
(1943) 56 LW 556 : (1943) 2 MLJ 6

Madras High Court

Case No: None

The Commissioner of
Income Tax

APPELLANT

Vs

Vedlapatla Veera
Venkataramiah and
Another

RESPONDENT

Date of Decision: March 15, 1943

Acts Referred:

Income Tax Act, 1961 " Section 66(1)

Citation: (1943) 56 LW 556 : (1943) 2 MLJ 6

Hon'ble Judges: Alfred Henry Lionel Leach, C.J

Bench: Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.

This reference has been made by the Income Tax Appellate Tribunal, Calcutta Bench, u/s 66(1) of the

Income Tax Act at the request of the Commissioner of Income Tax, Madras. On the 15th August, 1938, the assessee filed a return of their

income for the year 1938-39. On the 11th March 1939, the Income Tax Officer served a notice upon them under Sections 22(4) and 23(2) to

produce the accounts of their money-lending business for the year 1937-38 and connected documents. The notice was to be complied with by the

20th of that month. The assessee produced for the inspection of the Income Tax Officer certain books of account but when he examined them he

considered that the assessee possessed another set of books which they had suppressed. When the notice u/s 22(4) and 23(2) was served on the

assessee Section 28 had not been amended. It was amended with effect from the 1st April, 1939. Sub-section 1(b) of Section 28 now provides

that if the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of proceedings under the Act is

satisfied that a person has without reasonable cause failed to comply with a notice under Sub-section (4) of Section 22, or Sub-section (2) of

Section 23, he or it may direct him to pay by way of penalty, in addition to the tax payable by him, a sum not exceeding one and a half times the

Income Tax and super-tax, if any, which would have been avoided if the income as returned by the person had been accepted as the correct

income.

2. On the 9th December, 1939, the Income-tax Officer wrote to the assessee stating that a separate set of account books had been kept and that

these had not been produced. On the 4th January, 1940, he caused to be issued a fresh notice under Sections 22(4) and 23(2) requiring the

assessee to produce the books of account for the years 1937-38, 1936-37 and 1935-36. The assessee did not comply with this notice. On the

31st January, 1940, the Income Tax Officer assessed the assessee for the year 1938-39 on an income of Rs. 16,100. This assessment was u/s

23(4). Two days before this assessment was made the Income Tax Officer served a notice upon the assessee requiring them to show cause why

a penalty should not be inflicted u/s 28(1)(b). The respondents appeared before the Income Tax Officer in compliance with this notice and he gave

his decision in an order dated 21st December, 1940. He held that there had been default in compliance with the notice to produce the books of

account and consequently he imposed a penalty of Rs. 1,200 in addition to the amount of tax payable under the order of assessment.

3. The assessee challenged the correctness of both the orders of the Income Tax Officer in appeals to the Assistant Appellate Commissioner,

who agreed with the Income Tax Officer. The assessee accepted the decision of the Assistant Appellate Commissioner so far as it concerned the

assessment to Income Tax u/s 33(4) but they appealed to the Income Tax Appellate Tribunal against the penalty which had been inflicted on them.

The tribunal allowed the appeal on the ground that in connection with the imposition of a penalty for the non-production of books

the existence of the books should be shown in some more tangible material than it may ordinarily be necessary for purposes of an assessment u/s

23(4).

4. The Tribunal also held that Section 28 could not be applied in a case where the assessment was for a period prior to the 1st April, 1939, when

the amendment came into force.

5. The Tribunal has referred three questions to the Court for decision. They read as follows:

(1) Whether the proceedings in this case for the imposition of penalty in respect of the assessment for the year 1938-39 are governed by the

Income Tax Act as it stood in 1938-39, the year of assessment, or whether they are governed by the Income Tax Act as amended from the 1st

April, 1939, as the proceedings were completed in 1940.

(2) If it is held that the Income Tax Act as amended in 1939 should be applicable the next question will arise : When the default was committed,

whether on the 20th March, 1939, in answer to the first notice prior to the commencement of the amended Act of 1939 or in January, 1940, when

there was again a second default to comply with another notice u/s 22(4) for the production of the same books.

(3) If it is held that the Amended Act applied, whether, the view of law taken by the Tribunal that the existence of the books should be shown in

some more tangible material than the one in the case of an order u/s 23(4) was right in arriving at the conclusion that the case was not a fit one for

imposition of penalty.

6. It is regrettable that the Tribunal did not take greater care in framing these questions. The second and third questions as they stand are not

intelligible; but we gather what is meant from the order which the Tribunal passed on the assessee's appeal.

7. The first question is whether Section 28(1)(b) can be applied in respect of the failure to comply with the notice issued on the 4th January, 1940.

It obviously could not be applied to the earlier notice because when that notice was issued the amendment had not been made. When the second

notice was issued the amendment had been made and we consider that the section was applicable. When the amendment came into force the

Income Tax Officer had not made an assessment for " the year 1938-39 and he was entitled to make it when he did, namely, on the 31st January,

1940. It has been suggested that to hold that Section 28(1)(b) applies to the second notice is making the section retrospective, but this is not so.

The Income Tax Officer had full power to issue the notice on the 4th January, 1940 and failure to comply with it meant liability u/s 28(1)(b). The

answer to the first question is that the Income Tax Officer had the right to act u/s 28(1)(b) for failure to comply with the notice issued to the

assessee on the 4th January, 1940. This answer also covers the second question,

8. The third question is really whether more evidence is required for the imposition of a penalty u/s 28 than would be required for a " best judgment

assessment u/s 23(4). The two sections have nothing in common and it is not possible to give a direct answer to the question. when the Income

Tax Officer makes an assessment u/s 23(4) it must be in the nature of an estimate, because the assessee has failed to place before him material for

making an accurate assessment. In *Income Tax Commissioner v. Badridas Ramrai Shop, Akola* (1937) 2 M.L.J. 43 : L.R. 64 IndAp 102 : ILR

(1937) Nag. 191 (P.C.) the Privy Council pointed out how an Income Tax Officer should proceed when assessing under that section. Their

Lordships said:

The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not

act dishonestly, or vindictively, or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a

fair estimate of the proper figure of assessment and for this purpose he must, their Lordships think, be able to take into consideration local

knowledge and repute in regard to the assessee's circumstances and his own knowledge of previous returns by and assessments of the assessee,

and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the

matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary.

9. The imposition of a penalty u/s 28 is not a matter of guess-work. Before imposing a penalty in such a case as this the Income Tax Officer must

have in his possession such evidence as would convince a reasonably minded man that there exists a second set of books. It is not possible to lay

down any hard and fast rule as to what is actually required. Each case must depend upon its own circumstances. We answer the third question in

this sense.

10. The Commissioner is entitled to his costs which we fix at Rs. 250.