
(1931) 06 PAT CK 0009
In the Patna High Court

(Kunwarji) Ananda

APPELLANT

Vs

Commissioner of Income tax

RESPONDENT

Date of Decision : 26-06-1931

Acts Referred:

Income Tax Act, 1961 — Section 22, 22(4), 27

Citation : AIR 1931 Patna 306

Hon'ble Judges : Courtney-Terrell, C.J;Wort, J;Kulwant Sahay, J;Fazl Ali, J;Dhavle, J

Bench : Full Bench

Judgement

Courtney-Terrell, C.J.—This is a case stated by the Commissioner of Income Tax at the direction of the Court on the application of the assessee. The material facts which have given rise to the case may be shortly set forth. The assessee is a resident of Cutch and he carries oat engineering work for the Feudatory States of Orissa. The circumstances in which this work is carried on need not be mentioned in detail. It is sufficient to note that the assessee contends that the contracts are made and the work is paid for in circumstances, as found by the Income Tax Officer and the Assistant Commissioner, such that the income in respect of his business cannot be deemed in law to have been received in British India and so is not liable to taxation under the Income Tax Act.

2. The assessee received a notice from the Income Tax Officer u/s 22(2) requiring him to make a return in the prescribed form and verified in the prescribed manner setting forth his total income during the previous year, that is for 1926-27. He wrote a letter to the Income Tax Officer in the following terms:

Sir,

I have already intimated to you that I do not reside at Sambalpur, i.e., in British India and all my business is done in the Native States and no part of my income, gain or profit accrues or arises in British India. The provisions of the Indian Income Tax Act do not apply to my income.

I would submit my proof, in support of my statement herein above made as soon as I come down to Sambalpur in the course of a month.

Yours faithfully,

(Sd.) Kunwarji Ananda,

Contractor, 10-10-1927.

3. He did not fill up the form provided by the Act nor did he verify such form in the prescribed manner. An attempt was made to argue that the letter written by the assessee was a fulfillment of the requirement to make a return but this contention cannot seriously be relied upon and it must be taken that he failed to make a return. The Income Tax Officer also served a notice upon him u/s 22(4) requiring him to produce certain accounts. He failed also to comply with this notice. Thereupon the Income Tax Officer u/s 23(4) made a summary assessment to the best of his judgment.

4. The assessee thereupon went on appeal to the Assistant Commissioner who decided that as the assessee had not filed a return of his income and had not in a petition lodged by him u/s 27 given good and sufficient reasons for not filing such return, the Income Tax Officer was justified in making his assessment u/s 23(4) of the Act and in rejecting the petition filed u/s 27. The Assistant Commissioner in his decision went further than the circumstances required and dealt with the contention of the assessee that the income in respect of which he was assessed accrued and was received outside British India, and purported to decide that the view of the Income Tax Officer was right and that the income in question was assessable under the Income Tax Act.

5. The assessee then went to the Commissioner, u/s 33 for relief under the Commissioner's discretionary powers, and also u/s 66(2), requesting him to refer to the High Court the question of law which he said arose under the Assistant Commissioner's order, namely, as to whether on the Assistant Commissioner's findings of fact the income could be deemed in law to have been received in British India. The Commissioner refused to state a case holding that the assessment had been rightly made u/s 23(4) and that the Assistant Commissioner ought to have dealt with this latter point only and ought to have rejected the appeal in limine.

6. The assessee then came to the High Court, the application being heard by two learned Judges who directed the Commissioner to state a case upon the following two points:

(1) Whether a person who has been assessed u/s 23(4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act, or whether the proviso to Section 30, Clause (1), is a bar to the appeal; and

(2) Whether on the facts of the present case the assessee is liable to be assessed

under the Act.

7. The Commissioner has accordingly stated a case and it was heard in the first instance by Dhavle, J., and myself and we thought it desirable that the matter should be reheard by a Full Bench.

8. The assessee contends that he is only obliged by Section 22(2) of the Act to furnish a return of his "total income." He refers to the definition of "total income" contained in Section 2(15) which is as follows:

Total income" means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in Section 16.

9. The assessee's contention is that he is bound to furnish a return only of such income as is liable to assessment under the Act and therefore if he has no such income he need make no return and no part of the Act including Section 23(4) and Section 30(1) is applicable to him or to such income. Section 30(1) of the Act which is, in my opinion, conclusive against this contention, is as follows:

Any assessee objecting to the amount or rate at which he is assessed u/s 23 or Section 27 or denying his liability to be assessed under this Act, or objecting to a refusal of an Income Tax Officer to make a fresh assessment u/s 27, or to any order against him under Sub-section (2), Section 25 or Section 25-A or Section 28, made by an Income Tax Officer, may appeal to the Assistant Commissioner against the assessment or against such refusal or order:

Provided that no appeal shall lie in respect of an assessment made under Sub-section (4), Section 23 or under that Sub-section read with Section 27.

10. It was admitted on behalf of the assessee by Mr. Mohan Lal that if the assessee by his neglect to make a return or to fulfil the obligation of furnishing accounts or evidence u/s 23 incurs the liability to a summary assessment he cannot question the amount or rate of the assessment; but he contends that he is entitled to have the opinion of the Court upon the question of whether or not, upon the facts found, he has incurred such liability. With this contention I will deal later, but Mr. Manohar Lal further argues that since the income in respect of which the assessment is made is, according to his contention, not liable to any taxation under the Act he is entitled to come to us to have it decided as a point of law whether Section 30(1) including the proviso has any application to him or to his income. He agrees that should the decision be against him on this point, then the amount or rate of the assessment so summarily made cannot be questioned.

11. Section 30(1) gives a right of appeal to the Assistant Commissioner against the decision of the Income Tax Officer whether upon the question of the amount or rate of the assessment or upon the question of liability to assessment under the Act, and it is clear that the assessment may be questioned on either of these grounds. But the effect of the proviso is in my opinion to take away this right of appeal whether as to the amount or rate of assessment or whether as to the

question of liability to assessment in any case in which the assessment is made under Sub-section (4), Section 23. Now Sub-section (4), Section 23 expressly states that the Income Tax Officer may make a summary assessment if the assessee fails to make a return under Sub-section (2), Section 22 (as he has in fact failed in this case) or fails to comply with the notice u/s 22(4) (as the assessee has in fact also failed). The assessee has therefore brought himself within the terms of the proviso to Section 30(1) and as I have said no appeal lies in respect of an assessment whether as to the amount or rate or whether as to the question of liability to taxation. This view of the matter is not unreasonable. It must be remembered that the scheme of the Act provides that if the Income Tax Officer forms the opinion that any person has an income taxable under the Act he may serve upon him a notice requiring a return. It is open to that person to make a return in the prescribed manner and accompanied by the required verification and to state, if such be the fact that he has no income to which the Act applies. If made in the required form, and verified in the required form this is a good and sufficient return. The Income Tax Officer may however demand to see any books of account specified by him, whether or not these books of account do or do not, in the opinion of the assessee, refer to the assessee's taxable income. Indeed if the assessee truly says he has no taxable income it will follow that such books as he may keep cannot have any reference to a taxable income. Nevertheless, the Income Tax Officer is, u/s 22(4) entitled to see the books specified by him in the notice. Furthermore, if required by the Income Tax officer, under S., 23(2) to do so, the assessee must attend at the office and produce any evidence upon which he may rely in support of the return made by him. Failure to make a return in the prescribed form or failure to comply with the notice to produce books of account as specified by the Income Tax Officer or to produce evidence relied upon by the assessee is punished by the exposure of the assessee to summary assessment without right of appeal.

12. The assessee in this case has failed to make a return and being deprived of his right of appeal to the Assistant Commissioner he cannot question the summary assessment either on the ground of error in the amount or rate or on the question of liability.

13. But a further question of some importance has been fully argued and with it I propose to deal although it does not directly arise having regard to the view I take of the construction of Section 30(1). It is contended on behalf of the department that, if on appeal to the Assistant Commissioner, it is found that the order of the Income Tax Officer states that the assessment has been made u/s 23(4), the Assistant Commissioner is bound forthwith and without going further into the matter to reject the appeal in limine. It is contended, on the other hand, by the assessee, that the Assistant Commissioner may examine the matter to see whether or not in fact the assessee has failed to make a return or failed to comply with the notice so as to render him liable to summary assessment. It is conceded by the assessee that if the Assistant Commissioner finds that the assessee is in default in these matters and has therefore incurred the

punishment contemplated by the proviso to Section 30(1), he must dismiss the appeal without inquiry as to the amount or rate assessed or the liability to assessment. It is contended on behalf of the assessee that a decision of the Assistant Commissioner on this preliminary point of fact is an appellate order u/s 31 and therefore u/s 66(2) the commissioner is bound on the requirement of the assessee to refer to the High Court the question of law whether on the statement of facts by the Assistant Commissioner the assessee has or has not incurred the penalties set forth in the proviso to Section 30(1). It is true that the assessee has attempted to strain this argument beyond its legitimate scope: he has contended that he has made no default in making any return because there was no obligation upon him to make a return save in respect of income to which he was liable to assessment. With that argument I have already dealt, holding that the question of liability to assessment is barred to the assessee, but having regard to the contention of the Crown, it is nevertheless most important to see whether or not an assessee is entitled to come to this Court upon the limited question as to whether he has so conducted himself as to render him liable in law to the penalty imposed by the proviso to Section 30(1).

14. The argument for the department amounts to saying that the question of whether or not the conduct of the assessee (as found in fact by the Income Tax Officer or the Assistant Commissioner) is such conduct as will render the assessee liable to the penalty set forth in the proviso to Section 30(1), can never in any circumstances be brought before the Court, save perhaps by the doubtful process of an independent suit by the assessee. Whatever the technical legal considerations the general duty of the Court to stand between the subject and the Crown in the matter of illegal taxation forces me to regard this contention as very unattractive, and it is, in my opinion, unsound. It is undoubtedly the duty of the Assistant Commissioner when the order of the Income Tax Officer comes before him on appeal to decide whether or not he is precluded by the Act from going into the amount or rate of the assessment or the liability of the assessee, and if he is so precluded he must reject the appeal. In so rejecting the appeal he is, in my opinion, u/s 31 "disposing of an appeal" and such disposal is "a proceeding in connexion with an assessment under this Act." It is the duty of the Assistant Commissioner, if he disposes of an appeal in this manner, to refrain from going into the irrelevant question of the amount or rate of the assessment or the liability of the assessee but a question of law may certainly arise in connexion with such disposal of an appeal which will be limited to the point as to whether, on the facts found by the Assistant Commissioner the conduct of the assessee amounted in law to a refusal to perform the obligations upon him imposed by the Act. This view of the matter was indicated in the judgment of the learned Chief Justice of Lahore in the case of Duni Chand v. The Commissioner of Income Tax AIR 1929 Lah. 593. In that case it was decided that an assessee who has been summarily assessed u/s 23(4) is prevented by reason of the proviso to Section 30(1) from appealing to the Assistant Commissioner on the ground that he was not liable to assessment under the Act, and in this matter I respectfully

agree with the judgment of the Punjab High Court. The learned Chief Justice said:

The law punishes a person who does not comply with a requisition of the Income Tax Officer by depriving him of his right of appeal. But the appellate authority must, before denying him the right of appeal, be satisfied that he had really incurred the penalty prescribed by the law, and that the Income Tax Officer had acted legally in assessing him u/s 23(4) of the Act. The mere fact that the assessment purports to have been made under that Sub-section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that Sub-section. When the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely, under that Sub-section, he must stay his hand and decline to adjudicate upon the merits of the appeal on the short ground that the proviso to Section 30(1) bars an appeal in such a case.

15. With this view also I respectfully agree. If the Income Tax Officer wishes to justify his summary assessment u/s 23(4) he must set forth the facts which in his opinion entitle him to make such summary assessment. The assessee is entitled to go to the Assistant Commissioner and if the Assistant Commissioner finds that the facts so found are established and that as established they amount in law to a default by the assessee justifying the application of the proviso he should refuse to go into the merits of the assessment. But his decision on this point and his rejection of the appeal are proceeding in connexion with an assessment and it is the duty of the Commissioner, if required by the assessee, to state a case raising the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the assessee within the ambit of the proviso to Section 30(1).

16. To answer now the questions submitted to us I would reply that a person who has been assessed u/s 23(4) is not entitled to prefer an appeal to the Assistant Commissioner on the ground of liability to assessment and that upon this point the proviso to Section 30(1) is a bar to the appeal. The second question whether on the facts of the present case the assessee is liable to be assessed under the Act really raises the question of the liability to assessment and in this matter as I have said the contentions of the assessee cannot be heard and should not have been heard by the Assistant Commissioner. If the assessee should on a future occasion desire to raise this matter he must first so conduct himself in making his return and in subsequent proceedings that he does not as he has in this case, shut out such matters from consideration. It will then be time to examine into the merits of the question.

17. The assessee has failed in his contentions and has failed through his own obstinate refusal to follow the requirements of the Act. He must pay to the department 20 gold mohurs by way of the costs of this reference.

Wort, J.

18. This is a case stated by the Commissioner of Income Tax under the direction

of this Court, The questions which were stated by the Judges arose were:

(1) Whether a person who has been assessed u/s 23(4), is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act, or whether the proviso to Section 30, Clause (1) is a bar to the appeal; and

(2) Whether on the facts of the present case the assessee is liable to be assessed under the Act.

19. According to the case stated by the Commissioner, Kunwarji Ananda, who is the assessee, is a contractor whose business is to execute building contracts in certain of the Orissa Feudatory States. His home is in Cutch outside British India. There were contracts which were entered into with an Agency Engineer of the Orissa Feudatory States whose office is in British India at Sambalpur.

20. The year of assessment in dispute is 1927-1928 and for that year the Income Tax Officer of Singhbhum-Sambalpur served upon him a notice u/s 22, Income Tax Act to make a return of his income of the previous year. He returned the form blank with a covering letter or petition stating that he was under no liability to be assessed under the Income Tax Act.

21. There was certain correspondence and the assessee continued to deny his liability. Thereupon the Income Tax Officer issued a notice u/s 22, Sub-section (4) calling upon him to furnish accounts of his business and of his investments. The assessee appears to have replied by a petition repeating the statement that he was not liable to assessment as his business was outside British India and that no income accrued to him in British India undertaking at the same time to furnish proof on his next visit to Sambalpur. This was by a letter dated 10th October 1927. The assessee subsequently appeared before the Income Tax Officer, but produced neither proof of his contentions, nor any books of account. Having therefore failed to comply with the demand to make a return and with the notice u/s 22, sub Section (4), the Income Tax Officer proceeded to assess him to the best of his judgment u/s 23(4). From information which he received the Income Tax Officer found that the assessee had house property at Sambalpur and that the profits of his contract business accrued and were invested in British India.

22. According to the case stated by the Commissioner the fact that the profits were invested in British India was proved to his satisfaction from books of account of two assesseees who had been assessed by the officer.

23. As a result of this assessment there was an appeal by the assessee to the Assistant Commissioner and at the same time there was a petition u/s 27 of the Act to the Income Tax Officer. This petition was rejected and there was no appeal against this decision.

24. The appeal before the Assistant Commissioner then came on for hearing. He decided that the assessee had been properly assessed u/s 23, Sub-section (4).

He went into the merits of the case and came to the conclusion that he was properly assessed otherwise, that is to say, that apart from any summary assessment u/s 23(4) the facts before the Assistant Commissioner were such as to show the assessee as being liable. The finding that he had been correctly and summarily assessed came at the end of the order of the Assistant Commissioner dated 5th May 1928, and he also found that the Income Tax Officer was right in rejecting the petition to reopen the assessment u/s 27. There was an application then to the Commissioner in revision. The application in revision was accompanied by an application to state a case to the High Court u/s 66, Sub-section (2). The Commissioner decided that he had been properly assessed u/s 23(4), but for the purposes of the application in revision he examined the assessee's contention as to the merits and decided against him. In the course of his order he came to the conclusion that the Assistant Commissioner should have rejected the appeal "in limine" instead of going into the merits, as under the proviso to Sub-section (1), Section 30, no appeal lay in the case of a "summary" assessment u/s 23(4).

25. The first point which is made is by way of a preliminary objection on the part of the Crown. It is argued that this Court has no jurisdiction to entertain the case stated and that we must dismiss it forthwith. It is argued that as there is no appeal in the case of a "summary" assessment by reason of the proviso to Sub-section (1), Section 30 the order of the Assistant Commissioner was not an order u/s 31; that it is only in the case of an order u/s 31 that the assessee is entitled to call upon the Commissioner to state a case to the High Court: see Section 66, sub-S; (2); and that only when there has been an order u/s 31 has the High Court jurisdiction to call upon the Commissioner to state a case upon his refusal to do so. I cannot accept this argument in its entirety as I am not prepared to hold that under Sub-section (3), Section 66, the jurisdiction of the High Court is in any way limited: that is to say if the High Court is of the opinion that a point of law arises, the High Court may call upon the Commissioner to state a case thereon. Whether the High Court ought or ought not to use its discretion in favour of the assessee in any particular set of circumstances is another matter. Further the very argument of the assessee which is indicated by the first question which my learned brothers Das and James, JJ., decided is the point of law which on one view of the facts is stated to have arisen in this case, and if indeed such a question does arise it cannot be argued that the jurisdiction of the High Court is limited in ordering the Commissioner to state a case thereon.

26. It would appear that the argument of the Crown amounts to this: that as the first question which is stated to have arisen in this case must be answered in favour of the Crown, therefore the High Court has no jurisdiction to order the Commissioner to state a case. If indeed in the result it be found that no question of law contemplated by Section 66, arises, but only a question of jurisdiction, the case, in my opinion, would have to be answered in favour of the Crown and to that extent the substance of the preliminary objection would have to be upheld and to that extent only could the preliminary objection succeed. But as a mere

preliminary objection to this Court's going into the matter in any degree I think it must fail.

27. The first argument of Mr. Manohar Lal on behalf of the assessee is correctly represented by the first question. In the course of the argument he agreed to this statement of the proposition. He says that "the jurisdiction to impose a "summary" assessment depends not only upon the fact that a return has been made or not made as the case may be and the order u/s 22(4) has not been complied with but upon the assessee's liability in fact and in law to be "otherwise assessed."

28. He contends that on the facts that have been stated by the Commissioner the only inference which can be drawn is that the assessee has no income which is liable to assessment under the Act.

29. That being so, no summary assessment could be made although he was in default both under Sub-section 2, Section 22 and Sub-section (4) of the same section.

30. Now it is necessary to examine the sections in order to ascertain what gives rise to what has been described as a "summary" assessment. Sub-section (2), Section 22, is the first section in this connexion. Under that Sub-section the Income Tax Officer who is of the opinion that the total income of any person is of such an amount (Rs. 2,000 under the Act) as to render him liable to Income Tax must serve on that person a notice requiring him to furnish within such period a return in the prescribed form. The method of his arriving at a conclusion that his income is above a certain amount can be imagined. In most cases it is arrived at from the fact that the person upon whom the form is served is living in such a style that the inference to be drawn is that his income is in excess of that amount and that the person is within the jurisdiction of the Income Tax Officer is necessarily a condition precedent. In this case if it was necessary for the Income Tax Officer to have prima facie evidence, that would be found in the fact which has been stated in this case that the assessee resided from time to time in a house which was the property of the joint family of which he was a member. But I see nothing in the section which would disclose an obligation on the Income Tax Officer to establish this fact before serving a notice under the Sub-section. That there is no method provided under the Act enabling the assessee to question the actions of the Income Tax Officer is clear.

31. The next section is Sub-section (4), Section 23, which provides that if any other person fails to make a return under Sub-section (2), Section 22, and fails to comply with the terms of the notice under Sub-section (4) the income tax-Officer shall make the assessment to the best of his judgment.

32. The assessee after such an assessment has a certain remedy with regard to this u/s 27, that is to say, he can show that he was prevented from making a return by sufficient cause or that he did not receive the notice under Sub-section (4), the Income Tax Officer shall cancel the assessment and will proceed to make

a fresh assessment under the main provisions of Section 23. Indeed Section 23(4) appears to provide a penalty for not complying with the provisions of the Act and the orders of the Income Tax Officer thereunder. It is not seriously disputed that the assessee has made himself liable to a "summary" assessment.

33. I think that it must be conceded that the Income Tax Officer would not be entitled to assess a person whom he knew not to be assessable, as not having an assessable income. He is to assess "summarily" to the best of his judgment. That of course is not arbitrarily or illegally. This is however a question of jurisdiction and whether this Court is entitled to interfere by directing a case to be stated depends it would appear upon the provisions relating to appeals.

34. The legislature had placed in the hands of the Income Tax Officer the jurisdiction to form an opinion as to whether a person is a person assessable u/s 22. It is not disputed that so far the decision of the Income Tax Officer is final. That he has an uncontrolled discretion to issue a notice u/s 22(4) is not disputed. At what stage then does the control of the Courts arise? To this the obvious answer is at the stage when an appeal is preferred to the Assistant Commissioner. Before that stage can be reached there is an assessment.

35. It is not argued seriously that the appellate officers or the High Court can control the action of the Income Tax Officer in assessing a person u/s 23(4). It is at this stage that the learned advocate is driven back to the argument that the proviso to Section 30, Sub-section (1), means that there is an appeal in the case of an assessment u/s 23(4) in spite of the clear words of the statute.

36. The assessee's main contention is that in spite of the proviso to Sub-section (1), Section 30, he has an appeal to the Assistant Commissioner. The argument is based on the interpretation which he desires this Court; to place upon the word "assessment" in the proviso to Sub-section (1), Section 30.

37. The Sub-section itself reads:

Any assessee objecting to the amount or rate at which he is assessed u/s 23 or Section 27, or denying his liability to be assessed under this Act may appeal.

38. Two matters are referred to there, the first is the rate at which the assessee is assessed, and the second is his liability in law to be assessed the argument is that when you come to the proviso to the Sub-section the word "assessment" only is used, and it is contended that what is meant by the use of the word is merely assessment as regards the amount and that the proviso does not prohibit the assessee in the case of a "summary" assessment from appealing as regards his liability; that is to say, although he cannot question the amount before the Assistant Commissioner he may question his liability in law to be assessed. When the Income Tax officer or the Assistant Commissioner, is dealing with an assessment under the Income Tax Act he has to apply his mind to two main questions: the first is whether the assessee has any taxable income (this involves both questions of fact and law); the next matter he has to address

himself to, when, having satisfied himself that there is an income which under the law is liable to assessment, is what is the proper rate at which he should be assessed and it does not seem to me that it is possible to read the expression "assessment" in the proviso otherwise than in the sense which I have indicated in the foregoing statement. That is to say, in exercising his best judgment u/s 23(4) the Income Tax officer exercises it both as regards liability and as regards the amount. It cannot be assumed that the Income Tax officer has acted arbitrarily or that it could be said that he was assessing the assessee to the best of his judgment if he deliberately assessed a person whom he knew to be not liable to assessment in law. In my judgment the word "assessment" in the proviso is used in the wider sense.

39. So far as the assessments of a person assessed after making a return and complying with such notices that are directed to him, and an assessment made u/s 23(4) are concerned they differ in this respect only, that in the latter case the decision of the Income Tax Officer is final (apart from the revisional powers of the Commissioner and the jurisdiction u/s 27), whereas the assessment in the former case is open to appeal.

40. It will be seen that in order to argue that the assessee can question the "summary" assessment on the ground that he has no income liable in law to be taxed, or that this Court is entitled to say that on the facts disclosed there is no taxable income, the assessee must rely almost entirely upon this argument as to his right to appeal to the Assistant Commissioner on a question of law. In my judgment there is nothing in the Act which gives him this right.

41. But there is another branch of the argument and that is that the Assistant Commissioner has made an order in this case u/s 31, and therefore he is entitled to have the matter determined on a case stated. It will be seen that throughout the arguments which are advanced by the assessee that the gravamen of his contentions is that this Court is bound to express its view on the question whether the true inference from the facts is that the assessee's income is an assessable one. It is true that the Assistant Commissioner has stated his view of the facts and the law but he has also stated that there is no appeal in a case of this kind. If the proviso to Sub-section (1), Section 30, is to be construed in the way I have stated, then there was no such appeal, and the Commissioner was right in saying that the merits should not have been discussed. Does the fact that the Assistant Commissioner has discussed the merits give the assessee rights which he would not otherwise have had? I do not think that can be so. If the assessee had no appeal there could be no order u/s 31 excepting an order stating that no appeal lay. It is not such an order which is contemplated by Section 66, and if it is not, the Commissioner cannot be called upon to state a case as no question of law arises.

42. For these reasons I would answer the first question in the negative, or if put in its alternative form in the affirmative.

43. The further argument addressed to us on this point is this. It is said that this Court is not disposing of an ordinary action, that we are not entitled to say that the decision of a part of the case disposes of the whole and reliance is placed in this connexion on Section 66, Sub-section (5) which provides:

The High Court upon the hearing of any such case shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded.

44. It is argued that the expression "the question of law raised thereby" means such questions as this Court was of the opinion arose when the application was made by the assessee to order the Commissioner to state a case. I do not agree with that contention. Under the section [Sub-section (2), Section 66] the Commissioner shall within 60 days of the receipt of such application draw up a statement of the case and refer it with his own opinion thereon to the High Court. That of course is the provision relating to a Commissioner stating a case on the application of the assessee; but, in my judgment, the case stated by the order of the Court under Sub-section (4) is no different in form than that stated under Sub-section (2); in other words the jurisdiction of the Commissioner is to state the whole facts of the case and his opinion thereon. Although this Court was of the opinion that two questions arose the hands of the Court are not tied when it comes to hear the case argued as to what are the questions which in fact arose. Further I would hold that, even assuming we are bound by the questions which are said to arise at the time of the application to order the Commissioner to state a case, if indeed the answer to one disposes of the whole case, we have no jurisdiction to proceed to decide the other questions which in such circumstances can only be of an academic value. In this case the assessee was rightly assessed u/s 23(4). That assessment depends upon the fact that a notice has been served upon the assessee requiring him to make a return. His failure to do so and his failure to comply with the notice u/s 22(4) does not depend upon his being otherwise liable to be taxed.

45. The further argument on this first point to which I should have referred was that a "summary" assessment cannot be made unless there is a noncompliance with the notice u/s 22(4) and the noncompliance with a notice u/s 23(2). This argument obviously fails by reasons of the fact that three classes of cases are provided for in Section 23(4): one is the failure to make a return or fails to comply with the notice under Sub-section (4), Section 22, or having made a return fails to comply with the notice u/s 23(2); and it cannot be said that there must be a failure in each of those cases before the jurisdiction arises in the Income Tax Officer to summarily assess the assessee. In my judgment the assessee was properly assessed and the first question therefore should be answered in favour of the Crown, the second question not arising.

Kulwant Sahay, J.

46. I agree with my Lord the Chief Justice in the answer he proposes to give to

the first question formulated by the Division Bench of this Court in the order requiring the Commissioner to state a case u/s 66. The proviso to Sub-section (1) Section 30, bars an appeal in respect of an assessment made under Sub-section (4), Section 23, or under that section read with Section 27. This bar applies to an appeal not only as regards the amount or rate at which the assessment has been made, but also as regards the liability of the assessee to be assessed under the Act. It has been contended on behalf of the Crown that when an appeal is barred an order of the Assistant Commissioner dismissing the appeal on the ground of its being barred under the proviso to Section 30(1) is not an order passed u/s 31 within the meaning of Section 66(2), Income Tax Act. This contention I am unable to accept. An order holding that no appeal lies is an order disposing of an appeal within the meaning of Section 31 and the question of law which can be referred to the High Court u/s 66 against such an order is, whether upon the facts found the assessment was properly made u/s 23(4). In my opinion that is the point of law which can be referred to the High Court u/s 66 and the reference should be confined only to that point and to no other point. I am unable to accept the contention of Mr. Manohar Lal that when a reference to the High Court properly lies u/s 66, then the question as to whether the assessee was liable to assessment under the Act can also be raised before the High Court. In my opinion this question cannot be raised inasmuch as an appeal on this point did not lie before the Assistant Commissioner under the proviso to Section 30(1). In this view of the case the second question referred to us does not arise and I refrain from giving any opinion on that question.

Fazl Ali, J.

47. Besides the two questions which are set out in the order of this Court dated 18th November 1929, requiring the Commissioner of Income Tax to state a case, there arises a third question in this case, namely, whether the High Court has jurisdiction to act u/s 66 where no appeal lies under the Income Tax Act at all against the assessment made by the Income Tax Officer. The learned Assistant Government Advocate who appears for the Crown, relies on Section 66, Sub-section (2) which lays down that an assessee in respect of whom an order u/s 31 or Section 32 has been passed, may within a certain period of the date on which he is served with the notice of an order u/s 31 or Section 32, move the Assistant Commissioner to refer any question of law arising out of such an order or decision to the High Court.

48. It is argued that the language of this Sub-section clearly indicates that the assessee cannot move the commissioner in those cases where no appeal lies and where therefore no order u/s 31 or Section 32 can be passed. There is no doubt that a good deal can be said in support of this view, but on the whole it appears to me that it is based on a somewhat narrow construction of Section 66(2) and may in some cases at least defeat the very object for which the section has been enacted. All that the Sub-section requires is that there should be an order or a decision u/s 31 or Section 32 and the question of law which the assessee

requires the commissioner to refer to the High Court should arise out of such an order ... or decision. Now, what we find in this case is that an appeal was preferred to the Assistant Commissioner by the assessee whose contention was that although he had been summarily assessed u/s 23(4), he was not taxable under the Act at all and therefore he could not have been assessed in law u/s 23(4) or any other section of the Income Tax Act. The Assistant Commissioner did not summarily dismiss the appeal, but fixed a date and place for hearing the assessee and after dealing with the point as to whether the assessee was liable to be taxed under the Act or not, confirmed the assessment on the ground that the assessment had been rightly made u/s 23(5). The question is whether this order or decision was or was not one u/s 31.

49. The learned Assistant Government Advocate contends that once it is found that no appeal lay to the Assistant Commissioner, the order passed by that officer cannot be regarded as one passed u/s 31. Now Section 31 provides that the Assistant Commissioner may in disposing of the appeal confirm, reduce, enhance or annul the assessment or may set it aside and direct the Income Tax Officer, to make a fresh assessment after making such further inquiry as the Income Tax Officer thinks fit. In this case the Assistant Commissioner passed an order which is at least in form an order u/s 31. In passing the order the Assistant Commissioner also purported to act as the ordinary appellate authority and as far as I am aware there is no section in the Income Tax Act except Section 31 under which the order could have been passed. It appears to me therefore that the moment such an order is produced before the Commissioner of Income Tax, the assessee is entitled to ask him, if he so wishes, to refer such questions of law as arise out of it to the High Court u/s 66(2). It is to be remembered that Section 66, Sub-section (2), does not say expressly that the remedy provided by that section will not be available where the assessment is not appealable; but all that it requires is that there should be an order or decision u/s 31 or Section 32. u/s 31 the Assistant Commissioner has the power to allow the appeal as well as to reject it and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not passed u/s 31.

50. It is true that the majority of cases where an assessee has recourse to Section 66(2) are those where an appeal lies; but there may be certain cases where the assessee honestly thinks that an appeal lies and yet it is decided by the appellate authority that the appeal does not lie. I do not see why in such cases the assessee should be debarred from bringing up to the High Court at least the limited question as to whether an appeal did or did not lie in the circumstances of the case. It is true that there will not be many such cases in actual practice but the case of *Pitta Ramaswamiah Vs. Commissioner of Income Tax*, may illustrate one type of case where the question of whether an appeal lies or does not lie may be a debatable one. In that case the assessee, although he was called upon to substantiate his return, did not do so and said that the officer might assess him on such materials as he might find. The officer thereupon proceeded to estimate the income which turned out to be much larger than what

the assessee had stated and in making the assessment he used the words "to the best of my judgment" which occur in Section 23(4). A question arose as to whether it was an assessment u/s 23(4) or not but it was decided that it was really an assessment u/s 23(3) and an appeal lay to the Assistant Commissioner. Curiously enough in this case it was the assessee who contended that no appeal lay to the Assistant Commissioner, because it being a case of gross misstatement of income, the assessee had been fined and he therefore attempted to show that the proceeding before an appellate Income Tax authority was quorum non iudice. The decision nevertheless shows that there may arise in actual practice cases where it may be a debatable question whether a certain assessment has or has not been made u/s 23(4). The view that I am inclined to take is also indirectly supported by the decision of the Lahore High Court in *Duni Chand v. Commissioner of Income tax* (1). In that case there was an assessment u/s 23(4) and it was finally decided that no appeal lay to the Assistant Commissioner of Income tax. Nevertheless the matter was brought up to the High Court u/s 66 and no one raised the question that the provisions of Section 66 were not applicable because the assessment was not appealable.

51. In *Commissioner of Income Tax v. A.R.A.N. Chetiiyar Firm* AIR 1928 Rang. 108 a preliminary point was raised on behalf of the Crown that no appeal lay and so the High Court had no jurisdiction to deal with the case u/s 66, but this did not prevent the learned Judges of the Rangoon High Court from dealing with the points which arose in the reference. The learned Counsel for the petitioner also relied on a number of cases which support the principle that where an appeal is preferred to a Court which is the proper appellate authority, the order of such a Court would be regarded as the order of an appellate Court, even though no appeal in fact lay. One of such cases is *Wazir Mahton v. Lulit Singh* [1883] 9 Cal. 100 where while considering the meaning of para. 2, Article 179, Schedule 2, Act 15 of 1877, the learned Judges of the Calcutta High Court said:

Where there has been an appeal, three years are to be counted from the date of the final decree or order of the appellate Court. There is no question that in this case there was an appeal although both the appellate Courts held that no appeal would lie. The case therefore comes within these words of Article 179. namely, where there has been appeal, The next question is whether there is any decree or order of the appellate Court, There were orders no doubt of the Courts to which appeals were preferred rejecting the appeals on the ground that no appeal would lie. The words "appellate Court" in our opinion here mean the Court or Courts to which the appeals mentioned in the section have been preferred. The meaning of this clause therefore in our opinion is that where there has been an appeal, the period is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal.

52. That case it is true was decided with reference to a wholly different statute but the reasoning which was adopted there is, in my opinion, also applicable to this case and I think that where an appeal has been actually preferred to the

appellate authority, and where it has been disposed of by such authority the order passed in such a proceeding may without straining the actual words of the section be regarded as an order u/s 31 or Section 32 as the case may be. It is said that to take this view would be to invite the assessee to prefer appeals in those cases also where no appeal manifestly lies, merely as an excuse for taking the case up to the High Court. This however need not deter us from construing the section in the manner in which it ought to be construed, because even if an assessee does attempt to take the case up to the High Court on frivolous grounds, he will be generally limited only to the question as to whether an appeal does or does not lie in the case and will have always to reckon on being saddled with costs in the event of failure.

53. The next question to be determined in this reference has been formulated thus:

Whether a person who has been assessed u/s 23(4) is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act or whether the proviso to Section 30(1) is a bar to the appeal.

54. The answer to the latter part of the question was given in the affirmative by a Full Bench of the Lahore High Court composed of five Judges in *Duni Chand v. Commissioner of Income Tax* AIR 1929 Lah. 593, and fully agree with the view expressed in that case. The first part of Sub-section (1) makes it quite clear that it is open to an assessee to attack the assessment on three grounds namely, (1) as to the amount; (2) as to the ratio at which he is assessed and (3) on the ground that he is not liable to be assessed under the Income Tax Act. The proviso to Section 30(1) makes it equally clear that where an assessment has been made u/s 23(4) it cannot be attacked on any of those three grounds whatsoever. In other words, the assessee can neither impugn the correctness of the amount on which he is assessed or the rate at which he is assessed nor can he contend that he is not liable to be assessed under the Act at all. This drastic provision has apparently been made to induce the assessee to cooperate with the Income Tax authorities and to deter them from withholding such evidence as they can produce u/s 22(4) or Section 23(2). The learned Counsel for the petitioner contends that the proviso will not apply to those cases where an assessment has been merely labelled as one u/s 23(4) but where in law the assessee could not be taxed at all under that provision or any other provision of the Act, because he has no taxable income. To take this view however would be to read into the proviso words which are not there and to overlook that all that the section requires is that the assessment should in fact have been made under Sub-section (4), Section 23. It is said that to take this view would be to deprive the assessee of a valuable remedy. That may be so, but as has been pointed out by the learned Judges of the Lahore High Court, the assessee has a remedy u/s 33, Income Tax Act, and he may also possibly in certain cases be able to question the assessment by means of a suit if he succeeds in showing that the

assessment was ultra vires and could not have been made under the Act.

55. The last question is:

whether on the facts of the present case the assessee is liable to be assessed under the Act.

56. The learned Counsel for the petitioner contends that on the very facts stated in the order passed by the Assistant Commissioner on appeal as well as those set out by the Commissioner of Income Tax in his statement of the case submitted to this Court, it is clear that one of the heads of income on which the assessee has been taxed is not taxable under the Act at all. It is urged by him that the facts found by these officers should be distinguished from the conclusions of law arrived at by them or opinions expressed by them on the facts and while the former are binding upon this Court as findings of fact, the latter are not. On the other hand it is contended by the learned Assistant Government Advocate that as we are of opinion that in the present case no appeal lay against the assessment, the question as to whether on the facts of the present case the assessee is liable to be assessed under the Act is merely one of academic interest and a decision thereon is wholly unnecessary. It is urged by him that once we hold that the assessee had no right of appeal under the Act and the order rejecting his appeal is unassailable, no further question can arise for the purpose of taking action u/s 66. This argument has been urged with considerable force and the majority of my colleagues are disposed to accept it. Speaking for myself, I am in some doubt as to its soundness.

57. On the other hand, Mr. Manohar Lal who appears for the petitioner contends with some force that once it is held that the order rejecting the appeal is an order u/s 31 and it is found that the order deals not only with the question of the maintainability of the appeal but with other questions of law raised by the assessee, the High Court will have jurisdiction to decide those other questions, because they arise out of the order, even though it may take the view that the appeal was not competent. In this view it would seem that the present question, namely, whether the assessee's income under one of the heads was taxable at all cannot be shut out because it has been dealt with by the Income Tax authorities and does arise out of the order rejecting the appeal. The matter may be best put in this form. Assuming that on the facts of a particular case it is absolutely clear that an assessee was not liable to be taxed at all under the Income Tax Act and it is equally clear that the assessee has no right of appeal, because the particular assessment has been made u/s 23(4), can it be said that if the case has come up to the High Court in due course u/s 66, the High Court is debarred from saying that no assessment should have been made in the case at all, because the assessee had no taxable income under the Act? It may be assumed that the law has no sympathy with a person who has withheld material information from the Income Tax Officer by not submitting a return or not complying with the notice u/s 22(4) or Section 23(2) and hence the Act makes the drastic provision that such a person will have no right of appeal.

58. It does not however necessarily follow that he cannot get any relief whatsoever under the Act, because he may yet move the Commissioner of Income Tax to exercise the power which he has u/s 33, and if the Commissioner can relieve him u/s 33 even though his right of appeal has been taken away, it is difficult to see why, assuming that the question does arise out of the order passed u/s 31 or Section 32, the High Court cannot or should not decide the question and the Commissioner should not give relief to the assessee u/s 66(5) if the question is decided in favour of the assessee by the High Court. I think the decision in *The Commissioner of Income Tax v. A.R.A.N. Chettiyar* AIR 1928 Rang. 108 to which I have referred in another connexion, furnishes an instance where it was possible for an assessee to get relief u/s 66 even though no appeal lay. I find that that decision has been overruled by a Full Bench of the Rangoon High Court, but I must confess that this latter decision does not entirely remove my difficulty.

59. I am however as at present advised not disposed to disagree with the majority of my colleagues because I realize that there is a good deal to be said in support of the view which they are inclined to take and also because it appears to me that there are certain findings of fact against the assessee in this case which this Court cannot disregard or reopen at this stage. I would therefore agree to the order proposed by my Lord the Chief Justice that this application should be dismissed with costs.

Dhavle, J.

60. As regards the first question, learned Counsel for the assessee has endeavoured, by a close analysis of Sub-section 1, Section 30 of the Act and of the proviso to it, to show that the proviso has no application to the case of the assessee as he has no income, profits or gains coming within the Act, Section 4(1). The proviso bars an appeal "in respect of an assessment made under Sub-section 4, Section 23," while Section 30(1) gives an appeal "against the assessment;" but I cannot agree that the change from "against" to "in respect of" points to a difference, in favour of the assessee, between the scope of the main provision and that of the proviso. If an appeal is barred in respect of an assessment, it seems clear that no appeal can be maintained against that assessment. Mr. Manohar Lal has also laid stress on the fact that while the proviso speaks of an assessment made under Sub-section 4, Section 23, Section 30(1) speaks of denying liability to be "assessed under this Act." But this only shows the limited operation of the proviso; assessments may be made under other Sub-sections of Section 23 and the proviso will not bar appeals against them--a person assessed under Sub-section 1, Section 23, may, for instance, have occasion to question the rate, or a person assessed under Sub-section 3 of that section to question the amount or rate or even to deny his liability altogether, and such assessee will not be affected by the proviso. It has been contended that the assessment spoken of in the proviso must be a valid assessment, and reference has been made in support to the language of Section

57 which bars suits "to set aside or modify an assessment made under this Act" and which has been judicially held to be inapplicable to assessments that were not supportable under the Act. It seems to me however that the word "assessment" in the proviso must be construed in the same way as in the main provision, which runs:

Any assessee objecting to the amount or rate at which he was assessed u/s 23 ... or denying his liability to be assessed under this Act ... may appeal to the Assistant Commissioner against the assessment....

61. The appeal against the assessment is thus not confined to the amount of tax that the assessee may be called upon to pay, but may also be rested on the ground that the assessee is not at all liable to be taxed under the Act. If the word "assessment" is construed in the same way in the proviso, it is clear that where an assessment is made under Sub-section 4, Section 23, the assessee cannot appeal on the ground that he is not liable at all under the Act or indeed on any ground whatsoever. How do assessments under Sub-section 4, Section 23 come to be made? Under Sub-section 2, Section 22 of the Act, the Income Tax Officer shall serve a notice requiring a return of the total income upon any person (other than a company) whose "total income"--an expression defined in Section 2(15) of the Act and limited to sources to which the Act applies is in the Income tax Officer's opinion, of such an amount as to render him liable to Income Tax. If the person fails to make the return, or (as further in this case) fails to comply with the terms of a notice issued under Sub-section 4, Section 22, Sub-section 4, Section 23 provides that the Income Tax Officer shall make the assessment to the best of his judgment. The scheme of the Act further is that while any assessee denying his liability to be assessed under the Act may under Sub-section 1; Section 30, appeal against the assessment, no appeal shall lie in respect of an assessment made under Sub-section 4, Section 23. The liability to be assessed under Sub-section 4, Section 23, is only a particular instance of liability to be assessed under the Act, and it is this latter that is mentioned in Section 30(1) as one of the reasons for an appeal against an assessment. But for the proviso a person assessed under Sub-section 4, Section 23, could have appealed against the assessment on the ground that he was not liable under the Act at all, and the proviso bars an appeal by such a person on any ground whatever.

62. It seems clear from this that where the Income Tax Officer has served notices under sub-Ss. 2 and 4, Section 22, upon a person whose income was, in the Income Tax Officer's opinion, of such an amount as to render him liable to income tax, and such person has failed to comply with either of the "notices, the Income Tax Officer's jurisdiction to make an assessment under Sub-section 4, Section 23, depends not (as contended for the assessee) on the actual existence of an income taxable income of an amount above the limit of exemption, but upon an honest finding by him that the assessee has such income whether the proviso actually applies in any particular case, or whether the Income Tax Officer

has made a colourable use of Sub-section 4, Section 23 in an improper endeavour to shut out an appeal, will undoubtedly be a matter for the Assistant Commissioner to whom appeals lie under Sub-section 1, Section 30; but that is no reason for holding that notwithstanding the proviso, an assessee is entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. I therefore agree in holding on the first question that the proviso to Section 30, Clause (1) is a bar to the appeal.

63. I have already observed that it is for the Assistant Commissioner, to whom appeals lie against assessments made by the Income Tax Officer, to decide whether an appeal against an assessment which purports to be made u/s 4, Section 23, is barred by the proviso to Sub-section 1, S., 30. If the decision of the Assistant Commissioner be in favour of the assessee, there can be no question that the appeal must be heard on the merits, and that the order disposing of the appeal will be "an order u/s 31," so as to attract the operation of sub-Ss. 2 and 3, Section 66. Where however the Assistant Commissioner holds that an appeal is barred by the proviso, it has been urged by learned Counsel for the Income Tax department that there is no order passed u/s 31 and that consequently the assessee is not entitled to resort to the provisions of sub-Ss. 2 and 3, Section 66, for coming up to the High Court on questions of law. It appears to me that this contention is unsound. If the order be not an order u/s 31, there is no other section in the Act under which it can come. It is true that Section 31 deals with the hearing of the appeal, but does this necessarily mean a hearing of the appeal on the merits? A hearing on the preliminary question whether an appeal lies is just as much an exercise of jurisdiction by the appellate authority as a hearing on the merits. Nor can it be definitely said, having regard to the scheme of the Act, that the legislature must have intended to bar not only appeals but also proceedings u/s 66 in the case of assessments under Sub-section 4, Section 23. The defaults that bring Sub-section 4, Section 23 into play have before now actually given rise to questions of law, and I see nothing improbable or incongruous in the legislature disallowing appeals against assessments while laying it open to the assessee to obtain a reference to the High Court under sub-Ss. 2 and 3, Section 66 on questions of law arising out of the order of the Assistant Commissioner rejecting an appeal on the ground that it is barred by the proviso to Sub-section 1, Section 30. References arising out of orders relating to the proviso to Sub-section 1, Section 30, have actually been entertained by more than one High Court, and Section 66 does not in terms require as a foundation an appellate order on the merits but only "an order u/s 31". The summary assessment under Sub-section 4 Section 23 and the barring of an appeal against the assessment under the proviso to Sub-section 1, Section 30, are the penalty for the defaults specified in Sub-section 4, Section 23, and if it had been intended by the legislature to add to this penalty by depriving the assessee of any assistance u/s 66, I consider that that would have been done in unmistakable terms. I would therefore overrule Mr. Agarwal's contention. In the view that I have taken on the first question referred to us, it seems to me that

the second question does not arise. That is necessarily a question of law only, and the assessee is not entitled to obtain mere obiter dicta. I also agree to the order about costs.