

(1928) 03 CAL CK 0007
In the Calcutta High Court
In Re: Harmukhrai Dulichand

Date of Decision : 26-03-1928

Acts Referred:

Income Tax Act, 1922 — Section 66

Citation : AIR 1928 Cal 587 : 114 Ind. Cas. 90

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J;Buckland, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case the Commissioner of income tax has referred two points of law to this Court for its opinion u/s 66, income tax Act (11 of 1922). Before setting out the form of the question it may be as well to premise that the assessee in this case is a firm called Messrs. Harmukhrai Dulichand.

2. It appears that on 4th May 1926, an- ordinary notice was served upon them under Clause (2), Section 22, requiring them to render a return of their income for the purpose of income tax. It appears that the year by which this firm goes in maintaining its books of account is the Dewali year and the year of assessment was 1982-83, the previous year or the year of accounting being, therefore, 1981-82. On 22nd July 1926 a notice u/s 22(4) was served upon them asking: that they should produce their books of account for the Dewali year 1980-81 and 1981-82 and on 6th August 1926, the assessee submitted a return. The return which they submitted consists of the words and figures "Loss Rs. 26,000" under the head "Business." A notice was then issued upon them being a combined notice purporting to be under Clause (2), Section 23 and also Clause (4), Section 22. That required them to produce the accounts for 1980-81 and 1981-82 and also gave them an opportunity to call any other evidence on which they might rely in support of their return. On the date fixed by the notice the books of 1981-82 were examined and various adjournments were taken for the production of the books of 1980-81. There was a hearing on appointment on 26th August 1926, on 10th January 1927 and on 16th February 1927, and the final order of assessment was not made till the 26th February 1927. Although, therefore, these books for 1980-81 were called for, at all events, on 6th August 1926, they were not produced by the following February at the time when the assessment was

made. The income tax authorities have held that ample time was given for their production and that their non-production was wilful, as indeed it is reasonably obvious from the dates and also from the inconsistent stories told by these assesseees to the effect that their books for the year in question were sent to Bikaner because of the Calcutta riots and also because of settling some disputes. The finding of fact is that these accounts are still deliberately withheld. There can be no question that for the purpose of finding what was the profit or loss for the year 1981-82 it is necessary to get the books of the year previous to that because on any question of loss caused by fall in the value of stock it is most necessary to see on what basis the valuation has been taken. The result, therefore, was that the assesseees had deliberately withheld the best evidence - indeed the only evidence - that would enable one to test the accuracy of the return.

3. It is in these circumstances that the assesseees, having failed before the income tax authorities requested that two points of law should be referred to this High Court by the Commissioner of income tax. The first question is:

Was the notice u/s 22(4) which was issued in the case so defective as to be legally null and void?

4. The second question is this:

If an assessee has made a return in compliance with a notice u/s 22(2) and thereafter a notice has been served upon him u/s 23(2) and also a notice u/s 22(4), and the assessee has complied with the terms of the notice u/s 23(2) by producing the evidence upon which he relies, but has failed to comply with the notice u/s 22(4) is the income tax Officer entitled to make an assessment u/s 23(4), for failure to comply with the notice u/s 22(4), or is he bound to proceed u/s 23(3)?

5. In my opinion both of these questions must be answered against the assesseees.

6. The first question is whether there is anything illegal in the issue of a notice u/s 23(2) and Section 22(4). I am of opinion that there is no reason why these two notices should not be comprised in one document. The position is that the assessee is given one date on which he is first of all to produce certain accounts or documents required by the income tax Officer and he is also told that on that same date he will get an opportunity of producing any further evidence upon which he relies. I can see no objection at all to that procedure and I observe that in the case cited to us from the Allahabad High Court decided on 4th January of this year In Re: Chandra Sen Jaini Vaid, a Division Bench of that Court was of the same opinion. In my judgment there is no difficulty upon the answer to the first question.

7. The second question depends upon the construction to be put upon Sections 22 and 23 of the income tax Act. By Section 22 provision is made to the effect, in the case of companies, that the principal officer shall before 15th June in each

year furnish a return of income without being asked. Provision is also made, in the case of other persons whose total income is, in the income tax Officer's opinion, such as to render such persons liable to income tax, that the income tax Officer may serve a notice requiring a return to be made. The concluding paragraph of that section then provides that the income tax Officer may serve on the principal officer of any Company or on any person upon whom a notice has been served under Sub-section (2) a notice requiring him, on a date, to be therein specified, to produce, or cause to be produced, such accounts or documents as the income tax Officer may require provided that he shall not require the production of any accounts relating to a period more than three years prior to the previous year. That provision which enables the income tax Officer to require the production of accounts or documents" is in the case of persons other than companies a power given on condition that a notice has been served requiring the making of a return. There is no sign in that clause of any further condition.

8. When we come to the next section we find that the section begins by dealing with the case of a return as to which the income tax Officer is satisfied. In that case he assesses on the basis of the return. It then goes on to deal with a case where the income tax Officer has a reason to believe that a return made is incorrect or incomplete, and the language of the statute imposes upon the income tax Officer the duty of serving upon the assessee a notice requiring him either to attend at the income tax Officer's office or to produce any evidence on which such person may rely in support of the return. The meaning of that clause is that when a return is made the income tax Officer shall not reject it and take some other basis as the basis of assessment without giving the assessee an opportunity to appear before him and give any evidence which he may desire to give. The power under Clause (4), Section 22, is power to the income tax Officer which has reference to accounts and documents and to no other form of evidence. The right u/s 23(2) is a right to call any evidence that the assessee may desire to call.

9. The last clause of Section 23 deals with three different cases and for that reason perhaps the section is not so clearly drafted as it might be. It begins by taking the case of an assessee who makes no return at all and it says that the income tax Officer shall assess him to the best of his judgment. It then deals with the case of a person who has been ordered to produce accounts or documents and has failed to comply with the requirement. His is the same fate; the income tax Officer makes the assessment to the best of his judgment. It then deals with the third case - the case of a person who having made a return fails to comply with all the terms of a notice issued under Sub-section (2) of Section 23. Upon that the contentions that are raised are, first, that no notice to produce accounts or documents can validly issue after the return is filed; and secondly, that if in fact a notice is issued u/s 23(2) it is impossible for the assessee to be penalized for the mere non-production of accounts; in other words, the second case contemplated by Clause (4), Section 23 is no longer a case of which the

assessee can be deemed to be an instance.

10. In my judgment the exposition which the Commissioner of income tax has given is correct. He points out that the sub-section contemplates three distinct cases and, to my mind, it is abundantly shown by him that there is no warrant in the statute for saying that after a return is made the power given by Clause (4), Section 22 is gone. The only ground which I have discovered for that opinion is the insertion of the harmless words "having, made a return" into Clause (4), Section 23. It seems paradoxical and improbable that the making of a return should put an end to the power of the income tax Officer to require the production of accounts. One would naturally suppose that the income tax Officer having seen a return may in some cases be in a better position than he would otherwise have been to say whether he thinks it necessary to inspect books of accounts or other documents or not. But apart from that question it is at least extraordinary that a limit upon the power given by Clause (4), Section 22 should be made in the dubious and inferential manner which is suggested, namely, by the words "having made a return" being inserted in Clause (4), Section 23. In my judgment, there is no basis either as a matter of business or as a matter of construction for the opinion that the moment a return is filed the right of the income tax Officer to require the production of accounts u/s 22(4) is gone.

11. If that be so the next question is whether it can be contended that because in fact a notice under Clause (2), Section 23 was served upon this firm the power provided by Clause (4) of that section to meet a case of withholding of accounts can no longer be exercised. In, my judgment there is no ground for that contention either. The income tax Officer in this case had asked the assessee first of all, to produce their books; secondly to attend upon him; and thirdly, at the same time, to produce any other evidence they like. If the assessee are not in default, if they produce their books and attend, then, whether they produce other evidence or not, it will no doubt be for the income tax Officer to proceed against the assessee under Sub-section (3) of that section. But if when the date comes it turns out that the assessee are withholding their books of account, but want to produce some other evidence, it seems to me reasonably plain that the income tax Officer may well say:

You are in default for withholding your accounts; you will be dealt with on that basis. In the absence of available accounts neither argument nor other evidence is anything but a waste of time. If is mera palpatio. You will be treated as defaulters and in no other way.

12. In my judgment that is what the statute intends. The statute intends that persons who deliberately make default in producing their accounts when asked to do so under Clause (4), Section 22, shall be treated as defaulters and that the income tax Officer shall make the assessment to the best of his judgment.

13. It has been said that the income tax Officer must proceed in a judicial manner and Section 37 has been mentioned in this connexion. Fundamentally no

doubt the income tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts; though I would point out that the income tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party and Judge in his own case. However true it be and for whatever purpose it be true that the assessment to income tax is to be done in a judicial manner, the first thing which must be laid down as a condition before a person can complain of any departure from this principle is this : that he too must produce the evidence which the law requires him to produce. It is idle and absurd for a person who has books of account and deliberately withholds them to complain of not being treated in a judicial manner. The judicial manner is a manner which proceeds upon evidence, and the basis of the statute is to see that available evidence is produced. It is then, and only then, that the assessment is to be made upon a judicial consideration of the evidence. Otherwise it is to be made "to the best of his judgment" and *brevi manu*.

14. In my judgment, there is no foundation for the assessee's contention on either of the points that have been referred to us. It seems to me, therefore, that the answer to these two questions should be as I have indicated, to the first "No" to the second "Yes."

15. It only remains to mention certain cases which have been drawn to our attention. One is a decision of the High Court of Patna which is said to be reported in the Eighth Volume of the Patna Law Times *Vide Brij Raj Rang Lal Vs. Commissioner of Income Tax*, and a report from the All India Reporter has been allowed to be used. In that case it would appear that the learned Judges were not satisfied that a notice u/s 22(4) has been issued at all. They seem to think on the basis of the words "having made a return" u/s 23(4) that the power to call for books and documents is limited to the period prior to the filing of the return. But they say that

even if we assume that notice u/s 22(4) can be issued after a return has been filed and notice not having been issued in this case summary assessment was illegal.

16. It appears to me, therefore, that the view that the right to issue a notice under Clause (4), Section 22, comes to an end on the making of a return was not essential to the decision in that case; but, in any event, I disagree with that opinion. It seems to me to have no merits whether as a matter of business or of construction of the statute.

17. The next case to which we were referred was the case of *Duni Chand Dhani Ram v. Commissioner of income tax* AIR 1926 Lah. 161 decided by Mr. Justice LeRossignol and Mr. Justice Martineau. That was a case where, it seems to me, that no law was laid down which is not in harmony with the view which I have endeavoured to express. That was a case where an assessee had made a return of his income. He was called upon to produce his books of account and he did produce his books of account. That being so he was in the position of a man who

must under Clause (2), Section 23, be given a proper opportunity to support his own return by such evidence as he desires and whether his return was supported by further evidence or not the Commissioner was bound to assess him not on the footing that he was a defaulter but on the footing that his return ought to be accepted save in so far as there might be good reasons for criticizing it. The learned Judges in that case, so far as I can see, have laid down no law to the effect that a person who is in default by wilful failure to produce accounts is not within the summary power given by Clause (4), Section 23.

18. Another case to which we have been referred is a decision of Mr. Justice Greaves and Mr. Justice Mukerji of this Court in the case of. Nirmal Kumar Singh v. The Secretary of State AIR 192 Cal. 890. There, again, we have a case of an assessee who made a return and produced his accounts. At the time when he produced his accounts various matters were gone into between his gomasta and the income tax Officer. Without giving a proper notice requiring him to produce such evidence as he might desire in support of his return the income tax Officer assessed him upon a basis inconsistent with his return and in these circumstances one learned Judge thought that the statute had been substantially complied with and the other learned Judge (Mr. Justice Mukerji) took the view that the informality was one which had not been waived and could not safely be ignored. In the course of that judgment there is not only nothing to the effect that the power to call for accounts must be exercised before the making of the return, but that judgment supports what the income tax Officer has done In this case.

19. Two cases have been drawn to our attention on the part of the Advocate-General. One contains some expressions in a judgment of my own in an income tax Reference heard on the 18th January 1927; in the matter of Ram Kissen Das Bagri and the other is a judgment of Mr. Justice Walsh and Mr. Justice Banerji of the Allahabad High Court in In Re: Chandra Sen Jaini Vaid, . There, too, the dictum in the Patna case to which I have referred was dissented from and there, too, it was held that a combined notice u/s 22(4) and Section 23(2) was a proper notice.

20. In these circumstances it appears to me that the questions put to us must be answered against the assessee and that the assessee must pay the costs of this Reference.

C.C. Ghose, J.

21. I agree.

Buckland, J.

22. I agree.