

(1963) 08 MAD CK 0018
In the Madras High Court

J.M. Sheth

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-08-1963

Acts Referred:

Citation : (1964) 1 MLJ 308

Hon'ble Judges : G.R. Jagadisan, J

Bench : Single Bench

Judgement

G.R. Jagadisan, J.—This is a Reference under the Indian Income Tax Act. The question referred is as follows:

Whether the inference of the Tribunal that the Income Tax Officer had exercised his discretion lawfully in applying Proviso to Section 23(4) to

reject the assessee's renewal application u/s 26-A is legal ?

2. We heard the Reference before and called for a further statement of the case from the Tribunal by our order dated 5th November, 1962. The

Tribunal has submitted the statement called for, and the matter has now been placed before us for disposal. Learned Counsel on both sides, the

Department as well as the assessee, have addressed arguments in the light of the subsequent statement of the Tribunal. The facts leading up to the

Reference have been fully set out in our prior order and need not be repeated.

3. The question raised is whether the Tribunal acted rightly in conformity with law in refusing registration to the assessee firm. The Income Tax

Officer refused registration because the assessees were in default in complying with the terms of the notice u/s 22(4) calling for documents and

account books relating to the assessee's business. Taking the view that the assessee failed to comply with the statutory notice u/s 22(4) the Income

Tax Officer passed a "" best judgment"" assessment permissible u/s 23(4). On this followed the order of the Income Tax Officer refusing registration

applied for by the assessee. The Appellate Assistant Commissioner, before whom the assessee complained that the case was not one for a best

judgment assessment and that in any event registration ought not to have been refused, agreed with the assessee and held that really the

assessment of the Officer was one u/s 23(3) and that therefore there was no scope for refusing registration which would be permissible only if

Section 23(4) were to apply. The Appellate Assistant Commissioner went further and held that the estimated income of Rs. 1,50,000 made by the

Officer was not warranted. He reduced the estimate to Rs. 75,000. He also directed registration of the firm. On appeal by the Department the

Tribunal restored the order of the Income Tax Officer fully. In other words, the Tribunal held that the Officer's estimate of the income was correct

and that his refusal to register was also proper.

4. The assessment of the income of the assessee as Rs. 1,50,000 by the Income Tax Officer, which has now been confirmed by the Tribunal, has

become final and we are not called upon to say whether the Tribunal was right in interfering with the estimate of the Appellate Assistant

Commissioner. It is no doubt implicit in the Order of the Tribunal confirming the assessment made by the Income Tax Officer u/s 23(4) of the Act

that there has been a default on the part of the assessee in the matter of complying with the terms of the notice u/s 22(4). But now the question is

whether the Tribunal was right in upholding the order of the Income Tax Officer refusing registration.

5. Learned Counsel for the Department contends that it is not open to the assessee to submit at this stage before us that there has been no default

on their part in complying with Section 22(4) notice as that question must be deemed to have been set at rest by the very act of the assessee in

allowing the Tribunal's order regarding the quantum of assessment to stand. The argument is that there cannot be two conflicting views on the same

facts; (1) that the assessee was in default and that therefore they were assessed properly on the best judgment basis and (2) that the assessee

were not in default and that therefore refusal of registration of the firm would not be proper. Whatever may be the position when the Tribunal

considers the propriety of the best judgment assessment along with the question of the propriety of refusal to register in which case we have no

doubt that the Tribunal would be inclined to take only one consistent view in the matter we do not think that we should in any way be precluded

from considering the question whether there was in fact a default on the part of the assessee to attract the penalty of non-registration quite

independent of the implications that may be attributed to the best judgment assessment. The assessee has a right under the Act to claim the benefit

of registration Under certain conditions laid down by the Act. If those conditions are present he would be entitled to registration. That right should

not be taken away merely because he suffers an assessment on the best judgment basis u/s 23(4) of the Act. The assessee does not forfeit the right

of registration quite automatically as a consequence of such defaults which throw the doors open to an estimate assessment. In fact the power of

the Income Tax Officer to refuse registration consequent upon the default of the assessee in the matter of non-production of documents called for

or non-furnishing of the necessary materials for the assessment is contained in Section 23(4). That Sub-section reads:

If any person fails to make the return required by any notice given under Sub-section (2) of Section 22 and has not made a return or a revised

return under Sub-section (3) of the same section, 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 and determine the sum payable by the assessee on the basis of such assessment and in the case of

a firm, may refuse to register it or may cancel its registration if it is already registered.

6. It is clear that failure to make a return or a revised return, or failure to comply with all the terms of the notice u/s 22(4) would necessarily attract

the Income Tax Officer's jurisdiction to make an assessment to the best of his judgment. It might be said that defaulting assessee is visited with

the penalty of a best judgment assessment. But such a penalty only flows from the conduct of the assessee himself. In the face of a contumacious

default on the part of the assessee the Income Tax Officer vested with the statutory duty of making assessment has no alternative but to proceed to

determine the assessment in as good a manner as possible, indulging of course in some guess work within the limits of honesty. Refusal to register, however, does not appear to be an inevitable statutory consequence resulting from the defaults enumerated in Section 23(4). The use of the words "may refuse" in Section 23(4) would rather indicate that the Income Tax Officer has a discretion not to refuse registration or cancel registration even in spite of the default of the assessee. Significantly, the statute used the words "shall make the assessment to the best of his judgment" in the first part of the section. If the words "shall" and "may" are found in two different limbs of the same section, there cannot be a better legislative pointer to indicate that the first is obligatory and the second is discretionary. We have no doubt that the statute does not compel the Officer to deprive the assessee of the benefit of registration under the last part of Section 23(4). In other words, it would be wrong to assume that the defaults listed in Section 23(4) of the Act would lead to a two-fold penal consequence : (1) a best judgment assessment, and, (2) in the case of firms refusal to register or cancellation of the existing registration if any. It is therefore incumbent upon the Income Tax Officer to consider the question of registration on the materials available before him instead of refusing registration on the ground that a different conclusion would be illogical or not self-consistent. What consideration should weigh with the Officer in the matter of his decision regarding registration cannot of course be laid down exhaustively or comprehensively. Suffice it to say that the matter is purely one of discretion to be exercised by the Officer and therefore he should exercise it not arbitrarily or capriciously but in a manner consistent with judicial standards. This, in our opinion is the true scope of Section 23(4) of the Act.

7. We cannot help observing that in the instant case neither the Income Tax Officer nor the Appellate Tribunal seem to have had a correct perspective of the question.

8. We shall now consider the question as to whether in fact the assessee was in default in the matter of compliance with the notice u/s 22(4) of the Act. It is not disputed by the Department that all the account books called for by the Officer were produced by the assessee. The Tribunal seems to think that the assessee was called upon to produce their rough day

books but that they defaulted to do so. The Tribunal observes in its further statement as follows:

Though in the notice u/s 22(4) there is no specific reference to the rough day book the letter of the Income Tax Officer dated 14th November, 1951, clarified the requirement. A rough day book is one maintained in the regular course of business and the above mentioned letter called upon the assessee to produce genuine books of account maintained in the regular course of business. In our opinion the assessee failed to produce these books.

9. The Tribunal is in error in stating that the letter of the Officer dated 14th November, 1951, called upon the assessees to produce the rough day books. There was no such direction in that letter. The learned Counsel for the Department is unable to sustain the view of the Tribunal that rough day books were called for but not produced by the assessees. It is however contended on behalf of the Department that the assessees who were called upon to produce the stock book produced a spurious stock book withholding the correct stock book which the assessees must be presumed to have been maintaining. This inference is arrived at by a comparison of the stock book produced and the admitted sales book of the assessees.

10. It is true that there is a lot of discrepancy between the stock position as disclosed in the assessees' stock book and the sales accounts now produced by them. It may be that even the assessees' explanation for the discrepancies pointed out was not quite convincing. But the real question is whether it can be said that the assessees must have been maintaining another set of account books and that they committed default in not producing them in complying with the notice u/s 22(4) of the Act. The assessee cannot escape the consequence of non-production of books called for by merely pretending that he has no books. If the evidence would justify the inference in any given case that the assessee must have been maintaining account books it would be open to the officer to treat him as defaulter if the books are not produced. But if there are no materials from which the officer could reasonably infer that undisclosed account books exist the non-production of such imaginary books would not of course be a default as contemplated u/s 23(4) of the Act. There can be no presumption

that the assessee is suppressing books and documents called for but not produced. Mere non-production, with-out the existence of the things not produced, would not fall within the mischief of Section 23(4). In our opinion there are no materials in the present case to warrant the inference that the assessees were maintaining or had in their custody account books which they failed to produce before the Income Tax Officer when called upon to do so. The account books specified to be produced were in fact made available by the assessees and it would be a mere guess unsupported by any evidence to say that there must have been other books which the assessees deliberately refrained from producing. In our opinion the Tribunal was not right in holding that there has been a suppression of accounts on the part of the assessees so as to justify the penalty of non-registration as contemplated u/s 23(4). We have already pointed out that even if the assessees were to be treated as defaulters so as to attract assessment on the best judgment basis, it would yet be a matter of discretion for the Officer either to grant or refuse registration. This aspect of the matter was not considered at all either by the Officer or by the Tribunal.

11. For the reasons stated above we are of opinion that the question must be answered in favour of the assessees. We, however, make no order as to costs.