INCOME-TAX REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mosely, and Mr. Justice Ba U.

1935

Jan. 29.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

DEY BROTHERS.*

Income-tax—Service of notice—Delivery of notice to employé—Employé's habit of handing over notice to manager—Evidence of service on manager—Civil Procedure Code (Act V of 1908), O. 5, r. 13 (1)—Income-tax Act (XI of 1922), s. 63 (1).

Under the provisions of s. 63 (*1*) of the Income-tax Act it is prescribed that a notice or requisition under the Act may be served in one of two alternative ways, either by post or in the manner prescribed for the service of a summons under the Code of Civil Procedure.

Where a notice under the Act is delivered otherwise than by post casually to a clerk or servant on the premises where the assessee carries on business, and according to the practice obtaining in the business the employé is expected to hand on any communication which he has received to the manager, that is not evidence upon which the income-tax authorities can find as a fact that the manager was served with the notice.

A. Eggar (Government Advocate) for the Crown. S. 63 (*1*) of the Income-tax Act states that a notice under that Act *may* be served either by post or in the manner provided for the service of summons by the Code of Civil Procedure. The notice in the present case was not served by post; but was handed over to an employé of the assessee-firm. There is evidence to show that in the previous years notices were served upon one or another of the employés and were duly complied with. Order V, r. 9 *et seq* prescribe the procedure for the service of a summons; but since s. 63 of the Income-tax Act uses the word "may" and not "shall" the whole question reduces itself to this, namely, whether the notice was served in such a manner as to reach the hands of the assessees. This is a question of fact.

* Civil Reference No. 20 of 1934.

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See the *Commissioner of Income-tax* v. *Thillai Chidambaram Nadar* (1); *Gyanammal* v. *Abdul Hussain Saheb* (2); *Jangi Bhagat* v. *Commissioner of Income-tax, Bihar and Orissa* (3); *Sunder Lal* v. *Commissioner of Income-tax* (4).

K. C. Bose for the assessees. The present proprietor of the firm acquired the business only in 1932, and the mode of service of notices prior to its acquisition by him can have no relevancy to the present case. The proprietor lives in Calcutta, and the procedure prescribed by O. V., r. 13 must be complied with. The manager, S. M. Dutta, was not served with any notice.

PAGE, C.J.—In this case the question that has been referred for our determination is :

"Whether there were materials before the Income-tax Officer upon which he could conclude that the assessee had failed to comply with the terms of a notice issued under sub-section (4) of section 22, or with the terms of a notice issued under sub-section (2) of section 23 of the Income-tax Act."

It appears that the assessee L. M. Dey carries on a chemist and druggist business at 32, Mogul Street, Rangoon, under the style of Dey Brothers. L. M. Dey acquired the business in January 1932. He lives in Calcutta and the business at Rangoon is carried on by one S. M. Dutta, who was appointed by the assessee as the manager of the Rangoon business in March 1932.

The assessment under consideration is for the year 1931-32. On the 8th August 1932 notices under sections 22 (4) and 23 (2) were issued by the Income-tax Officer. They were taken by the process-

(1) I.L.R. 48 Mad. 602.
(2) I.L.R. 55 Mad. 223.
(3) I.L.R. 8 Pat. 877
(4) I.L.R. 10 Pat. 441.

server to 32, Mogul Street, and were delivered to one J. C. Mazumdar,—an assistant in the shop,—who signed on the back of the duplicate copies "for Dey Brothers" under a rubber stamp.

Under section 63 (*1*) of the Income-tax Act (XI of 1922)

"a notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a Court, under the Code of Civil Procedure of 1908."

The Commissioner of Income-tax in the case that he has stated expressed the view that so long as it was found that the notice in some way or other reached the person upon whom it was to be served there was sufficient compliance with the terms of section 63 (*1*). In my opinion such a contention is not in accordance with the provisions of this section, under which it is prescribed that a notice or requisition under the Act may be served in one or two alternative ways, either by post or in the manner prescribed for service of a summons under the Code of Civil Procedure. *Ex concessis* these notices were not served by post, and the question that falls for determination is whether there was material before the Income-tax Officer to justify him in finding that the notices were served in the manner prescribed for the service of a summons under the Code of Civil Procedure. For this purpose it is necessary to have recourse to Order V, rule 9 and rule 13, which run as follows :

"*Rule 9* (1).—Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

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Rule 13 (1).—In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service."

Now, it is common ground in the present case that S. M. Dutta and no one else was the agent of the assessee resident within the jurisdiction who was empowered to accept service of the summonses, and that Dutta alone was the manager or agent of the assessee who at the time of service was personally carrying on the business of Dey Brothers at 32, Mogul Street. Inasmuch as the assessee was living at Calcutta, in order that these summonses should have been duly served in the circumstances of the present case, each of them must have been served upon S. M. Dutta. That is a question of fact; and the Commissioner of Income-tax is of opinion that S. M. Dutta was duly served because this Mazumdar had acknowledged a previous notice which was complied with, a subsequent notice was acknowledged by another employé although the manager was present, and that this employé stated that the practice was for the employés to accept notices.

Now, it is common ground that when the two summonses under consideration were delivered at 32, Mogul Street, the manager S. M. Dutta was not present, and that they were delivered to and taken in by J. C. Mazumdar, one of the assistants working at the shop. There was evidence that each and every of the clerks and assistants in the shop used to accept communications addressed to the firm. The question is whether in such circumstances there was evidence to justify the conclusion that S. M. Dutta was served with the summonses in

question. In my opinion there was not. It is not pretended that S. M. Dutta was present, or had any personal knowledge of the delivery of either of the notices to J. C. Mazumdar, or that J. C. Mazumdar or any of the clerks or assistants in the firm were persons authorized to accept service of notices within Order V, rule 9 and/or rule 13. The problem, therefore, has resolved itself to this fine point: whether where a notice under the Income-tax Act is delivered otherwise than by post to any clerk or servant on the premises where the assessee carries on business, and according to the practice obtaining in the business the employé is expected to hand on any communication which he has received to the manager, that is evidence upon which the Income-tax authorities can find as a fact that the manager was served with the summons. I have no doubt that it is not; for, if we were to hold that it was, it would follow that merely because a process-server happens to hand over a notice to a durwan, or it might be to a chaprassi, that would be evidence that the person under whom the durwan or the chaprassi was serving had received the notice himself. In my opinion an inference to that effect could not be founded upon such evidence.

For these reasons, in my opinion, the question propounded should be answered in the negative. The Rs. 100 may be refunded but we make no order as to costs.

MOSELY, J.—I agree.

BA U, J.—I agree.