
(1925) 01 CAL CK 0029
In the Calcutta High Court

Nirmal Kumar Singh Nowlaksha

APPELLANT

Vs

The Secretary of State

RESPONDENT

Date of Decision : 26-01-1925

Acts Referred:

Income Tax Act, 1961 — Section 22(4), 23

Citation : AIR 1925 Cal 890

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

Bench : Full Bench

Judgement

Greaves, J.—This is a Reference made to us by the Commissioner of Income Tax in accordance with a previous direction of this Court). The Respondent was called upon by the income tax Officer of Murshidabad to forward a return under the provisions of Section 22 of Act XI of 1922. Considerable delay occurred in furnishing the return and extensions of time were granted on several occasions. Ultimately, on the 11th October the return was filed and so far as I have been able to ascertain this return which was filed by the gomasthas or servants of the Respondent was examined on the 12th and the 13th of October in the presence of the gomasthas. On the 13th of October an assessment was made upon the Respondent). It appears that the Respondent's return of the profits of his six businesses was accepted, but that the income tax Officer refused to accept the deductions which the Respondent sought to make in respect of the expenses of his business and made a percentage deduction from the profits to represent the legitimate deductions for expenditure incurred and we are told that this percentage was calculated without any relation to the actual facts of the expenditure incurred. An appeal was presented against the assessment to the Assistant Commissioner of income tax of the Burdwan Range and he upheld the assessment) and the Commissioner refused to make a reference. An application was accordingly made to this Court and the Commissioner was directed to make the reference which is now before us. It is now necessary to turn to the provisions of the Act. Section 23 of the income tax Act provides that if the income tax Officer has reason to believe that the 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 day specified therein either to attend at the office of the income tax Officer or produce or cause to be produced at the office any evidence on which the assesses relies in support of the return. Sub-section (3) provides that on the date specified in the notice the income tax Officer after hearing such evidence as the assesses may produce and any other evidence which he may require on specified points shall by an order in writing assess and determine the sum payable on the basis of such assessment. Sub-section (4) provides for cases in which there is a failure to make a return u/s 22 or failure to comply with the notice issued under Sub-sec, (4) of Section 22. The sub-section further deals with a failure to comply with all the terms of a notice issued under Sub-section (2) of Section 23. There is no doubt that if the income tax Officer is not satisfied with the return he is bound to serve the notice specified in Sub-section (2). In the present case no such notice was served, but I think that the notice was waived. The return was made in person, as I have already stated, on the 11th of October and it was examined on the 12th and the 13th of October in the presence of the servants of the assessee. I cannot conceive that there was not considerable discussion at any rate with regard to the items which were disallowed and it must be that arguments were urged and reasons adduced by the servants of the assessee as to what items of expenditure should have been allowed. Apparently, no application was made by the servants of the assessee to adduce any further evidence, oral or documentary, with regard to the items disallowed and the only conclusion which I can draw is that no other evidence was available and that at the interview on the 12th and the 13th when the accounts were examined all matters were urged by the servants of the assessee which could have been urged against the disallowance. It has been urged before us that there is some obligation on the income tax Officer to serve a notice indicating the points on which evidence should be produced. I do not find any such indication in Section 23. It is true that under Sub-section (3) it is open to the income tax Officer, if he so desires, to require evidence to be produced on specified points but he is not bound to specify any point on which evidence is required, and in my opinion it is a sufficient compliance with the provisions of the Section on his part either to give notice to attend or notice to produce evidence in general terms and in my view the reference to "all the terms of notice" in sub-section (4) means all the terms of the notice directed to specified points if the Income Tax Officer thinks fit to specify any special points on which he requires evidence. But; as I have already stated, I do not think that the section imposes upon him any obligation to directly specify the points upon which evidence should be given. In my view in the present case although no notice was served under Sub-section (2) of Section 23 as required by the Act this was waived and I think that the servants of the assessee were fully aware of all the matters in the return which were questioned by the Income Tax Officer and that they should not now be given any further opportunity of adducing evidence which they did not ask or desire to adduce either on the 12th or the 13th of October. But my learned brother takes a different view and as I do not think that this is a question upon

which there should be a reference be a third Judge and, as I understand he thinks that the assessee should have a further opportunity of adducing evidence with regard to the items which were disallowed, I do not think that I should stand in the way.

2. The result will be that this judgment and that of my brother Mukerji will be forwarded to the Commissioner in accordance with the provisions of Section 66, Sub-section (5) in order that he may dispose of the case in conformity with the judgment.

Mukerji, J.

3. This is a Reference made by the Commissioner of income tax under the provisions of Section 66, Sub-section (3) of the income tax Act, XI of 1922. The Reference has been made in pursuance of an order passed by this Court, on the 28th August 1924, in Civil Rule No. 478 of 1924. The circumstances under which the order was passed by this Court and the facts out of which the Reference arises have been set out in detail in the judgment just delivered by my learned brother and it will not be necessary for me to re-capitulate them.

4. The Commissioner of income tax states in his reference that in the present case no notice u/s 23, Sub-section (2) was issued on the assessee because the assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. He states that the accounts were produced and examined for two days before the assessment was made; he further states that the assessee did not give the income tax Officer to understand that he had any further evidence in support of his return. He accordingly is of opinion that although there may have been a technical non-compliance with the provisions of Section 23, Sub-section (2), the issue of a notice was superfluous and that the procedure followed by the income tax Officer, though not in strict accordance with the provisions of the section, was not, under the circumstances of the case, either unreasonable or inequitable; and in that view of the matter he recommends that the assessment) should not be held to have been invalidated

5. It is conceded that so far, as the provisions on Section 22 of the Income Tax Act are concerned they have been duly complied with. It is stated, as I have already said, in the letter of Reference that the return was duly submitted and that accounts were also submitted in support of the return and also that the accounts were examined prior to the assessment for two days. The question under these circumstances is whether, after all this, it was necessary to give the assessee a further opportunity under the provisions of Section 23, Sub-section (2) to adduce any evidence in support of the return. The Commissioner seems to suggest the object of issuing a notice under Sub-section (4) of Section 22 is practically the same as that of issuing a notice under Sub-section (2) of Section 23. In this, however, I am unable to agree. Reading Sections 22 and 23 of the Act, it seems to me clear that the law intends that there should be two opportunities given to the assessee for the purpose of supporting the return

which he has submitted. u/s 22 of the Act, he is given an opportunity to submit such accounts or documents as the income tax Officer may require. When a return is submitted under that Section the income tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material or he may, as required by Sub-section (4) of that Section, call upon him to produce or cause to be produced such accounts or documents as the In-come-Tax Officer may require u/s 28, Sub-section (2), the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. It is true that for two days in the presence of the assessee's officer the accounts were examined by the income tax Officer. At the end of those two days the proceedings, in my opinion, came to a stage at which Section 23, Sub-section (1) could be availed of if the income tax Officer was satisfied that the return made u/s 22 was correct and complete, but not beyond that stage at all. After she examination of the accounts for two days during which presumably the assessee's officer had an opportunity of explaining the accounts to the income tax Officer, and I may take it also of producing snob, evidence as he could produce in order to show that the return was correct and complete, the In" come-Tax Officer had to determine whether he should proceed under the first paragraph of Section 23. If he was of opinion that the return was correct and complete he could assess the income of the assessee on the basis of such return. Evidently, the income tax Officer was not of opinion that the return was correct or complete and therefore he did not think tit to proceed under Sub-section (1) of Section 23. When he came to be of that opinion, he should have proceeded under Sub-section (2) of that Section. The law provides that under those circumstances, before proceeding to make an assessment in accordance with his own judgment) under the provisions of Sub-section (4) of Section 23, he should give the assessee an opportunity of producing further evidence. u/s 23, Sub-section (2) when the income tax Officer has reason to believe that the return made u/s 22 is in-correct or incomplete he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the income tax Officer's Office or produce or cause to be produced any evidence on which such person may rely in support of his return Under Sub-section (3) of that Section, if such? evidence is produced, the income tax Officer after hearing such evidence as may be produced, and such other evidence as he may require, on specified points, shall assess the income of the assessee. Under Sub-section (4) of Section 23 if there is a failure to comply with all the terms of notice issued under Sub-section (2) of Section 23 the income tax Officer shall make the assessment to the best of his judgment. The intention of the law clearly is that if the income tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is not correct or complete the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return.

6. A further question arises as to what should be the terms of a notice issued under Sub-section (2) of Section 20. The wording of the sub-section is to the

effect that the notice issued under that sub-section should require the assessee either to attend at the Income Tax-Officer's office or to produce or cause to be produced any evidence on which such person may rely in supports of the return. That sub-section standing by itself would seem to indicate "that a general notice calling upon the assessee to appear or to produce evidence or cause it to be produced is sufficient. On a perusal of Sub-sections (3) and (4) of Section 23, however, it seems to me that, ordinarily the notice that is to be issued under Sub-section (2) should contain the points upon which the assessee has to produce evidence, if he thinks fit, for under Sub-section (3) the expression "on specified points" appears to be governed not only by the word "required" but also by the word "produced" appearing in that sub-section; and in Sub-section (4) dealing with the question of failure to comply with the terms of notice issued u/s 23, Sub-section (2). The Legislature speaks of failure to comply with "all the terms" of the notice under that sub-section. Moreover, it seems to me, to be only fair that if an opportunity is to be given to an assessee to produce evidence in order to show that the return submitted by him is correct and complete he should be told, if possible, specifically, what) the points are upon which such evidence is to be produced. In the present case it is conceded that no notice at all was served upon the assessee under the provisions of sub Section (2) of Section 23. I am not prepared to hold that because the assessee's officer was present at the office of the income tax Officer for two days at an earlier stage, there was a proper or substantial compliance with the provisions of the law; and with the utmost deference to the opinion of my learned brother, I am unable to hold that the failure of the assessee to produce any further evidence at that stage, can be construed as a waiver on his part to have a notice issued on him under Sub-section (2) of Section 23. The further opportunity, which the law allows the assessee by season of the provisions of Sub-section (2) of Section 23 he has not had in the present case; and I am, therefore, of opinion that the non-compliance with the terms of that sub-section, which is admitted on all hands has prejudiced the assessee.

7. Apart from all this the provisions of Sub-section (2) of Section 23, to my mind are mandatory and no appeal in respect of an assessment made under Sub-section (4) of that Section lies to the Assistant Commissioner. Under such circumstances there is no reason why the mandatory provisions of an enactment in a taxing statute like the Income Tax Act should not be strictly observed in the matter of making an assessment; under its provisions.

8. I, therefore, think that our answer to the Reference that has been submitted to us should be that the provisions of Section 23, Sub-section (2) not having been complied with the assessment made has been invalidated and should be set aside and made over again in due compliance with the law.