Assessment for 1972-73 had been completed on 11-10-1972 and that assessment was also reopened by notice under Section 148 on 5-7-1975. These assessments have been finalised after twice being reopened under Section 146 on 29-10-1983 for both the years. The Commissioner had issued the notice for revising the assessment under Section 263 on 7-10-1985.

6. The provision enabling the Commissioner to revise the assessments were amended by the Taxation Laws (Amendment) Act, 1984 with effect from 1-10-1984. Before the amendment to Sub-section (2) of Section 263 read as follows : (b) after the expiry of two years from the date of the order sought to be revised.

Now, this provision has been removed from the statute from 1-10-1984.

Another sub-section which is numbered as Sub-section (2) has been substituted but, the amended sub-section retains in substance only Clause (b) of the original Sub-section (2). In other words, the bar on revision of a reassessment under Section 147 which existed till 1-10-1984 has been removed.

7. The first contention of Shri Satyanarayana is that the assessments under Section 147 for both these years were completed on 29-10-1983 and as on that date the assessee was immune from the revision of those assessments as the law stood at that time. The amendment effected in 1984, according to him, would enable the Commissioner to take action only in respect of the reassessments made after 1-10-1984. It will not enable the Commissioner to pass an order under Section 263 in any of the reassessments passed before 1-10-1984. Shri Satyanarayana even went further and stated that the right of the asssessee against revision crystallised from the date of the issue and services of notice under Section 148 itself. According to him, it is not even necessary that the assessment should have been completed before 1-10-1984. But, it is unnecessary for the purpose of those appeals to go into this question because admittedly both the issue of notices and the completion of the assessments were long before 1-10-1984, the date of amendment. To support this proposition, he had relied on a decision of the Bombay High Court in a sales tax case--Seimens India Ltd. v. State of Maharashtra [1986] 62 STC 40. The Bombay High Court has stated that in order to determine the law which applies to suo motu revision proceedings, it is necessary to make a distinction between subtantive laws and procedural laws. The right of the Commissioner to initiate revision proceedings in respect of an

assessment order is similar to a right of appeal in that context though it may differ from a right of appeal in other regards. At the time, when the assessment proceedings are initiated the assessee has, according to their Lordships, a right to have these proceedings finalised in accordance with the substantive law then in force. It would include a right to apply for revision or a liability to have the order revised in accordance with the substantive law then in force. But, the High Court opined that if under the law in force at the date of initiation of assessment proceedings, a time limit is prescribed within which the right of revision has to be exercised, that law prescribing a period of limitation is procedural rather than substantive. That is, however, subject to one exception. If under the existing law of limitation, the right to initiate a proceeding has already become barred than a subsequent enlargement of time by amendment of law cannot be availed of. Thus, on this basis the finality achieved as a result of a proceeding becoming time barred is treated as a substantive right which has accrued to a party. That right cannot be taken away by a subsequent amendment. Strong reliance has been placed on this authority. According to Shri Satyanarayana when the assessment was completed on 29-10-1983, the assessee had become immune from revision under Section 263 as the law stood at that time. A subsequent amendment of provisions of Section 263 enlarging the scope of revision by including the assessments under Section 263 cannot be availed of in respect of the reassessments already completed. That is because the assessee had already acquired a right against such revision.

8. We think there is considerable substance in this submission. The law on this point seems to be well settled and we need only to refer one or two Supreme Court decisions. We will first refer to the decision of the Supreme Court in the case of S.C. Prashar v. Vasantsen Dwarkadas [1963] 49 ITR 1. This is a land mark judgment which trenches on several issues. One of the issues considered was the identical point. The matter related to the amendment to Section 34 of the Indian Income-tax Act, 1922 ('the 1922 Act'). This amendment enlarged the power of reassessment by the ITO at any time to give effect to the findings of an appellate authority. In the case before the Supreme Court this amendment was utilised in reassessing certain earlier assessment years.

The relevant assessments were 1942-43. As the law stood at that time, an assessment could be reopened for a period of four years or eight years and either way the limitation would have stepped in by 31-3-1951.

The amendment enlarging the field came into effect on 1-4-1952 the proceedings for reassessments were taken up thereafter. The majority judgment of the Supreme Court observed as follows : I now take up the second facet of the same question. On this aspect of the case both the learned single Judge (Desai J.) and the appellate court (Chagla C.J. and Tendolkar J.) were agreed. The relevant assessment year was 1942-43 and it ended on March 31, 1943.

The period of four years therefrom would end on March 31, 1947, and the period of eight years would end on March 31, 1951. Now the second proviso to Sub-section (3) came into effect, as I have stated earlier, on April 1, 1952. In other words, the time limit fixed by Sub-section (1) had expired some time before the amended second proviso came into effect. Desai J. has rightly pointed out that it is a firmly established principle of income-tax law that once a final assessment is arrived at and the assessment is complete, it cannot be reopened except in the circumstances detailed in Sections 34 and 35 of the Act and within the time limited by those sections.

Is there anything in the proviso in question which would give it a retrospective effect beyond April 1, 1952 In my opinion there is none. The second proviso came into force on April 1, 1952, and before that date the period of eight years from March 31, 1943, had already expired. The legislation which provided that from April 1, 1952, there would be no limitation in respect of certain cases could not revive a remedy which was already lost to the Income-tax Officer. It seems to me that the proposition of law is settled beyond any doubt that although limitation is a procedural law and although it is open to the Legislature to extend the period of limitation, an important right accrues to a party when the remedy against him is barred by the existing law of limitation and a vested right cannot be affected except by express terms used by the statute or the clearest implication flowing therefrom. . . .(p. 13) According to the Supreme Court although limitation is a procedural

law and although the Legislature can extend the period of limitation an important right accrues to an assessee when the remedy against him is barred by the existing law of limitation. The assessee gets a vested right. This vested right cannot be affected by an amendment except by express terms used by the statute or the clearest implication flowing from them. So we have to see whether the amendment made under Section 263 has by express terms had applied those provisions to reassessment proceedings which had already become final and whether there is a necessary implication to that effect. We do not find any such express terms and neither do we find any necessary implication to hold in favour of the conferring jurisdiction to the Commissioner.

9. Shri Santhanam appearing for the department had submitted that the amendment made on 1-10-1984 was only a procedural amendment. According to him, the revisionary powers contained in Section 263 are merely procedural and this is on the authority of the observation of the Supreme Court in the case of CIT v. National Taj Traders [1980] 121 ITR 535. He referred to the Chaturvedi and Pithisaria's Income-tax Law, Third edn., Vol. 1, p. 195 for the proposition that there were no vested rights regarding procedural law. He submitted that the procedure is only the machinery of the ground. In dealing with the procedural matters all that is necessary in some cases is only whether on the date on which the Commissioner seeks to exercise his jurisdiction, whether the statute gave him such jurisdiction. In other words, all that is to be seen is whether on the date of passing of the order by the Commissioner, the statute enables him to do so. On a plain reading of the section it certainly enables him to do so. Referring the decision of the Gujarat High Court in the case of CIT v. Ochhavlal Laljibhai Dharia [1980] 125 ITR 301, he referred to a passage which reads as follows : 'To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with exisiting rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law'.(p. 312) He, therefore, submitted that the question of retrospective operations do not at all arise.

10. He alternatively submitted that even if it were to be considered as substantive law, still the jurisdiction of the Commissioner would be unaffected. He referred the decision of the Supreme Court in the case of J.P. Jani, ITO v. Induprasad Devshanker Bhatt [1969] 72 ITR 595 where the same legal proposition as laid down by the Supreme Court in S.C. Prashar's case (supra) has been repeated. At first blush, it would appear to support the assessee's case but he submitted that this decision has been explained by the Calcutta High Court in the case of CIT v. B.R. Vasa [1979] 116 ITR 940. He referred to a passage occurring at p. 945 where it was stated that the Supreme Court in J.P. Jani's case (supra) proceeded on a concession of the revenue that the right of the ITO to reopen the assessment had become barred before the later time has come into force. The Supreme Court had not, therefore, considered the ambit of the section and the decision given on concession cannot have binding force. He then pointed out that the assessment under Section 147 need not have been completed on 29-10-1983. It could have been completed even after 1-10-1984. It was a mere accident that the assessment was completed before 1-10-1984. If that is so, i.e., if the assessment could have been completed after later date then the submissions of the assessee could not have been acceptable to out-jurisdiction. The assessment was completed earlier.

Shri Santhanam had also made a point that the assessments were not under Section 147 at all but they were assessments under Section 146.

Even under Section 146, the ITO could have completed the assessment by 31-3-1985 since the order under Section 146 was passed on 15-3-1983.

Finally, Shri Santhanam submitted that it would not be correct to consider Section 263 to be materially similar to Section 147. There are lots of differences between the reopening of the assessment under Section 147 and

revision under Section 263.

11. We are unable to accept these submissions. The question is not whether the omission under Sub-section (2) of Section 263 as it stood before 1-10-1984 effected the procedure or affected the substantive rights of the assessee. We have already quoted the Supreme Court's decision in S.C. Prashar's case (supra) to show that the assessee had substantive right in not reopening an assessment which has reached a finality. It is true that there are lot of differences between the reopening of the assessment and the revision under Section 263 but both are similar in this one aspect that they affect the finality of the assessment. Viewed from the narrow point of view of the finality of the assessment, we cannot accept any inroad into this right unless the statute clearly says so. We do not find anything which has laid down a contrary proposition in the case of National Taj Traders (supra).

12. With regard to the submission, that there are no vested rights in procedural law, there could be no quarrel at all about this proposition. But the question before us not which of the procedural laws was to be applied but whether the assessee has acquired any right by virtue of the assessment. That such a right exists is now well settled by the Supreme Court's decision in S.C. Prashar's case (supra).

In this case, we are dealing with interference with the existing rights.

13. We must also state that the proposition laid down by the Supreme Court in J.P. Jani's case (supra) is the same proposition laid down by them earlier in S.C. Prashar's case (supra). No doubt, the Calcutta High Court had found that a part of the decision rested on concession.

It may be that on the facts of the case, there was no question of affecting existing rights and the amendment would have enabled the department to have validly reopened the assessment. This aspect might have been omitted to be considered by the Court. But, we are not, in this case before us, dealing with the 1922 Act or Section 34 and its amendments. We are dealing with the existing rights which accrues to the assessee on account of finality of the assessment having been reached before the date of amendment. What is crucial is the date on which the order has been passed. It is immaterial that the ITO would have passed the order on a later date which may fall after 1-10-1984.

But on the date of the passing of the order the right has already accrued and if that right has accrued because of accident of the date falling before 1-10-1984, it is no use stating that the ITO would have completed the assessment on 1-10-1984 also.

14. We are also not accepting this submission that the assessment has been done under Section 143(3) of the Act only. The ITO has assumed jurisdiction by issuing notice under Section 147 only. Therefore, it is an assessment made under Section 147 and as the law stood at that time could have not been reached the Commissioner under Section 263.

15. We may now consider the other submissions. Shri Satyanarayana for the assessee had submitted that the Commissioner's powers of revision under Section 263 will not extend to revise an assessment made by the ITO after applying his mind. He agreed that in cases where the ITO has not applied his mind at all, it may be open for the Commissioner to revise that order. But in a case where the ITO has applied his mind and has given a finding, it cannot be said that the order is erroneous merely because the Commissioner on appraising the same evidence draws a different inference. We are unable to accept this submission. This point has already come before the Andhra Pradesh High Court in an unreported decision in the case of Kanikacherla Ananta Kotaiah & Sons [Reference Case No. 70 of 1971 dated 1-3-1973]. They have stated in the course of the judgment as follows : In order to find out whether the ITO was erred in concluding the three loans which the Commissioner had considered, he had to necessarily consider the material on record. We do not agree with Judicial Member that the Commissioner was not entitled to reappraise the evidence nor is it possible to agree with his view that if the Commissioner comes to a contrary conclusion, that will amount to imposing his will upon the ITO. In his revisionary authority under the said provision, he is entitled to revise the order and while

doing that if it is necessary he has to reappreciate the evidence.

The above paragraph is an answer to the contentions raised by Shri Satyanarayana.

16. Although we have already held that the amendment of Section 263 will not clothe the Commissioner with the jurisdiction in this case. We will nevertheless, go into the merits of the finding of the Commissioner. That will dispose of all the points raised in the appeal.

17. The assessee-firm has mentioned earlier, consisted of six partners.

The firm was dissolved on 31-3-1972. After the dissolution of the firm, some investigation of the firm was started by the department towards the end of 1973. An enquiry under Section 131 of the Act was conducted at the premises occupied by Sathaiah and his son Ganesh. In the course of the enquiries certain papers and documents relating to clandestine dealings were found. It is not known whether any of these documents were taken possession by the department. It is also not known whether any statement was taken from Sathaiah and Ganesh at the time of these enquiries.

18. In the course of the further enquiries, the department found that one of the employees of the firm L.S. Vaidyanathan had opened an account in Canara Bank, Secunderabad Branch. This account contained a large number of transactions. The department had also got in their possession cheques signed by Vaidyanathan but which were not presented to the bank for encashment. Xerox copies of these cheques have been furnished at the time of hearing before us and they are found in page 147 of the paper book of the assessee. These cheques are self cheques and the amounts are also mentioned in them. For instance, one of the cheques is for Rs. 15,000. The other for Rs. 10,000. On the reverse of these cheques, Shri P. Ganesh partner had signed for receipt of the amount from the bank.

19. The department had also got the details of the accounts maintained in the name of Vaidyanathan. Since they reflected large transactions, they started an enquiry as to the person responsible for these transactions. The first person obviously to be examined is Vaidyanathan because the account was in his name. The other partners were also examined. The partners Balraj, Laxmaiah and Sathaiah were examined on 19-8-1974. Shri Ganesh was examined on 20-8-1974 and Sambaiah had been examined on 23-8-1974.

20. In chronology, we would take up first the statement given by Sathaiah. He stated before the assistant director that there were businesses run by the firm in the name of Sagar Enterprises and Filial Enterprises. This is what he stated : The business run in the name of Sagar Enterprises and Pillai Enterprises was being shown in the books of Srinivasa Metal Works.

Sagar Enterprises was run in the name of L.S. Vaidyanathan who is residing at Praga Tools--I do not remember whether sales tax licence was obtained in his name. Pillai Enterprises was run by Sri D. Shanmugham who is now sick and staying at Lalapet Road, Secunderabad. The entire accounts are with Sri G. Sambiah, Vidyanagar, opposite Community Hall, Hyderabad.

Thus, one of the partners had admitted that the assessee-firm was doing business in benami names. His son Ganesh was examined on 20-8-1974. He did not refer to the two concerns named by Sathaiah but stated : In the firm we were also dealing with permits of others. The business was being run by K. Laxmaiah, P. Sathaiah and M.A. Aziz and the accounts were written by G. Sambaiah. I was only taken and giving delivery of goods. I was in receipt of profits amounting to Rs. 25,000 in cash which were not recorded in the books towards my share of profit from 1969 to 1972 in the firm. The cash was being distributed by K. Laxmaiah who was the finance partner along with K. Balaraj from out of the above amounts I invested Rs. 6,000 in Nagarjuna Industries and Rs. 6,000 in Mahesh Steel Traders. The balance was spent either for house expenses. A sum of Rs. 2,000 was given on loans to others.

The third partner Balaraj was examined on 19-8-1974. He said that he had no knowledge of any business being conducted under the name Sagar Enterprises and Pillai Enterprises. Mr. K. Laxmaiah also gave a similar

statement pleading ignorance about these two additional businesses of the firm.

21. Shri Sambaiah, another partner had given a statement on 23-8-1974 which dissented from the statements of Sathaiah and Ganesh. He stated as follows : The firm was also purchasing iron from permit holders and selling the same. We were recording in the books such transactions of permit purchases and sales. There was no business done by the firm in the names of Sagar Enterprises and Pillai Enterprises.

Thus some of the partners had admitted that the firm was doing business outside the books of accounts while the others expressed ignorance about them. Shri Sambaiah had stated that no business was done in the name of Sagar Enterprises and Pillai Enterprises but he had stated that the firm was purchasing iron from permit holders and selling the same.

Since this amounted to trafficking in permits, it would be against the rules but nevertheless he had stated that these transactions were recorded in the books of accounts. Thus, we are faced with conflicting statements given by the partners of the assessee-firm. We have to decide which of these versions are correct. For this purpose, we have to naturally look into the other surrounding circumstances and seek corroborative material evidence.

22. The next material is the evidence of Vaidyanathan who was examined on 17-2-1975. He stated as follows : During the period of my employment in Srinivasa Metal Works an account was opened in my name in Canara Bank, R.P. Road, Secunderabad. This account was opened in the year 1970. This was opened with the introduction either P. Sathiah or K. Lakshmaiah, who are partners in Srinivasa Metal Works. Though the transactions are in my name they did not relate to me. The transactions related to only Srinivasa Metal Works. The transactions related to amounts remitted from places outside the state towards sales of iron. In order to supress the real turnover the firm of Srinivasa Metal Works have introduced the account in my name. The extent of the transactions is about Rs. 3 lakhs to 4 lakhs. During that period I am only an employee of Srinivasa Metal Works and I acted according to their instructions.

Shri Vaidyanathan was examined in the presence of the partners Abdul Aziz, Sathaiah, Sambaiah, Ganesh, Laxmaiah and Balaraj. No question was asked to Vaidyanathan by Aziz Sathaiah, Sambaiah and Ganesh. Shri Laxmaiah wanted to consult his auditor before putting any questions.

Only Balaraj wanted a statement of Vaidyanathan to be given to him so that he can cross-examine him. We are not aware whether the cross-examination was allowed. At any rate, the copy of such cross-examination has not been furnished to us. It will be remembered that Sambaiah had stated that there was no business done in the benami names but he did not put any questions to Vaidyanathan when Vaidyanathan averred that he was merely a benamidar of the assessee-firm. We may, however, take it for the present that Laxmaiah and Balaraj had not accepted Vaidyanathan's statement.

23. Shri Sambaiah was also examined on the same date. He stated as follows : I used to maintain duplicate accounts are which is submitted to the department and another for an accounting purposes. The duplicate books maintained were destroyed after settlement of accounts between the partners. The original books introduced for the department may be available at Srinivasa Metal Works which is not run by K. Balaraj and K. Laxmaiah or in Sattaiah custody. I have received Rs. 60,000 approximately towards my share in the firm for the period 1968 to 1972 including bogus firms by names Sagar Enterprises, Pillai Enterprises, Nagarjuna Industries. The other partners also received their due shares of profit from the firm. I have shown certain account copies of partners and asked to state to whom they actually belong and who has written them. I state as under : Account page 2 in the name of Karika Balarajiah showing credits for the period 23-9-1968 to 22-5-1969 at Rs. 1,06,236.10 and debits amounting to Rs. 37,343. There are credits for interest at Rs. 9,435.60 and debit for interest at Rs. 5,126. There is credit towards profit at Rs. 26,700 on 31-8-1969. This is a page torn from the duplicate books and is in my handwriting. The statement also bears the handwriting of K. Laxmaiah in pencil showing the total of interest and profit at Rs. 36,135.60.

It will be seen from the above that Sambaiah's version supports the department's case and a statement of Sathaiah and Ganesh that they were clandestine transactions in benami names.

24. Before we finally appreciate the evidentiary value of his statement, we may refer to some of the objections of Shri Satyanarayana, the learned Counsel for the assessee. According to him, the statement given by Sambaiah was under coercion from Sathaiah and Ganesh. This submission is based on a letter written by Sambaiah on 19-3-1975 to the ITO. Shri Sambaiah has also filed an affidavit in which he had stated that the statement was given under threat from Sathaiah. He had also filed a complaint before the Deputy Commissioner of Police, Hyderabad. It is on the basis of this material, which are certainly contemporaneous, that it is submitted that it cannot be taken at its face value.

25. A statement given under coercion cannot, of course, have much evidentiary value. However, if that statement is corroborated by other documents then the submission that they were given under coercion cannot be accepted and its evidentiary value cannot be minimised. From the extract of the statement given, it would be seen that Sambaiah was referring to certain entries which were shown to him in certain books of accounts. These accounts were in the possession of the department and these evidenced some of the clandestine transactions which the department could lay their hands on. In fact, Shri Sambaiah had recognised that one of the sheets was torn from the duplicate book and was in his own handwriting. When this is so it is very difficult to understand how its evidentiary value could be nil and how it could be said to be a statement given under coercion. He also, recognised entries made by another partners Laxmaiah. He has not doubted that the genuineness of books and entries shown to him by the department. No such statement is made in any of the affidavits or in the later submissions. If the accounts shown to him were genuine accounts and if they reflected the clandestine dealings, then, the fact that some part of the statement given by Sambaiah was under coercion is of no significance.

26. We may also at this stage dispose of another submission of Shri Satyanarayana. He submitted that the order under Section 263 is only for treating the business in the name of Pillai Enterprises and Sagar Enterprises as benami businesses of the assessee-firm. He submitted that the evidence of the department must prove this. It may be that the firm has certain other dealings not accounted for in the regular books.

If they had made income outside the books, it will not be sufficient to support the finding that the assessee was doing business in the benami names. We are unable to accept this submission. The firm can do the business outside the books either in the benami names or without such benami names. As far as the partners are concerned and as far as the department is concerned, these are transactions outside the books and the income arising therefrom are unaccounted for income. The statement of Sambaiah clearly shows that there were unaccounted for income earned by the firm. Therefore, it could be also from benami business. In the face of the statement of two other partners and Sambaiah himself a presumption can arise that unaccounted for profits referred in detail by Sambaiah in his statement on 17-2-1975 refers to the profits from the benami firms. We, therefore, do not see any reason why the statement of Sambaiah on 17-2-1975 cannot be given its due weight.

27. We may refer to another statement given by Sambaiah on 16-4-1982.

One of the questions asked in the course of the examination and the answer given by Sambaiah are reproduced below : Question : From the torn out papers shown to you it is clear that you were writing not only the regular accounts intended for the Income-tax Department but also a duplicate sets of books maintained for sharing secret profits earned by the firm Answer : Yes. I have written two sets of account books. One for showing to the Income-tax Department and another duplicate set of books for sharing the real profits among the partners.

It will be noteworthy that he accepts that he had written two sets of accounts, one for showing the Income-tax Department and the other showing real profits. This statement is certainly not claimed to be given under coercion. It does support department's case.

28. As we stated earlier, the partners Sathaiah and Ganesh had admitted doing business outside books in benami names. Shri Satyanarayana, the learned Counsel for the assessee submitted that their statements cannot be accepted and for this purpose, he referred to certain other documents like voluntary disclosure made by Sathaiah and Ganesh and pointed out that these documents do not support Sathaiah's statement that the benami concerns belong to the assessee-firm. According to Shri Satyanarayana they might be benami concerns of Sathaiah and Ganesh and other partners have nothing to do with them. A copy of the declaration given by Sathaiah under Section 31 of the Voluntary Disclosure Scheme had been furnished before us. We have perused the same. They had disclosed income from Pillai Enterprises and Sagar Enterprises on a estimated basis in round figures. There is a note that these two benami concerns and the assessee-firm are considered as one group and it is also stated that Pillai Enterprises and Sagar Enterprises are subsidiary of the assessee-company. Much was made of the word 'subsidiary' used in the disclosure scheme and it was sought to be made that it refers to a different concern which may have common partners but which was not the assessee concern. We are unable to accept these submissions. The voluntary disclosure declaration clearly mentions them as one group which means that the income arises to that group. This narration in the declaration along with other facts of the case only go to show that they were the business concerns of the assessee.

Similarly, Shri Ganesh had also made a voluntary disclosure which also discloses the interest from these benami concerns. We are unable to discard these materials as irrelevant. They are relevant and they support the case of Sathaiah.

29. We may briefly mention the statements given by the other partners.

Mr. Abdul Aziz was examined on 19-4-1982 : Question No. 2 put to him by the ITO has some relevance. Now that is : Question 2 : Have your services been utilised by the firm of Srinivasa Metal Works for purchasing material from raw materials servicing centre like Cuddappah, Warrangal, Vizag or in any benami concerns of Srinivasa Metal Works? Answer : I used to take money from man aging partners of the firm of Srinivasa Metal Works mostly from late Shri P. Sathaiah to various centres like Warangal, Cuddappah, Vizag and purchase the unused permits from small traders. I used to purchase CR sheets, BP sheets, HR sheets and GP sheets from raw material servicing centres located in the above places and dispatched the same through the lorries to Hyderabad firm.

In our opinion, this answer more or less supports the department's case. As we have stated earlier the benami business is practically trafficking in permits and Aziz used to purchase the unused permits from small traders.

30. Shri K. Balaraj and K. Laxmaiah were examined on 22-4-1982 and 23-4-1982. respectively. It may be remembered that when Vaidyanathan was first examined in 1975, these two partners reserved their rights to cross-examine him. Whether such a cross-examination was allowed, it is not clear. In the statements given in 1982, they have stuck to their position that the concerns Pillai Enterprises and Sagar Enterprises have nothing to do with them. They had repeatedly denied his knowledge about these concerns, Shri Laxmaiah had also denied any connection with the alleged benami concerns. It is necessary to see whether their denial has to be accepted as correct in preference to the statements of other partners. We are of the opinion that the statements of other partners should be accepted in this matter. As we have pointed out that the statements of two of the partners Sathaiah and Ganesh clearly admit such benami concerns. Sambaiah has admitted maintenance of duplicate books of accounts and has been confronted with the entries in those books of accounts. Aziz has accepted that he was purchasing permits from other traders which is one of the businesses of. the benami concerns. Shri Vaidyanathan in his deposition has stated that he is only an employee and his name was being used in carrying on benami concerns. His statement is supported by the cheque leaves which shows the endorsement on the reverse by Shri Ganesh who is a partner of the firm. The cumulative effect of these evidences taken together make us believe that the department has a case that these two concerns are benami concerns.

31. However, it is not necessary for us to give a final finding whether they are benami concerns. The Commissioner in his order in paragraph 24 had only set aside the assessment with a direction to the ITO to redo the same afresh after giving full opportunity of hearing to all the parties concerned. The assessee is also at liberty to adduce any other evidence at the time of assessment. Under these circumstances, we do not see how the order of the Commissioner on merits could be said to be unreasonable.

32. Although, we have given a finding in favour of the department on the merits of the case, since we have held that the Commissioner has no jurisdiction to revise the order under Section 263, the appeals are allowed.