*Privy Council Appeal No.* 100 *of* 1945

**Malik Damsaz Khan** - - - - - - - *Appellant*

*v.*

**The Commissioner of Income-Tax, Punjab and North-West Frontier Province** - - - - *Respondent*

FROM

## THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1947

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*Present at the Hearing:*

LORD SIMONDS
LORD UTHWATT
SIR JOHN BEAUMONT

[*Delivered by* LORD SIMONDS]

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The substantial question raised in this appeal which is brought from the Judgment of the Court of the Judicial Commissioner, North West Frontier Province, is whether an order of the Appellate Assistant Commissioner, Rawalpindi Range, of the 18th January, 1942, imposing on the appellant a penalty of Rs.14,000 under section 28 of the Indian Income Tax Act, 1922, as amended up to the relevant date, is a valid order.

The question arises in this way. The appellant during the years 1937 and 1938 carried on business as a supply contractor at Bannu in the North West Frontier Province, supplying livestock, wood and vegetables to the military units stationed in Waziristan. On the 13th April, 1938, a notice was sent to him under section 22 (2) of the Act requiring him to furnish on or before the 13th May, 1938, a return for the year 1938/9 of his income for the previous year 1937/8. He did not do so. After two attempts to serve him with notice under section 22 (4) of the Act to produce accounts or documents had failed, he was served with such a notice returnable on the 18th October, 1938. On the same day he appeared before the Income Tax officer and produced a return made out on the usual form. This return showed no income except against item 5, which is headed " Business, trade, commerce, manufacture, or dealing in property, shares or securities (details as in Note 5) ". Against this item was an entry of Rs.10,000, which sum was also entered as the total income of the appellant. The declaration in the return was duly signed by the appellant. The details in Note 5 were not given, a matter which in these proceedings has assumed great importance.

On the same day the appellant made a statement to the Income Tax Officers in the vernacular which he duly recorded. This statement according to the translation recorded in the judgment of the Court of the Judicial Commissioner was as follows:

> " I have filled the form. I have given my approximate income. I had my books but they were spoiled in the fire which occurred during the previous year. My Munshi (clerk) has been ill and was treated for a long time by me. He could not therefore write those books correctly. Enquiry should be made about my status and I should be assessed on the payments made to me by Government."

The Income Tax Officer believing the appellant's statement that he had no books to produce made enquiries. He found that the appellant had received payments of Rs.6,69,929 during the account year 1937/8 and assessed the appellant at a net income of Rs.1,00,488. The income-tax and supertax on this net income was Rs.20,047. An Assessment

Order in this sum was accordingly issued on the 30th October, 1938: it was expressed to be made under section 23 (3) of the Act.

Against this assessment the appellant appealed to the Assistant Commissioner of Income-Tax on the 30th November, 1938. The appeal was directed solely to the amount of the assessment. It was not suggested in the grounds of appeal that the assessment had not been validly made under section 23 (3) of the Act. In the course, however, of the proceedings before the Assistant Commissioner " it came to notice " (so runs his judgment) " that the assessee had concealed the particulars of his income and had deliberately furnished inaccurate particulars ". Notice was therefore issued to him to show cause why a penalty should not be imposed on him under section 28 of the Act. It was thereupon urged on his behalf that it was not competent for the Assistant Commissioner to impose a penalty upon him upon the ground that the return made by him was not valid inasmuch as the requirements of Note 5 (*b*) of the statutory form had not been satisfied. This was the only reason then put forward for saying that the return was not valid.

The Assistant Commissioner by his order of the 18th January, 1942, affirmed the assessment of the Income Tax Office and, rejecting the appellant's plea that there was no valid return, imposed the maximum penalty of Rs.14,000 under section 28 (1) of the Act.

The appellant next appealed against both decisions of the Assistant Commissioner to the Income-tax Appellate Tribunal. It is unnecessary to refer further to the assessment, since that is not under appeal to their Lordships. It is however important to note what were the grounds (so far as they are now relevant) of appeal against the imposition of a penalty. These were in effect twofold, and are thus stated in the judgment of the Tribunal, " (1) that there was no valid return in this case and consequently there could be no appeal and, since in that view there were no valid proceedings before the Appellant Assistant Commissioner, section 28 could not be invoked by him, and (2) that since in the return no particulars whatever were furnished there could have been no concealment of any inaccurate particulars and consequently there is no case for the application of section 28 ". Once more the alleged invalidity of the return was based on the failure to fill in the details prescribed by Note 5 of the form. But it was also suggested that, having regard to the statement made by the appellant contemporaneously with his return, the item of income entered in his return should be regarded only as an estimate and that the return itself should therefore be held to be invalid. These contentions the Tribunal rejected, as also they rejected an argument that, as there was no proper return filed, the Income-tax Officer was bound to make an assessment to the best of his judgment under section 23 (4) and not to proceed under section 23 (3) of the Act.

The appellant then applied to the same Tribunal under section 66 of the Act that questions of law should be referred to the decision of the High Court, and, after argument, by order of the 25th May, 1943, the Tribunal referred the following questions of law for the decision of the Court of the Judicial Commissioner, North West Frontier Province:—

> " (1) Whether in the circumstances of the case the assessee had filed a valid return, so as to justify an assessment under section 23 (3) of the Act?
>
> " If the answer to question (1) be in the negative,
>
> " (2) Whether on the facts of the case, the assessment could be deemed to have been made on default under section 23 (4) in which case there was no valid proceeding on appeal before the Appellate Assistant Commissioner (under the law as it stood before its amendment in 1939), and consequently no power in Appellate Assistant Commissioner to take action under section 28? "

As appears from the judgment of the Court of the Judicial Commissioner the appellant's contention in that Court was as follows:—

> The return of income rendered by the Appellant on the 18th October, 1938, was not a return within the meaning of the word in section 22 (2) of the Act. It was not a return for two reasons,

namely: (1) it did not comply in form with the provisions of Rule 19 of the Income Tax Rules, in that it did not contain the statement required by Note 5 (*b*) of the form prescribed by that Rule; and (2) after rendering the return the Appellant made a statement showing that he had no definite information about his income, thus making it clear that the so-called return was merely an approximate guess. If there was no proper return, the Income-tax Officer could not make a valid assessment under section 23 (3) of the Act. Therefore, it was contended, the assessment was made, or must be deemed to have been made, under section 23 (4) of the Act; and, consequently, under section 30 (1) of the Act (as it stood until amended as regards subsequent years of assessment by the Indian Income Tax (Amendment) Act, 1939), the Appellant had no right of appeal against the assessment to the Appellate Assistant Commissioner, who, consequently, had no jurisdiction to impose a penalty, since there were no proceedings before him in which he had jurisdiction to do so.

The Court of the Judicial Commissioner answered the first question put to it in the affirmative, the second question therefore did not arise.

Their Lordships observe that the question thus referred was of a limited character and they do not propose to go beyond it or to consider any other reasons for challenging the validity of the return made by the appellant than those adduced in the Courts in India. The reasons so adduced have been already stated and they appear to their Lordships to be without foundation.

It has been observed that the appellant when making his return failed to comply with the prescribed form in that he did not enter any details such as Note 5 of the form required. It is this failure which in the appellant's contention invalidated his return. It is unnecessary for their Lordships to determine whether the Income-tax Officer could properly have declined to receive such a return and, upon the footing that the assessee had failed to make a return, have made an assessment to the best of his judgment under section 23 (4) of the Act and they do not cast any doubt upon analogous decisions to that effect in the Courts of India. But it appears to them that it was clearly competent for the Income-tax Officer in the circumstances of the present case to accept the return as a valid return and proceed to assessment under section 23 (1) or section 23 (3) as the case might be. Since he was not satisfied that the return was correct and complete he could not proceed under section 23 (1): he, therefore, as appeared upon the face of the assessment, proceeded under section 23 (3). Neither in the incompleteness of the return nor in the fact that in an accompanying statement the appellant referred to his return as an estimate can their Lordships find any possible justification for the plea that the assessment was incompetent or that the Appellate Assistant Commissioner had no jurisdiction to entertain the appeal proceedings which the appellant himself initiated.

For the first time before their Lordships the appellant by his counsel raised the contention that the Income-tax Officer could not lawfully have made the assessment under section 23 (3) as he had not given the necessary notice under section 23 (2), and that for this reason the assessment must be treated as having been made under section 23 (4). This plea depends for its validity upon questions of fact which have not been investigated and it is in their Lordships' opinion too late for the appellant to raise it now.

In the result their Lordships will humbly advise His Majesty that this appeal must be dismissed. The appellant will pay the costs of the appeal.

(58146) Wt. 8013—20 180 7/47 D.L. G. 338

**In the Privy Council**

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**MALIK DAMSAZ KHAN**

*v.*

**THE COMMISSIONER OF INCOME-TAX, PUNJAB AND NORTH-WEST FRONTIER PROVINCE**

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DELIVERED BY LORD SIMONDS

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