REFERENCE UNDER THE INCOME-TAX ACT, 1922.

FULL BENCH.

Before Terrell, C. J., and Das, Adami, Wort, and Allanson, JJ.

1928.

June, 15.

RAM KHELAWAN UGAM LAL

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (*Act XI of* 1922), *sections* 22(4), 23(4) *and* 63—*Notice calling for production of accounts after filing of return—Accounts not produced—Summary assessment.*

A notice may be issued under section 22(4) of the Income-tax Act, 1922, even after the assessee has filed a return, and, if the notice is not complied with, a summary assessment may be made under section 23(4).

Brij Raj Rang Lal v. *Commissioner of Income-Tax*(1), overruled.

Harmukhrai Dulichand, In the matter of (2), followed. In this case the Income-tax Officer had written on the order sheet of the assessment proceeding an order directing the assessee, a firm, to produce certain accounts and the order sheet was signed by a member of the firm and the referring *judges, Dawson Miller, C.J.*, and *Ross, J.*, overruled an objection that the assessee had not been properly served with a notice under section 22(4).

Held, also, by the referring judges, that where an assessee is carrying on a business at two places and, while an assessment of the assessee's income is being made at the assessee's headquarters, the Income-tax Officer in charge of the area in which the assessee's branch is situated forms an estimate of the profits of that branch and forwards it to the officer making the assessment at headquarters who accepts the estimate, the procedure is in conformity with section 64.

*Miscellaneous Judicial Case no. 141 of 1926, on a reference by the Commissioner of Income-Tax Bihar and Orissa, dated the 9th July, 1926.

(1) (1927) 8 Pat. L. T. 686. (2) (1927-28) 32 Cal. W. N. 710.

The facts of the case material to this report are stated in the following Order of Reference to the Full Bench.

DAWSON MILLER, C. J., and ROSS, J.—This case comes before us on a case stated by the Commissioner of Income-tax under section 60(*3*) of the Indian Income-tax Act, 1922.

The assessee was assessed under section 23(*4*) of the Act on the ground that he failed to comply with a notice under section 22(*4*).

The questions for decision are (*1*) whether the assessee was properly served under section 22(*4*); and (*2*) whether, seeing that the income-tax in respect of the United Provinces firm of Ramawatar Hira Lal had already been assessed at Rs. 10,000, it was any longer open to the Income-tax Officer, Saran, to assess the income-tax of the Saran firm summarily under section 23(*4*), because the books belonging to the Chilwaria firm had not in fact been produced.

The facts which appear from the case stated and the documents attached are shortly as follows. The firm of Ramkhelawan Sahu Ugam Lal carries on business at Siwan in the Saran district of this province. The partners in that firm are Ramkhelawan, his sons and grandsons and the sons and grandsons of his deceased brother Raj Kumar. There is also a firm at Pachrukhi in the district of Saran admittedly belonging to the same partners and carrying on business under the name of Mathura Prasad Sitaram, Mathura Prasad being a son of Ramkhelawan and Sitaram being a son of Raj Kumar. There is a third firm known as Ramautar Hiralal carrying on business at Chilwaria in the Baraich district of the United Provinces. All these firms belong to the same partnership. On the 6th of August, 1925, in response to a notice issued under section 22(*2*) of the Act a return of income was made in the name of the firm of Ramkhelawan Sahu Ugam Lal for the year 1925-26 based on the income of the previous year. This return related to the income of the two firms in this province. On examination of the books of the firms in this province which were called for and produced, it transpired that there was a third firm at Chilwaria belonging to the same persons and on the 7th of September, 1925, an order was passed and entered in the order-sheet directing the assessee to produce the accounts of that firm with original bijaks and bijak bahi on the 12th of September. This order was shown at the time to Banwari Lal, son of Ramkhelawan one of the partners, who had been attending the Income-tax Officer's office from time to time on behalf of the firm in connection with the assessment. By way of acknowledging that he had received notice, he signed his name in the margin of the order-sheet opposite the order. On the 12th of September Banwari Lal attended the office again in the afternoon but did not produce the books asked for and the matter was adjourned to the following day. On the 13th of September the assessee's gomashta attended but did not produce the books required stating that they had been written for to Chilwaria and he said that he could produce them after the Puja holidays. He was then given time until the 9th of October to produce the account books and bijak bahis and warned that if they were not produced on that date the

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firm would be assessed under section 23(4) of the Act. In the meantime, namely, the 28th of September, the Chilwaria firm of Ramautar Hira Lal made a return of the income of that firm to the Income-tax Officer of Baraich in the United Provinces and that firm was served with notice to produce its accounts on the 8th of October. On that date the firm's gomashta appeared and stated that the accounts were at Siwan in Saran and asked for a later date. The 22nd of October was then fixed to produce the books before the Income-tax Officer of Baraich. On the following day, the 9th of October, the day fixed for the production of the books before the Income-tax Officer of Saran, Banwari Lal appeared and said that he could not produce the Chilwaria accounts as they had been required by the Income-tax Officer of Baraich in the United Provinces on the previous day. From this it appears that the firm at Chilwaria excused themselves for not producing the books in Baraich on the ground that they were in Saran whilst Banwari Lal in Saran failed to produce them on the ground that they were wanted in Baraich. On the 22nd of October, the day fixed for the production of the books in Baraich, the firm's gomashta again appeared there and stated on oath that the books were with the owners at their house in this province. Then followed communications between the two Income-tax Officers of Saran and Baraich. On the 22nd of October the Income-tax Officer of Baraich reported to the Income-tax Officer of Saran as follows:

"I am not prepared to allow him (the gomashta) any *further extension* and as the books are stated to be at the proprietor's headquarters where the assessment is made, I report the whole case at it stands before me to the Income-tax Officer, Saran, who can send for the books there.......................... I estimate the profit of the firm at Chilwaria during the last year to be about Rs. 10,000."

On receipt of this report the Officer of Saran waited until the 21st of January, 1926, and, as no accounts were produced, he made an assessment on that day under section 23(4) in respect of the income from the business both in Saran and Baraich, the amount of profits being taken for the Baraich business at Rs. 10,000 as estimated by the Income-tax Officer there. The income derived from the Saran business was assessed from an examination of the accounts and evidence relating to that business at Rs. 47,000.

On the first question it was urged that the service of notice on Banwari Lal on the 7th of Sepetember, 1925, by showing him the order-sheet and obtaining his signature was not proper service under section 22(4). No special form of notice under the sub-section is prescribed by the Act, but it is provided in section 63 that a notice or requisition under the Act may be served by post or as if it were a summons issued by a Court under the Code of Civil Procedure. In the case of a firm or Hindu undivided family the notice may be addressed to any member of the firm or any adult male member of the family. In our opinion the mode of service mentioned in section 63 is permissive and not exhaustive and there is no substance in the objection taken on the ground of improper service of notice. The notice was accepted by a member of the firm and he waived, if it were necessary, any more formal notice and did in fact appear on the day named therein. As the books were not produced the case was adjourned to the following day and on that day the excuse given was that the books were required elsewhere. Again time was given

to the 9th of October with a warning that if the books were not produced assessment would take place under section 23(*4*). On the 9th the same excuse was put forward that the books were required at Baraich although at Baraich on the previous day the excuse for non-production was that the accounts were with the proprietors in this province. It is clear therefore that the assessee was well aware of what was wanted from him and that he had, and had accepted, notice to produce his accounts.

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Then it was said that the notice was bad because such notice could only be given before the assessee furinshed his return of income, whereas in this case the return of income had been furnished on the 6th of August, 1925, while the notice was not issued until the 7th of September. Reliance was placed on the decision of this Court in *Brij Raj Rang Lal* v. *Commissioner of Income-tax*(1). That decision however has been dissented from by the Allahabad High Court [*In the matter of Chandra Sen Jaini*(2)]. The ground of the decision in this Court is that the words " or having made a return " [in section 23(*4*)] would be quite unnecessary if they were not intended to be in sharp antithesis to the preceding words and to show that in the view of the legislature a notice under section 22(*4*) concerns only the stage before the filing of a return. Now it is to be observed in the first place that section 22(*4*) does not limit the time or define the stage at which the Income-tax Officer may serve a notice requiring the production of accounts or documents. The clause is free from any restriction except this that in the case of a person other than the principal Officer of a Company notice under section 22(*2*) shall have been served on him. Secondly, the object of the clause clearly is that the Income-tax Officer may have full access to the accounts and documents of the assessee and it is obvious that if this power is restrained (except as limited in the proviso), it will be dilfficult, if not impossible, in many cases to have a reliable and just assessment made. Thirdly, the stage at which the production of the accounts and documents will normally be required is after the return has been furnished. Before the return an Income-tax Officer can have little object in calling for accounts and indeed if he did so, he would deprive the assessee of the materials for the preparation of his return. When the return has been furnished, the Income-tax Officer must form an opinion whether it is such a return as may be accepted as correct and complete so as to form the basis of an assessment [section 23(*1*)], or whether it is incorrect and incomplete so as to require support from evidence [section 23(*2*)] and it is for this purpose in the main that we apprehend that the accounts are required. Fourthly, it does not seem necessary to construe the words " or having made a return " in section 23(*4*) by the aid of any supposed antithesis. They seem only to indicate, somewhat unnecessarily it may be, that it is only after the return has been made that notice under section 22(*2*) can issue and the assessee be required either to attend the Income-tax Officer's office or to produce or cause to be produced the evidence on which he may rely. For these reasons we differ from

(1) (1927) 3 Pat. L. T. 682. (2) (1927) 26 A. L. J. 340.

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the decision in *Brij Raj Rang Lal* v. *Commissioner of Income-tax*(1) and are of opinion that the notice in this case, even though given after the return had been furnished, was a good notice.

The second question may be shortly disposed of. While it is doubtless contrary to the provisions of section 64 that two simultaneous assessments should be made at different places upon the same person, it is clear that in the present case there was no double assessment. The Income-tax Officer at Baraich did not in fact assess the firm in Chilwaria, he merely framed an estimate of the profits and sent that estimate to the Income-tax Officer at Saran. There was therefore no obstacle in the way of an assessment being made by the Income-tax Officer at Saran and the procedure adopted was in conformity with the provisions of section 64.

With regard to the assessment actually made it is true that as to Rs. 47,000, the profits of the business in this province, it was based upon the return of the assessee, while only as to Rs. 10,000 was the assessment made under section 23(*4*). But the assessment was one, and as the full accounts of the assessee were not produced as required, it seems to us that the whole assessment must be taken to have been made under section 23(*4*) and to be unappealable.

But as this decision depends upon a view of the law which differs from that taken by a Division Bench of this Court in a previous decision, the case must be referred for decision by a Full Bench.

The question which we refer for decision is whether the case of *Brij Raj Rang Lal* v. *Commissioner of Income-tax* (1) was rightly decided.

Manohar Lal, *A. Burman* and *B. B. Sahay*, for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

The judgment of the Full Bench was delivered by—

Wort, J.—This is a reference by the late Chief Justice Sir Dawson Miller and Ross, J. arising out of an income-tax matter. The terms of reference are "whether the case of *Brij Raj Rang Lal* v. *Commissioner of Income-Tax* (1) was rightly decided."

The facts which it is necessary to state for the disposal of this question are brief. The assessee received notice on the 15th April, 1925, under section 22 (*2*) of the Income-Tax Act, 1922, asking him to

(1) (1927) 8 Pat. L. T. 686.

make a return as to the profits of his business, and, on the 6th August, 1925, he received a further notice under sections 22(4) and 23(2), the first asking him to produce books and the second asking him for certain evidence under the sub-section which I have mentioned. On the 21st August, in compliance with the notice under section 22(4) the assessee produce his books of account. On the 6th September the Income-tax Officer made an order in his order sheet which raises the question which is debated in this case. The order runs :—

"Accounts examined. There are many disclosures. The account need be checked again with Pachrukhi account and the Chilhawaria account which latter was not produced. It is found that he has a business in grains, etc., at Chilhawaria, where the firm goes by the name of Ramawatar Hiralal. He is directed to bring the account with original bijaks and bijak bahi on the 12th September, 1925."

On the 21st January, 1926, the assessee was assessed summarily under section 23(4). It is argued that this was illegal as there was no power in the Income-tax Officer to issue a notice under section 22(4) in the circumstances.

It was established in the case which was argued before the late Chief Justice and Ross, J. that on the order sheet under that date the assessee put his initials as having received notice of the direction by the Income-tax Officer to produce the books according to the order. One question raised in argument by the learned Counsel on behalf of the assessee was that although it has been decided that as a fact notice was served on the assessee there was no notice which sufficiently complied with the Income-tax Act, and it is argued that in spite of the decision of fact it is still open to the assessee to argue that he has received no notice. In our judgment there is no substance in that point. First of all we have the decision of fact that he has received notice and, secondly, as the Income-tax Act of 1922 makes no provision as to the form of notice it seems to us that the point now taken on that is unarguable and in our judgment must be decided against the assessee. The remainder of this

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judgment, therefore, must proceed on the basis that in fact on the 6th or 7th September, 1925, the assessee received a notice under section 22(*4*) and section 23(*2*).

The main substance of the argument addressed to us is, first of all, that the notice contemplated by section 22(*4*) is a notice which can be served only before a return has been made under the earlier part of the section. Taking the section by itself there seems to us to be no basis for that argument but the point which is raised is that taking section 22 with section 23 it is clear that the notice which is contemplated by section 22(*4*) can be served only before the return has been made. But dealing first of all with the construction of section 22 by itself. It provides:—

"(*4*) The Income-tax Officer may serve on the principal officer of any company or on any person 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."

The condition precedent entitling the officer to serve that notice is clearly that a notice has been served under sub-section (*2*) of section 22 and to suggest that there is any restriction as to the time when it may be served appears to us to be an entirely artificial construction of the section. As has already been stated there is one condition precedent and if that is complied with the section, construing it by itself, is sufficiently complied with.

But the argument which is addressed to us more particularly depends upon the construction of sub-section (*4*) of section 23. The argument can be best stated by the words of the judgment in the case which is referred to us, the judgment of Mullick, J. in *Brij Raj Rang Lal* v. *Commissioner of Income-Tax* (1). He states in the course of his judgment, "The words 'or having made a return' would be quite unnecessary if they were not intended to be in sharp antithesis to the preceding words and to show that in the view of

(1) (1927) 8 Pat. L. T. 686.

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the legislature a notice under section 22(*4*) concerns only the stage before the filing of a return." Section 23(*4*) provides that

"If the principal officer of any company or any other person fails to make a return"

and then it gives the circumstances under section 22(*2*) (which deals of course with a demand by the officer for a return)

"or fails to comply with all the terms of a notice issued under sub-section (*4*) of the same section" (that is the notice to which we have already referred the demand by the officer for accounts and documents)

and then comes the clause in the section upon which most of the argument addressed to us has been based :

"Or, having made a return, fails to comply with all the terms of a notice issued under sub-section (*2*) of this section."

The argument in fact is that sub-section (*4*) of section 23 is to be divided into two parts, the first division applying to the state of affairs when a return has not been made and the second applying to the case when in fact a return has been made. But there are clearly three cases contemplated by the sub-section and the words 'having made a return' are descriptive of the third class provided for by sub-section (*2*) of section 23. The argument is met by the judgment of the Chief Justice of Bengal *In the matter of Messrs. Harmukhrai Dulichand* (1). In the course of his judgment he says :—"In my judgment, the exposition which the Commissioner of Income-tax has given is correct. He points out that the sub-section contemplates three distinct cases and, to my mind, it is abundantly shown by him that there is no warrant in the statute for saying that after a return is made the power given by clause (*4*) of section 22 is gone. The only ground which I have discovered for that opinion is the insertion of the harmless words 'having made a return' into clause (*4*) of section 23. It seems paradoxical and improbable that the making of

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a return should put an end to the power of the Income-tax Officer." That appears to be a complete answer to the argument that once having made a return in compliance with the earlier part of sub-section (*2*) then the power which is given by the legislature to the officer under sub-section (*4*) is gone. As has been pointed out in the course of the argument that would lead to this drastic state of affairs ; an officer may issue a notice under sub-section (*4*) having already issued a notice to make a return under the earlier part of the section ; he might state a date for the compliance with the notice under sub-section (*4*) which was earlier than the date for compliance with the making of the return under the earlier part of the section. If the argument is right then the result would be that as a result of the failure to comply with the notice requiring the production of books although that was at an earlier date than the necessity to comply with the notice to make a return yet he might forthwith assess the assessee summarily although in fact the return had not been made. That is the very evil the assessee wishes to avoid. That is reducing the argument to an absurdity and a construction of that nature would seem to us to be quite unwarranted by the terms of the section. Books of account were produced on 21st August, 1925, and the order of 6/7th September demanded the production of books of the Chilhawaria branch ; and another aspect of the same argument is that when once the Income-tax Officer serves a notice under section 22(*4*) the enquiry assumes a judicial character and his power under section 23(*4*) ceases and he is limited to requiring evidence on particular points, and in any event he could not under the order of 6/7th September demand further accounts. We see nothing in the Act to warrant the view that any of the powers under the Act cease before the assessment has been fianally made.

The other point which has been raised is that even supposing there was a notice under section 22(*4*), no mention was made in that notice of the section or

sections under which the notice was served and in consequence the assessee is in a difficult position or is penalised ; in the case of non-compliance with one section although the right of appeal remains, non-compliance with the notice under the other section does away with the right of appeal. There seems to us to be no basis for this argument for the simple reason that nowhere in the Act is there any provision making it necessary for the officer serving the notice to state the section under which the notice is served or to state the section under which his powers have been granted. There appears therefore to be no substance in that point either.

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That being so it must be stated that, in our opinion, in so far as the case of *Brij Raj Rang Lal* v. *Commissioner of Income-tax* (1) was a decision on the construction of section 22(*4*) it was wrongly decided. In these circumstances the Income-tax Commissioner is entitled to his costs in this Court and before the late Chief Justice and Ross, J. Hearing fee Rs. 500.

(1) (1927) 8 Pat. L. T. 686.