MISCELLANEOUS CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

DUNI CHAND-DHANI RAM—PETITIONERS

versus

THE COMMISSIONER OF INCOME-TAX — RESPONDENT.

1926

Jan. 20.

Civil Miscellaneous No. 509 of 1924.

Indian Income-tax Act, XI of 1922, section 22 (4)—Production of accounts—cause for rejection of—Section 23 (2)—Notice to assessee—laxity in form of—Section 37—Procedure—judicial nature of—Section 13—Assessment—basis of, to be indicated —Evidence—nature of.

Where the assessee makes a return of his income which is recognised as such and then, in obedience to an order under section 22 (4) of the Income-tax Act, produces all his account-books, the Income-tax Officer is not justified in rejecting the same merely because they are complicated or without calling upon the assessee under section 23 (2) to appear and answer criticisms thereupon.

The notice issued to the assessee should state plainly the particular section under which the assessee is to appear.

Held further, that section 37 of the Act indicates that the procedure of the Income-tax Officer is of a judicial nature, and section 13 does not justify him in estimating the income of the assessee arbitrarily, by guesswork, or without indicating the basis of his assessment.

And, evidence produced by the assessee in support of his return should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay;

Held also, that where the Commissioner's order in review of the appellate order passed by his assistant still subsists, there is no force in the contention that, because both those orders were incompetent, the High Court has no mandatory jurisdiction under section 66 of the Act.

Application praying that the Commissioner of Income-tax, Punjab, be required to state the case

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under section 66, *clause* (3), *of the Income-tax Act and case stated accordingly.*

JAGAN NATH, AGGARWAL, for Petitioner.

CARDEN-NOAD, Government Advocate, for Respondent.

The judgment of the High Court was delivered by :—

LEROSSIGNOL J.—This is a case stated and referred by the Commissioner of Income-tax, Punjab, under clause (3) of section 66 of the Income-tax Act of 1922. The learned Commissioner prefaces his reference with a suggestion that this Court has no jurisdiction to issue a *mandamus* in this case on the ground that the Commissioner's own order in review of the appellate order passed by his Assistant was equally with the appellate order of his Assistant incompetent. The learned Government Advocate states that he is unable to support this contention which obviously has no force. The Commissioner's order still subsists and has not been set aside and it would be opposed to all ideas of congruity, legal or other, to hold that an order cannot be challenged on the ground that it should never have been issued.

The disputed assessment, which is confined to an item of Rs. 10,000 in respect of interest, was in respect of the year 1922-23. The return authorised by section 22 of the Act was made on the 9th September 1922, and that showed an income from interest of only Rs. 866. On the 12th February 1923, in obedience to an order issued under section 22, clause (4), the assessee produced his accounts before the Assessing Officer, and on the 23rd February received an assessment order to pay tax on an income of Rs. 30,000. The assessee applied for cancellation of

the assessment under section 27, but the Income-tax Officer rejected it on the 18th April 1923 by the following order :—

"Section 27 does not apply to this case ; return was submitted, accounts were seen. The pleas raised are relating to appeal." The assessee then appealed to the Assistant Commissioner who entertained the appeal and remanded the case for fresh enquiry. The appeal was subsequently dismissed and an application made to the Commissioner for review met with the same fate, but on the merits.

Now, the main contention on behalf of the assessee is that he made a return which was recognised as a return. He produced all the books he had and if the Income-tax Officer was not prepared to accept his accounts he should have acted in a judicial manner, and before proceeding to assess by a rule of thumb should have issued notice under section 23 (2) to the assessee to appear and answer the criticisms directed against his return and accounts.

The procedure under the Income-tax Act is as follows :—A return of income is called for from the assessee and must be furnished. If that return is not furnished the assessee places himself at the mercy of the Income-tax Officer who shall then make the assessment to the best of his judgment, and the assessee will have no right of appeal.

If a return is made it is open to the Assessing Officer to accept it and to base the assessment entirely upon it. If he is not prepared to accept it forthwith, he may issue notice to the assessee to appear before him and justify his return by his accounts. If the assessee, although he has furnished the return, fails to produce his accounts in support of that return he is placed in the same position as if he had made no

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return at all. If, however, he has made a return and has produced his accounts in obedience to an order under section 22 (4), the Income-tax Officer is not justified in rejecting the return and the accounts and in assessing on a rule of thumb until he has given notice to the assessee under section 23 (2) of the Act to appear before him and justify his return.

In this case no such notice was issued to the assessee. The Income-tax Officer rejected his accounts which had been produced in compliance with a notice under section 22 (4) and proceeded forthwith to make the assessment to the best of his judgment. In this connection we should like to draw the attention of the learned Commissioner to the great laxity which prevails in the office of the Income-tax Officers in the matter of the issue of notices. Probably with the object of avoiding the multiplicity of notice forms, a form is used which may be a notice either under section 22 (4) or under section 23 (2). If the notice is under section 22 (4) certain erasures are necessary before the notice issues. If the notice is one under section 23 (2) other portions of the notice must be erased. We find, however, that notices issued without any erasures so that it is not possible for the assessee to know whether he is being summoned under section 22 (4) or section 23 (2). Section 37 of the Act indicates that the procedure of Income-tax Officers is of a judicial nature, and in making his assessment the Income-tax Officer should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay.

Next, section 13 is invoked as justifying the assessment by the Income-tax Officer. That section provides that if no method of accounting has been

regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. Now, the Income-tax Officer's application of this section was as follows:—"As regards income from interest the Inspector's estimate seems to me a little high. My own estimate is about Rs. 10,000." We do not regard this wholly arbitrary assessment as one justified by section 13, for the Income-tax Officer does not lay down any basis, nor does he indicate how he arrives at his estimate of Rs. 10,000. Had he found that the sums loaned were a certain figure, and had he calculated a flat rate upon those sums, we should have regarded his action as in conformity with the provisions of the section. But a bare statement that his estimate is so and so we regard as a mere guess, without any obvious basis. Had the Income-tax Officer even said "the income from interest last year was Rs. 10,000 and the assessee has shown me no reason for holding that his income from interest has diminished this year" even that would have shown some appreciation of the limitations placed upon him by section 13.

When a return is furnished and accounts are put in, in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not always available particularly in the case of petty traders who very often have only a poor knowledge of accounts.

We accept the view that the production by the petitioner of his accounts was a substantial compliance with the notice received under section 22 (4) and

we hold the assessment illegal inasmuch as he was given no opportunity under section 23 (2) to appear and meet the objections to the return and accounts produced by him. The petitioner shall receive cost of this reference from the respondent.

N. F. E.

Petition accepted.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

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Jan. 20.

HAKIM RAI (PLAINTIFF) Appellant

versus

GANGA RAM (DEFENDANT) Respondent.

Civil Appeal No. 1325 of 1922.

Cause of action— Suit for money due upon a deed of partition which refers to a promissory note—Non-production of note—whether a bar to suit on original contract—Collateral security.

The plaintiff and the defendant executed a deed of partition of their joint property under which a portion of the property was allotted to the defendant on his undertaking to pay one half the value thereof to the plaintiff within a certain time, but the deed (which was admitted by the defendant), besides reciting these terms, referred to a pro-note executed that same day in a *bahi* which was not produced in evidence.

Held, that the pro-note was a mere collateral security by which the payment of the original debt might be facilitated, and there being an independent admission of the loan quite apart from the pro-note, the non-production of the pro-note did not render the suit upon the original contract contained in the deed incompetent.

First appeal from the decree of Rai Sahib Lala *Maya Bhan, Senior Subordinate Judge, Gujranwala, dated the 10th February 1921, dismissing the claim.*