

1981 PTD 210 = 45 TAX 44
Tax Reference No. 31 of 1973, decided on 6th July, 1980

LAHORE HIGH COURT

Before Muhammad Afzal Lone and Karrar Hussain Zaidi, JJ

Sh. Abdul Haq for Petitioner. Nemo for Respondents

COMMISSIONER OF INCOME-TAX
VS
SAKHI CONTRACTORS & ENGINEERS, MULTAN

JUDGMENT

KARRAR HUSSAIN ZAIDI, J. -This is a reference under section 66 (1) of Income-tax Act, 1922, on a point of law arising in the case in the follow-ing circumstances.

2. The return was filed by the assessee and the statutory notices under sections 22(4) and 23(2) of the Income-tax Act were issued in the name of assessee but the same could not be served upon him by the process-server.

3. The assessment year is 1970-71 and the assessee is a Contractor Firm known as Messrs Sakhi Contractors & Engineers, Multan. The Income-tax Officer again directed for the issuance of notices under sections 22(4) and 23(2) of the Income-tax Act for 2-12-1971 in the name of assessee under a registered post but the notices were received back as undelivered on account of refusal on the part of the assessee with following remarks :-

On 2-12-1971 the case was not taken up and the same was left over. The Income-tax Officer later on chose to make the assessment to the best of his judgment under section 23(4) of the Act on 15-12-1971 without issuing further fresh notices to the assessee concerned.

4. The assessee having felt aggrieved, filed an appeal before the Income-tax Appellate Tribunal, Multan Bench, Multan who allowed the same and remanded the case to the Income-tax Officer for fresh decision after due notice to the assessee firm vide order dated 22-8-1972. On these facts, the following question has been referred to us:--

"Whether on the facts and circumstances of the case the Appellate Tribunal was justified in holding that the Income-tax Officer could resort to S. 23(4) of the Income-tax Act only on 2-12-1971 and not on any subsequent date on which no notice had been given to the respondent."

5.-(1) In order to resolve the above question it would be pertinent to reproduce subsections (2), (3) and (4) of section 23 of the Act which runs as follows :-

(2) If the Income-tax Officer is not satisfied without requiring the presence of the person who made the return or the production of evidence that a return made under section 22 is correct and complete, he shall serve on such person 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.

(3) On the day specified in the notice issued under subsection (2), or as soon afterwards as may be, the Income-tax Officer hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment.

(4) If any person fails to make the return required by any notice given under section (2) of section 22 and does not make a return or a revised return under subsection (3) of the same section or fails to comply with all the terms of a notice issued under subsection (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under subsection (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and, in the case of firm, may refuse to register it or may cancel its registration if it is already registered

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration.

6. The provisions of subsection (2) of section 23 are mandatory in nature. Whenever an Income-tax Officer doubts the correctness of an return submitted by any assessee then do such a case it is incumbent upon him to serve a notice on the assessee requiring him, on a specified date, either to enter his appearance in the office of Income-tax Officer or to lead evidence in support of his return. We are fully aware of the well-recognized principle of law that taxing statute has got to be strictly construed and interpreted. In the instant case the learned Appellate Tribunal while setting aside the ex parte assessment made the following observations:--

"After; perusal of the record we find the contentions of the learned counsel of the appellant to be correct. On 16-4-1971 substituted service was ordered for 29-4-1971 but the Income-tax Officer did not pass ex parte order on that date, rather the case was taken up on various dates without any notice to the appellant. On 18-11-1971 the Income-tax Officer ordered issuance of notices by registered post A. D. for 2-12-1971 but on that date of hearing neither the case was taken up nor any ex parte order was passed. In the absence of any ex parte order on the date of hearing for which notices had been issued, no ex parte assessment could be completed. The Income-tax Officer was not justified under law to complete the assessment under section 23 (4) on 15-12-1971 for which date no notice had been issued to the appellant."

7. It is manifest from the above observations that requisite notices in the name of assessee were issued for 2-12-1971 but on that notified date of hearing the case was not taken up for hearing. This shows that the case which was fixed for 2-12-1971 for hearing was not called on that appointed date but was decided on a subsequent date, on 15-12-1971 which in fact was neither fixed for hearing nor it was ever intimated to the assessee concerned. Generally in a civil suit when a defendant has been served and if he does not appear, the Court may proceed in his absence but the Court is not directed to make an ex parte order. Of course the fact that it is proceeding 'ex parte' will be recorded in the Minutes of its proceedings but that is merely a statement of fact and is not

an order in the sense of 'ex parte decree' or other 'ex parte order' and which the Court is authorised to make under law in the instant case the Income-tax Officer concerned did not record the fact of proceeding ex parte against the assessee in the Minutes of the proceedings of the case.

8. According to the provisions of section 23 supra where Income-tax Officer does not believe the return as correct and complete he is bound to send a notice to the assessee under section 23 (2) of the Act providing turn an opportunity of being heard to justify the return submitted by him by attending the Officer's office or producing evidence, if the Income-tax Officer does not serve any requisite notice on the assessee and proceeds to make his own judgment under section 23 (4) of Income-tax Act, such assessment is not sustainable in the eye of law on account of non-compliance of law providing a statutory right of audience to the assessee on the adjourned date. In the light of this proposition of law in the Instant case the assessee had right of audience on the adjourned date, i.e. 15-12-1971 but the same was denied to him by the Income tax Officer while proceedings under section 23 (4) of the Act in an illegal manner.

9. As stated above, in the present case, the' conditions required under the law are not satisfied. The Income-tax Officer has acted illegally in making ex parte assessment on a date which was not fixed for hearing without furnishing the assessee with requisite notices. We, therefore, are of the view that the ex parte assessment made by him under section 23 (4) of the Act on 15-12-1971 was bad in law as he could do so on 2-12-1971. We, therefore, answer this question in the affirmative and fully endorse the view taken by the Tribunal on appeal. The reference having no force is hereby dismissed with no order as to costs.

Reference dismissed