Sm. Rajmani Devi Vs Commissioner of Income Tax

Court: Allahabad High Court

Date of Decision: May 4, 1937

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. This is a reference u/s 66(3), Income Tax Act, 11 of 1922. The proceedings in connection with which the reference arose were proceedings u/s

27 of the Act and the assessment year was the year 1932-33 ending with Chait 1989. The assessee was one Lala Ramji Das who was a banker

and carried on money lending business on an extensive scale. He maintained his accounts by the year ending on 15th Chait which corresponds

roughly with the financial year. The previous year or the accounting year would in the present case end with 15th Chait 1988.

2. When the assessment began, Ramji Das was alive, but he died on 9th April 1933, and the application u/s 27 which was submitted by Eamji Das

was continued by his widow Mt. Rajmani Devi. The Income Tax Officer dismissed the application u/s 27 on 13th April 1934 and an appeal

against the said decision was dismissed by the Assistant Commissioner on 24th July 1934. On 27th August 1934 the assessee filed a combined

application for review and reference to the High Court. On 8th October 1934 the learned Commissioner refused to state a case and on the

application for review he remitted certain issues to the Income Tax Officer. We are not concerned in the present proceeding with the result of the

application for review. The assessee then filed an application in the High Court praying that we should require the Commissioner to state a case u/s

66(3) of the Act. By our order dated 27th February 1936 we required the Commissioner to state a case and formulated three questions of law.

We mentioned then that the only matter which we had to decide at that stage was whether a question of law arose out of the decision of the

Assistant Commissioner, and we were of the opinion that the three questions formulated by us did arise and we did not agree with the opinion of

the Commissioner that no question of law arose although counsel for the Department also pressed that point before us even at that stage.

3. The learned Commissioner has now stated a case and has referred the three questions of law which we had ourselves formulated, but once

more he has lodged a mild protest questioning our jurisdiction in requiring him to state a ease u/s 66(3), for he is still of the opinion that a question

of law did not arise. He thinks that a question of law is foreign to an appeal pending before the Assistant Commissioner against an adverse order

passed by an Income Tax Officer u/s 27. He says:

The expression "prevented by sufficient cause" in Section 27 involves some definite active cause, making compliance with a notice impossible and

not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act.

4. This means that if an applicant wishes to submit that he was prevented by sufficient cause from complying with the terms of a notice, the

applicant must allege and prove some such fact as illness or accident, etc., and a decision on this point, would obviously be a decision on a

question of fact. The learned Commissioner is further of the opinion that it is not possible for an applicant to say that he was prevented by sufficient

cause from complying with the notice because the notice was illegal. We may state at the very outset that we cannot agree with the general

proposition that it is not possible to evolve a question of law out of the various circumstances mentioned in Section 27 of the Act.

5. It now remains to discuss a few decisions of some of the High Courts on which reliance has been placed by the learned Commissioner. They are

the cases in In Re: Jot Ram Sher Singh Mohan Lal Hardeo Das v. Commissioner of Income Tax B. & O. (1930) 5 I.T.C. 62, Abdul Bari v.

Commissioner of Income Tax Burma AIR 1931 Rang 194 and A.K.R.P.L.A. Chettyar Firm v. Commissioner of Income Tax AIR 1931 Rang 98

In In Re: Jot Ram Sher Singh the matter that was directly decided by this Court was that a question whether an assessment u/s 23(4) is valid or not

is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed u/s 31, and consequently such a question

cannot be made the ground for an order by the High Court u/s 66(3) requiring the Commissioner to state a case and therefore that case is not of

any help to the point that we are at present considering. The learned Commissioner, however, has made reference to a certain passage occurring at

p. 277 of the Allahabad Law Journal Reports. The passage is:

A refusal to make a fresh assessment under Rule 27 can proceed only on the ground that the assessee was not prevented by any sufficient cause

from complying with the notice u/s 22 or Section 23. If any question of law arises from such refusal, it can certainly be the subject of reference

under the orders of the High Court. But any question of law which arises from the best judgment assessment sought to be set aside by an

application u/s 27 cannot fall within the purview of Section 27.

6. From the words which we have underlined it is clear that the learned Judge was of the opinion that a question of law can. arise from a refusal by

the Income Tax Officer to cancel an assessment u/s 27 of the Act. This case therefore does not in any way support the opinion of the

Commissioner. The Patna case also has no bearing on the present matter, for all that was decided in that case was that where an application u/s

27, Income Tax Act, to re-open an assessment u/s 23(4) for failure to produce account books called for u/s 22(4) was dismissed by the Income

Tax Officer and an appeal therefrom was rejected by the Assistant Commissioner, such questions alone within the terms of Section 27 of the Act,

which could have been taken on the appeal before the Assistant Commissioner, could be raised on a reference to the High Court u/s 66 and not

questions regarding the assessment u/s 23(4) which is not appealable u/s 30(1) Proviso. It would thus appear that all that was decided in this case

was that as the assessment u/s 23(4) was not appealable, no question regarding such assessment could be raised in proceedings u/s 27 and it was

not decided as a general proposition that no question of law could arise in proceedings u/s 27. On the contrary, the case decides that certain

questions may form the subject of a reference u/s 66. The same may be said about the case in Abdul Bari v. Commissioner of Income Tax Burma

AIR 1931 Rang 194. Here also the question that was directly decided was that no question of law arises out of the Assistant Commissioner''s

order in an appeal against a best judgment assessment because of the Proviso to Section 30(1) and in the body of the judgment Page, C.J.

observed:

Under Section 27, however, the Income Tax Officer has to determine whether the assessee was prevented by sufficient cause from complying with

the requirements of the law as set out in Section 27. That is essentially a question of fact and not of law.

7. We also agree that in the majority of cases no question of law would ordinarily arise out of the decision of an Assistant Commissioner dismissing

an appeal against an order of the Income Tax Officer u/s 27, but we are not prepared to subscribe to the view that no question of law can ever

arise in such a matter and that the illegality of a notice, non-compliance with which has brought about a best judgment assessment, cannot be

agitated within the expression ""prevented by sufficient cause"". We have left for the last the consideration of the case reported in A.K.R.P.L.A.

Chettyar Firm v. Commissioner of Income Tax AIR 1931 Rang 98. The facts of the case are not stated at length in the reports, but the learned

Judges observed as follows:

The order of 28th March 1930 was made in an appeal u/s 30(1) from a refusal of the Income Tax Officer u/s 27 to cancel the assessment and

proceed with a fresh assessment upon the ground that he was not satisfied that there was sufficient cause shown by the assessee preventing him

from producing the Shan States accounts pursuant to the notice duly served on him in that behalf u/s 22(4), In such an appeal the question whether

the assessment was properly made or not was immaterial...

8. So far there is nothing which militates against the view that we are taking, but the learned Judges proceed and observe: and it was equally

immaterial whether the notice, which admittedly was served upon the assessee, calling upon him to produce the Shan States accounts, was valid or

not.

9. This last passage, standing in the cryptic form in which it stands, undoubtedly favours the view taken by the Commissioner, and if it implies that

the question about the validity of a notice can never in any form, as the basis of any allegation within the purview of Section 27, become the subject

of a reference u/s 66 out of the appellate order of the Assistant Commissioner, then we respectfully beg to dissent from it. On the authority of the

cases mentioned above including the Allahabad case, it is well settled that where the Assistant Commissioner rejects an appeal in limine on the

ground that the Proviso to Section 30(1) bars any appeal against an assessment u/s 23(4), the question whether an assessment u/s 23(4) is valid or

not is not a question of law and cannot be made the subject of a reference to the High Court. It may be further mentioned that the Proviso to

Section 30(1) bars not only an appeal against an assessment made under Sub-section 4 of Section 23 but an appeal against an assessment under

that Sub-section read with Section 27, and in the two Rangoon cases mentioned above, although the cases arose out of the proceedings u/s 27,

pointed reference was made to the Proviso to Section 30(1) of the Act, and it may be that in those two cases the appeal against the decision of the

Income Tax Officer u/s 27 was dismissed by the Assistant Commissioner under the Proviso to Section 30(1). If that is so, then obviously no

question of law can arise and the decision would be in line with the decision of the Allahabad High Court in In Re: Jot Ram Sher Singh

10. We may however mention that u/s 66 a reference can be made in connexion with any question of law arising out of an appellate order passed

by the Assistant Commissioner u/s 31. A perusal of Section 31 makes it quite clear that an appeal does lie under that section to the Assistant

Commissioner from an order of the Income Tax Officer refusing to make a fresh assessment u/s 27 and the Assistant Commissioner may confirm

such order or cancel it and direct the Income Tax Officer to make a fresh assessment. If, therefore, any question of law can arise out of the

appellate order of the ""Assistant Commissioner, we fail to see why such a question cannot be made the subject of a reference u/s 66. If, however,

after having cancelled an assessment u/s 27 the Income Tax Officer proceeds to make a fresh assessment, he has u/s 27 to make it in accordance

with the provisions of Section 23, and if while making this fresh assessment he has once more to invoke the aid of Section 23(4) because of any

default made by the assessee and an appeal is filed against that order, then the Assistant Commissioner would be entitled to reject the appeal in

limine under the Proviso to Section 30(1), and on the authorities mentioned, it would not be possible to argue that any question of law arises out of

the order of the Assistant Commissioner rejecting the appeal. So far as the present case is concerned, it is clear that the Assistant Commissioner

did not and could not reject the appeal against the Section 27 order passed by the Income Tax Officer under the Proviso to Section 30(1), but

could at worst only confirm the order of the Income Tax Officer u/s 31 of the Act and we are of the opinion that if a question of law arises from the

appellate order of the Assistant Commissioner, it can certainly be made the subject of reference under the orders of the High Court, and as a

matter of fact, when we directed the Commissioner to state a case, we were of the opinion that the three questions of law which we formulated for

the benefit of the Commissioner did arise, and we now propose to give our opinion on the said three questions which have been referred to us.

11. It might however be convenient to state a few facts in order to appreciate the questions. In the course of the assessment year 1932-33 ending

with 15th Chait 1989, a notice u/s 22(2) for the filing of a return was issued on 1st April 1932. After some extensions, with which we are not

concerned, the return was submitted on 3rd September 1932. On 15th October 1932 the Income Tax Officer issued two separate notices, one

u/s 22(4) for the production of accounts and a second u/s 23(2) requiring the assessee to attend in person. The date fixed for the compliance of the

above two notices was 20th October 1932. The assessee appeared on 20th October 1932 and produced certain books. From that date till about

22nd December 1932 the accounts were scrutinised and witnesses were examined. The Income Tax Officer came to the conclusion that all the

account books required in pursuance of the notice u/s 22(4) were not produced and the assessee''s explanation for their non. production was

unsatisfactory. He therefore thought that there was a default which entitled him to proceed u/s 23(4) and he made a best judgment assessment. The

appeal against that judgment was rejected by the Assistant Commissioner, and in connexion with proceedings u/s 27, the Commissioner as we

have mentioned before, stated the present case only after a direction by us. The first question of law that has been referred to us is:

Was the notice u/s 23(2) issued to the assessee irregular by reason of the fact that a wrong year was mentioned and by reason of the fact that the

words in the printed notice or to produce, or to cause to be there produced any evidence on which such person may rely in support of the return''

were scored out

12. On 15th October 1932 a notice u/s 22(4) and another u/s 23(2) were issued. Section 23(2) says:

If the Income Tax Officer has reason to believe that a return made u/s 22 is incorrect or incomplete, he shall serve on the person who made the

return a notice requiring him, on a date to be therein specified, either to attend at the Income Tax Officer''s office or to produce, or to cause to be

there produced, any evidence on which such person may rely in support of the return.

13. The notice that was issued in the present case is printed at page 12 of the case. It is as follows:

To enable me to test the correctness of the return made by you u/s 22 of Act 11 of 1922 for the year ending Chait Sambat 1988, I hereby require

you to attend in person on 20th October 1932.

14. It is argued on behalf of the assesses that there were two irregularities in this notice. The first irregularity is that the year ending Chait Sambat

1988 was mentioned, though the correct year which ought to have been mentioned was the year ending Chait Sudi 15th Sambat 1988. The

learned Commissioner has rightly pointed out that this did not in any way mislead the assesses and we might further mention that the assesses did

appear in person and did not lodge any protest in respect of this mistake. Moreover, the difference is only that of fifteen days and the account

books, such as were furnished, were in respect of the correct year ending Chait Sudi 15th Sambat 1989. The proceedings in connexion with which

the notice was issued related to the year ending Chait Sudi 15th Sambat 1989 and these were the only proceedings pending at that time and the

assessee knew perfectly well what account books he was required to produce. We are therefore of the opinion that this irregularity does not in any

way vitiate the notice.

15. The other irregularity is a more serious irregularity, and it is that words ""or to produce, or to cause to be there produced any evidence on

which such person may rely in support of the return"" were scored out. The contention on behalf of the assessee is that out of the alternatives

provided in Section 23(2), it is for him and not for the Department to choose the alter, native. There are three alternatives pro. vided by Section

23(2): (1) to attend at the Income Tax Officer''s office; (2) to produce any evidence on which the assessee may rely; and (3) to cause to be there

produced, any evidence on which the assessee may rely. In the present case the Income Tax Officer did not give to the assessee the option of

choosing any one of the three alternatives but asked the assessee to attend the Income Tax Officer''s office. The learned Commissioner says:

It is the Income Tax Officer, when he arrives at a certain frame of mind, who is required to give a notice and it is for him, I submit, to decide which

of the alternatives he will choose. If he thinks that for his purposes it will be enough that the assessee came and explained how he had made out the

return, there is no reason why he should enforce the other alternative, particularly when he knows that such an explanation would be supplemented

by the accounts he had required the assessee u/s 22(4) to produce. It is the Income Tax Officer who has, in a certain frame of mind, to iseue the

notice and the alternatives would appear to be intended for him.

16. There is no question of enforcing the other alternatives. The question is whether it is not the privilege of the assessee to choose one of the

several alternatives provided by the section. If the contention of the Department were correct, then the word ''either'' ought more appropriately to

have occurred at a different place and the section might read as follows: ""He shall serve on the person who made the return a notice either requiring

him on a date to be therein specified to attend... or..."" But as the section reads, the alternatives, seem to be for the benefit of the assessee who has

got to choose as to which of the options he will exercise. This is also more reasonable. The assessee has submitted his return and the Income Tax

Officer has reason to believe that the return is incorrect or incomplete, and although the Income Tax Officer may be of the opinion that the

explanations furnished by the assessee might remove the Officer''s suspicion, yet the assessee might feel that no amount of explanations furnished

by him would remove the doubts of the Officer, and it would be necessary for him to produce some evidence in support of the return, and if the

notice directed only the attendance of the assessee, the latter would not be able to produce valuable evidence. It may also be that the assessee

might find it extremely inconvenient to attend in person and at the same time might feel that the Officer could be given every satisfaction by the

production of some evidence. From every point of view, we are of the opinion that the law intended to give the options to the assessee and not to

the Department. It was contended by Mr. Verma on behalf of the Department that if the law were interpreted in the way in which we feel inclined

to interpret it, the position would become unworkable. He said that if the option were with the assessee, then under certain circumstances there

could be no default in compliance with a notice u/s 23(2) and the Income Tax Officer could never proceed to pass a best judgment assessment.

The illustration that he gave was that the assessee who admittedly keeps no accounts and whose calling does not necessarity involve the keeping of

the accounts, might on a notice issued u/s 23(2) decide to attend at the Income Tax Officer''s office and not to produce any evidence with the

result that even though the Income Tax Officer may not be satisfied with the explanation of the assessee, the Income Tax Officer would not be able

to say that there was noncompliance with the notice and would have to proceed u/s 23(3), and in that case he would be compelled to accept the

return filed by the assessee.

17. There is really no substance in this contention, because first it was never intended that the Income Tax Officer should invoke the powers vested

in him u/s 23(4) in the majority of cases and further if the assessee chooses not to produce any evidence in support of the return, it might really

work to the detriment of the assessee, because then the Income Tax Officer might utilize the information which he has received about the income of

the assessee and might place that information before the assessee and ask him to displace the same. The Income Tax Officer might well summon

certain witnesses u/s 37 of the Act to show what the income of the assessee is and on the basis of that evidence - the assessee being given the

option to cross-examine such witnesses - proceed to assess the individual on an income higher than stated in the return, and public revenues would

not in any way suffer. Further, the same difficulties would arise if the option were with the Officer. He might decide to ask the assessee to attend in

person or he might decide to ask the assessee to produce evidence in support of the return and in either event it is conceivable that the Income Tax

Officer may remain unsatisfied, and if the Income Tax Officer knows that the assessee keeps no accounts, he would not issue a notice u/s 22(4)

and he will have to proceed u/s 23(3). It seems to us that if the Income Tax Officer were the final judge in the matter of the alternatives, it would

work, great hardship on the assessee and the assessee in those cases in which the Income Tax Officer requires only the attendance of the assessee

might lose the valuable right of producing the evidence in support of the return and removing the doubts of the Officer. Our answer to the first

question is therefore in the affirmative. In view of a certain passage in the Judgment of the Income Tax Officer in the Section 27 proceeding, it was

argued that the question was only academic and did not really arise. The passage is:

After be had his full Bay and had produced all the evidence at his disposal, he informed me by his letter dated 22nd December 1932 that he did

not want to adduce any further evidence because he had produced all the evidence which he wanted to adduce.

18. This is not at all a correct statement of facts and we are satisfied after what has been said by counsel that the assessee did not produce any

evidence u/s 23(2).

19. The second question that has been referred to us is:

Is the issue of a valid notice u/s 23(2) a condition precedent under the circumstances of the present case to the making of an assessment u/s 23(4)

20. A plain reading of Section 23(2) shows that under certain circumstances the issue of a notice under the above provision is mandatory and the

question is whether it was so mandatory under the circumstances of the present case. The notice starts by saying: ""To enable me to test the

correctness of the return made by you"". It is therefore clear that the Income Tax Officer had reason to believe that the return filed by the assessee

was incorrect or incomplete and moreover the very fact that a notice u/s 23(2) was issued shows that the Income Tax Officer had reached that

frame of mind when he was not satisfied with the correctness of the assessee''s return. The law provides that if that frame of mind has been

reached, the Income Tax Officer shall serve on the person who made the return a certain kind of notice. There can therefore be no doubt that

under the circumstances of the present case a notice u/s 23(2) was imperative. In the case in Muhammad Hayat-Haji Muhammad v.

Commissionerof Income Tax AIR 1931 Lah. 87, Shadi Lal, C.J. at p. 134 observed as follows:

If he, however, considers the return to be incorrect or incomplete, he has no authority to reject it and to make the assessment to the best of his

judgment as he is entitled to do when no return is made. He must give the assessee an opportunity to prove the accuracy and completeness of the

return made by him and and he is, therefore, enjoined by Section 23, Sub-section (2), to serve on the latter a notice requiring him either to appear

at the office of the Income Tax Officer, or to produce, or to cause to be produced, evidence in support of his return.

21. A clear injunction is laid on the officer and the injunction must be obeyed. In connexion with the first question we were of the opinion that the

notice that was issued in the present case u/s 23(2) was an irregular and invalid notice and, as such, the notice was no notice at all, and for all

practical purposes the position is that no notice u/s 23(2) was issued to the assessee. It is however argued that although a valid notice u/s 23(2)

was necessary in the present case, it is not a condition precedent to the making of an assessment u/s 23(4), and it is said that an assessment u/s

23(4) can be made in the present case because of a default in the compliance with the notice u/s 22(4).

22. It is now well settled on the authorities of several High Courts in India that a notice u/s 22(4) can be issued on the assessee at any stage and at

any time and the only limitation that is fixed is that the assessee must have been served with a notice u/s 22(2): see the cases in In Re: Pallu Mall

Bhola Nath, Ramaswami chettiar v. Commissioner of Income Tax AIR 1929 Mad. 60 , Muhammad Hayat-Haji Muhammad v. Commissionerof

Income Tax AIR 1931 Lah. 87 , In Re: Pallu Mall Bhola Nath, and Ram Khelawan Ugam Lal Vs. Commissioner of Income Tax, S ome of the

above cases also lay down that a combined notice u/s 22(4) and 23(2) can be issued after an assessee has made a return, and it was held in

Superintendent and Remembrancer of Legal Affairs Vs. Murray and Others, that where an assessee had made a return in compliance with a notice

u/s 22 (2) and thereafter a notice has been served upon him u/s 23(2), and also a notice u/s 22(4) and the assessee has complied with the terms of

the notice u/s 23(2) by producing the evidence upon which he relies but has failed to comply with the notice u/s 22(4) to produce account books,

the Income Tax Officer is entitled to make an assessment u/s 23(4) for failure to comply with the notice u/s 22(4), and a somewhat similar view

was held in the case reported in Ramaswami chettiar v. Commissioner of Income Tax A .I.R. 1929 Mad. 60. It is therefore argued on behalf of

the Department that the defaults mentioned in Section 23(4) are independent defaults and any one of them would entitle the Income Tax Officer to

make an assessment to the best of his judgment, and although in the present case the-notice u/s 23(2) may be held to be* invalid or irregular, there

was a non-compliance with the notice u/s 22(4) and the Income Tax Officer was entitled to proceed u/s 23(4).

23. It must however be remembered that in the cases to which reference has been made the notice that was issued u/s 23(2) was a valid and a

legal notice and there was a compliance with the said notice, but there was a non-compliance with the notice u/s 22(4) and therefore the Income

Tax Officer could proceed; u/s 23(4). In the present case the contention on behalf of the assessee is that j because the Income Tax Officer had

reached the frame of mind when he had reason to believe that the return made under] Section 22 was incorrect or incomplete, he was bound to

issue a valid notice u/s 23(2), and as this mandatory notice was not issued, the officer could not proceed to make the best judgment assessment on

failure of compliance with notice u/s 22(4), because if a valid notice had been issued u/s 23(2), the assessee might have removed the suspicions of

the Officer and might have satisfied him that his return was correct and complete, and it would be j a great hardship if a best judgment assessiment

was made u/s 23(4) because of a non-compliance with the notice to produce accounts when such accounts were in reality not necessary for the

purpose of checking the return. There is some force in this contention and to a certain extent it is supported by a dictum of Bankin, C.J., in the case

reported in In the matter of In Re: Sadaram Puranchand, where the learned Chief Justice at p. 731 observes:

But I do not think that it was ever intended by the Act that failure to produce books, prior to the filing of a return, should deprive the assessee of

his right to have the return duly and properly inquired into. A return which by Section 22 is to be deemed to be a return made in due time cannot

be treated as still-born because of a previous failure to comply with a notice u/s 22(4).

24. Reliance is also placed on the case in In the matter of In Re: Kajori Mal Kalyan Mal of General Ganj, where the assessee had not filed a return

in pursuance of a notice u/s 22(2) nor had submitted his account books in pursuance of a notice u/s 22(4) and the Income Tax Officer had

proceeded under the provisions of Section 23(4) and his application u/s 27 of the Act was rejected by the Income Tax Officer and the Assistant

Commissioner. A reference was then made to the High Court and the learned Judges held that it was open to the High Court to formulate

questions of law that really arose in a case and to answer them for the benefit of the Commissioner and the parties, and the fresh question of law

that was formulated by the High Court was to the following effect: ""Was the assessee prevented by sufficient cause from making the return required

by Section 22

25. The answer that was given was that u/s 22(2) the Income Tax Officer must give the proposed assessee at least 30 days time within which to

file a return. If this minimum is denied, the notice becomes entirely illegal and no subsequent extensions of time will cure the defect that initially lay in

the notice issued. It will be observed that in this Allahabad case there was a non-compliance with a notice u/s 22(4), but as the initial notice u/s

22(2) was an irregular notice, the learned Judges held that there could possibly be no valid assessment of Income Tax u/s 23(4). The phraseology

of Section 23(2) suggests that under the circumstances of the present case a valid notice u/s 23(2) was imperative, but the phraseology of Section

23(4) suggests that perhaps the Income Tax Officer could proceed to make a best judgment assessment because of the failure to comply with all

the terms of a notice issued u/s 22(4). Our answer to the second question is that although the issue of a valid notice u/s 23(2) was not a condition

precedent under the circumstances of the present case to the making of an assessment u/s 23(4), the issue of such a valid notice was imperative,

and this opinion of ours will have a bearing on the answer to question 3. Question 3 runs as follows:

If the issue of the above notice is a condition precedent, is an assessee justified in disobeying a notice u/s 22(4) and can he be said to be prevented

by sufficient cause from complying with the said notice

26. The meaning of the question is fairly clear, but in view of our answer to the second question the third question might be re-framed as follows:

Whether the issue of the above notice is a condition precedent under the circumstances of the present case to the making of an assessment u/s

23(4) or not, was the assessee justified in disobeying a notice u/s 22(4) and can he be said to have been prevented by sufficient cause-under

Section 27 from complying with the said-notice

27. This necessitates an interpretation of Section 27 of the Act which for the purpose of the present case might be deemed to read-as follows:

Where an assessee within one month from the service of a notice of demand issued as hereinafter provided satisfies the Income Tax Officer that he

was prevented by sufficient cause from making, the return required by Section 22, or that he did not receive the notice issued under Sub-section

(4) of Section 22 or Sub-section (2) of Section 23, or that he bad not a reasonable opportunity to comply, or was prevented by sufficient cause

from complying with the terms of the last-mentioned notices, the Income Tax Officer shall cancel the assessment and proceed to make a fresh

assessment in accordance with the provisions of Section 23.

28. It would thus appear that the assessee, in order to succeed u/s 27 has got to establish any one of the following conditions : (1) he was

prevented by sufficient cause from making the return required by Section 22; (2) he did not receive the notice-issued under Sub-section 4 of

Section 22; (3) he did not receive the notice issued under sub-section 2 of Section 23; (4) he had not a reasonable opportunity to comply with the

terms of the last-mentioned notices; or (5) he was prevented by sufficient cause from complying with the terms of the last-mentioned notices. It is

contended on behalf of the assessees that the notice issued u/s 23(2) in the present case was an illegal notice and therefore it is tantamount to the

non-receipt of such a notice and therefore he has established condition No. 3. There is some force in this contention and as the Section 27 reads, it

might be argued that on the establishment of any one of the conditions mentioned in Section 27, the Income Tax Officer has to cancel the

assessment and has to proceed to make a fresh assessment. The argument on behalf of the-Department however is that Section 27 is utilized by

the assessee when there has been a best judgment assessment, and one has got to see as to what the default was which brought about the best

judgment assessment and the assessee has got to satisfy that that default can be condoned either because the notice in connection with which the

default was made was not received or that he had no reasonable Opportunity to comply with that notice or that he was prevented by sufficient

cause from complying with that notice. In the ,present case the default was in connection with the notice u/s 22(4) and the assessee has therefore to

satisfy that that notice was not received or that he had no reasonable opportunity to comply with that notice or that he was prevented by sufficient

cause from complying with that notice. Although, perhaps, according to the wording of the section, there is some force in the contention of the

assessee, yet it is more reasonable to accede to the argument of the Department and to hold that the assessee must satisfy the conditions laid down

in Section 27 in connection with that particular notice, non-compliance with which brought about the best Judgment assessment.

29. We have already held in connection with the preliminary objection raised by the learned Commissioner that a question of law can arise in a

matter like this, and in the case reported in In the matter of In Re: Sadaram Puranchand, , the learned Chief Justice after narrating the facts of the

case observed:

I am prepared to hold as a matter of law that he (the Income Tax Officer) did not give to the assessee such reasonable opportunity as the Act

requires to produce their evidence in support of their return.

30. In the present case we have already held that the notice u/s 23(2) was an illegal notice and we have also held that the Income Tax Officer was

bound to issue a valid notice u/s 23(2). It must therefore be deemed that no notice u/s 23(2) was issued to the assessee and to that extent the

Income Tax Officer was in default. The assessee was also in default in having failed to comply with the terms of a notice u/s 22(4), but he can very

well say that as the imperative notice u/s 23(2) was not issued to him, he could ignore the notice issued ''under Section 22(4) and in that sense was

prevented by sufficient cause from complying with that notice. Whether a valid notice u/s 23(2) was a condition precedent or whether it was only

imperative under the circumstances of the present case, it is clear that the assessee was denied a valuable right and he was therefore prevented by

sufficient cause from complying with the notice issued u/s 22(4), and this is our answer to the third question. A copy of our judgment will be sent to

the learned Commissioner under the seal of the Court and the signature of the Registrar. The assessee is entitled to his costs as certified. Counsel

for the department is entitled to Rs. 500 as his fees. Six weeks are allowed to him to file the certificate.