

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Kulwant Sahay and Fazl Ali, JJ.

JANGI BHAGAT RAMAWTAR

1929.

v.

Feb., 25.
March, 11.

COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA.*

Income-tax Act, 1922 (Act XI of 1922), sections 22(4), 23(4), 28, 33, 64 and 66(3)—notice to produce books served on assessee's gomashtha—books not produced—summary assessment, validity of—Penalty imposed by Income-tax Officer set aside by Commissioner—fresh penalty imposed by Commissioner—reference to High Court, whether assessee entitled to.

Where, in response to a notice under section 22(4) of the Income-tax Act, 1922, assessee's gomashtha produced certain books before the Income-tax Officer, and the latter, finding that these were not the books called for by the notice, issued another notice under section 22(4), which was served upon the gomashtha, *held*, on a contention by the assessee that he was not affected by the notice served on the gomashtha, that the service of the notice was valid, and an assessment made under section 23(4), the books called for not having been produced, was properly made.

Where the Commissioner of Income-tax set aside a penalty imposed by the Income-tax Officer under section 28 and, after giving the assessee an opportunity to show cause, himself imposed a penalty, *held*, that as the Commissioner's order was not an appellate order passed under section 31 or 32, but an original order passed under section 33, the Commissioner could not be required under section 66(3) to refer the question of the validity of the order to the High Court.

Sachchidananda Sinha v. Commissioner of Income-Tax, Bihar and Orissa(1), distinguished and doubted.

Trikamjee Jivan Das v. Commissioner of Income-Tax, Bihar and Orissa(2), referred to.

*Miscellaneous Judicial Case no. 18 of 1929.

(1) (1924) I. L. R. 3 Pat. 664.

(2) (1925) I. L. R. 4 Pat. 224.

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The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

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S. N. Basu and Hiralal Das Gupta, for the assessee.

C. M. Agarwala, for the Crown.

KULWANT SAHAY, J.—This is an application ^{11th March, 1929.} under section 66 of the Indian Income-tax Act praying that the Commissioner of Income-tax, Bihar and Orissa, may be required to state a case and to refer it to this Court on the following points :

- (1) Whether the assessment under section 23(4) of the Act was valid?
- (2) Whether the order under section 28 of the Act was legal and valid?
- (3) Has there been a misdirection in arriving at a finding about the genuineness or otherwise of the account books produced by the petitioner inasmuch as the fact that the rokar bears the Income-tax Officer's signature, dated 7th October 1925, was completely ignored, and, if so, whether the finding itself is legal?

The petitioner submits that these points arise under the following circumstances :

The petitioner has a money lending business at Beldarwa and a rice-mill at Adapur in the district of Champaran. The present assessment is for the year 1927-1928 which is based on the income of the previous year, the accounting year of the assessee ending in the month of Kartik of the Fasli year. In compliance with a notice under section 22(2) of the Act he submitted a return showing an assessable income of Rs. 5,787. Thereupon the Income-tax Officer, by his order, dated the 21st of December, 1926, called upon the assessee to produce accounts in support of the return, and a combined notice under sections 22(4) and 23(2) was issued requiring him to produce accounts of the years 1331, 1332 and 1333, Fasli, fixing the 13th of January, 1927, for the purpose. On the 13th of January time was granted to the assessee on

his application up to the 26th of January. On the 26th of January he produced his account books which were partly examined on that date. On the 27th of January the Income-tax Officer discovered that the account books produced were different from the books which were shown to him when he had gone to the locality on a local inquiry on the 30th July, 1926, and which books he says he had signed there on that date. It appears from the order of the Commissioner that the Income-tax Officer had examined the books at Adapur on the 30th of July, 1926, and had made notes thereof in the departmental note-book kept by the Income-tax Officer, and the reference about his visit to the assessee's mill was also found in the Income-tax Officer's diary of the 30th of July, 1926. The Income-tax Officer on examining the books produced before him discovered that there were discrepancies as regards the amount of the sale price of rice as shown in the books produced and the sale price noted by him during his local inspection on the 30th of July. On the 27th of January, therefore, he made a note in the order-sheet to the effect that the account books produced were different from those signed by him at the time of the local inquiry as the sale price did not agree, and the assessee was asked under section 22(4) to produce the books which the Income-tax Officer had signed, giving a warning to the assessee that otherwise he would make a heavy assessment and also a penal assessment. The 29th of January was fixed to produce these books. It appears that on the 29th of January a servant of the assessee, named Ibadat Mian, appeared, and it appears from the order-sheet that a petition was filed on that date for a month's time on the ground of illness of the proprietor. The order-sheet shows that the Income-tax Officer was of opinion that time was asked for simply to evade producing the account books. He, however, allowed another opportunity to the assessee to produce the books and fixed the 31st of January, 1927. It is represented that Ibadat Mian at first made an oral

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application for a short adjournment but that the Income-tax Officer required him to file a written petition praying for a month's time. This the Income-tax Officer denies. He only admits that at first an oral application was made and the Income-tax Officer directed a written application to be filed but he states that he did not direct him to apply for a month's adjournment. It may be noted that the books were produced on the 26th of January, 1927, by a gomashita of the assessee, named Chhathu Lal, and it is contended that Ibadat Mian had no authority to make the application as he was merely a peon and not a gomashita of the assessee. On the 31st of January the order sheet shows that Ramawtar Prasad, the son of the assessee, Jangi Bhagat, both of whom are members of an undivided Hindu family, appeared before the Income-tax Officer and stated that the books which the officer had signed at the mill were not found even after a long search and that they were missing. The Income-tax Officer was of opinion that this was a false excuse and he made an assessment on that date under section 23(4) of the Act on a total income of Rs. 18,350. On the 29th of January the Income-tax Officer also recorded an order on the order-sheet directing the representative of the assessee, namely, Ibadat Mian, to show cause on the date fixed, viz., the 31st of January, why a penalty under section 28 should not be imposed for deliberately showing a lesser amount as the income from sale of rice. On the 23rd of February, 1927, the assessee filed an application before the Income-tax Officer for cancellation of the assessment and for making a fresh assessment under the provisions of section 27 of the Act. The Income-tax Officer rejected this application by his order, dated the 4th of June, 1927, and on the same day he imposed a penalty of Rs. 679-5-0 under section 28 of the Act.

The assessee preferred an appeal to the Assistant Commissioner under section 30 of the Act; but this appeal was not admitted by the Assistant Commissioner as in his view the appeal was filed beyond the

period of limitation of thirty days provided by sub-section (2) of section 30 of the Act. The assessee then went before the Commissioner with an application under section 33 of the Act as well as an application under section 66. The learned Commissioner by his order, dated the 22nd July, 1928, held that the assessment under section 23(4) was legal and proper; but, as regards the penalty under section 28, he was of opinion that the procedure adopted by the Income-tax Officer was irregular inasmuch as the order passed by him on the 29th of January, calling upon the representative to show cause why the penalty should not be imposed, was not properly communicated to the assessee, it being signed by Ibadat who was merely a peon and could hardly be held to be an agent of the assessee, and that it was not clear to the Commissioner whether the assessee had in reality an opportunity of showing cause why the penalty should not be imposed. He accordingly cancelled the order; but, as he was doubtful whether the Income-tax Officer had jurisdiction at that stage to take up the matter again, he himself called on the assessee to show cause why a penalty should not be imposed under section 28 on the ground that he had deliberately furnished inaccurate particulars of income and had thereby returned it below its real amount. Ultimately the Commissioner, by his order, dated the 6th of November 1928, imposed a penalty of Rs. 679. The present application is directed against these two orders, dated the 22nd of July, 1928, and the 6th of November, 1928, passed by the Commissioner.

In dealing with the present application this Court is bound to accept the findings of fact arrived at by the Commissioner. It is not open to this Court to go into the facts of the case and to determine whether the Commissioner was right in his findings of the facts. The finding of facts of the Commissioner is that the Income-tax Officer did, as a matter of fact, go to the mill at Adapur on the 30th of July, 1926, inspected

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certain books, made notes in the departmental note-book and in his diary, and signed the books which he had inspected. The Commissioner was also of opinion that the books produced by the assessee on the 29th of January through his gomashtha, Chhothu Lal, were not the real books, and that the Income-tax Officer acted within jurisdiction in issuing the notice on that date calling upon the assessee to produce the account-books which he had signed, and non-compliance with that order gave jurisdiction to the Income-tax Officer to make the assessment under section 23(4) of the Act. Upon these findings the first and the third points stated in the application now before us, upon which we are asked to require the Commissioner to state a case, do not arise.

It is contended on behalf of the petitioner that the assessment under section 23(4) was illegal because notice of the order of the 27th of January, 1927, was not served personally upon the assessee; that the notice was bad because it did not comply with the provisions of section 22(4); and that if the assessee is directed to produce account-books which the assessee says were not in existence then non-production of the books did not amount to a non-compliance of the notice under section 22(4). In my opinion none of these grounds can prevail. Chhothu Lal appears to be the accredited agent of the assessee; he was the gomashtha and produced the books before the Income-tax Officer: and a notice of the order of the 27th of January served upon him was a sufficient compliance with the provisions of the law as regards the service of notice. Nothing is shown why the notice is said not to comply with the provisions of section 22(4), and the mere fact of the denial of the existence of the account-books required to be produced does not absolve the assessee, when it is found upon evidence that the books were really in existence, and the non-production thereof did amount to a failure to comply with the notice under section 22(4). As regards the order of the Commissioner imposing the penalty under section

28 of the Act, it is contended by Mr. Agarwala on behalf of the Commissioner that this was an original order passed by the Commissioner and did not come within the provisions of sub-section (3) of section 66 of the Act which would empower this Court to call upon him to state a case. It is contended that it is only against orders passed on appeal under section 31 or 32 of the Act that a reference can be made to this Court by the Commissioner and this Court cannot call upon the Commissioner to state a case in respect of orders passed by him not in appeal but as an original order. The petitioner, however, refers to the case of *Sachchidananda Sinha v. The Commissioner of Income-tax*(¹). In that case there was an order made by the Commissioner under section 33 of the Act and the Commissioner was required to state a case and ultimately this Court was of opinion that the procedure adopted by the Commissioner was illegal. It does not, however, appear from the decision of that case that the question was raised whether this Court had jurisdiction to act under section 66 of the Act in respect of an original order made by the Commissioner. In a later case, however, in *Trikamjee Jivan Das v. The Commissioner of Income-tax, Bihar and Orissa*(²), grave doubts were expressed whether the High Court was justified in requiring the Commissioner to state a case. The plain language of section 66 does not empower this Court to require the Commissioner to state a case in respect of an original order passed by him and not in respect of an order passed in a matter which came before him on an appellate order by the Assistant Commissioner. I am, therefore, of opinion that the point no. 2 also does not arise in the present case.

This application is dismissed.

FAZL ALI, J.—I agree.

Application dismissed.

(1) (1924) I. L. R. 3 Pat. 664.

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