
(1954) 11 OHC CK 0007
In the Orissa High Court
Case No : S.J.C. No. 17 of 1952

R.K. Bala

APPELLANT

Vs

Commr. of Income Tax

RESPONDENT

Date of Decision : 19-11-1954

Acts Referred:

Income Tax Act, 1922 — Section 22, 22(2), 22(4), 23(4)

Citation : AIR 1955 Ori 119

Hon'ble Judges : Mohapatra, J; Misra, J

Bench : Division Bench

Advocate : M.S. Mohanty, for the Appellant; G.G. Das, for the Respondent

Judgement

Mohapatra, J.—This is a reference u/s 66(1), Income Tax Act, 1923 made by the Appellate Tribunal on two points of law arising in the case in the following circumstances:

The assessment year is 1947-48. The Income Tax Officer had sent a notice u/s 22(2) of the Act asking for the Return in June, 1947. The assessee on 29-6-1947 applied for two months' time for furnishing the Return. Time was extended to the end of July, 1947. The fact remains that no Return was received by the Income Tax Officer at any time whatsoever. On 9-2-1948, the Income Tax officer issued a notice by registered post u/s 23(4) for production of books on 23-2-48. The assessee's representative however prayed for time to comply with the notice u/s 22(4). On this the Income Tax Officer sent a further notice u/s 22(4) for production of books on 12-3-1948. As no Return had been received and notice u/s 22(4) had not been complied with, the Income Tax Officer made, assessment u/s 23(4) on 13-3-1948 according to his best judgment.

The assessee filed an application u/s 27 of the Act for reopening the matter on the ground that in fact he had sent the Return by post on 7-3-1948 and further that the notice u/s 22(4) was received by him only on 17-3-1948, that is, five days after the date fixed, for the production of the books in the notice u/s 22(4).

Thereafter, it appears the case had taken a chequered career. The Income Tax Officer having refused the prayer of the assessee, he (the assessee) went up in appeal before the appellate, Assistant Commissioner who allowed the assessee's appeal by an order for reopening of the assessment u/s 27 of the Act.

The department filed an appeal before the Appellate Tribunal. There being a difference of opinion between two Members who originally heard the appeal, the opinion of the third Member decided the case in favour of the department.

As I have indicated above the Income Tax Officer had never received the Return in compliance with the notice u/s 22(2) but nevertheless there is no dispute over the fact that the assessee had sent the Return by post on 7-3-1948 to the Income Tax Officer, and further that in fact the second notice u/s 22(4) for requiring the assessee to produce the account-books on 12th March was received by the assessee on 17th March. On these facts, the following two questions have been referred to us:

"(1) Whether the assessee's posting of an envelope containing a Return of his income is equivalent to his "furnishing" a Return u/s 22 (2)?, and

(2) Whether assessment u/s 23(4) can be validly made for non-compliance of notice u/s 22(2) where notice u/s 22(4) has also been issued but not served on the assessee at the time when assessment u/s 23(4) is made?"

2. We will take up question No. (1) first It will be pertinent" to reproduce Sub-sections (2), (3) and (4) of Section 22 and Sub-section (4) of Section 23 which run as follows:

"Section 22:

(2) In the case of any person 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 may 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, 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 and total world income during the previous year:

Provided that the Income Tax Officer may in his discretion extend the date for the delivery of the return.

(3) If any person has not furnished a return within the time allowed by or under Sub-section (1) or Sub-section (2), or having furnished a return under either of those sub-sections, discovers any omission or wrong statement therein he may furnish a return or a revised return, as the case may be, at any time before the assessment is made.

(4) The Income Tax Officer may serve on any person who has made a return under Sub-section (1) or 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 to the previous year. Section 23:

(4) 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:

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income Tax Officer to the firm intimating his intention to cancel its registration."

Mr. M.S. Mohanty, appearing on behalf of the assessee; urges that the word "to make the return" as used in Sub-section (4) of Section 23 of the Act does not connote within itself any concept of "delivery of the Return" to the Income Tax Officer or receipt of the same by the said Officer. According to him, it is sufficient compliance with the provisions of Section 23(4) if it is proved beyond doubt that the assessee had prepared the Return no matter whether it was actually received or not by the Income Tax Officer. If, as in the present case, after preparation of the Return the assessee had posted it having given the correct address of the officer, it cannot be said that he has failed "to make the return" as contemplated u/s 23(4) in order to invoke the jurisdiction of the Officer to make an assessment according to his best judgment.

To develop his argument that the term "to make" the Return used in Section 23(4) does not contain within itself the concept of "delivery" of the same but simply means "the preparation" of the Return, he has placed before us several sections of the Act in proximity to the Sections where different terms, such as, "furnishing the return," "delivery of the Return", "shall prepare, deliver and cause to be delivered to the Income Tax Officer" have been used.

He strongly relies upon the provision that if different terms have been used by the Legislature in the sections preceding and succeeding the section in question, it has got to be construed that the Legislature intended to convey different meanings by the different terms used. Section 21 of the Act provides for a Return to be delivered before issue of notice u/s 22. The words used there are "....every private employer shall prepare, and, within thirty days from the 31st day of March in every year, deliver or cause to be delivered to the Income Tax Officer in the prescribed form.... a return in writing". The section implies two

different conceptions by using the terms "prepare" and "delivery to the Income Tax Officer."

In Section 22(2) which is the pertinent provision under which notice to the assessee was issued and served, but nevertheless the assessee did not furnish a Return, the words used are "may serve a notice upon him requiring him to furnish, within such period a return in the prescribed form". The proviso to Sub-section (2) says that the Income Tax Officer may in his discretion extend the date for the delivery of the Return. Section 28 is the penal section for failure to furnish the Return of the total income. There the terms used are "any person has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under Sub-section (1) or Sub-section (2) of Section 22".

Section 27 of the Act, which makes provision for reopening of the assessment under certain circumstances, provides that "where an assessee... satisfies the Income Tax Officer that he was prevented by sufficient cause from making the return required by Section 22".

3. After going through these sections carefully we are unable to accept the contention of Mr. Mohanty that the words "make the return" used in Section 23(4) do not convey the meaning of delivery to or receipt by the Income Tax Officer. It is one of the settled principles of construction that the terms used in the section ought to be interpreted with reference to, the context in which expressions have been used in the statute. It will be sufficient for our purpose, in support of this well settled principle, to refer to a decision of the Madras High Court in the case of -- RM. P.R. Viswanathan Chettiar Vs. Commr. of Income Tax, Madras, . Their Lordships observed;

"Even without a reference to the cases listed under the expression "made" in Stroud's Judicial Dictionary, III Edn., Vol. 3, at pages 1698 to 1700 it should be obvious that that expression as a statutory expression should be construed with reference to the context in which that expression has been" used in that Statute."

It is manifest that in Section 23(4) the expression "has not made a return or a revised return" appears as a default provision providing for legal consequences on account of the non-compliance with the provisions of Section 22. The word "make" as used in Section 23(4) must therefore convey the same meaning as the words "furnish" and "deliver" used in Section 22(2) and its proviso; otherwise there will be no meaning in the default provision contained in Section 23(4). In Sub-section (4) of Section 23, we get "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"; it can convey only one meaning that the notice u/s 22(2) has not been complied with and that the assessee has not furnished a Return or a revised Return, as the case may be, at any time before that assessment is made, that is to say the word "make" conveys exactly the same meaning as the word "furnish" used in

Section 22.

Mr. Mohanty does not dispute the position that the word "furnish" used in Sub-section (2) of Section 22 carries with it the import of delivery which is also made clear by reference to the proviso empowering the Income Tax Officer in his discretion to extend the date of delivery of the Return. The interpretation which Mr. Mohanty wants to put on the word "to make" will render Section 23(4) as completely nugatory and meaningless as, according to him, when the assessee prepares the Return and puts it into his box without making any attempt whatsoever that the Return should reach the Officer he will not subject himself to the mischief of Section 23(4) and even then the Income Tax Officer will have no jurisdiction to make an assessment on the basis of his best judgment.

4. We are aware of the well-recognised principle of law that taxing statute has got to be strictly construed and that the words must be clear and precise in order to give power to the authorities to impose a tax; but nevertheless we find in the present case that the meaning is absolutely clear on a fair looking to the language used in several sections.

5. Mr. Mohanty further contends that even accepting that the law makes it incumbent upon the assessee to deliver the Return to the Income Tax Officer, the assessee in the instant case has complied with the provisions of law by posting of an envelope containing the Return of his income for the year in question correctly addressed to the Income Tax Officer. It is admitted on both sides that in fact there is no rule prescribing that the Return may be sent by post. In the absence of such a rule, we fail to understand how by mere delivery of the Return to the Post Office to be conveyed to the Income Tax Officer it can be said to meet the requirements of the notice u/s 22(2). Indeed the Post Office is always deemed to be the agent of the sender; but unless there is any request by the addressee that the letter, parcel, money-order or the Return, as in the present case, may be sent by Post Office, the Postal Department cannot be said to be the agent of the addressee.

Indeed if the Post Office is to be taken as the agent of the addressee or, as a matter of that of the Income Tax Department, then due delivery in the Post Office will be deemed in the eye of law to be delivery to the Income Tax Department. But the position is absolutely clear that if there is no request on the part of the department or any prescribed rule that the Return may be sent by post, the post office cannot serve as an agent of the Income Tax Department, and therefore, mere posting of the Return is not equivalent to the furnishing of the Return u/s 22(2).

Mr. Mohanty has drawn our attention to a decision of their Lordships of the Supreme Court reported in -- *The Commissioner of Income Tax, Bombay South, Bombay Vs. Ogale Glass Works Ltd., Ogale Wadi*, . Their Lordships have laid down the same principle that delivery of the cheque to the post office at the request of the addressee is a delivery to him as by posting the cheque in

pursuance of the request of the creditor the debtor performs his obligation in the "manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance. We are of the view therefore that the question should be answered in the negative, that is to say, the assessee by posting the envelope containing the Return has not furnished the return as required by notice u/s 22(2).

6. The second question is whether the assessment u/s 23(4) can be validly made for the non-compliance of notice u/s 22(2) where notice u/s 22(4) has also been issued, but not served on the assessee at the time when assessment u/s 23(4) is made. As we have indicated above, for the second time notice u/s 23(4) was issued by the Income Tax Officer to the assessee and the assessee received the notice only on 17-3-1948 while in the meantime on 13-3-1948, he (the Income Tax Officer) had made the assessment on the basis of his best judgment,

As it appears from the language of Section 23(4), which has been reproduced in the earlier part of the judgment, the Income Tax Officer is empowered to make the assessment to the best of his judgment in 3 sets of circumstances which appear to be disjunctive and independent of each other. The three such circumstances are; (i) the assessee fails to make the Return required by- any notice given under Sub-section (3) of the same section; (ii) or if he fails to comply with all the terms of the notice issued under Sub-section (4) of the same section; and (iii) or having made a Return fails to comply with all the terms of a notice issued under Sub-section (2) of Section 23.

In the present case, Income Tax Officer has assumed jurisdiction as the requirements under the 1st set of circumstances have been fulfilled, that is to say, as the assessee has not made a Return under subsection (2) of Section 22 and further he has not made any Return or revised Return under Sub-section (3), Section 22. u/s 22(3) the assessee is given additional privilege to furnish Return or revised Return at any time before the assessment is made if he has not made a Return as required in the previous Sub-section (2) or his Return under Sub-section (2) contains any omission or mistake. But this privilege, it is manifest, is to be exercised only before the actual assessment is made.

7. It is contended by Mr. Mohanty that when the Income Tax Officer thought it fit to issue notice under Sub-section (4) of Section 22 to produce books, a fresh right accrued in favour of the assessee to submit a Return or Revised Return before the date fixed in the notice u/s 22(4) and, therefore, the assessment on 13-3-1948 is illegal and without jurisdiction as the notice was served upon the assessee on 17-3-1948. It is to be noticed that under Sub-sections (2) and (3) of Section 22, the assessee is to furnish a Return or a revised Return while in compliance with notice u/s 22(4) he is to produce books or return of accounts etc. As we have mentioned above, Section 23(4) empowers the Income Tax officer to make an assessment according to his best judgment in the happening of the eventuality contained in any one of the three sets of circumstances.

In the present case, the conditions required under the first set are fully satisfied that the assessee has not made a Return before the actual date of assessment. Merely because the Income Tax Officer has issued a notice u/s 22(4), his powers conferred under the first set of circumstances are not in any way curtailed or affected and he has got the right to proceed in accordance with law in making assessment to his best judgment without waiting for the return of the notice u/s 22(4). Indeed we have got to observe that when in the absence of any Return he thought fit to issue a notice for the production of books, he ought to have waited for the return of the notice for production of books. He has acted improperly in making the assessment without waiting for the actual service on the assessee for production of books but we cannot go to the length of finding that he (the Income Tax Officer) has acted illegally or without jurisdiction. We would, therefore, answer this question in the affirmative and find that the assessment u/s 23(4) has been validly made in the present case.

8. In conclusion, we answer the first question in the negative and the second question in the affirmative. The reference is disposed of accordingly; but in the circumstances, there would be no order as to costs of this Court.

Misra, J.

9. I agree.