REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1929.

July, 12, 19.

Before Fazl Ali and Chatterji, JJ.

FIRM OF MOHAN LAL HARDEO DAS

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (Act XI of 1922), sections 22(4), 23(2), 30, 31, 32 and 66—Limitation—terminus a quo—exclusion of time for obtaining copies—omission to comply with notice—summary assessment, effect of.

The period of limitation for an application under section 66(2) of the Income-tax Act, 1922, is one month from the passing of the appellate order under section 31 or 32 and not one month from the date on which the date of the appellate order is communicated to the assessee.

But in computing the period of limitation for an application under section 66(2) the time taken in obtaining a copy of the appellate order, and for an application under section 66(3) the time taken in obtaining a copy of the Commissioner's order, should be excluded.

Where, in the course of an assessment of a firm, at its headquarters, the Income-tax Officer called for and received reports from the local Income-tax Officers of the profit made or loss sustained by branches of the firm within the jurisdiction of such officers, and, in response to a notice subsequently issued to the assessee to produce the books of all his branches, he omitted to produce the books but informed the assessing officer that he relied on the reports of the local officers, *held*, that this was not a compliance with the notice and, therefore, that the assessing officer properly made the assessment under section 23(4), with the result that the assessee lost his right of appeal, and, consequently, also lost his right to apply to the Commissioner under section 66(2), and could not apply to the High Court under section 66(3).

*Miscellaneous Judicial Case no. 56 of 1929.

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

Hasan Jan and *Ahmad Reza*, for the assessee.

C. M. Agarwala, for the Crown.

FAZL ALI, J.—This is an application asking us under section 66, clause (*3*), of the Income-tax Act, to call upon the Income-tax Commissioner to draw up a statement of the case and refer it with his own opinion to this Court.

The petition is on behalf of a firm carrying on business in the districts of Monghyr, Darbhanga and Calcutta. The firm was called upon to submit a return, in respect of its income for the years 1923 and 1924 and to file account books. The Income-tax Officer of Calcutta found that the business in Calcutta had suffered a loss of Rs. 14,725 while the Income-tax Officers of Darbhanga and Monghyr found that the firm had made a profit of Rs. 8,500 and Rs. 8,000, respectively, in those districts. The Income-tax Officers of Calcutta and Darbhanga also reported the result of their examination of the accounts produced by the petitioners to the Income-tax Officer of Monghyr. The Income-tax Officer of Monghyr then proceeded to assess the petitioner upon a total income of Rs. 22,000. On the 29th June, 1924, the Assistant Commissioner cancelled the assessment and directed a fresh assessment. Between this date and now the case has had, to use the words of the Income-tax Commissioner, "a long and muddled history" for which some of the orders passed by the officers of the Income-tax Department are to some extent responsible. It will suffice, however, for the purpose of considering the present application not to go further back than the order passed by the Commissioner of Income-tax on the 15th December, 1927. By this order he directed the Income-tax Officer to make a fresh assessment for the years 1923 and 1924 after calling for the accounts of the business in Calcutta and Monghyr. In pursuance of this order the Income-tax Officer of

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

Monghyr issued a notice on the 19th January, 1928, under section 22, clause (*4*) and section 23, clause (*2*), calling for the books of accounts referred to in the order of the Commissioner and fixing the 8th February, 1928. On that date a petition was received by registered post by the Income-tax Officer in which it was stated that the account books had been destroyed and the assessee could not produce them. It may be mentioned that the case of the petitioners, as put forward before us, is that the books were sent to Marwar where they were eventually destroyed by white ants. The case was then postponed till the 27th February, 1928, on which date the firm was asked to produce any other evidence it chose in support of the return. No one appeared on that date but a petition was received in the office on the 28th February, 1928, in which the petitioners stated that the firm had no further evidence to rely on than the findings of the Income-tax Officers of all the three places which were already before the Income-tax Officer of Monghyr. The Income-tax Officer then proceeded to assess the petitioners estimating the income once more to be Rs. 22,000. The petitioner thereupon appealed to the Assistant Commissioner of Income-tax and it appears that while the appeal was pending, the Income-tax Officer, finding that the demand notice was not quite regular, cancelled it under section 35 and issued a fresh demand notice showing that the assessment had been made under section 23, clause (*4*).

Sometime later the Assistant Commissioner of Income-tax heard the appeal which was disposed of by an order, dated the 5th July, 1928. The latter part of the order passed by the Assistant Commissioner of Income-tax shows that he rejected the appeal mainly on the ground that the notice of demand which had been originally issued by the Income-tax Officer having been cancelled and rectified under section 35 and there being no appeal against the " rectified notice " which

was issued after the appeal before him had been filed, the appeal was not maintainable. It appears that an intimation of the order passed by the Assistant Commissioner was sent by post to the petitioners on the 7th July, 1928, and it reached them sometime after the 8th July, 1928. The petitioners thereupon sent a petition to the Commissioner of Income-tax asking him to refer certain questions of law to the High Court along with a statement of the case, as well as his opinion thereon. This application was disposed of by the Commissioner of Income-tax on the 20th December, 1928, one of the grounds being that the application was out of time. The petitioner thereupon filed this petition before this Court on the 24th June, 1929.

Now the learned Counsel who appears for the Income-tax Department raises certain preliminary objections and asks us to hold that this petition is not maintainable. His first contention is that the application was not thrown out by the Commissioner of Income-tax on the ground that no question of law arose but on the ground that the application was out of time and, this being so, the requirements of section 66, clause (*3*), are not fulfilled in this case and this Court is not competent to proceed under section 66, clause (*3*). The simple reply to this point, however, is that the Commissioner has elaborately dealt with the points of law raised by the petitioners in their application before him and the order passed by him makes it absolutely clear that he has refused to state the case not only on the ground that the application before him was out of time, but also on the ground that no question of law arose in the case.

The next point raised by the learned Counsel for the Income-tax Department was that the applications before the Commissioner of Income-tax, as well as before this Court, are out of time. It will be necessary here to refer to a few dates in order to

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

appreciate the point raised by the learned Counsel. As I have already stated the Assistant Commissioner of Income-tax rejected the petitioners' appeal on the 5th July, 1928. It appears that no date was fixed for passing the order and the order was passed in the absence of the petitioners. The order, however, was communicated to the petitioners by means of a post-card, dated the 7th July, 1928, and it is stated by the petitioners in the affidavit before us that the post-card reached them sometime after the 8th July. The application of the petitioners under section 66, clause (2), was posted at Darbhanga on the 4th August and it was received in the Commissioner's office on the 8th August, 1928. At first sight, therefore, it would appear that the application before the Commissioner was out of time by about three days because section 66, clause (2), requires that the application under that section should be made within one month of the passing of an order under section 31 or section 32. Similarly the application to this Court, which should have been filed within six months from the receipt of the notice of the order of the Commissioner, seems to have been filed a few days later.

Now, it is contended by the petitioners that their application before the Assistant Commissioner was not out of time on two grounds. It is said in the first place that the time is to be computed not from the date of the order but from the date on which the order was communicated to the petitioners. The second contention is that the petitioners are entitled to claim that the time required for obtaining the copy of the order of the Assistant Commissioner of Income-tax should be excluded in computing the period of limitation. The last ground is also urged to show that the application before this Court was also in time.

As regards the first contention our attention is drawn to the fact that the Assistant Commissioner fixed no time for passing the order and the order was passed in the absence of the petitioners. It is said

that it is only just that in these circumstances the period of limitation should be computed not from the date on which the order purports to have been recorded but from the date when the order was communicated to the petitioners, namely, the date on which the post-card was received. It is also pointed out that, according to the prevailing practice, the officers of the Income-tax Department do not insist on the presence of the party on the date on which the order is to be passed, and, as no date is fixed for the passing of the order, the order is always communicated to the party by post. This being so, it is urged that if the period of limitation is not computed from the date of the communication of the order, it may mean great hardship to the party in certain cases because it is possible that the party may not know anything about the order until the period of limitation has expired. Now, if the learned Advocate for the petitioners means to point out to us what should be the law, we would say that his argument deserves serious consideration. In the present case, however, our concern is not to lay down what should be the law, but to interpret the law as it stands. In doing so I have to say that I do not find anything in the language of the section to enable us to hold that the expression "passing of the order" should be interpreted as the communication of the order to the party. On the other hand it is noticeable that while under clause (*2*) of section 66, time is to run from the passing of the order, it is to be computed under clause (*3*) from the date on which the assessee is served with notice. Whether this distinction was deliberately made or whether, at the time clause (*3*) was being amended, the language used in clause (*2*) was not noticed, is difficult to say, but it is clear that the plain language of the section does not support the contention of the petitioners. It is true that ordinarily the judgment of a Court, in order to be properly delivered, must be pronounced in court, and in fact there is a specific provision to this effect

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

in section 33 and Order XX, rule 1, of the Civil Procedure Code. There is, however, no such clear provision in the Income-tax Act and I cannot hold, without considerably straining the law, that the order passed by the Income-tax Commissioner can be ignored for the purpose of limitation, until it has been duly communicated by post to the assessee. All I can say is that what seems to be the hardship of the existing law can be only met by the vigilance of the assessees, on the one hand, and by the realisation by the Income-tax Department, on the other hand, that if it does not require the assessees to be present on the day the orders are to be passed, then it is only fair that the orders should be communicated to them as soon as possible after they have been passed.

The second point raised by the learned Advocate for the petitioners appears to me to be much more substantial and they have at least two reported decisions to support them on the point, one of them is a decision of the Rangoon High Court in *Rao Bahadur S. Ramanatha Reddiar* v. *Commissioner of Income-tax*(1), where it has been held that an assessee who desires to have a reference made to the High Court under section 66, clause (*2*), of the Income-tax Act on a question of law arising out of an order passed under section 31 or 32 of the Act, is entitled to be furnished with a copy of the reasons for the order and the time taken by the office to furnish such copy must be excluded in computing the period of one month allowed to the assessee to apply for the reference. The other decision was given by the Lahore High Court in the case of *Muhammad Hayat Haji Sardar*(2). In that case the question arose as to whether the days spent in obtaining the copy were or were not to be excluded in computing the period of limitation fixed for presenting an application to the High Court under

(1) (1926) I. L. R. 4 Rang. 175.

(2) (1929) A. I. R. (Lahore) 170.

section 66, clause (*3*), after the application under section 66, clause (*2*), had been rejected by the Commissioner of Income-tax, and it was held that, in view of section 29 of the Limitation Act, the period should be excluded. Now section 29 of the Limitation Act as amended by Act X of 1922, provides as follows:—

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18 and section 22 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law ; and

(*b*) the remaining provisions of this Act shall not apply."

One of the sections referred to here is section 12 of the Limitation Act which provides that in computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from, or sought to be reviewed, shall be excluded. Now reading the two sections together there seems at the first sight to arise a difficulty which was unfortunately not noticed by either party in the course of the argument before us. Section 12 apparently provides that the time for obtaining copies is to be excluded only in case of an appeal, an application for leave to appeal and an application for review of judgment. The question then arises whether an application under section 66, clause (*2*), made to the Commissioner of Income-tax or an application under section 66, clause (*3*), made to this court will be covered by the provisions of section 12 of the Limitation Act. In my opinion, however, section 29 should be liberally construed and when we turn to that section it appears

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

that it provides for the application of section 12 of the Limitation Act,

"for the purpose of determining any period of limitation prescribed for any *suit*, *appeal* or *application by any special* or local law."

Thus it will not, I think, be straining the law to hold that the main principle laid down in section 12, namely, that the period for obtaining copies shall be excluded in computing the period of limitation in certain cases has been made applicable under the special law for which a period of limitation has been prescribed and this will cover an application under section 66(*2*) and (*3*) of the Income-tax Act. In my judgment, technicalities apart, this will be the only reasonable way of giving effect to the intention of the Legislature. This is the view which seems to have been taken by the Lahore High Court in the case to which I have referred just now and which was a case in which the question of limitation arose in connection with an application made to the High Court under section 66, clause (*3*). This is also substantially the view of the Rangoon High Court and it finds no little support from the line of reasoning which was adopted in many cases which were decided before the passing of Act XI of 1922. In those days there was nothing in section 29 of the Limitation Act, or anywhere else, to make the general provisions of the Limitation Act as found in sections 4, 9 to 18 and 22 applicable to any of the special laws or enactments. It was, however, held in a number of cases that these general provisions would apply to a special enactment where that Act is not a complete Code in itself. To mention only one of the cases in which this view was propounded I may refer to the case of *Dropadi* v. *Hira Lal*(1) which was decided by a Full Bench of the Allahabad High Court. The following passage which occurs in the judgment of that case may be instructive: "The question is one of considerable

(1) (1912) I. L. R. 34 All. 496.

difficulty and it must be admitted that at first sight it is straining the words to hold that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts does not affect or alter those periods. In one sense it certainly does. But the construction accepted by Stratchey, C.J., Banerji, J., and Muthusami Ayyar, J., seems to us to be correct. Apart from the history of this piece of legislation, we find it difficult to believe that the Legislature introduced, as it has, into several Acts, provisions giving a right of appeal and prescribing periods within which the right may be exercised, it intended as a general rule that those provisions should be applied without reference to the general provisions contained in the general Limitation Act. In many, if not most cases, the Code of Civil Procedure is made applicable with the result that an appellant must produce a copy of the order against which he is appealing. It is reasonable to suppose that the Legislature intended to give him time to procure a copy of the order. The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to the period of limitation prescribed by special Acts as to period of limitation prescribed by the Limitation Act itself."

I may also quote here the following passage from the judgment of the Rangoon High Court in the case of *Rao Bahadur S. Ramanath Reddiar* v. *Commissioner of Income-tax*(1). "It seems to us that when the Legislature allowed thirty days to the subject in which to make an appeal it never intended that the Deputy Commissioner should not communicate his reasons to the assessee at the same time as his bare decision. It is manifestly impossible for any person to make up his mind whether a point of law arises unless he has proper materials to do so before him. The mere statement that his appeal has

(1) (1926) I. L. R. 4 Rang. 175.

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

been allowed or dismissed is not sufficient. It has often been said that revenue statutes should be construed in favour of the subject. In my view it is much more important in this connection that any rights of appeal contained in revenue legislation be strictly construed as to their exact meaning as far as they allow a specific time in which an effective appeal can be put forward. It can easily be seen that a glut of work in the office of a busy Commissioner may completely deprive an assessee of his right to appeal at all. Such a state of affairs would not be carrying out the intention of the statute and in this case, therefore, although I think that no conduct of the assessee himself could have enlarged to his advantage the statutory period under the section, neither can any conduct of the executive diminish the full period of time allowed to reflect upon and decide whether action should be taken by way of approach to this Court."

I am therefore of opinion that although, as was laid down in *Ratanchand Khimchand Motichand* v. *Commissioner of Income-tax, Bombay*(1) and in *Commissioner of Income-tax, Madras* v. *Mothey Ganga Raju*(2), neither the High Court nor the Commissioner has the power to extend the time prescribed by section 66 of the Indian Income-tax Act of 1922, yet on general principle, and in view of section 29 of the Limitation Act, the assessee is entitled to have the benefit of the time which was spent in obtaining a copy of the order with which he is dissatisfied. As it is conceded that, if such time be excluded, the application of the petitioners both before this Court as well as before the Commissioner of Income-tax would be well within time, so in my opinion the preliminary objection raised by the learned Counsel for the Income-tax Department fails so far as it is based on the question of limitation.

There is, however, another point which seems to me to stand very much in the way of the petitioners.

(1) (1916) 28 Bom. L. R. 1096. (2) (1927) 100 Ind. Cas. 291.

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

As I have already stated the petitioners were asked by the Income-tax Officer to produce their books of account but they did not produce them. They were given another opportunity to produce any such further evidence as they chose on the 27th July, 1928, but they neither appeared before the Income-tax Officer on the date fixed nor did they produce any evidence on that date. It is said that one of their applications did reach the Income-tax Officer on the 28th and it being stated there that they would rely upon the findings of the Income-tax Officers of Calcutta and Darbhanga, it is contended that this would be sufficient compliance with the notices under section 22, clause (*4*) and under section 23, clause (*2*) and no assessment can, therefore, be made under section 23, clause (*4*). I find, however, that both the Assistant Commissioner of Income-tax and the Commissioner of Income-tax have held that the petitioners did not comply with the notices under the sections referred to above and that their case came directly under section 23, clause (*4*). Now I have carefully considered the matter and it appears to me that it is not possible for me to say that this view is incorrect. The petitioners were requested by the Income-tax Officer to produce evidence but they simply turned round and said, "We have no evidence to produce and so we want you to decide the case on the materials which are before you." They did not file any affidavit in support of their statement nor did they make any serious attempt to convince the Income-tax Officer that they had no evidence in their possession. In these circumstances there cannot be any doubt that in substance there was no compliance with the notices under section 22, clause (*4*) and under section 23, clause (*2*). There also arises here a technical point in favour of the Crown. Section 23, clause (*4*), says that an assessment will be made by Income-tax Officer under section 23(*4*) if *all* the terms of the notice under the provisions referred to in that section are not complied with. In this case one of the terms of the notice was that the assessee should produce any such evidence as they might choose to produce on

1929.

FIRM OF MOHAN LAL HARDEO DAS v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

FAZL ALI J.

the 27th July. No such evidence was, however, produced by them on that particular date and therefore all the terms of the notice were not complied with. Thus it would perhaps be open to the Income-tax Department to take the view that the case came under section 23, clause (4), although the Income-tax Department neither should, nor, I believe, do as a rule, take their stand on such a technical ground, in those cases where there is a substantial compliance with its requisitions. I am, therefore, not in a position to say that, the decision of the Income-tax Officers that the assessee's case came under section 23, clause (4), under the circumstances of the case, is not correct. If so, it is clear that no appeal lay to the Assistant Commissioner of Income-tax from an assessment made under section 23, clause (4), and, if no appeal lay in this case, then the provisions of section 66 do not apply and we cannot serve a requisition on the Commissioner of Income-tax to state the case and refer it to the High Court. I have only to observe here that up to a certain point the petitioners had a good case. It is not clear how the assessment was made on a profit of Rs. 22,000 if the Officers of the Department had found, as stated, a profit of Rs. 16,000 in Monghyr and Darbhanga against a loss of Rs. 14,725 in Calcutta. Again, assuming that an appeal lay to the Assistant Commissioner of Income-tax in this case, I do not see how the Assistant Commissioner of Income-tax could throw out the appeal merely because the demand notice was subsequently amended by the Income-tax Officer. A reference to section 30 of the Income-tax Act will show that the appeal lies against the assessment and it is only for the purpose of calculating the period of limitation that the notice of demand is referred to in clause (2) of that section. The order of the Commissioner also is open to criticism on the ground that he held that the application filed by the petitioner was time-barred, although in our opinion it was not. These matters, however, cannot avail the petitioners in the present case, because we can neither go into

facts nor proceed under section 66(3) on account of the legal difficulty that the assessment being made under section 23(4) no appeal lay from that assessment. It is clear that the petitioners have considerably weakened their case by not producing their books of account and by setting up the plea, which has been rejected everywhere, that their books which were in existence in the years 1923 and 1924 have since been destroyed by white ants. In my opinion the application ought to be dismissed, but under the circumstances of the case there will be no order as to costs.

FAZL ALI J.

CHATTERJI, J.—I agree.

Application rejected.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

SPECIAL BENCH.

1929.

Nov. 14, 25.

Before Terrell, C.J., Das and Kulwant Sahay, JJ.

J. M. CASEY

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (Act XI of 1922), section 2(1)(b) and 4(3)(viii)—Aloe plants cultivated by assessee and decorticated by machinery.

Where an assessee grew aloe plants and, by means of machinery, decorticated the leaves for the purpose of making rope from the fibre, and it appeared that there was no cultivation of the aloe plants save in connection with the economic process involving the use of machinery such as was employed by the assessee, *held*, that this was the " process ordinarily employed by the cultivator for rendering his produce fit to be taken to the market ", and, therefore, that the entire profits were exempted from taxation by section 4(3)(*viii*) of the Income-tax Act, 1922.

Killing Valley Tea Company, Ltd. v. *Secretary of State for India*(1), distinguished.

*Miscellaneous Judicial Case no. 82 of 1929.

(1) (1921) I. L. R. 48 Cal. 161.