SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Beasley and Mr. Justice Reilly.*

1928, November 5.

R. M. S. R. M. RAMASWAMI CHETTIAR AND OTHERS, ASSESSEES,

v.

COMMISSIONER OF INCOME-TAX, REFERRING OFFICER.*

Indian Income-tax Act (XI of 1922), ss. 22 (4) and 23 (2) and (4)—Notce calling for accounts after submission of return, legality of.

Even after an assessee has submitted a return of his income and has complied with the terms of the notice issued to him under section 23 (2) of the Indian Income-tax Act (XI of 1922), the Income-tax Officer has power to call for accounts under section 22 (4), and if they are not produced, to make an assessment under section 23 (4) of the Act.

REFERENCE by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act (XI of 1922) and under section 45 of the Specific Relief Act (I of 1877), in the matter of assessment of R. M. S. R. M. Ramaswami Chettiar and two others.

The facts and the question referred are given in the judgment.

K. S. Krishnaswami Ayyangar (with *R. Kesava Ayyangar*, *K. R. Rama Ayyar* and *M. Rajagopala Achari*) for assessees.—Section 22 of the Act deals with the stage prior to the submission of return of income. Section 23 (1), (2) and (3) deal with the procedure to be adopted after a return is submitted; and section 23 (4) deals with the penalty for default in submitting a return or in producing accounts, documents or evidence. This view of section 22 is further strengthened by the position of the words " or having made a return " in section 23 (4), which must be deemed to be in antithesis to the words going before

* Original Petitions Nos. 188, 186 and 187 of 1928.

Hence, once a return is made by an assessee, the Income-tax Officer can, if the return is not correct or complete, resort to the procedure mentioned in section 23 (2) and (3), wherein his power to call for further evidence is limited; he cannot, after a return is submitted, resort to section 22 (4) which gives him a general power to call for any accounts or documents, limited only by the wording of the proviso. This is not merely a question affecting his jurisdiction to act under section 22 (4) after submission of a return. If he has the power to act under section 22 (4) at that stage, then default under section 22 (4) entails also the disability to appeal from the assessment. I rely on *Ramaswamiah* v. *Commissioner of Income-tax*(1), *Brij Raj Rang Lal* v. *Commissioner of Income-tax*(2) and *Khushi Ram* v. *Commissioner of Income-tax*(3). The case of *In the matter of Messrs. Harmukhbai Dulichand*(4) does not discuss all the aspects of the case and gives the go-by to the words "or having made a return." This case is simply followed in *In the matter of Chandra Sen Jaini*(5) and *Ram Khelawan* v. *Commissioner of Income-tax*(6). There are other penalties provided for non-production of accounts after the submission of return, such as those provided by sections 37 and 51 of the Act and sections 174 and 175 of the Penal Code. The penalty of summary assessment cannot be deemed to have been intended to cases of this kind wherein there has been a submission of return and the production of some evidence.

[*Court.*—What is the use of a power to call for accounts only before a return is made? Such power is more useful only afterwards, as it can ensure a proper return.]

M. Patanjali Sastri for the Commissioner.—Section 22 (4) is unqualified and gives a general power to call for accounts, documents, etc., whether before or after a return is made. Otherwise, any kind of false return can be made, without the officer having power (*a*) to check it by calling for production of accounts, documents, etc., and (*b*) to punish such assessee by summary assessment. I rely on the last three cases quoted by the assessee and the arguments therein. In the Act of 1918, there was no such general power to call for accounts as is provided for in the section 22 (4) of the Act of 1922. In order to provide also for a case of default under section 22 (4), suitable words were introduced in

(1) (1925) I.L.R., 49 Mad., 831.
(2) (1927) A.I.R. (Pat.), 390.
(3) (1928) A.I.R. (Lah.), 219.
(4) (1928) 32 C.W.N., 710.
(5) (1928) I.L.R., 50 All., 589.
(6) (1928) A.I.R. (Pat.), 529.

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX.

section 23 (4). In the Act of 1918 only one case of default after submission of return, viz., one under section 18 (2) which corresponds to section 23 (2) of the Act of 1922 was provided for. The words "or having made a return" are inadvertently retained in the Act of 1922. They are redundant. The case of *Ramaswamiah* v. *Commissioner of Income-tax*(1) is a case of default under section 23 (3) and not under section 22 (4).

JUDGMENT.

REILLY, J.

In this case, an income-tax assessee made a return of his income, when required to do so under section 22 (2) of the Indian Income-tax Act, 1922. Not being satisfied with the return, the Income-tax Officer required the assessee under section 23 (2) of the Act to produce evidence in support of his return. The assessee produced some evidence; but the Income-tax Officer found it insufficient to show the amount of the assessee's income and then issued a notice to him under section 22 (4) of the Act to produce complete accounts of a branch business at a place in the Federated Malay States for the account-year in question. Those accounts, the assessee did not produce, and the Income-tax Officer therefore proceeded to make his assessment under section 23 (4) of the Act—that is, an assessment not made upon evidence but "to the best of his judgment,"—an assessment from which under the Act the assessee had no right of appeal. The question referred to us is, "the applicant having made a return of his income and having complied with the terms of the notice issued to him under section 23 (2), was there any jurisdiction in the Income-tax Officer to revert to section 22 (4) and make an assessment under section 23 (4) for non-compliance with the notice under section 22 (4)?" The assessee contends that in those circumstances the Income-tax Officer had no power to

(1) (1925) I.L.R., 49 Mad., 831.

make an arbitrary assessment under section 23 (4), from which there was no right of appeal.

This question has been before four of the Indian High Courts. It has been answered against the assessee by a unanimous Full Bench of three Judges of the Calcutta High Court in *In the matter of Messrs. Harmukhbai Ubulichand*(1), by a unanimous Full Bench of five Judges of the Patna High Court in *Ram Khelawan* v. *Commissioner of Income-tax*(2), overruling *Brij Raj Rang Lal* v. *Commissioner of Income-tax*(3), a decision of two Judges, and by a Division Bench of the Allahabad High Court in *In the matter of Chandra Sen Jaini*(4). Now that the earlier decision of the Division Bench of the Patna High Court has been overruled, there remains in the assessee's favour, of the cases quoted before us, only a decision of a Division Bench of the Lahore High Court in *Khushi Ram* v. *Commissioner of Income-tax, Lahore*(5). At one stage of the arguments before us, it was suggested that the decision of a Full Bench of this Court in *Ramaswamiah* v. *Commissioner of Income-tax*(6) was by implication in favour of the assessee in this matter; but on examination it will be seen that it was found in that case that the assessment was in fact made, not under section 23 (4), but under section 23 (3). The weight of authority on the question before us is, therefore, overwhelmingly against the assessee.

It was first contended by Mr. Krishnaswami Ayyangar for the assessee that the Income-tax Officer's power to call for accounts under section 22 (4) can be exercised only before the assessee has submitted a return of his income. There is nothing whatever in the wording of the sub-section to suggest that; on the contrary, the

(1) (1928) 32 C.W.N., 710.
(2) (1928) A.I.R. (Pat.), 529.
(3) (1927) A.I.R. (Pat.), 390.
(4) (1928) I.L.R., 50 All., 589.
(5) (1928) A.I.R. (Lah.), 219.
(6) (1925) I.L.R., 49 Mad., 831.

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX. — REILLY, J.

only limitations on the power of the Income-tax Officer to call for accounts in that sub-section are that, if the assessee is not a company, a notice requiring him to make a return of his income must have been served on him and that accounts for a period more than three years prior to the previous year cannot be called for. The fact that those restrictions are mentioned explicitly makes it the more improbable that any other restriction is implied. It is urged that the fact that the sub-section occurs in section 22, which deals with the procedure for getting in a return, makes it probable that all its provisions apply to the stage before the return comes in. That would be a very unsafe reason for limiting the plain effect of the words of the sub-section; and it may be remarked that the sub-section (3) of section 22 enables the assessee to do something after he has submitted his return. If section 22 (4) is to be construed, as in this part of his argument Mr. Krishnaswami Ayyangar would have us to construe it, we must read into it a very important restriction, which only a very careless Legislature could have omitted to express if it were intended. And, as has been pointed out by Mr. Patanjali Sastri for the Commissioner of Income-tax, in the great majority of cases it must be after the return has come in, not before, that the Income-tax Officer has any need to see the assessee's accounts. If the provision for calling for accounts were restricted to the period before the return is submitted, it would be of comparatively little use. Until he knows whether a company is going to submit its return by the 15th June or any other assessee is going to submit his return by the date specified in the notice to him under section 22 (2), the Income-tax Officer need not trouble about accounts at all, as, if no return is submitted in time, he can, as is unquestioned, make his arbitrary assessment under

section 23 (4) without referring to any accounts or evidence. It is very highly improbable that the only specific provision made by the Legislature for calling for accounts would apply only to the period when accounts are least required. But it has been argued—and the argument was adopted in *Khushi Ram* v. *Commissioner of Income-tax, Lahore*(1) and in the overruled case in the Patna High Court—that this surprising restriction of the effect of section 22 (4) has been introduced by the Legislature in a cryptic and back-handed way by the wording used in section 23 (4). What the exact meaning of that wording is, I will discuss later; but pushed to its farthest grammatical extreme, as contended by the assessee, it comes to no more than this—that the penalty provided by section 23 (4) for failure to produce accounts, when required to do so by a notice under section 22 (4), applies only if the notice is issued before the return is submitted. Even if that interpretation were correct, it would in my opinion be a clearly insufficient reason for refusing to read section 22 (4) according to its plain meaning and for reading into it a remarkable and very important restriction, which those who framed it could hardly have forgotten to express. The prevailing judgments of the Calcutta, Allahabad and Patna High Courts, which I have mentioned, agree that there is no such restriction.

But Mr. Krishnaswami Ayyangar has tried to get at the same result by another road. In a later stage of his argument, he has admitted that the Income-tax Officer must have the right to call for the assessee's accounts even after he has submitted his return, but has suggested that calling for accounts at that stage is

(1) (1928) A.I.R. (Lah.), 219.

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX. — REILLY, J.

provided for in section 23 (3). The admission that the Income-tax Officer can call for accounts under section 23 (3) in the course of an inquiry under that sub-section, Mr. Krishnaswami Ayyangar can make without reluctance, because failure to comply with a demand of the Income-tax Officer made under that sub-section does not expose the assessee to the penalty of arbitrary assessment provided by section 23 (4). If the Act provided explicitly for calling for accounts during the inquiry under section 23 (3), which is to be made after a return has been submitted, there might be some reason for supposing that the provision for calling for accounts under section 22 (4) applied only to an earlier stage. But the power given to the Income-tax Officer by section 23 (3) is to require the production of evidence "on specified points." If it were intended by those words to give power to call for accounts for several years, the language would, in my opinion, be ill-chosen and misleading. If it were intended to give power to call for accounts, what object could there be in failing to say so explicitly, what object could there be in using language in such contrast with the language of section 22 (4)? The accounts of a series of years may provide evidence on a specified point; but to describe them as "evidence on a specified point" is obviously inappropriate. To my mind, the language of section 23 (3), adds force to the Commissioner's contention. If accounts can be called for at any stage, before or after the return is submitted, then, in the inquiry under section 23 (3), power to call for further evidence on specified points is enough and the language of that sub-section need not be strained in any way.

And, though Mr. Krishnaswami Ayyangar has called section 23 (3) to his aid as showing an implied restriction of section 22 (4), on examination, it throws light on

the question of immediate importance in this case—whether failure to produce accounts when called for after a return has been submitted, entails the penalty of arbitrary assessment under section 23 (4). Failure to comply with a direction under section 23 (3) does not entail that penalty. If the power of the Income-tax Officer under section 23 (3) is confined to the plain meaning of that sub-section, viz. to call for evidence on specified points, it is reasonable that failure to comply with such a direction should not entail the very severe penalty of arbitrary assessment without right of appeal. If it did entail that penalty, it could obviously be used in a very oppressive way. For instance, the Income-tax Officer might call for some evidence of doubtful relevance and difficult or impossible to produce, and, if it were not produced, enforce the penalty of arbitrary assessment. That would be clearly unjust, and the Legislature has rightly made the penalty of arbitrary assessment inapplicable to such a case. But, if an assessee fails to produce at any stage, when required, his accounts—the most important of all evidence in such a matter, the very evidence on which, if he is honest, he will himself wish to rely—why should he be treated more leniently when his improper and obstructive refusal comes after, instead of before, he submits his return? No reason has been suggested for such a distinction. On the contrary, the man who refuses to produce his accounts when the Income-tax Officer has expressed under section 23 (2) dissatisfaction with his return, is clearly more blameworthy and obstructive than the man who fails to produce them before he has made his return, when no one has yet expressed an opinion whether his return will be an honest one or not. When once it is admitted that the Income-tax Officer must have power to call for accounts in the course of the

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX.

REILLY, J.

inquiry under section 23 (3)—and without it the inquiry might easily be reduced by the assessee to a farce—the omission to penalize failure to comply with the officer's requisition under that sub-section by arbitrary assessment is strong evidence that the right to call for accounts even at that stage must be found elsewhere, that is, in section 22 (4).

There remains the actual wording of section 23 (4), which sets out the failures on the part of the assessee which entail the penalty of arbitrary assessment without appeal. It is contended that, even if section 22 (4) gives power to call for accounts after the assessee has submitted his return, the penalty of arbitrary assessment is restricted to a failure to produce accounts when called for before the return is submitted. As I have indicated, there is nothing in the object or nature of the proceedings and nothing in section 22 or the rest of section 23, to make it probable that the Legislature would intend to treat more leniently a failure to produce accounts when required after the submission of a return, than before it. But it is contended that the wording of section 23 (4) has that surprising result. It is quite clear that, if a company or other assessee fails to submit a return by the proper date, the penalty of arbitrary assessment is to be enforced. That is what the sub-section first provides. Then it goes on to provide the same penalty for failure "to comply with all the terms of a notice issued under sub-section (4)" of section 22. If the notice under section 22 (4) can be issued at any time—and that I do not think can now be doubted—there is nothing so far to suggest that the penalty is attached only to failure to comply with a notice issued under section 22 (4) before a return is submitted. But section 23 (4) goes on to provide that, if a company or other assessee, "having made a return, fails to comply

with all the terms of a notice" issued under section 23 (2), the penalty shall apply. The contention of the assessee in this case rests upon the insertion of the words "having made a return". It is urged with truth that failure to comply with a notice under section 23 (2) can occur only after making a return, as that notice cannot be issued before a return is made. Therefore it is contended these otherwise useless words must have been introduced to show by contrast that the other two failures penalized must occur before a return is made. No such contrast could be of any use in regard to the first failure mentioned in the sub-section, which is failure to make a return at all. Then this supposed contrast, if it indicates anything, must be understood to indicate that the failure to comply with a notice to produce accounts under section 22 (4) is to be penalized only if the notice is issued before the return is submitted. But, if that was the intention, if the object was to express something of such importance, why try to indicate it in a clumsy and obscure way? We must all accept the principle adopted in 1928 A. I. R. Lahore, 219, that, if two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced. But the contention of the assessee in this case rests on too frail a foundation. The words "having made a return" in section 23 (4) may be superfluous and add nothing necessary for the description of the third failure penalized; but they are applicable to that failure. Their use may be tautological and inartistic. But because they are unnecessary, we are not justified in jumping to the conclusion that they have been used to express something which it cannot be pretended they could express clearly, which a child could express clearly in other words, which no man of education and sense of

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX.

REILLY, J.

responsibility would think of expressing in that way, and of which there is no indication in section 22 or the other parts of section 23. That, to my mind, would not be choosing between two equally possible and reasonable constructions but adopting a strained construction, unreasonable in effect and out of tune with the policy of the Act that an assessee should make full disclosure of his income. In my opinion, the power to call for accounts under section 22 (4) may be exercised by the Income-tax Officer after the assessee has submitted a return, and failure of the assessee to produce his accounts when called for after he has submitted a return may be penalized by arbitrary assessment under section 23 (4); the question referred to us must be answered in the affirmative, and the assessee should pay the costs of the reference, Rs. 250.

O.P. No. 186 *of* 1928.

This reference raises the same question as that decided in O.P. 188/28, and the decision must follow the decision in that case. The reference is not now pressed by the assessee in respect of any other contention. The assessee will pay the costs of this reference, Rs. 150.

O.P. No. 187 *of* 1928.

This case raises the same question as that decided in O.P. 188/28, and the decision so far must be the same. But in this case it happened that the Income-tax Officer in 1926–27 called for the assessees' accounts both for the year of account and for the preceding year. The accounts of the year of account were produced but not those of the preceding year. On that default, the Income-tax Officer proceeded to make his assessment for 1926–27 under section 23 (4) of the Act. The

assessees applied for cancellation of the assessment under section 27. The Income-tax Officer refused to reopen the assessment, and in his order refusing to do so, he stated that he had wanted the accounts of the preceding year for the purpose of making a revised assessment for 1925–26 under section 34. It is admitted that he had no power at that time to call for the accounts for the earlier year for that purpose, as he had issued no notice under section 34. The assessees appealed to the Assistant Commissioner of Income-tax against the refusal of the Income-tax Officer to reopen their assessment for 1926–27. The Assistant Commissioner then discovered and stated in his order, that the Income-tax Officer had required the accounts of the earlier year, not only for the purpose of revising the assessment of 1925–26 but in order to verify the opening balances of the accounts actually produced for the assessment of 1926–27. It is clear that the Income-tax Officer had the power to call for accounts of the earlier year for the purpose of the assessment of 1926–27. The notice which he issued did not disclose for what purpose he wanted those accounts. The fact that he afterwards gave to the assessees a reason which would not justify his action in calling for the earlier accounts did not make his action unjustifiable or illegal; nor did it make the failure of the assessees to produce those accounts an insufficient basis for an arbitrary assessment of their income under section 23 (4) of the Act. The assessment for 1926–27 under section 23 (4) in this case was therefore legal.

The assessees have failed on both the questions raised in this reference. But it will be seen that the second question would never have been raised and the assessees' appeal to the Assistant Commissioner would never have been preferred if the Income-tax Officer

RAMASWAMI CHETTIAR v. COMMISSIONER OF INCOME-TAX.

REILLY, J.

had stated in his order on their application under section 27, as the Assistant Commissioner afterwards stated, that he wanted the accounts of the earlier year for the assessment of 1926–27, with which he was then engaged. But he chose to give as his only reason for calling for those accounts a reason which could not justify his action and which the Assistant Commissioner afterwards discovered was not his only reason. It is at least curious that the Assistant Commissioner should afterwards have known that the Income-tax Officer had a good reason for his action which the Income-tax Officer himself did not think of stating in his own order. And, though the reason stated by the Income-tax Officer does not affect the legality of his action or the consequences of it, his statement of his reason in his order was undoubtedly misleading to the assessees, and left them under the impression that they had a good case for appeal, when they had none. It is much to be regretted that the Income-tax Officer should have misled the assessees and should have given to the proceedings of his department an air of disingenuity. If the only question raised in this reference had been whether the Income-tax Officer had the power to call for the accounts of the earlier year as he did, it would have been proper in the circumstances that the Commissioner of Income-tax should be ordered to pay the costs of the assessees in these proceedings. But, as the assessees have failed on the other question also, which is common to this case and to O.Ps. Nos. 186 and 188 of 1928, each party will bear his own costs.

COUTTS TROTTER, C.J.—I agree.

BEASLEY, J.—I agree.

N.R.