

(1929) 07 AHC CK 0064
In the Allahabad High Court

In Re: Lachhman Prosad Babu Ram of Cawnpore

Date of Decision : 09-07-1929

Acts Referred:

Citation : (1929) 07 AHC CK 0064

Hon'ble Judges : Niamatullah, J; Mukerji, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Mukerji, J.—This is a reference by the Commissioner of Income Tax, united Provinces, u/s 66(2), Income Tax Act of 1922.

2. The case sent up for expression of opinion on the part of the High Court is fully stated in the "statement of the case," submitted to us and very briefly is as follows: The assessees, at whose instance the reference has been made, carry on business at Cawnpore, Bombay and Calcutta with headquarters at Cawnpore. u/s 64, Sub-section (1), Income Tax Act, the Income Tax Officer of Cawnpore had the right and power of assessing the Income Tax, because Cawnpore was within his jurisdiction. The Income Tax Officer of Cawnpore, on 22nd April 1927 issued a notice u/s 22(2), Income Tax Act, requiring the assessees to submit a return of their total income in the "previous year." The previous year in this case was from Dewali 1925 to Dewali of 1926, as the account year of the assessees commenced on the first day after the Dewali festival of a Hindi year. On different occasions the assessees submitted returns for Cawnpore and Bombay. With regard to Calcutta business they submitted no return to the officer at Cawnpore but submitted one to the officer in Calcutta. On 11th August 1927, the Income Tax Officer of Cawnpore issued a combined notice u/s 23(2) and Section 22(4) of the Act requiring the assessees to produce, on 15th August their accounts and evidence relating to their income at Calcutta and other branch places of business. On 26th August 1927 accounts were produced for Cawnpore and Bombay business while with regard to the Calcutta accounts, an application was presented to the effect that it would be detrimental to the Calcutta business to send the Calcutta accounts to Cawnpore and also to send the munib, who was

conversant with them, to explain the accounts. It was stated that the munib was in the sole charge of the Calcutta business. After examining the Cawnpore and Bombay books the Income Tax Officer of Cawnpore postponed the case sine die pending receipt of a report of the Income Tax Officer of Calcutta which report, he had recently called for at assessee's request. He thought that if a complete report was received from Calcutta:

there will be no need to insist on the production of the Calcutta accounts at Cawnpore.

3. The report from Calcutta was received on 17th February 1928. The Income Tax Officer in Cawnpore thought that it was not complete and it was not accompanied with certain documents which he thought were necessary for him to see in order to arrive at a proper estimate of the assessee's income. These were copies of profit and loss account. Thereupon the Cawnpore officer issued another notice u/s 22(4) on 18th February 1928, requiring the assessee to produce on 22nd February 1928 the accounts of the headquarters business at Cawnpore. The Cawnpore accounts made him suspicious of the correctness of the report received from Calcutta. He also thought that he should have a statement of the account of house property at Cawnpore. He accordingly served a further notice again under Section 22(4) calling for the production on 10th March 1928 of accounts of income from property (house property) for the Sambat years 1981 to 1982 and 1982 to 1983 and to trial balances of the Calcutta shop as on Dewali 1981, 1982 and 1983. On 14th March 1928 the assessee's mukhtar-i-am (general agent) Sheonath, appeared and stated that no account of income from house property at Cawnpore was kept and that the trial balances relating to Calcutta shop could not be produced because the account books had already been produced before the Income Tax Officer at Calcutta. On this statement, the case was again postponed since die pending receipt of a further report from the Income Tax Officer of Calcutta. On 30th March 1928 a report was received from the Income Tax Officer of Calcutta but there were no "trial balances" or profit and loss account or the balance sheet. On the same date the Income Tax Officer of Cawnpore asked the representative of the assessee to explain his doubts and to produce the accounts of the Calcutta shop. The representative declined to do so and asked the Income Tax Officer to refer the matter again to Calcutta. This the Cawnpore officer declined to do and as the financial year was closing he assessed a tax "to the best of his judgment" on the same date i.e. 30th March 1928. The Cawnpore officer purported to act u/s 23(4) of the Act.

4. The assessee went up in appeal to the Assistant Commissioner of Income Tax. That officer held that no appeal lay to him, as the assessment had been rightly made u/s 23(4) of the Act.

5. Thereupon the assessee asked the Commissioner to make this reference and the Commissioner accordingly sent up the following questions for the opinion of the High Court.

6. These are:

(1) Has an Income Tax Officer jurisdiction to issue a notice u/s 22(4) after the commencement of an inquiry u/s 23(3)?

(2) Was the notice u/s 22(4) issued by the Income Tax Officer, Cawnpore, on 22nd February 1928, invalid, because it included accounts and documents connected with the Calcutta shop?

(3) Was the notice invalid?

(a) because it was issued in form A, intended for use where a return had not been made, though modified so as to suit the assessee's case in which a return had been made?

(b) because 25th April 1927 (the date mentioned in it) was that on which the notice u/s 22(2) was returned after service, and not that on which it was actually served on the assessee, which was apparently 23rd April 1927?

(4) Is it incumbent on the Income Tax Officer of the principal place of business, where an assessee is assessed to Income Tax, to issue separate notices u/s 22(2) requiring returns in respect of the income of each branch of the assessee's business?

(5) Was the Income Tax Officer entitled, in the face of the statement of Pandit Sheo Nath Pandey, the assessee's mukhtar-i-am dated 14th March 1928, to hold that the notice u/s 22(4), dated 22nd February 1928, had not been complied with?

(6) When an assessee denies the existence of accounts or documents may the Income Tax Officer presume the existence of such accounts or documents?

(7) Has the Income Tax Officer of an assessee's principal place of business jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business when he has submitted a return, produced accounts, and otherwise complied with all the requirements of the law before the Income Tax Officer of the place where he has such branch business?

(8) Is the Income Tax Officer of the principal place of business bound to accept the report of the Income Tax Officer of a place where an assessee is carrying on a branch business? If not is he bound to refer the matter back to the latter officer for further enquiry and not to assess according to his judgment?

(9) In all the circumstances of this case, was the assessment rightly made u/s 23(4)?

7. Before I proceed to answer the several questions, it will be necessary to find out the meaning and application of Section 22(4) and Section 23(4), Income Tax Act, for practically the whole controversy ranges over those two sections. I will refer to decisions of this Court and other Courts, later on, for I want, for the present, to examine, for myself, the language of the law independently of and

untrammelled by any opinion of other Judges.

8. The controversy relates to the import of Section 23(4). The question is in what cases an appeal is allowed and in what cases an appeal is not allowed? The assessee's sole grievance is that they had the right to lay their case before the Assistant Commissioner and they have been unjustly shut out from the exercise of such a right. The Income Tax Officer of Cawnpore purported to act, in making the assessment u/s 23(4) "to the best of his judgment." u/s 30 of the Act, no appeal lies where an Income Tax Officer is entitled to make and does make an assessment to the best of his judgment.

9. Section 23(4) runs as follows:

If... any... person fails to make a return under... Sub-section 2, Section 22... or fails to comply with all the terms of a notice issued under Sub-section 4 of the same section, or having made a return, fails to comply with all the terms of a notice issued under Sub-section 2 of this section, the Income Tax Officer shall make the assessment to the best of his judgment.

10. A plain reading of Sub-section 4, Section 23, would suggest that there are three cases in which an Income Tax Officer is entitled to "make assessment to the best of his judgment." They are (I am not mentioning the case of a company:

(1) when a proposed assessee fails to make a return u/s 22(2);

(2) where he fails to comply with all the terms of a notice issued under Sub-section (4), Section 22; and

(3) fails to comply with all the terms of notice issued under Sub-section 2, Section 23.

11. These three occasions, it will be noticed, are enumerated in the same order in which the rules for asking for a return or compliance with a notice are enacted. The rule as to calling for a return comes first and is the first of the occasions mentioned in Section 23(4). The issue of a notice u/s 22(4) comes after the provision as to calling for a return and is the second occasion mentioned in Section 23(4). The provision for issue of notice u/s 23(2) comes last and is third occasion mentioned in Section 23(4). Ordinarily it would be expected that the three occasions would come in order of time, the notice for return first, then the notice for accounts and documents and then the notice for production of evidence. If there were any doubt in the matter, these doubts are completely removed by the use of four words, "having made a return," to be found in Section 23(4). Those words, if they have any meaning at all, indicate that the first two occasions for making an assessment to the best of the Income Tax Officer's judgment come before the third occasion may possibly appear.

12. The learned Government Advocate has argued that the words "having made a return" in Section 23(4) have really no significance, and to quote the language of one of the cases cited before us, they are "harmless." In my opinion this is a

method of construction which must not be allowed to prevail.

13. It is an established rule of construction of statute that where the meaning is plain, it is not open to any party to read the rule of law in any way other than what is dictated by the plain meaning of the enactment: see p. 66 of Craies' Statute Law (1923). I shall have occasion to refer to this book more than once. It cannot be doubted that the words "having made a return" if allowed to remain where they are, suggest that the first two occasions for making an assessment to the best of judgment, come before the third occasion for the purpose comes. If that be so it will not do to say that those four words have been used unnecessarily as a mere tautology or as "harmless" words: Craies at p. 98 quotes the following from Lord Brougham:

A statute is never supposed to use words without a meaning.

14. Then he quotes from Erle, C.J.:

To reject words as insensible is the ultima ratio when an absurdity would follow from giving effect to the words of an enactment as they stand (ibid).

15. Again Lord Hord Holt is quoted as having said:

I think we should be very bold men, when we are entrusted with the interpretation of Acts of Parliament, to reject any words that are sensible in an act.

16. It will be seen from the above quotations which are from very high authorities, that unless and until the language used in a statute makes the meaning entirely insensible, every word used must be given its plain meaning.

17. It has, however, been urged that the plain meaning of the words, "having made a return" cannot be given effect to for this reason, Section 22(4) is worded in language without limit of time, and, therefore, it would not do to import into it a limit of time. In other words, it is urged that a notice u/s 22(4) of the Act may be issued at any time, even after an enquiry u/s 23 of the Act has started. I agree that if Section 22(4) stood by itself, it would be uncontrolled by any time limit. But is not a time limit imposed by the four words, "having made a return" already quoted?

18. If there be any obscurity in an enactment, an apparent contradiction, the meaning of the Act has to be found within the four corners of the Act itself. Craies quotes from Coke the following (see p. 92):

The office of a good expositor of an Act of Parliament is to make construction on all the parts together and not of one part only by itself....

19. And again at p. 93:

It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute for that best expresseth the meaning of the makers....

20. Again, at p. 93 the learned author quotes the following from a case, decided by Sir John Nichall:

The key to the opening of every law is the reason and spirit of the law; it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole.

21. Supposing, then that the rule in Section 22(4) is unlimited by time and Section 23(4) does impose a limit of time, let us assume there is a little obscurity. What are we to do? Are we to reject the express words of Section 23(4) in order to hold that Section 22(4) is uncontrolled by time limit? That would be sacrificing one part in order to read another part of the same enactment in a particular way. Would it not be a better method of reading the Act to make the whole consistent and to say that although there is no time-limit in Section 22(4) a time limit is brought in by Section 23(4).

22. Now let us see if there is any sense in putting a time limit on Section 22(4) as in my opinion, Section 23(4) does. What is the effect, after all, of Section 22(4) being not complied with? It is that the assessee is shut off his right to appeal. There is no other consequence. Is the right to appeal taken away, as a matter of punishment or from some other motive? In an unreported Madras case read out to us by the learned Government-Advocate as a part of his argument, a learned Judge thought that it was by way of a penalty for non-compliance of the Income Tax Officer's order, that the appeal is shut out. With all respect, I find nothing in the Income Tax Act which says that the appeal is to be shut out as a matter of punishment. Unless an Income Tax Officer is actuated by malice or chagrin on account of the non-compliance with his order, he will, if he does his duty, assess a tax which, in his opinion, would be just and fair, "to the best of his judgment" does not imply any penal imposition of tax but what is only a fair and reasonable tax, having regard to all the information, as to circumstances, the Income Tax Officer may possess, without any formal enquiry. It must therefore, be taken that the rule shutting out an appeal was not meant for the punishment of the assessee. By way of analogy, I may point out that under the CPC no appeal is allowed where a decree follows a compromise or a decree follows an award. Surely the parties do not commit any contempt of Court by coming to terms, nor do they commit any contempt of Court by entering into a reference to arbitration which is followed by an award.

23. Similarly, there is no appeal from the verdict of the jury, in a criminal case except as to punishment, with which the jury have nothing to do. The principle underlying the shutting out of an appeal, in all such cases is the same namely there is nothing which can be taken before a Court of appeal for the exercise of its judgment. Where the parties come to terms, no benefit can be reaped by an appeal. Where an award is made, the judgment is given by the chosen arbitrator of the parties and the Court of appeal cannot be called upon to exercise its own judgment. An arbitrator in coming to his decision is not fettered by rules of evidence. The result is, the appeal is shut out because there is no proper

materials, on which the appellate Court may exercise its judgment. Similarly, in a jury trial, the jury do not give any reason for their verdict, nobody knows how they are influenced and how they discussed the matter among themselves. There is no room for any appellate Court to exercise its jurisdiction. Coming back then to the case before us, we find that the appeal has been shut out only where there are no materials which can be proplacred before an appellate Income Tax Officer. To start, where the proposed assessee makes no return of his income, there is no right of appeal. The reason is plain. What are the materials to be placed before the appellate officer to exercise his judgment on? The information on which the Income Tax Officer has assessed the proposed assessee is, so to say, "extra-judicial" and cannot be disclosed and cannot be made the subject matter of scrutiny by the appellate officer. Again, if the proposed assessee has not furnished the Income Tax Officer with the accounts and documents as required by the officer u/s 22(4) of the Act, there is no material besides any private information that the Income Tax Officer may possess, for assessing the tax. Before the Income Tax Officer can examine, with any chance of accuracy, a return submitted by an assessee with whose antecedents he is not acquainted favourably, he might require the proposed assessee to submit his accounts and documents. Where an Income Tax Officer knows his assessee sufficiently well and has a favourable opinion about him, he would be content with simply asking for a return. Where the Income Tax Officer has not got a favourable opinion of his proposed assessee or has no definite opinion either way, i.e., either in his favour or against him, he might think it desirable to have the assessee's accounts and documents before him in order to decide whether he would accept the return or would hold an enquiry as to its correctness.

24. If the assessee fails to submit the accounts and the documents required, he does not put the Income Tax Officer in a position to form a definite judgment and the only thing that remains open to the officer is to act "to the best of his judgment," which means in plain words, to act on such information obtained privately as he may possess. In such a case, to allow an appeal would be meaningless. The appellate officer would have no materials on which to go. Again, where the Income Tax Officer is not satisfied with the return submitted by the assessee, possibly even after its scrutiny, with the aid of the assessee's accounts and documents, he would decide to hold an enquiry. Where he wants to hold an enquiry and the assessee does not help him with materials and evidence, here again there is nothing for the taxing officer, to go upon, except his own judgment which, again means unverified and unsubstantiated information. Here, again, there will be no sense in allowing an appeal; for the appellate officer would have no materials on which to form judgment. Apparently, the accounts and documents called for u/s 22(4), would not be sufficient to satisfy the doubts of the taxing officer, for it must be taken that they have been examined and have been disbelieved. By themselves, then, those documents would not furnish any proper criteria for investigation. But where an enquiry has started and has been conducted at least partially, there would be materials on the record which might

fairly be submitted to the consideration of an appellate officer. It is in the last mentioned case alone that an appeal would be allowed with justification.

25. It is hardly conceivable that it was considered to be just that an appeal should be shut out in a case like the following. Suppose an enquiry has gone on, in the case of a large business, for ten days. On the eleventh day, the Income Tax Officer wants a particular book of the proposed assessee for some reason, good, bad or indifferent, the assessee fails to produce that book. If, at that stage, the Income Tax Officer says that he would make an assessment "to the best of his judgment," he would not be making the assessment on such information alone as he possessed before the enquiry began, but on information which were placed before him. The assessee may then fairly say that, having supplied materials for assessment he should be allowed to go before an officer of greater experience, for his judgment by way of appeal. As I have said, it is inconceivable that the legislature should have meant that a prolonged enquiry should come to nothing and should not be subjected to appellate judgment simply because the assessee at one moment failed to produce a certain document. On principle therefore, and on reading, as a whole, the two Sections 22 and 23, it seems to be abundantly clear to me that a right to make an assessment to the best of the officer's judgment cannot be made after an enquiry has been started, so as to shut out an appeal, simply because at any time after the enquiry has been started the assessee fails to produce a certain document or account.

26. It has been urged that Section 22(4) is a very useful provision and it should be open to the Income Tax Officer to use it at all times, even in the case investigated by sub-Ss. 2 and 3, Section 23. There can be no doubt that an Income Tax Officer should have the power to call for documents and all information that he may require for a proper and just assessment. For this purpose he has been invested with the powers of a civil Court by Section 37, Income Tax Act itself. If he has all the powers of a civil Court trying a suit, why can he not ask the assessee, under those powers to produce the very accounts and documents which he thinks are needed for a fair assessment? Surely, a civil Court can call upon a party to produce any document in his possession or power. The power of the Income Tax Officer to call for documents and accounts is not limited by the language of Section 23(3), Income Tax Act, or even by Sub-section 4, Section 22. If Section 22(4) was meant to be only a part of the power of an officer in holding an inquiry its proper place would have been in Section 37. The whole question is, in what cases an appeal has been allowed by the Act and in what cases they have not been allowed?

27. I need not repeat what I have already stated, namely an appeal has been shut out only when it would serve no useful purpose. That is to say, an appeal has been shut out where the appellate officer would have no material on which to decide a case. But where materials are on the record, whether sufficient or insufficient, an appeal has been allowed.

28. I may mention here that one of the main reasons which has actuated the learned Judges of different High Courts to hold that Section 22(4) must be unlimited in its application, in point of time, is that it is a useful rule of law, which must be made use of by the Income Tax Officer, for the benefit of the assessee himself. Those learned Judges, with all respect to them, have overlooked, at least have not quoted in their judgment the provisions of Section 37, Income Tax Act, which confers on the Income Tax Officer all the powers of a civil Court, trying a suit. Certainly, it may happen that an order made in the course of the enquiry by the Income Tax Officer for the production of a document is disobeyed. Even in such a case, the Income Tax Officer will be entitled to draw such adverse inference, as he may, from the disobedience; but, nonetheless, his decision will be a decision on the merits of the case, on such materials as are before him, and in such a case, an appeal will be permitted under the Act. It will be noticed that even under the Civil Procedure Code, where a party is in contempt by non-production of documentary evidence in his possession or power or by not giving evidence, the Court is empowered to pronounce judgment against him, but such judgment is open to appeal: see Order 16, Rule 20 and Order 43, Rule 1(h), Civil P.C. It must not be forgotten that there are two distinct classes of cases. In one class there is no enquiry at all, owing to the proposed assessee's default. In such a case there will be no sense in granting an appeal and there is no appeal. In the other case, there is some material before the assessing officer plus some want of material owing to the assessee's default. In the latter case, an appeal would be granted, because after all, there is something on which the appellate officer may form his own judgment and may be disposed to modify the judgment of the Income Tax Officer.

29. Another principle bearing on the interpretation of statutes must not be overlooked in interpreting the Income Tax Act, which is a purely fiscal enactment. It is the ordinary privilege of a subject that he shall not be taxed on his income, without a proper investigation. It is but an elementary right of the subject that it should be open to him to prove what his income is before he is assessed on the income. If it had been the intention of the legislature that the mere word of the taxing officer should be final one should find a clear indication of that in the language of the statute. Craies in his invaluable book on Interpretation of Statute Law says at p. 195:

Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:

(1) imposition of tax....

(2) Altering or excepting from the operation of clearly established principles of law....

30. If the meaning of Section 22(4) read with Section 23(4) is this that the power of an Income Tax Officer should be allowed to hang, like the sword of Democles, on the head of the proposed assessee, to be applied at any time to

shut out an enquiry by the appellate Court and for the acceptance, as final word, of the Income Tax Officer's assessment, we should expect the clearest language being employed for the purpose. As against the argument that Sub-section 4, Section 22 is a very useful rule and should not be limited in its operation by the four words, "having made a return" to be found in sub-R. 4, Section 23, the following may be usefully quoted from Craies' book at p. 106:

... if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

31. As I have already said, there is no necessity to press Section 22(4) into the service of the Income Tax Officer holding an enquiry u/s 23. He has ample powers for the purpose of the enquiry, the same powers which a civil Court has got in trying a suit.

32. As for authority on the interpretation of Section 22(4) and Section 23(4) the majority of them are in favour of reading Section 23(4) as if the words, "having made a return" did not exist in the section. The case of *Khushi Ram v. the Commr. of Income Tax* (A.I.R. 1921 Lah. 219) takes the same view as I have taken. All other cases, including a two Judge case of this Court, viz. *In the matter of In Re: Chandra Sen Jaini Vaid*, , practically, take the view that the words "having made a return" have no force of their own, they are "harmless" or mere surplusage. These cases are, *In the matter of Harmukhrai Duli Chand* AIR 1928 All. 587 and *Ram Khelawan Ugam Lal Vs. Commissioner of Income Tax*, It would serve no useful purpose to take the arguments of the learned Judges one by one in the several cases and to attempt to dissect them. If, however, these cases are examined, it will be found that they have proceeded either on the view that the words "having made a return" are mere surplusage or that Section 22(4) is a useful piece of rule and the Income Tax Officer should not be deprived of its use. It has indeed been pointed out that the use of the rule is for the benefit of the proposed assessee himself. I have already pointed out that we have no right to throw away the language of a statute, especially of a fiscal statute, as a mere surplusage. I have pointed out that clear and consistent meaning can be given to both Section 22(4) and Section 23(4) of the Act. I have pointed out that the Income Tax Officer has got ample power, in the course of an investigation held by him u/s 23 to call for any document or evidence or accounts from the assessee. Such being the case, with utmost respect, I am unable to agree with the view taken in this Court or in the Courts in Bombay, Madras and Calcutta. If the points, that have struck me as very very material and as fully answering the objections and arguments of the learned Judges had been considered by them, I would, certainly, have bowed to their decisions.

33. But as things stand, the arguments that weigh with me have not been considered, at least in their entirety, by the learned Judges and my inability to accept the views of so many eminent Judges I trust, is fully justified.

34. I would now come to the several questions put by the Commissioner of Income Tax and attempt to answer them. In view of a general discussion of the law given above, I will not discuss the reasons of the answers except where they are really necessary.

35. Question 1.-My answer is an emphatic no.

36. Question 2.-My answer is that the notice is invalid not because it included accounts and documents connected with the Calcutta shop, but because the issue of such a notice was illegal after an enquiry had commenced u/s 23(3).

37. Question 3(a).-My answer is that the form used is immaterial. The invalidity lies in the issue of the notice after the enquiry had started.

38. Question 3(b).-Answer.-The date was not material and does not affect the issue of the notice, if it was otherwise valid.

39. Question 4.-Answer.-Section 64(1), Income Tax Act, authorizes the Income Tax Officer at Cawnpore to assess the Income Tax at the headquarters for all the branches of the business wheresoever situated and there is nothing in Section 22(2) which requires that separate notices should be issued for separate places of business.

40. Question 5.-Answer.-It was open to the Income Tax Officer to disbelieve Sheonath Pandey when he stated that no account book was kept and to hold that one was kept. It was also open to the Income Tax Officer to hold as to the account sheets of Calcutta, that his order had not been complied with. This answer, however, is subject to the answer given to question 1, viz., the notice was illegal.

41. Question 6.-Answer.-It must depend entirely on the circumstances of the case. No general answer can be given which can be applied to every case. In this particular case, I have replied to question that the Income Tax Officer would be justified in holding that there was an account book showing the income from the house property at Cawnpore and that it has been intentionally withheld from him.

42. Question 7.-My answer to this question is that having regard to the language of Section 64(1), Income Tax Act, the only officer who is responsible for a correct assessment for the entire business of the assessee is the Cawnpore officer and for the purpose of assessment he can call for any returns and accounts he likes, although an independent enquiry has been conducted by the Income Tax Officer exercising jurisdiction at the locations of the branch offices of the assessee. This was the opinion given by this Court in the matter of *In Re: Lachhman Prasad Babu Ram of Cawnpore*, . I would add the rider which was added in the case just quoted, viz., the powers of the authorities at the headquarters should never be exercised oppressively, so that persons willing to submit to an enquiry at the branch office should not, ordinarily, be compelled to bring their documents and officers all the way to the head office from distant places like Calcutta and Bombay. The Act should be administered as inoppressively as may be possible,

always having an eye to the convenience of the subject whom it is proposed to tax.

43. Question 8.-Answer.-As already stated in answer to question 7, although the officer at Cawnpore was not an appellate officer to the officer in Calcutta, yet the Cawnpore officer was not bound by the report of the Calcutta officer and was not bound to refer the matter back to the Calcutta officer. As regards the assessment according to one's judgment, the assessment should always be on the merits, after an enquiry has started and not "according to judgment" (if that is meant to shut out an appeal.)

44. Question 9.-Answer: No.

45. The Income Tax Officer was bound to pronounce judgment, on the merits, so as to allow of an appeal.

Niamatullah, J.

46. This is a reference u/s 66(2), Income Tax Act 1922 made by the Commissioner of Income Tax for decision of certain questions of law arising under the following circumstances:

47. Messrs. Lachman. Das Babu Ram the assesseees carry on business at three places, viz., Cawnpore, Bombay and Calcutta, the first named being the principal place of business where they have been assessed to Income Tax to which the reference relates. They were required by a notice issued on 22nd April 1927" u/s 22(2), Income Tax Act, to submit on or before 31st May 1927 a return of their total income in the previous year. On 2nd May 1927, the Income Tax Officer, who had issued the notice already mentioned, wrote to the Income tax Officers of Bombay and Calcutta asking for reports in regard to the assesseees' profits at those places. On 1st August 1927, the assesseees submitted a return in respect of their income derived from the Cawnpore concerns. Subsequently they submitted a similar return with regard to their income of the Bombay business. They did not make any return to the Income Tax Officer Cawnpore regarding their profits derived from Calcutta. On 11th August 1927, a combined notice u/s 22(4) and Section 23(2) requiring them to produce their accounts relating to the Calcutta branch and such evidence as they desired to adduce in support of their return. On 26th August 1927, accounts relating to their business at Cawnpore and Bombay were produced but not those relating to the Calcutta branch. On 17th February 1928, a report was received from the Income Tax Officer of Calcutta in respect of the assesseees' income derived from the Calcutta business. This did not satisfy the Income Tax Officer of Cawnpore who obtained the production of the assesseees' accounts maintained for the headquarters of their business, viz., Cawnpore. This led to certain discoveries and a notice u/s 23(2) was issued on 22nd February 1928 calling upon the assesseees to produce accounts relating to "property" and trial balances of receipts and disbursements in respect of the Calcutta concern for a certain period.

48. On 5th March 1928, it was stated on behalf of the assesseees that no account was kept of the income of such property. The trial balances requisitioned were also not furnished. On 14th March 1928, certain proceedings were taken by the Income Tax Officer, Cawnpore, to whom Sheonath the general agent of the assesseees definitely stated that no account was kept for the income of "property" and that the trial balances relating to the Calcutta shop could not be furnished as the accounts relating to that shop had already been produced before the Income Tax Officer, Calcutta. After some correspondence between the Income Tax Officer, Cawnpore and that of Calcutta an assessment was made on the 30th March 1928. The income of the Calcutta branch was assessed at Rs. 40,000 u/s 23(4). The significance of assessment u/s 23(4) is that it is based on the "best judgment" of the Income Tax Officer and that no appeal lies from such an assessment. An appeal was, however, preferred from this assessment on the ground that it could not in law be considered to be one u/s 23(4-) so as to deprive the assesseees of the right of appeal. The Assistant Commissioner who heard the appeal in the first instance, ruled that Section 23(4) applied and that the appeal was incompetent. A further appeal to the Commissioner led to the reference under consideration. The questions which emerge from this statement of facts and which we are called upon to decide are nine in number and are mentioned at pp. 5 and 6 of the statement of facts submitted by the Commissioner with his own opinion. The answers to these questions largely depend on a consideration of Sections 22(2) and (4) and 23 which are quoted below:

22(2) In the case of any person other than a company whose total income is, in the Income Tax Officer's opinion, of such an amount as to render such person liable to Income Tax, the Income Tax Officer shall serve a notice upon him requiring him to furnish, within such period not being less than thirty days, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) his total income during the previous year.

(4) 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 the Income Tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

23. (1) If the Income Tax Officer is satisfied that a return made u/s 22 is correct, and complete, he shall assess the total, income of the assessee, and shall determine the sum payable by him on the basis of such return.

(2) If the Income Tax Officer has reason to believe that a return made u/s 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend the

Income Tax Officer's office or to produce, or to be caused to be produced, any evidence on which such person may rely in support of the return.

(3) On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, the Income Tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income Tax Officer may require on specified points shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment.

(4) If the principal officer of any company or any other person fails to make a return under Sub-section (1) or Sub-section (2), Section 22, as the case may be, or fails to comply with all the terms of a notice issued, under Sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under Sub-section (2) of this section, the Income Tax Officer shall make the assessment to the best of his judgment.

49. The first question which calls for a decision of this Court has been stated in these terms:

Has an Income Tax Officer jurisdiction to issue a notice u/s 22(4) after the commencement of an enquiry u/s 23(3)?

50. The contention before us has gone further and it has been argued that notice u/s 22(4) cannot be issued after a return required by Section 22(2) has been made. In this view Section 22(4) applies only to cases where for some reason not easily conceivable the Income Tax Officer desires inspection of the assessee's accounts before he has any idea of the sources of their income, of the amount of their income and of the contingency of the accounts being needed to test the correctness of the figures to be mentioned in the return. Section 22(4) clearly lays down that a notice under that section can be issued to:

any person upon whom a notice has been served under Sub-section (2),

51. i.e. to any person who has been previously called upon to furnish a return. The scope of the section is thus narrowed down to the absurd limits of the time after a notice for return has been served and before the return is made. It will be observed that notice u/s 22(4) can be issued only to a person who has been previously required to furnish a return, and if the contention put forward on behalf of the assessee is sound, notice u/s 22(4) cannot be issued after a return has been made.

52. I am unable to accept such a reading of Section 22(4) otherwise quite general and unqualified as regards time, which leads to the result I have indicated and which can hardly serve any useful purpose in making an assessment. To give effect to the interpretation contended for on behalf of the assessee we have to insert some such words as "and who has not made the return" after the words "Sub-section (2)." It is one of the elementary rules of construction of statute that it should be so read as to avoid introducing what the

legislature has not thought fit to introduce, and that a construction which has that effect should be rejected. Section 23(1) which follows it makes it quite clear what the object of a notice u/s 22(4) is. On receipt of a return the Income Tax Officer may either accept it forthwith or may if so advised verify its correctness with reference to the accounts for which a requisition may be made u/s 22(4) at that or any other stage.

53. There is likewise no reason to confine the scope of Section 23(4) to the period before the commencement of an enquiry initiated by Section 23(2). It is conceded that the section itself does not warrant such a restriction. It is true on the other hand that ordinarily the requisition contemplated by Section 22(4) will be made on receipt of the return so as to avoid an enquiry if possible. In majority of cases the Income tax Officer will call for accounts on receipt of a return which is prima facie unsatisfactory and before an enquiry is decided on. But cases may occur in which after the commencement of such enquiry the necessity of examining the accounts may be felt. Cases are also conceivable where accounts are not expected to remove doubts altogether and yet they cannot be dispensed with.

54. In such cases the Income Tax Officer may consider it advisable to issue a notice u/s 22(4) calling for accounts and another u/s 23(2) requiring the assessee to produce such evidence as he desires to adduce in support of his return. It is to be observed that a notice u/s 23(2) is in the interests of the assessee and must be issued; while one u/s 22(4) may or may not be issued according as the Income Tax Officer may or may not deem it expedient having regard to the circumstances of the case, but if issued must be obeyed. The plain language of the sections enables one to arrive at the result indicated above. It is, however, pointed out that Section 37, Income Tax Act, empowers the Income Tax Officer to direct the production of documents by any person, assessee or otherwise, in the manner laid down by the CPC in relation to suits and proceedings before civil Courts, and it is argued that after an enquiry initiated by Section 23(2) has commenced, the production of accounts is to be enforced not by a resort to a notice u/s 22(4) but by the exercise of the power conferred by Section 37.

55. It may be that the law has provided more than one mode of securing evidence, but because an alternative method of achieving a certain object is available it does not follow that another if it is otherwise permissible should be denied. There is a difference between the provision contained in Section 22(4) and that laid down in Section 37. The latter applies to assesses and others in a position to give evidence; while the former which is more drastic, is applicable only to assesseees who are to be visited with certain consequences in cases of failure to produce accounts.

56. Reliance has been placed on a case decided by a Division Bench of the Lahore High Court, reported in AIR 1928 Lah 219 *Khushi Ram Karam Chand v. Commissioner of Income Tax, Punjab*. It does support the contention of the

assessee in the case before us. The reasons given by the learned Judges for not giving effect to the plain language of Section 22(4) are thus stated by them:

The words "having made a return" and the order in which the defaults are enumerated in Section 23(4) indicate that a notice u/s 22(4) precedes the notice and enquiry u/s 23. It is significant that Sub-section (4), Section 22 does not authorize a summary assessment in the case of a default u/s 23(3).

57. The learned Judges also observe that:

It is true that the wording of 5. 22(4) is somewhat wide, but it must be construed with reference to the context. It is also a well established rule of the interpretation of fiscal enactments that, in case of doubt, an interpretation which is more favourable to the subject is to be preferred.

58. With great respect to the learned Judges I am unable to agree with this view. The order in which certain provisions occur may in some cases assist us in construing one of those provisions. But where the arrangement is consistent with a reading which gives effect to the entire language of that provision, its plain meaning cannot be departed from only because a different location of such provisions would have made that meaning clearer. The reason why the provision in question before us has been made Sub-section (4), Section 22 and placed before the enquiry provided for by Section 23(2) is that ordinarily notice under the former will precede the notice contemplated by the latter. Assuming for a moment that the legislature intended to confer a power on the Income Tax Officer to issue a notice, non-compliance with which should attract the operation of Section 23(4), whether such notice is issued before or after the commencement of the enquiry, where is the provision to be inserted? If it be placed between sub-Ss. (2) and (3), Section 23, to make it plain that such notice can be issued after the commencement of the enquiry it would lead to the result, according to the reasoning based on the order of the provisions, that the Income Tax Officer has no power to issue such a notice before the commencement of the enquiry. It follows, therefore, that the arrangement of the provisions is not a safe guide in this particular instance. It is not disputed that the language of Section 22(4) is wide enough to enable the Income Tax Officer to issue before the commencement of the enquiry a notice u/s 22(4) which if disobeyed will entail the consequences mentioned in Section 23(4).

59. The words "having made a return" occurring in Section 23(4) founded on in the ruling referred to, do not in my opinion, support the conclusion arrived at in that case. These words may possibly make it arguable that notice u/s 22(4) can be issued only where a return has not been made, an argument which I have already disposed of. The learned Judges who decided that case do not seem to be inclined to accept it, and on the contrary are of opinion that Section 22(4):

is apparently intended to help the Income Tax Officer in deciding whether he will accept the return or proceed to make any enquiry.

60. It seems to me that the words "having made a return" in Section 23(4) have been used because Section 23(2) to which they relate presupposes that a return has been made. In cases to which Section 22(1) and (2) apply, return is out of question; while in cases to which Section 22(4) applies return may or may not have been made. The object of introducing these words in relation to Section 23(2) is to indicate what is certain to have happened, unlike the preceding two cases in which a return might or might not have been made. They cannot be so read as to imply that in the first two cases return could not have been made. I have already pointed out, one of the objections to such a construction, viz., that we, in effect insert some such words "and who has not made the return" after "Sub-section (2)" in Section 22(4) which is more vicious than treating the words ""having made the return" in Section 23(4) somewhat lightly. The view taken by the learned Judges of the Lahore High Court is diametrically opposed to what has been held by at least three High Courts. In *Chandra Sen Jaini, Vaid, Etawah*: In the matter of (1). In the matter of *Ram Khelawan Ugam Lal Vs. Commissioner of Income Tax*, It has been distinctly ruled that notice u/s 22(4) may be issued at any time before or after the commencement of an enquiry contemplated by Section 23(2) and that the words "having made a return" occurring in Section 23(4) do not signify anything which may affect the plain language of Section 22(4). For the reasons detailed above, I answer the question in the affirmative.

61. The second question runs thus:

(2) Was the notice u/s 22(4) issued by the Income Tax Officer Cawnpore, on 22nd February 1928, invalid, because it included accounts and documents connected with the Calcutta shop?

62. That the Income Tax Officer of Cawnpore had jurisdiction to assess tax on the income derived by the assesseees from the Calcutta branch of their business is not disputed, and in View of the provisions of Section 64, Income Tax Act, such jurisdiction cannot be denied. This being so, it can scarcely be maintained that a notice issued u/s 22(4) calling upon the assesseees to produce or cause to be produced their accounts of the Calcutta branch is invalid. It was certainly open to the Income Tax Officer Canpore to require the Income Tax Officer Calcutta to send the account books which appear to have been produced before him by the assesseees, who were for some reason of their own reluctant to have such accounts subjected to the scrutiny of the Income Tax Officer, Cawnpore. The latter preferred to make the assesseees responsible for the production of these accounts and whether he was right or not in the exercise of his power to adopt the more drastic of the two courses open to him he cannot be said to have done what he had no jurisdiction to do. It has been contended that the Income Tax Officer, Cawnpore, having called for a report from the Income Tax Officer, Calcutta regarding the income of the assesseees accruing there, he (the Income Tax Officer Cawnpore) ceased to have jurisdiction in regard to that matter. I cannot accede to this contention. It is only a departmental arrangement that one Income Tax Officer requires another to furnish information in matters supposed

to be better known to him, but in doing so he does not divest himself of the powers which the law has conferred on him, so as to become functus officio. My answer to question 2 is in the negative.

63. The opinion of the Commissioner on questions 3 and 4 has not been challenged by the learned advocate for the assessee, and I think rightly. I answer them in the negative. Questions 5 and 6 have been argued together and may be so disposed of. They are as follows:

(5) Was the Income tax Officer entitled in the face of the statement of Pandit Sheonath Pandey, the assessee mukhtar-i-am dated 14th March 1928, to hold that the notice u/s 22(4) dated 22nd February 1928 had not been complied with?"

(6) When an assessee denies the existence of accounts or documents, may the Income tax Officer presume the existence of such accounts or documents?

64. Where the Income Tax Officer has reason to believe that certain accounts and documents are in the possession or power of the assessee and calls upon him u/s 22(4) to produce them, but the assessee denies the existence of such documents, the Income Tax Officer can arrive at his own conclusion in view of the circumstances of the case, and if he persists in his belief that such accounts and documents exist and ought to have been produced, he can proceed u/s 23(4). The assessee has a remedy by challenging the finding of the Income Tax Officer, u/s 27, Income Tax Act, which provides that

where an assessee within one month from the service of a notice of demand satisfies the Income Tax Officer that he did not receive the notice issued under Sub-section (4), Section 22, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying, with the terms of the last mentioned notices, the Income Tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Section 23.

65. From the finding arrived at by the Income Tax Officer u/s 27 adversely to the assessee an appeal has been allowed by Section 30 of the Act, and if he satisfies the appellate authority that he was prevented from complying with the notice u/s 22(4) because the accounts and documents to which it related did not exist, he will escape the consequences of disregarding that notice. It must be conceded that the procedure laid down for an assessee, who is believed to possess certain accounts and documents, to vindicate his denial in that respect, is clumsy and one-sided, but such appears to be the law as it stands. I answer questions 5 and 6 in the affirmative.

66. Questions 7 and 8 may be disposed of together. They are as follows:

(7) Has the Income-Tax Officer of an assessee's principal place of business jurisdiction to compel such assessee to submit a return and produce accounts in respect of a branch business when he has submitted a return, produced account", and otherwise complied with all the requirements of the law before the

Income Tax Officer of the place where he has such branch business?

(8) Is the Income Tax Officer of the principal place of business bound to accept the report of the Income Tax Officer of a place where an assessee is carrying on a branch business? If not, is he bound to refer the matter back to the latter officer for further enquiry and not to assess according to his judgment?

67. My remarks in answering question 2 have bearing on the questions and should be referred to. As stated by me in that connexion the Income Tax Officer, Cawnpore, which is the principal place of the business of the assessee, had jurisdiction to assess the tax on their income from all sources. It follows that he could call for a return of their income from all sources including the Calcutta branch and to direct the production of accounts thereof. The assessee is not relieved of the obligation imposed on them by making a return of their income derived from a branch concern to the Income Tax Officer of the district where such branch concern is carried on and by producing accounts relating thereto before such officer. The law gives to the assessee no choice in this matter. I answer the seventh question in the affirmative and question 8 in the negative. Question 9 as it stands is too widely put. It runs thus:

(9) In all the circumstances of this case, was the assessment rightly made u/s 23(4)?

68. Taking it as it stands the language would include the question whether the Income Tax Officer was right in the exercise of his discretion to proceed u/s 23(4) or u/s 23(3). But I think the learned Commissioner making the reference meant no more than to obtain a ruling of this Court on the question whether under the circumstances of this case the Income Tax Officer, Cawnpore, had jurisdiction to make an assessment u/s 23(4). For the reasons which I have already stated in answering question 1, I would answer question-9 in the affirmative.

69. As we are not agreed as to our answer on question 1, we refer the "case" u/s 98, Civil P. C, and Section 66(2), Income Tax Act 1922, to the Hon. the Chief Justice, for orders as to it being put before a single Judge or a Bench of Judges, as he may think fit. We, however, want to mention that the question is of utmost importance to the Income Tax authorities and the public who pay the tax, that on the point, different High Courts have taken different views and that it might be desirable to require a Bench of three Judges to hear the point and decide it to avoid a further difference of opinion, and a second reference.

70. Question 1 is as follows:

71. Has an Income Tax Officer jurisdiction to issue a notice u/s 22(4) after the commencement of an enquiry u/s 23(3)?

72. This is a reference u/s 98, Civil P. C, made by a Division Bench of this Court in a matter arising under the Income Tax Act of 1922. Notice was served on Lachhman Das Babu Ram a firm with their headquarters at Cawnpore and

branches in other places, u/s 22(2), Income Tax Act, to make a return of their income. After certain proceedings, which it is unnecessary to detail, a combined notice was sent to the firm on 11th August 1927, in the form known as form B, drafted apparently under the authority of the Board of Revenue but not incorporated in any way in the Income Tax Act. This so-called combined notice purports to be a notice u/s 22(4) and also u/s 23(2) of the Act. The nature of the notice that can be issued under those sections is clear on the face of the sections themselves and we need not detail it.

73. After many postponements and the receipt of many reports and the examination of certain accounts, next on 22nd February 1928, the Income Tax Officer felt that he had reason to ask for further particulars in regard to the purchase of a house, and issued what we are told was a notice u/s 23(3) asking for particulars in regard to this house. In the statement of the case made by the Income Tax Officer this notice is referred to as having been one u/s 23(2), but that is apparently a misprint, and this notice of 22nd February 1928, was presumably a notice asking for evidence on "specified points" in accordance with Sub-section (3), Section 23. On the same date 22nd February, he issued another notice u/s 22(4) calling for certain Cawnpore headquarters accounts. On 14th March 1928, one Sheonath was examined on oath, and this appears to be the only occasion on which any evidence" was heard. On 30th March, after certain reports had been received, the Income Tax Officer asked for further accounts. The representative of the firm asked for a further reference to the Calcutta branch, but this was refused as the day, 30th March, was the last day but one for the close of the financial year, and the Income Tax Officer proceeded to a summary assessment, purporting to act u/s 23(4). Upon the assessee appealing to the Assistant Commissioner it was held that he had no right of appeal owing to the fact that the assessment had been made and properly made u/s 23(4). The assessee thereupon required the Income Tax Officer to refer the case to this Court on certain points stated. A number of those points came up for consideration before a Bench of this Court consisting of Mukerji, J., and Niamatullah, J. On one point the learned Judges have differed, and the matter has come up before the present Bench of three Judges on the reference. The point referred to us is stated by the learned Judges as follows:

Has an Income Tax Officer jurisdiction to issue a notice u/s 22(4) after the commencement of an inquiry u/s 23(3).

74. We have had some difficulty in ascertaining the facts on the basis of which we are asked to decide this question. The following appears in the statement of the Income Tax Officer at p. 3:

The assessees now desire that I should make a reference to the Honourable High Court on the following points of law (Appendix E) (as propounded by them):

(a) Whether the notice issued u/s 22(4) on 22nd February 1928, was legally valid inasmuch as, it was issued after the commencement of proceedings u/s 23(3),

etc.

75. It does not appear, however, that we have to consider the effect of the notice on 22nd February 1928, at all. The notice u/s 22(4), which we have really to consider, is referred to at p. 8 of the Income Tax Officer's statement, at para. 20, point 9. It is referred to us as follows:

The assessees clearly failed to comply with the notice u/s 22(4), issued on 11th August 1927, calling for the production of their Calcutta accounts. This default justifies the assessment u/s 23(4).

76. The Assistant Commissioner also said in his order dated 15th June 1928, which is printed as Appendix D to the Income Tax Officer's statement of the case:

and there was the failure to produce the Calcutta accounts for which a notice was issued on 11th August 1927.

77. These circumstances clearly reduce the assessment to one u/s 23(4).

78. A consideration of the facts chronologically set out at the commencement of this judgment will show that no inquiry u/s 23(3) commenced until the date of 14th March 1928, when the evidence of the one witness Sheonath was heard on oath. It is manifest, therefore, that neither the notice issued on 11th August 1927, nor that issued on 22nd February 1928, was issued after the commencement of the inquiry u/s 23(3). The question, therefore, which has been referred to us does not appear to us to arise on the facts of the case. We may add that Mr. Bajpai, the Government advocate who has represented the case here for the Crown has had the advantage of the presence of the Income Tax Officer in Court assisting him in the case, and Mr. Bajpai himself, after having consulted the Income Tax Officer agrees that no inquiry u/s 23(3) can be said to have commenced until 14th March 1928. Even if it could be said to have commenced on 22nd February 1928, the date on which a notice was issued u/s 23(3) to produce evidence as regards the specified point of the purchase of a house, a point which we have not to decide it is manifest that that the notice u/s 22(4) of 11th August 1927, was long prior to that date.

79. We therefore, direct that this case be returned to the Bench that referred it to us, with the expression of our opinion that the point referred to us does not on the facts of the case arise.

80. (On return of the case the original Bench delivered the following judgments.)

Mukerji, J.

81. By an order of this Bench dated 22nd February 1929 we directed that the matter in difference between the Judges composing this Bench might be referred to a single Judge or a Bench of three Judges. The Hon"ble the Chief Justice was pleased to appoint a Bench of three Judges. The matter was considered by the learned Judges to whom the matter in difference between us was referred. The learned Judges came to the conclusion that in the circumstances of the case, the

question referred to, namely question 1 of the nine questions referred to the High Court by the Commissioner of Income Tax, did not arise. This Bench thought that the learned Judges who expressed the opinion quoted above were not authorised under the provision of law under which the reference was made, to say that the question did not arise. This Bench accordingly addressed the learned Chief Justice again proposing that the said question 1 might again be referred to other Judges. The learned Chief Justice thereupon called a meeting of the Judges of the Court and the majority of the Judges decide that it was open to the three Judges, to whom the question had been referred, to say that the question did not at all arise and that such opinion would be binding on the Division Bench which referred the question.

82. The matter was again placed before us. We have heard the counsel for the parties. Dr. Katju has argued that on the judgment delivered by the three learned Judges mentioned above, the answer to question 9 as recorded by us previously should be reconsidered. He has argued and in my opinion quite correctly that question 9 and question 1 are not identical. Question 1 is:

Has an Income Tax Officer jurisdiction to issue a notice u/s 22(4) after the commencement of enquiry u/s 23(3).

83. Question 9 runs as follows:

In the circumstances of this case, was the assessment rightly made u/s 23(4).

84. Question 1 is a pure question of law and on this point my brother Niamatullah, J., and I are at a difference. Dr. Katju argues that in spite of this difference, we ought to say in answer to question 9 that having regard to the facts of the present case, the assessment was not rightly made u/s 23(4).

85. Let us examine the contention of Dr Katju. He has pointed out that when the Income Tax Officer at Cawnpore started his enquiry, he asked for the account books from all the places of business from the assessee, namely, from Cawnpore, from Bombay and from Calcutta. The Bombay and Cawnpore accounts were produced but the Calcutta accounts were not produced before the Officer at Cawnpore. The Income Tax Officer at Cawnpore issued a notice, on on 11th August 1927, which was a combined notice u/s 23(2) and 22(4) of the Income Tax Act, to produce the Calcutta accounts on 15th August. To this order the assessee demurred and requested the Income Tax Officer at Cawnpore not to press his order but to allow them to produce their accounts before the Income Tax Officer at Calcutta. To this request the officer at Cawnpore acceded and wrote to the Officer in Calcutta as follows: see p. 9 Appendix A:

It is, therefore, the Calcutta shop account which is the most important. I would request you to examine these books again and obtain copies.... I would have taken all this trouble on myself, but the assessee is unwilling to show the Calcutta shop accounts to me. The case is important and requires your personal attention. I have fixed the case for 6th March 1928, and shall be extremely

obliged to have your reply before that date.

86. This letter was written as late as on 24th February 1928, and evidently after some other correspondence had passed. Dr. Katju urges, and in my opinion rightly, that by agreeing to accept the report of the Income Tax Officer, Calcutta, provided same was satisfactory, the Officer in Cawnpore, waived, so to say, the effect of his order dated 11th August 1927. That order, argues Dr. Katju, could not be revived after seven months in March 1928, and could not be made the basis of an order u/s 23(4), Income Tax Act, namely an assessment to the best of the judgment.

87. It will be remembered that there were two notices issued against the assessee, both purporting to be combined notices u/s 22(4) and Section 23(3), one was dated 11th August 1927 and the other was dated 22nd February 1928. It was on account of the failure to comply with both these notices, that the Income Tax Officer purported to act under Section 23(4), Income Tax Act. When the assessee questioned the propriety of this assessment "to the best of judgment" they questioned the validity of the notice of 22nd February 1928: see point (a) at p. 3 of the statement of the case. The learned Commissioner is required by law to give his own opinion on the points referred to the High Court for its opinion. In answering question 9: see p. 8 of the statement of the case, the learned Commissioner did not rely on the notice issued on 22nd February 1928, but relied on the notice of 11th August 1927 only. For this reason the Bench consisting of three learned Judges of this Court expressed the opinion that the notice of 22nd February 1928 might very well be ignored. The learned Judges then considered the circumstances under which the notice of 11th August 1927 had been issued and came to the conclusion that it had been issued before any enquiry was started. From this finding of fact it followed that the question of law on which there was a difference of opinion between myself and my learned brother did not arise. Dr. Katju has argued that if we are bound by the opinion of those three learned Judges, as the majority of the Judges of the Court have held in an English Meeting, we must ignore the notice of 22nd February 1928, as being a document of no relevancy in the case.

88. In my opinion, this view contended for, ought to be accepted and for the reasons already given. Further, however, there is good reason why the notice of 22nd February 1928 should be ignored as waived or as being never intended to be operative. I have already pointed out that the letter addressed by the Income Tax Officer of Cawnpore to the Income Tax Officer at Calcutta is dated 24th February 1928: see Appendix A. and was, therefore, written two days after the notice dated 22nd February 1928 had been issued. From the portion of the letter quoted above it will be seen that the Income Tax Officer at Cawnpore was perfectly willing to accept the report of the Calcutta Officer and it was not his intention to enforce either the notice of 11th August 1927 or that of 22nd February 1928.

89. Whether we accept the opinion of the Full Bench or whether we decide on our

own initiative, there can be no doubt that both the combined notices had been waived so to say, and it would be extremely unfair on the part of the Income Tax Officer to turn round and say without giving the assessee a fresh opportunity to produce the books, that their failure on previous occasions to produce accounts subjected them to the penalty of having a best judgment assessment made against them.

90. In view of this fresh argument and in view of the opinion expressed by the Full Bench, I am clearly of opinion that the answer to question No. 9 should be in the negative.

91. I may point out that this answer entirely makes it unnecessary to return any answer to question 1 and as already stated in the opinion of the Full Bench, question 1 does not arise.

92. I would therefore direct that, in substitution of my answer to question 9 as recorded on 22nd February 1929, the detailed answer which is also in the negative recorded above be returned to the Commissioner of Income Tax.

93. I note that Mr. Bajpai the learned Government Advocate has argued in Court for 4? days and that he is entitled to a fee of Rs. 1100. He should get this fee from the Government. As regards the costs of this reference, I would direct that the Government should pay the costs of the assessees.

Niamatullah, J.

94. In my order of 22nd February 1929, I answered question No. 9 in the affirmative, because, in my view, disregard of a notice u/s 23(2) of the Income Tax Act entitles the Income Tax Officer to proceed u/s 23(4) and if he does so, the assessee has no right of appeal. Whether the Income Tax Officer could do so under the circumstances of the present case depended on the effect of two notices issued by him (1) on 11th August 1927, and (2) on 22nd February 1928. It had been contended on behalf of the assessees that the first notice had been waived. I did not deal with this argument, because if it be accepted with regard to the first, the second notice, which in my opinion cannot be said to have been waived as the result of a letter, dated 24th February 1928, could not be got over. I would have respectfully differed from my learned colleague on this part of the case, had the question been open to discussion; but the view taken by the Full Bench as regards the second notice relieves me of the responsibility of dealing with it. The Full Bench have placed their own construction on the statement of facts submitted by the Income Tax Commissioner, according to which the effect of the notice dated 22nd February 1928, is not to be considered. They observed, after considering the statement of the case, that;

It does not appear, however, that we have to consider the effect of the notice on 22nd February 1928, at all.

95. As regards the first notice they ruled that it was issued before the commencement of the enquiry, in which case, according to the view both of my

brother Mukerji, J. and myself, the Income Tax Officer had jurisdiction to proceed u/s 23(4), unless he is otherwise debarred from taking that course. On receipt of the finding of the Full Bench, the assessee pressed for the consideration of the question that the first notice (of 11th August 1927) had been waived. The second notice (of 22nd February 1928) being ignored, as we must ignore in view of the ruling of the Full Bench, I must now consider the effect of the former. I have had the advantage of reading the judgment of my learned colleague, and find myself in agreement with him in holding that, under the circumstances of the case stated by him, it was waived with the result that it loses its legal effect altogether.

96. In accordance with the view expressed by the Full Bench and for the reasons stated above, I have to answer question 9 in the negative, which I accordingly do.

97. Let the following answers to the questions put by the Commissioner of Income Tax be returned as the answers of the Court. Along with the answers will be sent copies of all the judgments of the Judges forming this Bench and to which the question 1 was referred for an answer.

98. Question 1.-In the view expressed by the Bench of three Judges, this question does not arise.

Question 2 ... Answer No Question 3(a) ... " No " 3(b) ... " No " 4 ... " No " 5 ... " Yes " 6 ... " Yes " 7 ... " Yes " 8 ... " No " 9 ... " No

99. With reference to the costs we declare that the Government Advocate having worked for more than 4 days is entitled to a fee of Rs. 1100. As the assessee has substantially succeeded in the reference, we direct that he shall get his costs from the opposite party.