

The Commissioner of Income Tax, Punjab, North-West Frontier,
and Delhi Provinces, Lahore - - - - *Appellant*

v.

Messrs. Nawal Kishore-Kharaiti Lal - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1937.

Present at the Hearing :

LORD THANKERTON

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

This appeal is brought from a decision of the High Court at Lahore by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces. On 8th June, 1931, the Income-tax Officer at Delhi made an order under section 23, subsection 3, read with section 34 of the Indian Income-tax Act, 1922, whereby for the year of assessment 1926-27 he assessed the respondent firm upon a "total income" of Rs.72,928 and determined that the tax payable thereon was Rs.6,837. This assessment order was made upon the respondent firm whose name and style is Nawal Kishore-Kharaiti Lal and who carry on business as jewellers at Delhi, but it was made upon them as agent for a Hindu undivided family resident in the State of Jaipur outside British India. One Seth Banji Lal had been head of this family but had died in December, 1928.

The validity of this assessment order is in substance the matter in dispute between the parties, but the case comes before their Lordships as an appeal by special leave from the judgment of the High Court upon a reference made under section 66 of the Act formulating three questions of law for the High Court's decision. As these questions challenge the procedure adopted by the Income-tax authorities it will be convenient to state first the steps which they had taken and then the objections raised by the respondent firm. Sections 34, 42 (1) and 43 of the Act are the provisions of chief importance in the case:—

" 34.—If for any reason income, profits, or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person

liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

“ Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.”

“ 42 (1).—In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax:

“ Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come within British India.”

“ 43.—Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent:

“ Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.”

On the 2nd February, 1928, the Income-tax Officer served the respondent firm with a notice in the following terms:—

“ You are hereby required to attend this Court on 9th February, 1928, and show cause why you should not be treated as agents of Seth Banji Lal of Jaipur State for Income-tax assessment purposes.”

This notice did not specify any particular year of assessment. It was headed “ Notice under proviso to section 43 of the Income-tax Act of 1922.” On the 13th February the Income-tax Officer recorded as follows:—

“ Mr. Chatar Behari Lal present. Heard. Section 22 (2) notice with necessary forms served on him for 1926-27 (section 34) and 1927-28 for Nawal Kishore Khairati Lal agents of S. Banji Lal.”

The respondent firm on the 12th March filed a blank return under protest and lodged a petition of appeal against the order of the 13th February before the Assistant Commissioner. This appeal, which purported to be brought under section 30 of the Act, was not in their Lordships' view within the terms of that section, but the Assistant Commissioner did not dismiss it on that ground. He considered, as their Lordships read his order of 2nd May, 1928, that the Income-tax Officer's order of the 13th February did not purport to decide that the respondent firm were agents of Seth Banji Lal. About a year later—namely, on 5th April, 1929—a notice under section 23 (2) of the Act was sent to the respondent firm as agent for Seth Banji Lal requiring them to attend at the Income-tax Officer's office and to produce

evidence in support of the return which they had rendered. This notice specified the year 1926-27 as well as 1927-28. Nothing appears to have been done under this notice or for two years afterwards, a fact which may be explained by the circumstance that the assessment in respect of previous years was being disputed. On 5th May, 1931, however, two things happened. The respondent firm filed a fresh return in respect of the year 1926-27 showing a sum of Rs.51,550 as interest on loans payable by them to Seth Banji Lal of Jaipur. The Income-tax Officer on the same date served a notice on the respondent firm stating that it was proposed to treat them as the agent of Seth Banji Lal for the year 1926-27. The 8th May, 1931, having been appointed for hearing any objections to this course, the Income-tax Officer on that date recorded an order against the respondent firm as follows:—

“ They pay interest to the non-resident on his deposits with them. The non-resident has thus business connections with them and is in receipt of income through them. I accordingly hold them as agent for Seth Banji Lal of Jaipur under section 43 for the assessment for 1926-27.”

The assessment order of 8th June, 1931, included, besides the sum of Rs.51,550 admitted to be payable by the respondent firm, two other items of interest payable by other persons to Seth Banji Lal, bringing the “ total income ” to the figure of Rs.72,928 already mentioned.

An appeal to the Assistant Commissioner having been dismissed on 19th August, 1931, application was made to the Commissioner under section 66 of the Act to state a case to the High Court. On the 14th May, 1932, the Commissioner referred to the High Court three questions as follows:—

“ (1) Whether in the circumstances of this case, the petitioner could be held to be an agent for Seth Banji Lal within the meaning of section 43?

“ (2) Whether the assessment made on the firm of Nawal Kishore Kharaiti Lal of Delhi (the petitioner) as agent of Seth Banji Lal of Jaipur under section 43 is rendered illegal by the fact that the notice which the Income-tax Officer served on the firm under the proviso to section 43 did not mention any particular year for which the Income-tax Officer proposed to treat the firm as an agent?

“ (3) Whether proceedings could be started under section 34 of the Act against the petitioner as agent of the non-resident in view of the fact that action under that section was time-barred, more than one year having lapsed since the issue of the notice, dated 2nd February, 1928? ”

As required by the Act the Commissioner gave his opinion on each question, answering each against the respondent firm—namely (1) Yes; (2) No; (3) Yes. The High Court (Addison and Sale JJ.) answered the first and third questions in the negative and held that the second question did not arise. Their view was that the Assistant Commissioner, having by his order of 2nd May, 1928, held that no order had been passed declaring the respondent firm to be the agent of the non-resident, the Income-tax authorities were bound by that opinion. On this footing there was no

order declaring the respondent firm to be such agent until 8th May, 1931. No such order having been passed before 13th February, 1928, the notice of that date calling for a return of income under section 22 (2) was in the opinion of the learned Judges invalid, and as this was the only notice ever served under that sub-section the assessment was illegal as well as out of time under section 34. They concluded their judgment by saying, "The result of this reference is that the petitioner will escape assessment of income-tax for the year 1926-27 on a technicality."

The first question for decision is whether by the terms of the Act it is necessary to the validity of a notice calling for a return of income under section 22 (2) where it is served upon a person as agent of a non-resident under section 43 that it should have been preceded, not only by the notice of intention prescribed by section 42 and by the opportunity of being heard prescribed by the proviso thereto, but also by an order to the effect variously described by the High Court as "declaring the petitioner to be the agent of a non-resident person" and "treating him as such agent." It may be reasonable that A should not be required to render a return of B's income until it has first been decided that he is agent for B: on the other hand, having regard to the circumstances which for this purpose constitute agency, it may well be thought advisable that the information afforded by a return and by books of account produced in support thereof should be available for the purpose of deciding as to agency. The avoidance of delay may also be a consideration. The matter must be determined entirely upon the language of the Act, and their Lordships cannot find that it imposes the technical requirement upon which the High Court have insisted. It seems to their Lordships to be open to the Income-tax Officer under the Act to postpone any final determination of the question of agency until the time comes to make an assessment under section 23 of the Act. The notice of 13th February, 1928, was served before the expiry of one year from the end of the financial year 1926-27. Subject therefore to the merits of the case and to the answer to be given to the second of the three questions referred, the notice of 13th February was a valid initiation of proceedings to assess the respondent firm as an agent under section 43 and in respect of the year of assessment 1926-27. Proceedings if begun in time are not by the Act required to be completed within any time limit.

The objection taken by the second question is that the notice of 2nd February, 1928, did not specify the year 1926-27 though this was done by the notice of 13th February requiring returns to be made under section 22 (2). It would appear that in 1931 the then Income-tax Officer had some doubt upon this point, and that the issue of a second notice on 5th May, 1931, specifying 1926-27 was intended to meet the difficulty. If, however, the original notice of 2nd February, 1928, had been for this reason bad, that of May, 1931, was much too late to take its place or cure it.

The High Court did not think it necessary to answer the second question referred to them, but in their Lordships' view it should be answered, and the answer is in the negative. The notice is by section 43 made part of the series of facts which results in the resident being deemed agent by force of the section. The extent of his responsibility if he be agent is another matter. If by notice given in due course under section 22 (2) the year or years be specified he has no grievance in point of procedure, and he can make his case upon the merits.

No question of law arises upon the controversy as to agency. At the hearing it was desired by learned counsel for the respondent firm to contend that his clients should not have been assessed upon the figure of Rs.72,928, which includes interest payable to the non-resident by third parties in British India, but only upon the figure of Rs.51,550 which was payable by the respondent firm. No such issue can be brought within any of the three questions referred by the Commissioner to the High Court nor has it been discussed at any previous stage of the reference. Their Lordships are accordingly unable to entertain it.

They will humbly advise His Majesty that this appeal should be allowed, that the judgment of the High Court be reversed and that in lieu of the answers given by the High Court to the three questions referred to them by the Commissioner, the following answers be respectively given—namely Question (1) Yes; Question (2) No; Question (3) Yes. The respondent firm will pay the appellant's costs of this appeal and of the reference in the High Court.

In the Privy Council

THE COMMISSIONER OF INCOME TAX,
PUNJAB, NORTH-WEST FRONTIER, AND
DELHI PROVINCES, LAHORE

vs.

MESSRS.
NAWAL KISHORE-KHARAITI LAL

DELIVERED BY SIR GEORGE RANKIN

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