LAHORE HIGH COURT

Gurmukh Singh

Vs

Commr. of Income-tax

(Din Mohammad, J.)

10.04.1944

JUDGMENT

Din Mohammad, J.

1. This reference to the Full Bench has arisen out of the assessment proceedings relating to the years 1934-35, 1935-36 and 1936-37 started against Seth Gurmukh Singh and his nephew, Seth Dayal Singh, respectively. In the year 1934-35 Seth Gurmukh Singh was assessed to Income Tax on an income of ₹ 11,142. Some time later, the Income Tax Officer was informed that the assessee had received some income which had accrued to him in Siam and he consequently served a notice on him under Section 34, Income Tax Act, 1922, and ultimately added a sum of ₹ 40,000 on that account and assessed him accordingly. The assessee took an appeal to the Assistant Commissioner under Section 31 of the Act, challenging the finding of the Income Tax Officer that income had accrued to the assessee in Siam and that he had received it in the accounting year. The Assistant Commissioner remanded the case to the Income Tax Officer observing that "it is absolutely necessary that there should be some data and definite materials on record for the finding that some profits were received into British India during the accounting period." A further report was accordingly submitted by the Income Tax Officer and the Assistant Commissioner declined to interfere with his order. The assessee then moved the Commissioner of Income Tax both under Section 33 and Section 66, Income Tax Act, but he too did not disturb the assessment. So far as the assesee's application under Section 66(2) was concerned, where as many as 11 questions had been raised by him, the Commissioner remarked:

> The upshot of the whole is that the assessee failed to discharge the onus that lay on him, while there was abundant circumstantial evidence to prove the existence of productive sources of income in Bangkok and influx of money from there. As there is no issue of law involved in these facts, the application under Section 66(2) is rejected.

Similar action was taken by the Income Tax Officer in the case of Seth Dyal Singh and his attempt, too, to have the order upset by the higher authorities encountered a similar opposition at the hands of the Department. The assessments relating to the years 1935-36 and 1936-37 were also made on a similar basis, and were similarly confirmed by the Assistant Commissioner. The Commissioner too refused to refer the matter arising therein to this Court when moved under

Section 66(2), Income Tax Act. Both the assessees then filed six petitions in this Court under Section 66(3), Income Tax Act, and in all the six petitions it was prayed that the Commissioner of Income Tax be required to state the case and to refer to this Court the following points of law that arose for decision:

> (1) Whether there is any evidence in support of the finding that the assessee carries on business in Siam and has rent producing property there and that he brought any earnings from Siam to Gujranwala, the extent of which is ₹ 40,000? (2) Whether the onus of proof that the assessee has no source of income outside India, and that he has not received any income from abroad, is on the assessee in an enquiry under Section 34 of the Act, particularly when during previous five years no assessment on such income was made by the Income Tax Department? (3) Whether in law the absence of explanation by an assessee in the following matters is circumstantial evidence of the fact that he brought during the year under assessment ₹ 40,000 from Siam to British India:
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> (a) Ten years ago assessee held assets worth four lacs in Siam. No satisfactory explanation given as to disposal of these assets, (b) Investments made in Gujranwala of Rupees 24,000 during the year of assessment and of two lacs during the last ten years. No satisfactory explanation from where he did so, though assessee has other sources of non-taxable income.
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> (4) Whether it was permissible in law to base a finding on the question involved under Section 34 enquiry on the history of last ten years of assessment and was that legal evidence in the case?
>
> (5) Whether in the circumstances of this case action under Section 34 was justified in law, and whether the Income Tax Officer could act on information which he does not, place on the record?
>
> (6) Whether it is within the competency of the Income Tax authorities to know the total amount of wealth possessed by an assessee, hoarded or otherwise, or is their jurisdiction-limited to discover assessable income for a particular year?

2. These petitions came on for hearing before a Bench of this Court composed of Dalip Singh and Ram Lall, JJ. in November 1940. Dalip Singh, J., with whom Ram Lall, J. concurred, delivered the principal judgment, in the course of which the learned Judge inter alia observed:

> (1) It is sufficient to say that the Income Tax Officer arrived at his finding after ample opportunity had been given to the assessees to show that the reasons for which the Income Tax Officer came to the conclusion that there was business or property in Siam stilly existing and which yielded income were incorrect. (2) It appears that the Income Tax Officer made some inquiries behind the back of the assessees the source of which is not disclosed at all and was not disclosed to the assessees at any time though they asked for it, but the substance of the information which was supplied to the assessees was that these inquiries revealed that the assessees had personally and through relatives brought large

sums either in cash or in gold bullion into India during the disputed years. (3) It appears that the names of the relatives were not supplied to the assessees nor were the assessees told on what dates during the years in dispute they had gone to Siam and returned therefrom with this alleged cash and gold bullion which they were supposed to have brought personally from Siam into British India? (4) It does not appear from the record and the learned Counsel for the Income Tax authorities is unable to inform us whether the source of the inquiries made by the Income Tax Officer was even disclosed to the learned Assistant Commissioner. (5) The first difficulty that arises in the case of Seth Gurmukh Singh is that the evidence or alleged evidence on which the Income Tax authorities rely is partly circumstantial, which would be evidence proper before a Court and partly of inquiries made behind the back of the assessee which were not revealed to him of which a very inadequate 'substance' of 'information' was revealed to him by the Income Tax authorities. (6) It appears to me clear that information derived behind the back of a person and-not revealed to him on which some conclusion is based against him can by no stretch of the word be construed as evidence. Such a procedure offends against the principles of natural justice and that which would not be evidence under the principles of natural justice cannot be held to be evidence within the meaning of Section 23(3)(7) In the case of Seth Dyal Singh the circumstantial evidence referred to above is altogether missing. In his case, therefore, the assessment was based entirely on those private inquiries which revealed that he personally or through, his relatives, had brought gold bullion or cash into British India during the three years in dispute.

3. While holding that the conclusions reached by the Income Tax Officer that "there was a business or income producing property in Siam existing even now" and that "income does accrue from this property," the learned Judges in view of the remarks extracted above formulated the following two questions and required the Commissioner to state the case and to refer it to this Court: "(1) Was the finding of fact by the Assistant Commissioner on the question of income brought into British India during the years in dispute in an assessment, made under Section 23(3) in the case of Seth Gurmukh Singh vitiated by the fact that in arriving at his conclusion the Income Tax Officer based that conclusion partly on circumstantial evidence and partly on material derived from inquiries made behind the back of the assessee and which were-never disclosed to the assessee? (2) Whether the Income Tax Officer in the case of Seth Dyal Singh in an assessment made under Section 23 (3) was entitled to base his conclusion solely on inquiries made behind the back of the assessee and not revealed to him?"

4. In compliance with this order the Commissioner drew up a statement of the case and expressed the opinion that an assessment based on circumstantial evidence as well as confidential inquiries was not bad in law. He, however, stressed the fact that "the substance of the information received by the Income Tax Officer was placed before the assessee and he was given ample opportunities to meet the case." On this reference coming before a Bench of this Court of which I was a member, several questions of law arose which in the opinion of the Bench were most material for the proper decision of the reference. Unfortunately the trend of authority was not uniform on those matters and the Bench accordingly framed the following questions for reference to a Full Bench of five Judges at least inasmuch as a case of this Court which came in for consideration

had been decided by a Bench similarly composed.

5. (1)(a) Whether the High Court can formulate questions at the stage of mandamus or whether the Commissioner alone is the authority to formulate those questions while stating the case? (b) Whether the assumptions made by the 'High Court on the strength of which a question is framed at the mandamus stage are conclusive, or is it open to the Commissioner to point out in the statement of the case drawn up pursuant to the mandamus that those assumptions are inaccurate? (c) Whether the Bench hearing the reference, in case it finds that the statement of the case drawn up by the Commissioner is correct, can go behind the assumptions made by the Bench issuing the mandamus and amend the question formulated by that Bench so as to bring it into accord with the real state of affairs?

6. (2)(a) Whether, after rejecting the accounts of an assessee without reference to method of accounting but otherwise an Income Tax Officer is bound to rely on the evidence, true or false, adduced by the assessee? (b) Can he not ignore the false evidence altogether and make an assessment under the proviso to Section 13(c) If he makes his own estimate, is he bound to disclose the material on which he founds that estimate to the assessee? (d) Is he entirely debarred from relying on private sources of information which he may not disclose to the assessee at all? (e) In case he utilises the private inquiries made by him is it enough for him to communicate the substance of informations to the assessee?

7. Along with these questions another matter mooted at the bar was also referred to the Full Bench, viz., whether a finding of fact arrived at by the Income Tax Officer was vitiated altogether if it was partly based on admissible material and partly on confidential inquiries, the substance of which was never disclosed to the assessee. It may be observed that questions (1)(b), (c) and (2)(e), formulated by Sale, J. and myself were on our suggestion modified to some extent at the hearing so as to bring out the real matter in controversy.

8. The three parts of question No. (1) involve the true construction to be put upon Sub-sections (2), (3) and (5) of Section 66, Income Tax Act. By Sub-section (2) an assessee is permitted to make an application to the Commissioner within 60 days of an order under Sections 31, 32, 33 or of a decision by a Board of Referees under Section 33(a), requiring the Commissioner to refer to the High Court any question of law arising out of such order or decision and the Commissioner is enjoined to draw up a statement of the case and refer it with his own opinion thereon to the High Court. If the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may under Sub-section (3), apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it, and on receipt of any such requisition the Commissioner is bound to state and refer the case accordingly. Sub-section (5) provides that the High Court upon the hearing of any such case, shall decide the questions of law raised thereby-and shall deliver its judgment thereon containing the grounds on which such decision is founded. If however the High Court is not satisfied that the statements in a case referred by the Commissioner are sufficient to enable it to determine the question raised thereby, the High Court is under Sub-section (4) empowered to refer the case back to the Commissioner by whom it was stated, "to make such additions thereto or alterations therein as the Court may direct in that behalf." As to this matter there is no ambiguity and consequently no dispute.

9. It is obvious that in the first instance it is the assessee who indicated a question of law arising out of an order with which he is dissatisfied and the Commissioner if agreeing to make the reference is required to draw up a statement of the case evidently in respect of that question only and refer it with his own opinion thereon to the High Court. In case of refusal by the Commissioner to state the case on the ground that no question of law arises, the assessee is permitted to apply to the High Court and here too the application is evidently confined to the question of law which the assessee had raised in the first instance and on which the Commissioner had refused to state the case. If the High Court is not satisfied of the correctness of the Commissioner's decision, it would require the Commissioner to state the case and to refer it and this requisition will necessarily relate to that question only which was originally indicated in the assessee's application. It follows, therefore, that in a reference under Sub-section (2) the Commissioner cannot travel beyond the question originally indicated by the assessee nor can the High Court raise any question suo motu which is not covered by the reference and in case of the Commissioner's refusals the High Court is confined to the question raised by the assessee in his application to the Commissioner. The High Court may formulate the question itself but its substance must be the same though the form may be modified either to give the question indicated by the assessee a proper shape, or to bring out most prominently the legal aspect of the case, discarding all reference to facts

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10. In *Commr. of Income Tax v. Maharajadbiraj of Darbhanga*[1], the Commissioner had made a reference to the High Court under Sub-section (2) of Section 66, Income Tax Act, and had omitted to formulate any question of law arising out of a certain transaction which appeared material to the High Court. The High Court accordingly formulated the question itself and decided that question too along with the other questions referred by the Commissioner. On appeal to the Privy Council thier Lordships did not favour this procedure and in this connexion observed as follows: "The commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under Section 66(5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the questions to be decided as being.... Their Lordships deprecate this departure from regular procedure.... This dictum of their Lordships clearly debars the High Court from taking into consideration any matter which has not been raised by the Commissioner himself while stating the case under Section 66(2). In *National Mutual Life Assocn. Australisia v. I.T. Commr*[2]., where the High Court had decided a case on an argument submitted to them for the first time their Lordships of the Privy Council observed at p. 53 that any claim as to liability to tax based on that argument was a matter outside the letter of reference and was irrelevant to the questions

[1] AIR 1933 PC 108 : 1933 AWR (P.C.) 2 74 : 1933-37-LW 701

[2] AIR 1936 PC 55

submitted. Similarly in *Rajendra Narayan Bhanj Deo v. Commissioner of Income Tax, B. & O*[3]., their Lordships observed that the function of the High Court in cases referred to it under Section 66 is advisory only and is confined to considering and answering the actual question referred to it.

11. A new question of law, therefore, cannot be raised by the High Court itself, though the High Court may re-state a question propounded by the Commissioner if considered necessary. In *Commr. of Income Tax v. Shaw Wallace & Co*[4]., where me question framed by the Commissioner had not been happily worded their Lordships did not object to the High Court having recast the

question in order to make it more precise. In another Privy Council case as reported in *Commr. of Income Tax v. Sarangpur Cotton Manufacturing Co*[5]*.,* reference had been made by the Commissioner under Sub-section (3) of Section 66 on a question formulated by the High Court. The Commissioner in the statement of case drawn up by him suggested the substitution of another question. The High Court, without remanding the case, itself amended the question originally formulated by it and gave its decision thereon, Their Lordships of the Privy Council did not criticise this procedure and while finally disposing of the appeal themselves recast the question so as to make it conform to the true state of affairs as disclosed in the case and answered it accordingly. In *Trustees Corporation India v. Commr. of Income Tax Bombay*[6]*,* where the High Court had remanded the case to the Commissioner directing him to deal in particular with a further question, which in its opinion arpse in the case, and the Commissioner had in compliance with the requisition of the High Court referred two further questions, their Lordships made the following observations:

> Their Lordships are fully alive to the circumstances in which the High Court was constrained to direct that these further questions should be referred to it for consideration, and the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court will, in future cases, be well advised to require, before they seek to entertain any question under Section 66, Income Tax Act, that the preliminary requirements of the section are strictly complied with.

This authority again clearly impresses upon the High Court the necessity of observing all the formalities laid down in Section 66 before a question is raised and unmistakably leads to the conclusion that, unless and until a question is duly referred to the High Court under the provisions of Section 66, the High Court is not competent to raise any question of its own accord. Relying on the remarks of their Lordships of Privy Council in *Commr. of Income Tax v. Maharajadbiraj of Darbhanga*[7]*,* and *Trustees Corporation India v. Commr. of Income Tax Bombay, AIR 1930 PC 151 : 1930-32-LW 127(supra)*, a Full Bench of the Rangoon High Court in *Commr. of Income Tax v. Chettiyar Firm A.I.R. 1934 Rang. 172,* decided that the High Court under Sub-section (3) of Section 66 had no jurisdiction to order the Commissioner to refer any question of law not raised by the assessee. The Bombay High Court, however, dissented from this view in *Vadilal v. Commr. of Income Tax*[8] and, while

[3] AIR 1940 PC 158 : 1940 AWR (P.C.) 10 122 : 1940-52-LW 406
[4] AIR 1932 PC 138 : (1932) ILR 59 P.C. 1343 : 1932-36-LW 63
[5] AIR 1938 PC 1
[6] AIR 1930 PC 151 : 1930-32-LW 127
[7] AIR 1933 PC 108 : 1933 AWR (P.C.) 2 74 : 1933-37-LW 701
[8] A.I.R. 1935 Bom. 170

suggesting that the function of the High Court is only to indicate the question and the actual framing of the question rests with the Commissioner, observed that the Court under Sub-section (3) was no more limited than was the Commissioner under Sub-section (2) to the precise questions formulated by the assessee. If this judgment only means that the form of questions, as formulated by the assessee or the Commissioner can be amended, I entirely agree but if it further lays down that even new questions can be put, with all respect I consider that this view proceeds on a wrong interpretation of the wording of Sub-sections (2) and (3) of Section 66. The word 'any' before the word 'question' does not indicate that by merely making an application under Sub-section (2) an assessee can call upon the Commissioner to delve deep into the case and find out for him what questions of law arise in the case and to refer them to the High Court; and further in case of the Commissioner's refusal he can similarly require the High Court to hunt up

all questions of law arising in the case and order the Commissioner to refer them. In my view, what the word 'any' really connotes in this context is that if for example ten questions of law arise in a case, it is open to the assessee to choose all or any of them as he likes and require a reference in that respect only but it is he who has to exercise his choice in the first instance and none else. If he abandons any question although it arises in the case, neither the Commissioner nor the High Court can raise it of his or its own accord as the case may be. How can the High Court express its dissatisfaction with the Commissioner's decision on a point which was never raised before him and it is only when it is so dissatisfied, that it can take action under Sub-section (3). While here it may be necessary to explain some of the remarks made by me in *Ganga Ram-Balmokand v. Commr. of Income Tax*[9] which are liable to be somewhat misunderstood. I there observed:

> Counsel for the firm has finally urged that in view of the fact that the question as formulated by the Court issuing the mandamus leaves us no choice to determine any other aspect of the case but that envisaged in the question. We are bound to give a reply to the question put within the terms of the question. I may say at once that I do not consider that the proposition advanced by the counsel is legally sound. Under Sub-section (3) of Section 66, the High Court, if not satisfied of the correctness of the Commissioner's decision, is empowered to require the Commissioner to state the case and to refer it. It is nowhere laid down that a question is to be formulated by the High Court issuing the mandamus. Further, Sub-section (5) of the same section lays down that upon the hearing of any such case the High Court is empowered to decide the questions of law raised thereby. This Sub-section also does not confine the High Court to the decision of the question of law as formulated by the Commissioner or the Court issuing the mandamus. On the other hand, it confers upon it full power to decide the question of law in the form it actually arises from the statement of the case made by the Commissioner.

12. I may explain that I did not mean to suggest that the High Court could frame any question it liked even though not raised by the assessee or the Commissioner if that question could be raised in the case. What I intended to stress in these observations was that the High Court while hearing a reference under Sub-section (3) of Section 66 was not bound to answer the question in the form in which it had been propounded by

[9] A.I.R. 1937 Lah. 721 at p. 45

the Commissioner or by the Bench issuing the mandamus as the case may be, even if its form was defective, and that it was open to the High Court to recast the question itself if the exigencies of the case so required and this is exactly what I even now consider to be the true position. No doubt I followed *Shiv Prasad v. Commissioner of Income Tax*[10], in that respect but it was only to this extent that if the question put by the Commissioner does not state the actual point in controversy, the High Court may set it right. This is so far as the first part of question (1) is concerned. The conclusion at which I have reached on that matter, therefore, is that whether a reference is made under Sub-section (2) or Sub-section (3) of Section 66, Income Tax Act, it is really the question indicated by the assessee in the first instance that serves as the basis. In a reference under Sub-section (2), the Commissioner may give the question a proper shape, and' in case he refuses to refer the case to the High Court, that Court at the stage of issuing the mandamus or hearing the reference may determine the proper form in which the question of law indicated by the assessee may arise. But subject to this, the High Court is confined to the

statement of the case drawn up by the Commissioner so far as the substance of the question is concerned and can decide that question only which is raised thereby.

13. Adverting now to the second part of question (1), I consider that if any assumptions of fact are made by the High Court at the stage when the mandamus is issued they are open to correction by the Commissioner when he draws up the statement of the case. The consideration of the case by the High Court at that stage is not final. No doubt the Commissioner is represented before the High Court in those proceedings also, but at that particular time the only, question that falls for the determination of the High Court is whether the decision of the Commissioner that no question of law arises is correct or not. If therefore any remark concerning the facts of the case is made by the High Court on the strength of which the High Court interferes with the order of the Commissioner, he cannot be precluded from stating that the High Court.was misinformed on the subject. In *Rajendra Narayan Bhanj Deo v. Commissioner of Income Tax, B. & O*[11], which has already been referred to in another connexion a question had arisen whether on the terms of a certain kaoolnama the assessee's income from his raj was exempt from taxation. The Commissioner refused to submit any reference to the High Court on that matter and the High Court directed him, under Sub-section (3) of Section 66, to refer the question set out above. The Commissioner, while drawing up the statement of the case, pointed out inter alia that the kaoolnama relied upon by the assessee was merely of historical interest and did not affect the matter at issue. The High Court nevertheless decided that the question propounded be answered and gave a reply in the negative. On appeal, their Lordships of the Privy Council agreed with the Commissioner that the kaoolnama in question did not come into play at all in the matter and made the following observations:

> In these circumstances their Lordships do not think it would be right to depart from the well established practice of the Board to refuse to decide a question which is purely academic.... In their Lordships' opinion, both the respondent and the High Court ought to have refused to answer the question referred to it, leaving it to the appellant to take such steps as he might be advised to obtain

[10] AIR 1929 All 819 [11] AIR 1940 PC 158 : 1940 AWR (P.C.) 10 122 : 1940-52-LW 406

> the reference to the High Court of such other question with regard to liability to Income Tax as may in fact arise under the material settlement. In these circumstances, their Lordships are of opinion that the order of the High Court should be discharged, and in lieu thereof it should be declared that having regard to the facts set out in the statement, the question referred ought not to have been answered.....

14. This passage is a clear authority for the proposition that even if the High Court propounds a question at the mandamus stage requiring the Commissioner to state a case thereon, the Commissioner can in the statement submitted by him draw the attention of the High Court to such circumstances as render the question unnecessary. In the face of this dictum it is idle to expatiate on this matter any further. I would, therefore, hold that the assumptions of fact made by the High Court at the mandamus stage are not binding on the Commissioner and it is open to him to point out their inaccuracy while making the reference. This disposes of to a great extent the third part of question No. (1) too. The High Court on reference is concerned only with the statement drawn up by the Commissioner and by virtue of Sub-section (5) is required to decide

the question of law raised thereby. Any expression of opinion on facts made by the High Court at the time of issuing the mandamus, which ultimately turns out to be incorrect, does not, therefore, bind the Bench hearing the reference and it can on the authority above cited refuse to answer the question if so minded.

15. Even prior to the decision of their Lordships of the Privy Council in 1940 the Courts in India proceeded on this basis and the Bench hearing the reference did not consider circumscribed within the limits set out at the stage of the mandamus. In *Commissioner of Income Tax v. Chengalvaraya Chetti*[12] Sir Murray Coutts-Trotter C.J., while hearing the reference made the following remarks in respect to a question which had been propounded by a learned Judge of that Court while issuing the mandamus: "The learned Judge did something further which the section does not provide for; he framed the question which he supposed to arise from the facts as set out in the Commissioner's report. With great respect to the learned Judge, I do not think that the question he framed was the real question raised in the case, and I think that the question as he has framed it is so beset with assumptions and begged questions that it would be impossible to decide fairly what the real point in this case is by any answer that could be given to the highly involved questions he formulated."

16. Krishnan, J., who generally agreed with the Chief Justice, also added: "It is difficult, however, to understand what exactly the learned Judge thought should be decided in this case. The question stated by him is put in such a form that, taking the hypothesis involved in it, it is impossible to give any answer except in the negative. That is not a fair Way of framing a question. It should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income Tax who makes the reference."

17. I am in respectful agreement with the observations reproduced above and would answer this part of the question accordingly. The second set of questions hihges on the true interpretation to be put upon Sub-sections (2) and (3) of Section 23. Before dealing with the individual questions comprised therein, it will be helpful to set out in

[12] A.I.R. 1925 Mad. 1242

brief the circumstances in which these questions arose. The contention raised on behalf of the assessees in this case was that if on a notice issued by the Income Tax Officer, under Sub-section (2) of Section 23, an assessee produces his account books and also leads other evidence, which tends to support his allegations, and the Income Tax Officer is unable to rebut that evidence by any evidence placed on the record by himself, he is bound to act upon the evidence led by the assessee, of whatever worth it may be, and is thus incompetent to assess on any other basis. It was further stressed that the enquiry contemplated by Sub-section (3) of Section 23 was in the nature of a judicial enquiry and consequently the Income Tax Officer could not have recourse to any sources of information which were not disclosed to the assessee and was altogether debarred from relying on any material so collected while coming to a final decision. By Sub-section (2) of Section 23, if the Income Tax Officer has reason to believe that a return made under Section 22 is incorrect or incomplete, he can "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."

18. Sub-section (3) enacts that "on the day specified in the notice issued under Sub-section (2), or

as soon afterwards as may be, the Income Tax Officer, after 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." Sub-sections (1) and (4) of Section 23 are not really relevant to the discussion, but they may, for facility of reference be reproduced here, as the provisions made as well as the language employed therein can render some assistance in the discussion of the other Sub-section s. Sub-section (1) reads as follows:

> If the Income Tax Officer is satisfied that a return made under Section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return." Sub-section (4) enacts: "If the principal officer of any company, or any other person fails to make a return under Sub-section (1) or Sub-section (2) of Section 22, as the case may be, or fails to comply with all the terms of a notice issued under Sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under Sub-section (2) of this section, the Income Tax Officer shall make the assessment to the best of his judgment and in the case of a registered firm may cancel its registration." The notice contemplated by Sub-section (4) of Section 22 requires an assessee to produce, or cause to be produced, such account or documents as the Income Tax Officer may require.

19. From the provisions reproduced above the following conclusions clearly emerge: (1) Accounts or documents required by the Income Tax Officer may be requisitioned under Sub-section (4) of Section 22. (2) In case no return is furnished at all, or no accounts or documents are produced as required by the Income Tax Officer under Sub-section (4) of Section 22 or no evidence is led under Sub-section (2) of Section 23, the Income Tax Officer is empowered to make the assessment to the best of his judgment. (3) If the return is correct and complete in every respect, assessment is to be made under Sub-section (1) of Section 23. If, however, the return is considered to be incorrect or incomplete, action is to be taken under Sub-section (3) of Section 23. This may involve the recording of oral evidence as well as the examination of books of account. If the result of the enquiry is favorable to the assessee, the return furnished by him will form the basis of the assessment; otherwise the Income Tax Officer will make such order as he is authorized by law to make.

20. It is further to be noted that the word "assess" as used in Sub-section (1) and Sub-section (3) of Section 23 and the word "assessment" as used in Sub-section (3) of Section 23 have not been defined in the Act itself and naturally, therefore, one shall have to consider the ordinary meanings that these words carry. The word "assess" as defined in Murray's Oxford Dictionary may mean either "to determine or settle or fix the amount of taxation to be paid by a person," or "to estimate the official value of property or income for the purpose of apportioning its share of taxation." Similarly, the word "assessment" means, among other things, "the determination of the amount of taxation, the amount of charge determined upon, the official valuation of property or income for the purposes of taxation." When, therefore, it is stated in Sub-section (1) of Section 23 that the Income Tax Officer shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return, the word "assess" is used not in the sense of fixing "the amount of taxation" but in that of estimating the official value of the property or income to

be taxed. In the same manner, when in Sub-section (3) of Section 23 it is stated that the Income Tax Officer shall "assess" the total income of the assessee and determine the sum payable by him on the basis of such "assessment", the word "assess" carries the same meaning as it does in Sub-section (1) of Section 23. Similarly, the word "assessment" too signifies the determination of the official valuation of property or income for the purposes of taxation. In both these Sub-section s the determination of the sum payable by the assessee follows the act of "assessing" in the first instance.

21. The process of assessment i.e., the estimating of the value of the property or income to be taxed necessarily involves its computation. If the taxable income falls under Section 7 (Salaries), Section 8 (Interest on Securities) and Section 9 (Property), the matter is plain, being one of simple arithmetic. But if on the other hand it is covered by Section 10 (Business), Section 11 (Professional Earnings) and Section 12 (Other Sources) the Act itself lays down a method of computation in Section 13. This section reads as follows: "Income, profits and gains shall be computed for the purposes of Sections 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee: Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine." It cannot be disputed that if a return falling under Sections 10, 11 or 12 is considered to be correct and complete in every respect, computation under Sub-Section (1) of Section 23 will be made under Section 13. This also cannot but be admitted that if after taking action under Sub-section (3) of Section 23 read with Sub-section (2) the Income Tax Officer is satisfied of the correctness and completeness of the return, he shall again have to compute the income on the principles laid down in Section 13. Similarly if he is unable to accept the assessee's account books as correct or genuine, the same section would come into play and the proviso to that section would enable him to compute the income of the assessee "upon such basis and in such manner as he may determine."

22. It may be observed that while it is expressly provided in Sub-section (4) of Section 22 that a notice may be issued requiring an assessee to produce or cause to be produced such accounts or documents as the Income Tax Officer may require, in Section 23 no specific provision is made to meet the contingency if the accounts or documents so produced are rejected by the Income Tax Officer on the ground of being untrue, fictitious or incomplete. It is suggested that there is a lacuna in the statute 'on this score. But, as stated in Maxwell on the Interpretation of Statutes at p. 61, "it is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning maybe attributed to the words, if they are fairly susceptible of it." No doubt it is further stated there that the construction must not be strained to include cases plainly omitted from the natural meaning of the words, but this prohibition does not come into play in this case for the simple reason that the language of Sub-section (3) does not plainly omit a case falling under this category. A similar opinion was expressed by me in *Ganga Ram-Balmokand v. Commr. of Income Tax*[13] where I gave my detailed reasons at pp. 15-21 for holding that the proviso to Section 13 can be utilised in these circumstances for computing the income of the assessee, and it is not necessary to recapitulate them here. Suffice it to say that several cases both of this Court and of the other High Courts in India have been decided on the same basis quite independently of my judgment. In *In re*

Navadwipchandra Nagendra Das[14] Sir Harold Derbyshire C.J. of the Calcutta High Court, observed:

> The Income Tax Officer was justified in being thoroughly suspicious of the return and when he went into the figures of the returns, and analysed them as far as he could, they indicated, wherever reliable data were available, that the rates of profit were much higher than those shown in the returns. It was his duty to make an assessment under Section 23(3) and in so doing to be guided by the provisions of Section 13 of the Act." In *Shamrao v. Commr. of Income Tax*[15] Stone C.J. and Vivian Bose, J. of the Nagpur High Court explained that where the books were found to be unreliable, the assessment was made under Section 23(3) but the computation was made under the proviso to Section 13. The following passage from that judgment brings out this view unmistakably: What is of importance is that the Income Tax Officer must when assessing under Section 23(3), apply his mind to Section 13 proviso in eases where he is rejecting the evidence of the books...Clearly, if the books are unreliable, no method employed in the keeping of them can be founded the basis of a computation. The books are simply unreliable." In a later case coming before the same High Court as reported in *Bknath v. Commr. of Income Tax*[16] Stone, C.J. and Clarke, J. applied the proviso to Section 13 where the books had been found unreliable by the Income Tax authorities.

[13] A.I.R. 1937 Lah. 721 [15](39) 7 I.T.R. 515 (Nag)

[14] (39) 7 I.T.R. 488 (Cal.) [16](42) 10 I.T.R. 110 (Nag)

23. In *In re Ram Khelawan and Sahu Thakur*[17] the Income Tax Officer looked into the accounts of the assessee and came to the conclusion that they were not reliable. A Bench of the Allahabad High Court composed of Iqbal Ahmad and Bajpai, JJ. observed that in these circumstances the Income Tax Officer had to compute the income in accordance with the proviso to Section 13. In similar circumstances another Bench of the same Court in a case reported in *Ganeshlal v. Commr. of Income Tax*[18], referred to Section 13 for the purpose of computing the assessee's income whose return-did not show a fair margin of profit. In *In re Badhey Lal*[19], too Section 13 was said to come into play in computing income under Section 23(3). In all these cases it was suggested that this proviso was a check of the arbitrariness of the Income Tax Officer. In *Rulia Mal Raunak Ram v. Commr. of Inoome-tax*[20] where the Income Tax Officer had found as a fact that complete accounts had not been produced before him and had on that account proceeded to estimate the assessable income under the proviso to Section 13 of the Act, a Bench of this Court composed of Addison and Sale JJ. approved the course adopted by him. Another judgment of this Court as reported in *Bulaqi Mal & Sons v. Commr. of Income Tax*[21] may also be referred to in this connexion. A case from the Rangoon High Court reported in *Commr. of Income Tax v. Chan Lochwan*[22] also supports the view taken by me in respect of the use of the proviso to Section 13 even when the accounts are not found to be genuine.

24. I am aware of the fact that my judgment in *Ganga Ram-Balmokand v. Commr. of Income Tax*[23] was dissented from by a Full Bench of the Madras High Court in *Subbayya v. Commr. of Income Tax*[24] on the ground that Section 13 did not contemplate the rejection of the accounts. But with all respect I still consider that the course suggested by me is the only proper way of dealing with the matter. Judgments like *In re Ganeshi Lal & Sons*[25], and Ganeshi Lal Ram Chand (41) 1941-9 I.T.R. 241 (Lah.), which approve of the applying of a flat rate in such circumstances as

well as the Madras judgment which permits the Income Tax Officer to use his best judgment invest the Income Tax Officer with a very wide discretion limited by his own good sense only and thus encourage arbitrariness in him, while if the proviso is brought into play, a statutory bar is provided against his whims in so far as the basis and manner of his computation are made open to scrutiny by the higher authorities. Further, in allowing the Income Tax Officer to make a random assessment the distinction that exists in the statute between Sub-section (3) and Sub-section (4) is abolished altogether, and had this been intended by the Legislature, such cases could easily have been included in Sub-section (4). It now remains to consider what the nature of the inquiry conducted by an Income Tax Officer under Sub-section (3) of Section 23 is. In other words, is the Income Tax Officer bound to conduct himself as a judicial tribunal and to consider only such evidence as is legally admissible or can he act even on such information as he may himself collect confidentially and of which he may neither indicate the nature nor disclose the source to the assessee? Here too the observations made in the cases cited to us are not very clear. In some of them the whole inquiry conducted under this Sub-section is considered to be in the nature of a judicial inquiry, in some it is emphasized that the proceedings held by an Income Tax Officer

[17](39) 7 I.T.R. 607 (All.) [19] AIR 1931 All 23 : (1930) ILR 52 All 991
[18] AIR 1941 All 24 [20] A.I.R. 1935 Lah. 539
[21](34) 8 I.T.C. 21 (Lah) [23] A.I.R. 1937 Lah. 721 25 AIR 1938 All 367
[22] A.I.R. 1929 Rang. 102 (F.B) [24] A.I.R. 1939 Mad. 371

are of a confidential nature, while there are some in which a middle course is favored, stress being laid on the necessity of the Income Tax Officer conducting himself in accordance with the rules of justice, equity and good conscience.

25. The first matter to be considered in this connexion is how far Section 37, Income Tax Act, supports the suggestion that every proceeding taken under Chap. 4, including a proceeding under Sub-section (3) of Section 23, is a judicial proceeding. Section 37 reads as follows: "The Income Tax Officer, Assistant Commissioner and Commissioner shall, for the purposes of this Chapter, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the followiug matters, namely: (a) enforcing the attendance of any person and examining him on oath or affirmation; (b) compelling the production of documents; and (c) issuing commissions for the examination of witnesses; and any proceeding before an Income Tax Officer, Assistant Commissioner or Commissioner under this Chapter shall be deemed to be a 'judicial proceeding' within the meaning of Sections 193 and 228 and for the purposes of Section 196, Penal Code."

26. It is obvious that it is only in respect of certain specified matters that the Income Tax authorities are invested with the powers exercisable by a civil Court and it is only for a limited purpose that a proceeding before them is declared to be deemed to be a judicial proceeding. It naturally follows that in all other matters, not covered by the section, the Income Tax authorities cannot exercise the powers of a civil Court, nor can the proceedings before them be deemed to be judicial proceedings. Had the Legislature intended that the Income Tax authorities should in every matter conduct themselves as a Court of law, bound by the rules of evidence and the procedure of a civil Court, the wording of Section 37 would have been different. Under some of the provisions contained in Chap. 4 it was necessary for the Income Tax authorities to examine persons on oath or affirmation, to compel them to produce documents and to issue commission for the examination of witnesses and it was essential, therefore, with a view to facilitate the

discharge of their functions to confer upon them the powers of a civil Court. Similarly, with a view to check perjury or the use of false or fabricated evidence and to maintain the dignity of the office the proceedings were to be declared judicial proceedings, otherwise Sections 193 and 228, Penal Code, could not have come into play at all. In fact, Section 37 was so narrowly construed by a Bench of the Calcutta High Court in *Lal Mohan v. Emperor*[26], that the Legislature thought it necessary to amend the law so as to bring Section 196, Penal Code, also within its ambit. I consider, therefore, that the scope of Section 37 cannot be so extended as to characterize every proceeding taken before an Income Tax Officer under Sub-section (3) of Section 23 to be a judicial proceeding in the legal sense of the term. I would now examine the authorities cited at the bar. In *Dunichand Dhani Ram v. Commissioner of Income Tax*[27] decided by Le Rossignol and Martineau, JJ., it was observed: "Section 37 of the Act indicates that the procedure of Income Tax Officers is of a judicial nature and in making his assessment the Income Tax Officer should proceed on judicial principles. If evidence is produced by the assessee in support of his return, it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay." In *Md. Hayat-Haji Md. Sardar v. Commr. of Income Tax*[28] a case disposed of by five learned

[26] AIR 1927 Cal 724 : (1928) ILR 55 Cal 423 [27] A.I.R. 1926 Lah. 161 [28] A.I.R. 1931 Lah. 87

Judges of this Court, Sir Shadi Lal C.J. remarked:

> If he (the Income Tax Officer), 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 completeness of the return made by him, 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. If the aasessee does not comply with the terms of the notice, the Income Tax Officer has no material before him except the incomplete or incorrect return; and he has, therefore, no alternative but to make an assessment to the best of his judgment: vide Section 23, Sub-section (4). When the assessee complies with the terms of the notice, the Income Tax Officer is bound to hear the evidence which the former may desire to produce in support' of his return, and, if, in the course of the enquiry, the Income Tax Officer considers that additional evidence should be produced, he is authorised to complete the enquiry by taking such evidence after specifying the points requiring elucidation. After he has received the evidence produced by the assessee and also the evidence, if any, which he has himself called for on the points specified by him, he must assess the income on the material produced before him and has no right to make an assessment to the best of his judgment.

27. In *Gopinath Naik v. Commissioner of Income Tax*[29], a difference of opinion arose between Niamat Ullah and Bajpai, JJ. on the question under consideration. Niamat Ullah, J. was of the opinion that, although the Legislature did not intend that the evidence on which the Income Tax authorities were to act should be evidence which fulfilled all the technical requirements of the Evidence Act, mere conjecture, surmise or assumption of facts as distinct from inference from proved circumstances did not amount to evidence within the meaning of Section 23(3). The learned Judge consequently observed that the result of the inquiries made by the Assistant Commissioner in the absence of the assessee was not evidence that could be acted upon. Bajpai,

J. on the other hand was of the view that the proceedings before the Income Tax Officer were not judicial proceedings in the real sense of the term especially as the same person could not be a party, a Judge and witness in his own case and all that was required from him was to proceed upon the principles of natural justice. On this difference of opinion the case was referred to Sir Shah Muhammad Sulaiman C. J. who remarked that the proceedings taken by the Income Tax Officer before the issue of notice to the assessee under Sub-section (2) of Section "23 were administrative in character and necessarily confidential, but once that notice was served, the proceedings assumed the character of a judicial inquiry, although not conducted by a judicial officer. The learned Chief Justice based his conclusion on the fact that the word used in. Sub-section (3) of Section 23 was 'evidence' and not 'information' and it followed therefore that what the Sub-section authorized the Income Tax Officer to do was to take evidence in rebuttal of the evidence produced by the assessee, which should prima facie be taken in the presence of the assessee and of which the assessee should have knowledge in order that he could rebut such

[29] AIR 1936 All 286

evidence. It was, however, added that an Income Tax Officer was not bound to accept either the correctness of the return or the genuineness or completeness of the account books or the truth of the evidence produced by the assessee. If he had ground for believing that such evidence was untrustworthy, he could certainly reject it and having rejected such evidence it was open to him to pursue the inquiry further and take more evidence which he considered necessary.

28. In *Nathu Ram v. Commr. of Income Tax*[30] decided by Sir Douglas Young C.J. and Monroe, J. it was observed that the procedure of the assessing authority was a judicial one and that he ought to act on evidence. The learned judges, however, explained that the assessing officer was entitled to regard the account produced by the assessee as unsatisfactory without producing any evidence to show that the statements in the books or some of them were false. In *Subbayya v. Commr. of Income Tax A.I.R. 1939 Mad. 371* Leach C.J. inter alia remarked that where in a case falling under Sub-section (3) the assessee had failed to produce evidence on which the Income Tax Officer could make a proper assessment of the assessee's income, the Income Tax Officer was bound himself to take steps to procure material for the purpose if it was not already in his possession. The learned Chief Justice further observed:

> There are two other questions which are bound up with the question under discussion, namely, whether the Income Tax Officer when making an assessment on material which he himself has gathered shall disclose it to the assessee before making his assessment and give him an opportunity to adduce material in rebuttal and whether the Income Tax Officer should in his order of assessment set out the facts which he has taken into consideration when estimating the assessee's income for the year. There is nothing in the Act itself which requires the Income Tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order but natural justice demands that he should draw the assessee's attention to it before making the order. Information which the Income Tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income Tax Officer has been misinformed, but the Income Tax Officer is obviously not bound to disclose the source of his information.

> In a later part of this judgment it was added: "From every point of view it is desirable that the Income Tax Officer should indicate in' his order the material on which he has made his assessment, but I realize that he cannot be-compelled to do so.

29. In *Paras Dass Munna Lal v. Commr. of Income Tax*[31] it was held by a Bench of this Court composed of Abdul Rashid and Tek Chand, JJ. that the word 'evidence' as used in Sub-section (2) of Section 23, Income Tax Act, could not obviously be confined to direct evidence and that it was comprehensive enough to cover circumstantial evidence as well. In *In re Bagbat Halwai*[32] Sir Cecil Walsh of the Allahabad High Court remarked that the-proceedings before the Income Tax Officer

[30] A.I.R. 1937 Lah. 919 [32](28) 3 I.T.C. 48 (All.)
[31] A.I.R. 1938 Lah. 209

were judicial proceedings in the colloquial sense only because the Income Tax authorities had to make up their mind judicially with fairness to the public and to the assessee between whom they stood after taking all the facts or such facts as they could into account. But they were: not judicial proceedings in the strictly scientific sense of the term. In the words of the learned Judge "it is to some extent a private inquisition, it is confidential, it is not supposed to be disclosed to the public, and it is certainly not open to review, especially because frequently the Income Tax Officer is compelled to draw inferences and to consider evidence which might not be justified by the Evidence Act." In *Binjraj v. Commissioner of Income Tax*[33], Sir George Rankin C.J., made the following observations:

> When as in this case an assessee produces his books for the year of account and complies with any other requirements as to specific documents so that he is assessed in the ordinary way under Section 23(3) and not as being in default, the Income Tax authorities cannot assess him upon any figure of profits not warranted by evidence which they have before them." In *In re Harmukhrai Dulichand*[34], the same learned Chief Justice observed: "It has been said that the Income Tax Officer must proceed in a judicial manner and Section 37 has been mentioned in this connexion. Fundamentally, no doubt, the Income Tax Officer must proceed in a judicial spirit and: come to a judicial conclusion upon properly ascertained facts; though I would point out that the Income Tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party or Judge in his own case. However true it be and for whatever purpose it be true that the assessment to Income Tax is to be done in a judicial manner, the first thing which must be laid down as a condition' before a person can complain of any departure from this principle is this that he too must produce the evidence which the law requires him to produce.

30. In *Commr. 34of Income Tax v. Khemchand Ram Das*[35] the learned Judicial Commissioner gave the following answer to the question whether in making an assessment under Section 23(3) the Income Tax Officer could rely upon information which was not disclosed to the assessee:

> Though there is nothing in the Act which requires the Income Tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order, natural justice requires-and he should conduct his proceedings in accordance with natural justice-

he should draw the assessee's attention to any such material and give him a reasonable opportunity to meet the case arising therefrom before making his order. Further, as an order under Section 23(3) is appealable, that order should contain with sufficient precision, the material on which the assessment is based, so that the appellate authority can form a just opinion of the fairness of the assessment. There can, however, be no question of the assessee being entitled to demand copies of confidential statements in the possession of the Income Tax Officer or to demand that his informants should be called by the Income Tax Officer, so that they can be cross-examined by the assessee, and the Income Tax Officer is not a Court in

[33] AIR 1931 Cal 683 : (1931) ILR 58 Cal 1446

[34] AIR 1928 Cal 587 : (1929) ILR 56 Cal 39 : 114 Ind. Cas. 90

[35] A.I.R. 1940 Sind 92

the usual meaning of that word when he is holding an enquiry under Section 23(3). Under Section 37 of the Act he has merely certain powers of a civil Court for the purposes of Chap. 4." Even in a case under Sub-section (4) of Section 23, where the Income Tax Officer has unfettered powers and unlimited discretion, their Lordships of the Privy Council in a case reported in *Commissioner of Income Tax v. Badridas Bamrai Shop*[36], observed: "He (the Income Tax Officer) 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 though there must necessarily be guess-work in the matter, it must be honest guess-work." Similarly, in *Commr. of Income Tax v. Maharajadbiraj of Darbhanga, AIR 1933 PC 108 : 1933 AWR (P.C.) 2 74 : 1933-37-LW 701(supra)* their Lordships observed at p. 334 that even a guess could not be made without evidence.

31. I cannot do better than to wind up the consideration of the authorities on this aspect of the case by a quotation from Viscount Haldane, Lord Chancellor, in *Local Govt. Board v. Arlidge*[37] "They (the Income Tax authorities) must deal with the question referred to them without bias, and they must give to each Of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.... The judgments of the majority of the Courts below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial, methods or procedure should apply to departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The department must obey the statute and if administration is to be beneficial and effective, it must be the master of its own procedure." Though the procedure to be observed under the Indian Income Tax Act is not the same as that under the English Act, the observations reproduced above are not altogether irrelevant, as they throw sufficient light on the nature of the functions the Income Tax authorities have ordinarily to perform.

32. On giving my full consideration to the different views expressed in the judgments cited above, I am personally inclined to hold that the proceedings taken by the Income Tax Officer under Sub-section (3) of Section 23 cannot be characterised as judicial proceedings as we understand them, but all the same as remarked by me in *Ganga Ram-Balmokand v. Commr. of Income Tax A.I.R. 1937 Lah. 721(supra)* he is required to proceed without bias and give

sufficient opportunity to the assessee to place his case before him as well as to meet the case made out against him. In other words, he is bound to conduct himself in accordance with the rules of justice, equity and good conscience, even though he may not be compelled to observe all the formalities of a Court of law. Under the law as it stands, while proceeding under Sub-section (3) of Section 23 the Income Tax Officer is bound to hear such evidence as the assessee may produce in support of his return and, if, after hearing the evidence so produced, he still thinks that he is not satisfied on any particular point, he can require the assessee to produce further evidence on that point. To that extent he may be taken to

[36] AIR 1937 PC 133 : 1937-46-LW 21

[37]1915 A.C. 120

proceed quasi judicially, but his quasi judicial functions begin and end here. If not satisfied with the character of the evidence produced by the assessee, he is not bound to lead evidence on "his own account with a view to rebutting it. He may gather information in any manner he likes and utilise it against the assessee even if it does not in all respects satisfy the requirements of the Evidence Act. The very nature of the proceedings conducted by him necessitates the use of such media for collecting information as he may not like to disclose to the assessee, and he is perfectly within his right if on inquiry by the assessee he refuses to disclose the source of his information. But if he makes up his mind to reject the evidence of the assessee on any grounds which appeal to him to be sufficient for that purpose, it is but fair and just that he should acquaint the assessee with those grounds so as to enable him to disabuse his mind, if possible, by explaining them away as baseless or untenable. It is, however, impossible to hold that if once the assessee under Sub-section (3) of Section 23 leads evidence, whether reliable or unreliable, or produces any document, whether genuine or fictitious, the Income Tax Officer must base his decision on that evidence unless he is in a position to bring on the record any definite evidence to the contrary.

33. My answer to the second set of questions would, therefore, be as follows: (a) An Income Tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false, (b) He can have recourse to the proviso to Section 13 even in those cases where he rejects the accounts produced by the assessee on the ground that they are not genuine, and thus fail to represent truly his income and profits, (c) If he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate, (d) He is not, however, debarred from relying on private sources of information, which sources he may not disclose to the assessee at all. (e) In case he proposes to use against the assessee the result of any private enquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him, ample opportunity to meet it, if possible.

34. The only other point that falls for determination is whether the finding of fact arrived at by the Income Tax Officer is vitiated altogether if it is partly based on admissible material and partly on confidential enquiries, the substance of which was never disclosed to the assessee. On behalf of the assessees, it is contended that such a finding has no forcein law and reliance in this connexion is placed on *Balwant Singh v. Baldev Singh A.I.R. 1921 Lah. 119(Supra)* a case of second appeal, where a Bench of this Court composed of Broadway and Abdul Qadir, JJ. remanded the case to the lower appellate Court observing' that a decision on a question of fact could be attacked on second appeal if in arriving at that decision reliance had along with other

evidence also been placed on evidence that was inadmissible. Support for this action was sought from a judgment of the Patna High Court reported in *Mt. Sumitra Kuer v. Ram Khair*[38] There a document which was not admissible in evidence had been relied upon by the first appellate Court and on second appeal a learned Judge of that Court had remanded the case to the first appellate Court with a direction to come to a decision leaving out of consideration the said document. On an appeal being preferred

[38] A.I.R. 1921 Pat. 61

against this decision to a Bench, of that Court the learned Judges were referred to Section 167, Evidence Act, which lays down inter alia that the improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. They, however, repelled this contention with the following observation:

> Were we a Court of appeal with power to go into the evidence and arrive at an independent judgment upon the evidence itself, we would then be in a position to say whether or not the evidence justified the finding of the learned Subordinate Juage, but in second appeal the Court is not in possession of all the evidence or in a position to be able to weigh it and see whether in fact, apart from the objection-able evidence, there was sufficient evidence to entitle the lower Court to come to the decision which it did. It is impossible for us here to say exactly how far the mind of the Subordinate Judge was influenced by this document.

Though no earlier decisions were cited in the Patna judgment, there are some which may be perused with advantage. In *Mohur Singh v. Ghuriba*[39] a case which had been before three Courts in India, two of which had tried the question of fact, certain grounds were brought to their Lordships' notice on which their conclusion could be impeached. While dealing with this aspect of the case, their Lordships observed:

> It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not ki the position of a Court of law in this country before which, on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not Judges of fact, and are unable to say what weight the Jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships, who are Judges of the fact in such a case as this, to consider whether throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees." In *Lalla Banseedhur v. Government of Bengal*[40] their Lordships were once more faced with a case in which improper evidence had been admitted, and it was argued before them that the decree of the Courts below was vitiated on that account. In this connexion their Lordships inter alia observed:

> Now, it is alleged that they (the Courts below) made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight--not only evidence which was inadmissible by the law of England, but evidence which ought not, in fairness and justice, to be

[39](71) 15 W.R. 8 (P.C)

[40](71) 14 M.I.A. 86 (P.C)

> allowed to have any weight.... Then as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the Zillah Court and of the Sudder Court...that any reliance was placed upon them, and, therefore, they may be rejected. The real question is, therefore, first of all, taking the evidence which must be and everybody says is admissible, how does the matter stand?

Both these cases were decided before the Evidence Act was enacted and it was presumably with a view to give effect to the observations made there that Section 167 was incorporated in the Evidence Act, which enabled the Court to maintain a decision although partly based on inadmissible evidence, if what remained was enough to support it. In 1881, in a case reported in *Womesh Chandar v. Chunder Churn (81) 7 Cal. 293(supra)* a Bench of the Calcutta High Court composed of Sir Richard Garth C. J., and McDonell, J. discussed the possibility of using Section 167 in second appeals where the High Court was concerned not with findings of fact but with questions of law only. The learned Chief Justice who delivered the main judgment observed:

> The question which we have now to determine is, whether we ought to remand the case on account of the improper reception of this evidence. Section 167, Evidence Act, provides that.... It seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus: On second appeal we have no power to deal with the sufficiency of the evidence; we have only a right to entertain question of law. And our duty being thus confined it seems to me, that when evidence has been wrongly admitted by the Court below, this Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below. We cannot deoide that question, as it seems to me, without examining in detail that other evidence, and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding. I think that the only cases which we may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment, a remand is unnecessary, because then the error committed by the lower Court had not affected the decision upon the merits. (See Section 578, Civil P. C.)

35. It is to be remembered that in the case of second appeals however erroneous a finding of fact may be, provided it is based on evidence, it is binding on the High Court. *Wall Md. v. Md. Bakhsh, AIR 1930 PC 91 : 1930-31-LW 321(supra)*. It is also clear that the question of

sufficiency or otherwise of evidence is not for the High Court to determine. As remarked by Sir Henry Richards C.J. and Sir Premada Charan Banerji, J., in *Mauladad Khan v. Abdul Sattar*[41], "We have nothing to do in second appeal with the weight to be attached to any particular piece of evidence.... We think the learned Judge of this Court was bound to accept the finding of the lower appellate

[41] AIR 1917 All 35 : (1917) ILR 39 All 426 : 39 Ind. Cas. 666

Court in second appeal on a question of fact based on legal evidence.... As already stated the question of sufficiency or insufficiency of evidence is not for this Court in second appeal." On the principles enunciated above, in all cases of improper admission of evidence the trend of authority has been to apply Section 167 with full force to all first appeals where the High Court could look into facts as well, but in second appeals to remand cases to the lower appellate Court with a view to enable it to determine whether after rejecting the evidence improperly admitted there was enough evidence left to support the finding of fact originally based on partly admissible and partly inadmissible evidence.

36. In references under Section 66(3), the same limitations are imposed on the powers of the High Court as exist in second appeals. On all questions of fact, the Income Tax authorities are the sole arbiters and the only question of law that arises in respect of the finding of fact recorded by them is whether there was any material to support it. If they can point to any material on which their order could be founded, the sufficiency or insufficiency of it is neither within the competency of the assessee to attack nor within the functions of the High Court to determine.

37. It is to be seen, therefore, whether the same principles as apply to second appeals can be followed in references under Section 65, Income Tax Act. In *Gopinath Naik v. Commissioner of Income Tax, AIR 1936 Allahabad 286(Supra)*. Sir Shah Muhammad Sulaiman C.J. remarked: "In this view of the matter, I am of the opinion that the finding of the Assistant Commissioner was passed partly on the result of private inquiries made by him and partly on the admitted eiroumstanoes of this case. So far as it was based on the private inquiries, it was improper and is vitiated. But if it could be based on the other circumstances without taking: into account the result of the private enquiries, then the finding would not be illegal according to the principle underlying Section 167, Evidence Act. I am not called upon to say whether in this particular case the assessment at 11 lakhs could have been made on the other circumstances of this case excluding the result of the private inquiries. This is for the Assistant Commissioner to decide." In spite of declaring that the finding of the Assistant Commissioner so far as it was based on the result of private inquiries was improper and vitiated, the learned Chief Justice did not formulate his answer to the question propounded on those lines, but merely recorded "that the estimate was based on evidence which the Assistant Commissioner was partly empowered to act upon and partly not empowered to act upon." In other words, the finding of the Assistant Commissioner was left intact. I respectfully consider that this is the only proper way of dealing with the matter, the power of remand exercisable by the High Court in second appeals not being available under Section 66. No doubt Sub-section (4) does provide that if the High Court is not satisfied that the statement drawn up by the Commissioner is sufficient to enable it to determine the question of law raised thereby, it may refer the case back to the Commissioner by whom it was stated to make much additions thereto or alterations therein as it may direct in that behalf. But this is not the same thing as remand with a direction to the Income Tax Officer to retry and redecide the whole matter after rejecting the evidence improperly admitted.

38. It may be urged that where it is not possible to determine how far the finding of fact was

influenced by inadmissible material, the entire finding should disappear. But I do not consider that that consequence necessarily follows in every case. If the material that could not be used is so mixed up with the material that could be used as to make it impossible to separate one from the other, or, to put it in a different way, if the inadmissible material is the main foundation of the entire superstructure raised by the Income Tax Officer, no doubt the finding will vanish as soon as the basis is destroyed. But if this is not the case and the admissible material is quite independent of the inadmissible material, the same result will follow as did even in the case of a second appeal in *Womesh Chandar v. Chunder Churn (81) 7 Cal. 293(supra)*. I would hold, therefore, that if there is any admissible material to support the finding of the Income Tax Officer quite apart from the result of the confidential enquiries made by him and not communicated to the assessee, it will not be open to the High Court to declare the finding altogether vitiated. The Commissioner shall pay the costs of the assessee.

Harries, C.J.

39. I agree to the answers suggested by my brother Din Mohammad, J. to all the questions except the answer to question 2 in the second set. To that question I agree with the answer proposed by my brother Munir, J.

Sale, J.

40. I agree to the answer proposed by my brother Din Mohammad, J. and with the judgment delivered by him.

Abdur Rahman, J.

41. I prefer to agree with the answers proposed by my brother Din Mohammad without any reservation.

Munir, J.

42. The facts of this case and the circumstances in which the two sets of questions were referred to the Full Bench have been stated In detail in the judgment of my brother Din Mohammad and need not be repeated. With the exception of the answer to question 2 in the second set, I agree that the answers to the questions referred to the Full Bench should be as proposed by my learned brother. As regards the answer to question 2 in the second set I may state at the very outset that though I differ from my learned brother in his interpretation of Section 13, on the substance of the issue I have arrived at practically the same result as he has arrived in the present case, or as he arrived in *Ganga Ram-Balmokand v. Commr. of Income Tax A.I.R. 1937 Lah. 721(supra)* The only difference between the view taken by him and the one that I take is that whereas he arrives at this result by relying on the proviso to Section 13, I do so without invoking the aid of that proviso and by confining myself within the terms of Section 23, Sub-section (3). Under Section 6, Income Tax Act, 1922, the following heads of income, profits and gains are chargeable to Income Tax in the manner indicated in the subsequent sections of the Act, namely, (i) Salaries, (ii) Interest on securities, (iii) Income from property, (iv) Profits and gains of business, profession or vocation, and (v) Income from other sources.

43. Under Section 23, the Income Tax Officer has to assess the total income of the assessee from

all these sources and to determine the tax payable by him. While the Income Tax Officer is assessing the total income of the assessee under Section 23, the Act does not direct him to adopt any particular method of computation of salaries taxable under Section 7, of interest on securities taxable under Section 8 or of income from property taxable under Section 9. But when the Income Tax Officer assesses profits and gains of business, profession or vocation taxable under Section 10 or income from other sources taxable under Section 12, he is directed by the Act to compute for the purposes of assessment the profits and gains or the income in a certain manner: vide Sections 10 and 12. Now, Section 13 provides as follows: "Income, profits and gains shall be computed for the purposes of Sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee: Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in' the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine." It is clear from the terms of this section and the position of the section in the Act that it only deals with computation of profits and gains of business, profession or vocation and of income from other sources. Thus the section is complementary to the provisions of computation detailed in Sections 10 and 12 and has nothing to do with the question how evidence, consisting of books of account or not, is to be judged when it is produced by the assessee under Section 23(3) in support of his return. Section 23 before its amendment by the Act of 1939 was as follows: 23. (1) If the Income Tax Officer is satisfied that a return made under Section 22 is correct and complete Assessment. he shm asseess the total income of the assessee, and shall determine the sum payable by him on the basis of such return. (2) If the Income Tax Officer has reasons to believe that a return made under Section 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. (3) On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, the Income Tax Officer after 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.

44. When a return in the prescribed form is submitted by the assessee and the Income Tax Officer is satisfied that the return is correct and complete, he is directed by Sub-section (1) of this section to assess the total income of the assessee and to determine the sum payable by him on the basis of such return. If, however, the Income Tax Officer has reasons to believe that the return is incorrect or incomplete, he has under Sub-section (2) of this section to 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. On the day specified in such notice, or as soon afterwards as may be, the Income Tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income Tax Officer may require, on specified points, has to assess, by an order in writing, the total income of the assessee and to determine the sum payable by him on the basis of such assessment. It is, therefore, clear that when evidence is produced by the assessee in support of his return, it has to be examined and accepted or rejected by the Income Tax Officer while assessing the total income of the assessee under Section 23, Sub-section (3). The Sub-section does not say--and it was wholly unnecessary to say--how evidence, oral or documentary, which has been produced by the assessee in support of his return

or on points specified by the Income Tax Officer under Sub-section (3) of Section 23, has to be examined or appraised. These are matters on which the Act contains no provision and which have been rightly left by the Act to the judgment of the Income Tax Officer making the investigation about the total income of the assessee. The power to reject the books produced by the assessee in support of his return is implied in the Income Tax Officer's power to inquire into the total income of the assessee and does not need to be specifically conferred. I shall presently come to the question what the Income Tax Officer may do when he rejects the evidence produced by the assessee. All that I wish to point out and emphasise at present is that the section contains no directions for the appreciation of evidence and no provision about the result following from the rejection of evidence. When an assessee produces his books of account in support of his return, he produces them in an investigation under Sub-section (3) of Section 23, just as he may produce any other kind of evidence that he wishes, and the Sub-section does not say how the Income Tax Officer should deal with the evidence. Now entries in books of account may be quite true as to the transactions purporting to be recorded therein or they may be wholly false, fictitious and 'cooked up' for the purposes of assessment to Income Tax. If the books are false, the Income Tax Officer may reject them as he may reject any other false evidence, oral or documentary, produced by the assessee. What consequences follow from the rejection of such books is not stated in the section just as it is not stated what result may follow from the rejection of other oral or of documentary evidence produced by the assessee. Section 13 is not relevant to a case where evidence, be it books of account or other evidence, documentary or oral, is rejected by the Income Tax Officer on the ground that it is false. Books of account may however be true as to the transactions recorded therein but they may have been kept in such a manner that it is not possible to deduce therefrom the true income, profit and gains of the assessee which are directed by Sections 10 and 12 to be computed in a certain manner. It is here that Section 13 begins to operate. If the assessee has employed a regular method of accounting and the true income for the previous year can be computed according to that method, the section makes it obligatory on the Income Tax Officer to compute the income in accordance with the method Employed by the assessee. If however the assessee has employed no regular method of accounting, or if the method employed by him is such that in the opinion of the Income Tax Officer the true income for the previous year cannot be properly deduced therefrom, the section in that case gives to the Income Tax Officer a discretion to compute the income upon such basis and in such manner as he may determine. Where the books of account are false, no question of computation of income under Section 13 from the books arises because ex hypothesi the books are not evidence of the true income of the assessee for the previous year and are, therefore, no evidence of the correctness of the return.

45. It seems to me, therefore, that Section 13 is relevant to and only operates in cases where the books are accepted as correct in regard to the transactions recorded therein and the entries appearing therein can in some manner be made the basis of computing the true income of the assessee for the previous year. Where the books are false, they can in no manner be made the basis of computing the true income of the assessee for the previous year. I respectfully agree with the opinion of Sir Lionel Leach C.J. in *Subbayya v. Commr. of Income Tax A.I.R. 1939 Mad. 371(supra)* that Section 13 adds nothing to and takes nothing away from Section 23(3) and with the view of Davis, J. C. and Weston, J. in *Commr. of Income Tax v. Khemchand Ram Das A.I.R. 1940 Sind 92(supra),* that Section 13, and in consequence the proviso to that section, relates to the method of accounting and that alone, though the word 'method' must be given a broad and reasonable interpretation. A distinction must be drawn between books of account that are false or

fabricated and books that are unreliable in the sense that though the transactions are correctly recorded therein, from the manner in which those books have been kept it is not possible to deduce the true income of the assessee for the previous year. Where the books are unreliable in this sense the proviso to Section 13 is applicable provided the Income Tax Officer can in some manner make the entries therein a basis for the computation of the true income of the assessee for the previous year. The word 'method' in Section 13, as pointed out by Davis, J.C. in *Commr. of Income Tax v. Khemchand Ram Das A.I.R. 1940 Sind 92(Supra)* must be given a broad and reasonable interpretation and the proviso to Section 13 employed where the books, if they are not rejected as false and the entries therein correctly represent the business activity of the assessee, have been kept in such a manner that though ex facie they do not show the true income of the assessee for the previous year, the Income Tax Officer can in some mariner make the entries therein the basis of computation of such income. This view receives support from the Privy Council judgment in *Commr. of Income Tax v. Sarangpur Cotton Manufacturing Co. ('38) 25(supra)* where Lord Than-kerton made the following observations about Section 13: Their Lordships are clearly of opinion that the section relates to a method of accounting regularly employed by the assessee for his own purposes-in this case for the purposes of the company's business-and does not relate to a method of making up the statutory return for assessment to Income Tax. Secondly, the section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of, the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom. It may well be that, though the profit brpught out in the accounts is not the true figure for Income Tax purposes, the true figure can be accurately deduced therefrom. The simplest case would be where it appears on the face of the accounts that a stated deduction has been made for the purpose of a reserve. But there may well be more complicated cases in which, nevertheless, it is possible to deduce the true profit from the accounts, and the judgment of the Income Tax Officer under the proviso must be-properly exercised. It is misleading to describe this duty of the Inoome-tax Officer as a discretionary power.

> But though this is my view of the scope and function of Section 13 of the Act, I do not mean to say that in all cases where the books of account correctly record the business transactions of the assessee but have not been kept according to any method of accountancy, the Income Tax Officer must, in some manner, however complicated or laborious, make them the basis of computation of the assessee's income for the previous year. If an assessee maintains no more than a memorandum of his transactions merely showing receipts and expenditure without any capital account or without drawing any distinction between capital and revenue income and expenditure and mixes up such income and expenditure with his other income and expenditure, the Income Tax Officer is under no obligation to examine the entries item by item and to re-arrange them in such a manner as to prepare for the assessee a profit and loss account for the previous year. The proviso to Section 13 only applies to those cases where by some method, not involving unreasonable amount of labour, the Income Tax Officer can discover the true income of the assessee for the previous year. Where the accounts are complicated, the Income Tax Officer, as pointed out by their Lordships of the Privy Council in the case above cited, must exercise his judgment, and, if by a reasonable amount of labour, he can deduce the true profit from the accounts, he should do so and not reject the books on the mere ground

> that in such a case it is entirely discretionary with him to accept or reject the books. Where however books are not merely unreliable in the Sense indicated above but false and fictitious, the Income Tax Officer is neither under any obligation, nor has he any power, to act under the proviso to Section 13. In such a case the books must be rejected and the only use to which the Income Tax Officer may put them is to take the admissions contained therein against the assessee for the purpose of the assessment or to draw from the fact that they are false certain inferences against the assessee. It has been contended by the learned Counsel for the assessee that where the only material produced by the assessee in support of his return under Section 23, Sub-section (3) is the books of account and there is no contrary material before the Income Tax Officer about the income of the assessee, the Income Tax Officer must accept the books and, even if the books are false, he must make them the basis of assessment. This is a startling proposition indeed and has merely to be stated to be rejected. If the books contain inherent evidence of their being false, or if material entries therein are proved by evidence aliunde to be false, it is ridiculous to suggest that they must be made the basis of assessment under Section 23, Sub-section (3). An Income Tax Officer is under no obligation to prove that each and every entry in a book or account is false, or to accept all such entries as have not been proved by him to be false. Books are kept so that they may reflect the true income of the assessee for the previous year and if they contain in themselves evidence of their being false or if by external evidence some material entries therein are proved to be false, the Income Tax Officer is under no obligation to accept them and must reject them unless he can use them against the assessee.

46. I am unable to accept the contention that an investigation under Sub-section (3) of Section 23 is, as held in *Gopinath Naik v. Commissioner of Income Tax, AIR 1936 Allahabad 286(supra)*, in the nature of a judicial trial and that the Income Tax Officer cannot base the assessment except on the "evidence" produced by the assessee and such "evidence" as he himself calls in the presence of the assessee. All that this Sub-section requires is that if, not accepting the assessee's return of income as correct, the Income Tax Officer has issued a notice under Sub-section (2) requiring the assessee's presence or the production of evidence by the assessee in support of his return, he must take all such evidence as the assessee may produce in support of the return or on the points specified by the Income Tax Officer. The proceedings before the Income Tax Officer are not judicial proceedings in the ordinary acceptation of that term. They neither take the form of the trial of a suit nor are they proceedings inter partes the assessee and the Income Tax Officer. The comma before the words "on specified points" in Sub-section (3) would seem to indicate that the evidence before the Income Tax Officer when he is making an investigation under Sub-section (3) of Section 23 must be limited to specified points, whether such evidence is called by the assessee or by the Income Tax Officer himself. But this construction of the Sub-section would conflict with Sub-section (2) of Section 23 inasmuch as it would restrict the assessee's right under Sub-section (2) to produce all evidence that he wishes, in support of the return. In the interpretation of statutes punctuation, not being a part of the statute to be construed, is not the determining factor and if the provision as punctuated leads to an absurd result or conflicts with some other provision of the statute which is unambiguous and free from doubt, the punctuation must yield to an interpretation that is reasonable and makes it consistent with the other provisions

of the Act. If the words "on specified points" which are preceded by a comma are taken to qualify not only the words "such other evidence as the Income Tax Officer may require" but also the words "such evidence as such person may produce," the result would be that the assessee's right to produce "any evidence on which such person may rely in support of the return" which is given to him by Sub-section (2) of Section 23 would be curtailed and the assessee would not be entitled to produce all such evidence as he wishes to produce in support of the return and his right to lead evidence would be limited to the production of evidence on the points specified by the Income Tax Officer. This interpretation would, therefore, derogate from the right which is given to him by the notice issued under Sub-section (2) of Section 23. If, on the other hand, the comma before the words "on specified points" is deleted, the Sub-section not only becomes consistent with Sub-section (2) but also becomes perfectly intelligible and workable. With the comma deleted, the Sub-section would preserve the right of the assessee to produce all such evidence as he wishes in support of his return and would also give him the right to lead evidence on the points that may be specified by the Income Tax Officer.

47. In my opinion Sub-section (3) does not mean that, when the assessee appears before the Income Tax Officer, the Income Tax Officer should, as if it were, settle the issues between himself and the assessee by specifying the points on which evidence has to be led and make the assessment only on the evidence formally produced under this "Sub-section . It is true that after the word 'require' the words "the assessee to produce" do not occur in the Sub-section , but that this is the meaning of the words "such other evidence as the Income Tax Officer may require on specified points" seems to me to be perfectly clear. The right to call such evidence, documentary or oral, as the Income Tax Officer wishes is 'already given to him by Section 37, and I do not think that the words 'such other evidence as the Income Tax Officer may require" mean that the Income Tax Officer acting under Section 37 should himself call in the presence of the assessee all the evidence on which he intends to base his assessment. Read in this way, the Sub-section is not exhaustive or definitive of the material on which an assessment may be based. The Sub-section does no more than entitle the assessee to produce all evidence that he wishes to produce in support of his return and such other evidence as the Income Tax Officer may require him to produce on the points specified by the Income Tax Officer. The intention of the Sub-section is that if the Income Tax Officer has reasons to doubt the correctness of the return or the evidence produced by the assessee in support, of the return, he should draw the attention of the assessee to that doubt in order to enable him to remove it by such evidence as he may wish to produce. If this interpretation of the section is correct, the Income Tax Officer would have the power to base the assessment on any material that is before him, provided the attention of the assessee is drawn to that material and he is given sufficient opportunity to rebut it. Such material may be within the Income Tax Officer's own knowledge and might have been derived by him from hearsay or from information of a most authentic character. I do not think that this Sub-section was intended to mean that the Income Tax Officer should, as if it were, try an issue or issues in a suit between the assessee and himself by calling his own evidence--though undoubtedly he has such power-and marshalling and exhibiting his documents in the presence of the assessee, and that the assessee should have the right to cross-examine the Income Tax Officer's witnesses and the right to inspect his documents.

48. The Income Tax Officer has an unqualified power of seeking for and obtaining information about the assessee's affairs and to base his assessment on all such information and material even though it may not be "evidence" within the meaning of the Evidence Act and may be merely

secondary or hearsay evidence within the meaning of that Act. The only limitation imposed by the Sub-section on the powers of the Income Tax Officer is that if he wishes to use any material or any fact within his own knowledge against the assessee he should specify the point to which that material or information relates and give the assessee the right to rebut that material or information. But even if the Sub-section is read as punctuated and the comma before the words "on specified points" is given full effect, the Sub-section does not become definitive or exhaustive of the material on which an assessment may be based. On that construction the assessee will be entitled to call all such evidence as he wishes to produce in support of the return but the actual production of the evidence, whether called by the assessee or by the Income Tax Officer under Section 37, will be limited to the points specified by the Income Tax Officer who will be deemed to have accepted the return as correct except in the particulars specified or but for the reasons specified. If after evidence on specified points is taken, the Income Tax Officer is not satisfied that the return is correct either in the particulars specified, or for the reasons specified, he will have to do his best to ascertain the assessable income of the assessee but in determining such income he will not be confined to the evidence actually produced on the specified points in the presence of the assessee though, since the Income Tax Officer is required to pass an order in writing, he will have to state the reasons for rejecting the evidence of the assessee. If the evidence produced by the assessee is unreliable, the Income Tax Officer may reject the return in the particulars specified or the whole return on the ground that the objections to the return raised by the Income Tax Officer have not been satisfactorily met by the assessee and base the assessment on the information with him provided the nature of the information is disclosed to the assessee to enable him to rebut it and the inferences arising therefrom. What is important to bear in mind is that the Sub-section says nothing about the material on which assessment may be based and does no more thafi give to the assessee the right to be heard and to produce evidence on the specified points.

49. When an assessee produces books of account either in support of his return or as special evidence on a point specified by the Income Tax Officer, the Income Tax Officer has to examine the books in the same way as he would examine any other evidence produced by the assessee under Sub-section (3) of Section 23. If the objection to the books is merely one of method or if the books are unreliable merely in the sense that, though they are a correct record of the assessee's transactions, they have been kept in such a manner that they do not ex facie reveal the true result of the assessee's trading activity during the previous year, and the Income Tax Officer can, in some manner, make them the basis of computation of the assessee's income for the previous year, he must proceed under the proviso to Section 13. If, however, the books are false, fictitious or "cooked" for the purposes of assessment to Income Tax, the Income Tax Officer must reject them, as he must reject any other false evidence, and make the assessment on the other material before him provided the attention of the assessee is drawn to that material. The proviso to Section 13 has no application to such cases and the Income Tax Officer has to arrive at the assessable income, of the assessee in some other way. The argument that after the books are rejected, if the Income Tax Officer has no definite information about the affairs of the assessee he has no alternative but to fall back upon the books, is, to my mind, fallacious inasmuch as no correct finding can be based on evidence which ex hypothesi is false. The income of an assessee is a fact peculiarly within the knowledge of the assessee, the burden of proving which lies on him. Where the assessee relies on false evidence to discharge this onus, the Income Tax Officer has no option but to reject such evidence and to hold that the assessee has failed to prove the correctness of his return. This onus is neither discharged nor shifts to the Income Tax Officer merely by the assessee producing false books of account. In my opinion, where the Income Tax

Officer finds the books to be false, the position presented is the same as if the assessee had kept no books of account or, there being no question of default, he had produced no books of account. Nor does the position postulated differ from the position where the assessee in support of his return produces no other evidence or only produces false evidence. If in the cases contemplated, namely, where the assessee produces false evidence or does not keep or produce books of account, the Income Tax Officer can make an assessment under Sub-section (3) of Section 23, without having recourse to the proviso to Section 13, I do not see why he should not be able to do the same when the books of account that have been produced before him are false. In fact the case where the assessee produces books of account that are false is, in one respect, stronger for the Income Tax Officer, because in such a case he can draw his own inferences against the assessee which a Court of law may draw against a party who fabricates a mass of false evidence in support of his claim or defense.

50. If, for instance, the books of the assessee written and purporting to be kept on a strict mercantile or cash basis and accompanied by a profit and loss account and a balance-sheet disclose the assessable income of the assessee to be ₹ 10,000 but the Income Tax Officer from the evidence furnished by the books themselves or by evidence de hors the books comes to the finding that the accounts have been "cooked" for the purposes of assessment to Income Tax and from this finding infers that the assessee's income must have been several times the income disclosed by the books of account to furnish to the assessee a motive sufficiently strong to induce him to prepare such elaborate accounts, the finding would, without invoking in aid the proviso to Section 13, be legal and based on material under Sub-section (3) of Section 23 and would raise no question of law referable to the High Court under Section 66, the assessee's only remedy being an appeal to the appellate Assistant Commissioner and the Income Tax Appellate Tribunal, inasmuch as the finding being based on material would raise no question of law and the adequacy or inadequacy of the material for the finding would be for the appellate authority to judge. Even where the books are held to be false, there is nothing to prevent the Income Tax Officer from using and acting on any admissions that they might contain. For instance, the Income Tax Officer may accept the figure of sales and estimate the profits without accepting the trading account as a whole or he may accept the expenditure and on this basis estimate the sales. While proceeding in this manner the Income Tax Officer is not acting under the proviso to Section 13 but on general rules of reasoning and independently of Section 13. I do not, therefore, think that unless the proviso to Section 13 is applied to such cases there would be a hiatus in the Act and that Sub-section (3) of Section 23 would not work. As I have already pointed out, Sub-section (3) of Section 23 does not specify or define the material on which the Income Tax Officer may base his finding. While making the assessment under that Sub-section any material which te'nds to show the assessable income of the assessee is good material on which assessment may be based, provided the assessee's attention has been drawn to that material. But though the Income Tax Officer has very wide powers and is not fettered by technical rules of evidence and pleadings, there is one overriding restriction on his judgment and that is that he must, act honestly on the material, however inadequate, before him, and not vindictively, capriciously, or arbitrarily. He cannot do under Sub-section (3) of Section 23 what he cannot do under Sub-section (4) of that section, and under Section 23, Sub-section (3) he may proceed on any material that is before him provided he proceeds without bias and gives sufficient opportunity to the assessee to place his case before him. For the reasons given, I differ from my brother Din Mohammad in the answer to question 2 in the second set of questions and my answer to that

question is that, if the books are false, the Income Tax Officer can ignore them but the proviso to Section 13 is inapplicable. In such a case, the Income Tax Officer has to discover the probable income of the assessee otherwise than by resorting to the proviso to Section 13 and, subject to some well recognised restrictions some of which have been indicated in this order, he may base the assessment on any fact that tends to show such income, provided the assessee's attention has been drawn to that fact and he has been given an opportunity to rebut it.

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