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none of them is, therefore, of any assistance to Mr. Hoshiarpuri except to the extent that there are some observations in the first case which are helpful to him.

The second contention of Mr. Hoshiarpuri must be rejected on the short ground that the findings on issues Nos. 2 and 3 are purely of fact and cannot be assailed in second appeal. No error of law has been shown to us which would vitiate the said findings. There was a good deal of direct and circumstantial evidence brought on record and the Courts below have based heir findings on the said evidence.

In the result, the appeal fails and is dismissed with costs.

Mehar Singh, J

MEHAR SINGH, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before Mehar Singh and K. L. Gosain, JJ.

RAMA NAND,—*Petitioner.*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB,—

Respondent.

Income Tax Reference No. 25 of 1960.

Income-tax Act (XI of 1922)—Sections 18, 28 and 43—Agent of a non-resident—Whether can be called upon to pay penalty under Section 28 for non-compliance with the provisions of Section 18A (3).

1960

Dec., 30th.

Held, that an agent of a non-resident cannot be called upon to pay any penalty under section 28 of the Income-tax Act for non-compliance with the provisions of sub-section 3 of section 18A of the Act. A penalty may be imposed on him if he fails to make a return in spite of a notice under section 22(2) or section 34 of the Act.

Case referred by the Income-Tax appellate Tribunal, Delhi Bench, under section 66(1) of Indian Income-tax Act 1922 (Act XI of 1922) for decision of the following question of law arising out of Tribunal's order dated 12th November, 1959 in I.T.A. Nos. 7454 and 7458 of 1956-57 (assessment years 1947-48 and 1948-49).

"Whether on the facts and in the circumstances of the case, penalty could be legally imposed on the agent of the non-resident under section 18A(9) read with section 28(1) ?"

V. C. MAHAJAN, ADVOCATE, for the Petitioner.

D. N. AWASTHY, ADVOCATE, AND H. R. MAHAJAN, ADVOCATE, for the Respondent.

ORDER

GOSAIN, J.—An important and interesting point of law arises on this reference and the facts giving rise to the same are as under :— Gosain, J.

Jubbal State in Simla hills was not a part of British India in the accounting years, 1946-47 and 1947-48. Shri Rama Nand of Jubbal State was therefore, a non-resident in the said years so far as the Income-tax Act was concerned. He was, however, carrying on some timber business in those years in British India through Messrs. Jishan Lal Kuthiala of Abdullapur, a registered firm which was treated as his agent under section 43 of the Income-tax Act, and through whom Shri Rama Nand was assessed to an income-tax to the extent of Rs. 57,877 for the assessment year, 1947-48 (accounting year 1946-47) and to a sum of Rs. 54,607 for the assesment year 1948-49 (accounting year 1947-48). Firm of Messrs. Jishan Lal Kuthiala, with whom Shri Rama Nand had business connections, was served with a notice under section 43 of the Income-tax Act, and was called upon to show cause why it should not be treated as an agent for Shri Rama Nand. No objection having been lodged by the aforesaid firm, it was treated as an agent of the non-resident under section 43 of the Act, and assessment for the aforesaid two years was thereafter completed

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on the firm as agent of the non-resident on the basis of voluntary returns filed by it under section 22 of the Act. The Incomet-ax Officer further found that the aforesaid firm in its capacity as an agent had failed to submit an estimate of the non-resident's income in accordance with the provisions of section 18(A) (3) and to make advance payment of tax. Accordingly a notice under section 28(3) was issued on the agent firm requiring it to show cause why a penalty under section 28 should not be imposed on it. After hearing the representative of the agent firm the Income-tax Officer decided to impose a penalty of Rs. 2,000 for each of the two assessment years 1947-48 and 1948-49, under the provisions of section 18A(9) read with section 28(1) of the Act. In appeal, the Appellate Assistant Commissioner vacated the order of the imposition of penalty on the basis of a ruling of this Court in *Commissioner of Income-tax, Delhi*, v. *Teja Singh* (1), to the effect that no penalty could be imposed under the law for non-compliance with the provisions of section 18A (3). A second appeal was then preferred by the Department before the Income-tax Appellate Tribunal, who reversed the decision of the Appellate Assistant Commissioner on the basis of the Supreme Court Judgment in the same case, i.e., *Commissioner of Income-tax, Delhi* v. *Teja Singh* (2). Firm of Messrs. Jishan Lal Kuthiala then made an application to the Appellate Tribunal for the case being referred to the High Court on the question of law—

> "Whether on the facts and in the circumstances of the case, penalty could be legally imposed on the agent of the non-resident, under section 18A(9) read with section 28(1) ?"

(1) (1955) 28 I.T.R. 371.
(2) (1959) 35 I.T.R. 408.

and the Appellate Tribunal has made the reference as prayed for by the assessee.

It cannot be denied that the agent of a non-resident is liable to pay income-tax, and that he shall be deemed to be, for all the purposes of the Act, the assessee in respect of income-tax. Such a liability is clearly provided for in sub-section (2) of section 40 read with sections 42 and 43 of the Act. Section 18-A of the Act provides for advance payment of tax. Sub-section (3) of this section reads as under :—

> "Any person, who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed the maximum amount not chargeable to tax in his case by two thousand five hundred rupees, send to Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount, on such of the dates specified in that sub-section as have not expired, by instalments which may be revised according to the proviso to sub-section (2)".

The plain interpretation of this section is that an assessee not hitherto assessed has to send an estimate of his income to the Income-tax Department during the accounting year and has to pay tax on the basis of such estimate by instalments

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provided for in this section. Sub-section (9) of this section reads—

> "If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee—
>
> (a) has furnished under sub-section (2) or sub-section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or (b) has without reasonable cause failed to comply with the provisions of sub-section (3),
>
> the assessee shall be deemed, in the case referred to in clause (a), to have deliberately furnished, inaccurate particulars of his income, and in the case referred to in clause (b), to have failed to furnish the return of his total income; and the provisions of section 28, so far as may be, shall apply accordingly:"

There is a proviso to this sub-section which provides for the rates of penalty, but the terms of the same need not be reproduced here as no dispute with regard to the rates arises in the present case. This sub-section certainly allows the imposition of penalty on any assessee, who has either furnished the estimate of the tax payable by him which he knew or had reason to believe to be untrue or who has without reasonable cause failed to comply with the provisions of sub-section (3).

A view was taken by this Court in *Commissioner of Income-tax, Delhi* v. *Teja Singh* (1), that

(1) (1955) 28 I.T.R. 371.

no penalty could be imposed on any person for not complying with the provisions of sub-section (3) of section 18-A for the simple reason that no notice having been issued to him for furnishing returns, he could not be deemed to have not furnished the returns of his income so as to be liable to penalty under section 28(1)(a) of the Act. This view was not approved by their Lordships of the Supreme Court in *Commissioner of Income-tax, Delhi* v. *Teja Singh* (1), who held that by reason of fiction of law the assessee must be deemed to have failed to furnish the returns, and that by reason of the same fiction the assessee must be deemed to have failed to comply with notices under section 22(1) and 22(2) of the Act. The difficulty in the present case, however, arises by reason of the provisions of proviso (c) to sub-section (1) of section 28. This proviso reads as under :—

> "(c) No penalty shall be imposed under this sub-section upon any person assessable under section 42 as the agent of a person not resident in the taxable territories for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under section 34 has been served on him;"

It is contended by the learned counsel for the agent-firm that the case of an agent stands on an entirely different footing than from the case of a resident assessee so far as the imposition of penalties under section 28 is concerned. He urges that proviso (c) expressly lays down that no penalty can be imposed on an agent on failure to furnish the return required under section 22, and that an exception has been made only in one case,

(1) (1959) 35 I.T.R. 408.

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namely, where a notice under sub-section (2) of that section or under 34 has been served on him. For non-compliance with the provisions of sub-section 3 of section 18-A, an assessee becomes liable to penalties under sub-section (9) of the said section and he is treated as a person, who has failed to furnish the return. Proviso (c) to sub-section (1) of section 28 exonerates an agent from penalties on the ground of his non-furnishing the return, except of course in one case only and that is where he had actually received notice under sub-section (2) of section 22 or under section 34.

After giving our careful consideration to the whole matter and after hearing the learned counsel for the parties at great length, we feel that there is good deal of force in the contentions raised by the learned counsel for the agent-firm. It is true that if an assessee does not comply with the provisions of sub-section (3) of section 18-A, his case will be covered by clause (b) of sub-section (9) (9) of that section, and that he will be deemed to have failed to make a return. It is also true that according to the fiction of law, it will be deemed that the said assessee was served with notices under section 22 of the Act and was, therefore, required to make a return, although the question of making a return could not possibly arise so far as the provisions of section 18-A are concerned. An agent of a non-resident, however, cannot be visited with any penalties for not making a return, except that if he fails to make a return in spite of a notice under section 22(2) or section 34 of the Act, a penalty may be imposed on him. Unless the case clearly falls within the exception, the agent cannot be called to pay the penalty for not making a return and in view of this statutory provision there is no scope for saying that by a fiction of law an agent of a non-resident can be

deemed to have been served with a notice under section 22(2) or section 34 of the Act.

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The facts of the present case are clearly distinguishable from those of the case decided by their Lordships of the Supreme Court and we are definitely of the opinion that an agent of a non-resident cannot be called upon to pay any penalty under section 28 of the Act for non-compliance with the provisions of sub-section (3) of section 18-A. We would, therefore, answer the question referred to us in the negative. The Commissioner shall pay the costs of this reference. Counsel's fee Rs. 200.

MEHAR SINGH, J.—I agree.

Mehar Singh, J.

B.R.T.

APPELLATE CIVIL

Before G. D. Khosla, C.J., and Tek Chand, J.

SETH SAT NARAIN AND OTHERS,—*Appellants.*

versus

UNION OF INDIA AND OTHERS,—*Respondents.*

Regular First Appeal No. 34 of 1951.

Limitation Act (IX of 1908)—Articles 115 and 120—Applicability of to a suit for compensatoin in respect of requisition property—Ex contract *relationship—Essence of—Defence of India Act (XXXV of 1939)—Section 19—Scope of—Civil Courts—Whether entitled to decide suit for compensation in which plea taken by defendant is that the plaintiff is estopped from claiming compensation—Evidence Act (I of 1872)—Section 115—Estoppel—When can be pleaded—Various kinds of estoppel explained.*

1961

Jan., 2nd

Held, that the essence of an *ex contractu* relationship, apart from other requirements, is free consent of parties entering into it. Free consent is *sine qua non* of a contract. A contract is a deliberate engagement between competent parties, who undertake to do or abstain from doing some act. Free consent means a voluntary concurrence in the proposal made by another after the exercise of an intelligent choice. It is not a neutral but an affiirmative attitude. A mere non-resistance, passiveness, or submission is not equal to a free consent or voluntary agreement. Coercion, undue influence, fraud are antitheses of