FULL BENCH

Before Bhandari, C. J., and Falshaw and Kapur, JJ.

MASH TRADING CO., ODEON BUILDING, NEW DELHI,—*Petitioner.*

versus

THE COMMISSIONER INCOME-TAX, DELHI, AJMER, RAJASTHAN AND MADHYA BHARAT, DELHI,—

Respondent.

Civil Reference No: 11 of 1953.

1955

May, 20th

Indian Income-tax Act (XI of 1922) Section 66—Whether a reference to the High Court is competent on a point which was not raised before or considered by the Tribunal—Rule, whether absolute—Nature of the Jurisdiction of the High Court and the powers of the Tribunal under the Income-tax Act, stated:

The following questions were referred by the Tribunal to the High Court:—

(1) Whether a reference to the High Court is competent on the point indicated in the question following, which was not raised before or considered by the Tribunal?

(2) If the answer to the above question is in the affirmative, whether cash-credits, the nature and source of which were not satisfactorily explained and which came to the surface in the financial year 1946-47, were properly assessed as the assessee's income from undisclosed sources for the assessment for 1948-49?

Held per Full Bench.

That the first question referred should be answered in the negative.

Held per Falshaw, J.

That the view that in no case in which a question of law has not been raised and decided by the Tribunal, a reference can be made to the High Court, is too sweeping as it stands and requires some qualification. For instance the question of the jurisdiction of the Appellate Tribunal itself to deal with the appeal can be raised under section 66 even if it has not been raised and dealt with in the appellate order. So also when a point has been raised and argued in the appeal but from inadvertance or because the point was considered to be unworthy of serious consideration, it has not been referred to in the appellate order.

Held per Kapur, J.

That—

(*i*) the jurisdiction of the High Court under the Income-tax Act is advisory and a limited one;

(*ii*) only such questions of law arise out of an order of the Tribunal which have been raised and dealt with by it;

(*iii*) in order to raise a question of law the assessee or the Commissioner, as the case may be, must make an application within a specified time on a prescribed form raising the questions of law which arise out of the order and specify the question on which reference is sought;

(*iv*) on such an application being made it is for the Appellate Tribunal to decide whether the questions are questions of law and if they are questions of law to refer them for the opinion of the High Court;

(*v*) if the Appellate Tribunal refuses to refer the questions the applicant can approach the Court under section 66 (2) to direct that a reference be made;

(*vi*) the jurisdiction of the High Court is limited to the questions raised and referred. The High Court cannot raise any question which has not been referred to it either under section 66(1) or section 66(2);

(*vii*) the Tribunal itself has no power to raise a question *suo motu*. Its powers are also limited to the provisions of section 66(1) and section 66(2): and

(*viii*) once the question is properly raised and reference made to the High Court, the High Court is bound to answer the question.

(*Case referred to Full Bench by Hon'ble the Chief Justice A. N. Bhandari and Hon'ble Mr. Justice Falshaw on 21st October, 1954 for decision.*)

Reference under Section 66(1) of the Indian Income-Tax Act XI of 1922 forwarded by the Registrar, Income-Tax Appellate Tribunal, Bombay with his letter R. A. 652 of 1951-52, dated 9th April, 1953, for orders of the High Court.

ORDER

BHANDARI, C. J. There is a conflict of decisions between the various High Courts and between different Benches of this Court in regard to the first question which has been propounded by the Appellate Tribunal. We are of the opinion that in view of the divergence of opinion which has manifested itself the matter should be referred to a larger bench. Bhandari, C.J.

K. L. GOSAIN and RAJ KUMAR AGGARWAL, for Petitioner.

S. M. SIKRI, Advocate-General, and H. R. MAHAJAN G. S. PATHAK, and A. M. SURI, for Respondent.

JUDGMENT

KAPUR, J. A Division Bench of this Court has in view of the difference of opinion between various Courts including different Benches of this Court referred the first question which has Kapur, J.

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been stated to the High Court for opinion. The question referred by the Income-tax Appellate Tribunal is—

> "(i) Whether a reference to the High Court is competent on the point indicated in the question following, which was not raised before or considered by the Tribunal ?"

It arises in the following circumstances. Nanak Chand Malik was a Government servant. After retiring from Government service in June, 1946 he started a business in the name and style of Mash Trading Company for purchasing and selling of goods from the Disposals Department and from other sources. The previous year in the present case is from the 1st of July, 1946 to the 30th of June, 1947. He filed a return showing a profit of Rs. 6,184. It is claimed that the accounts were found to be correct and in order, but three items stated to be from undisclosed sources were taken into Revenue Account by the Income-Tax Officer. The items were—

1. Rs. 40,000 found to be in Fixed Deposit on the 16th of July, 1946 in the name of the assessee's wife.
2. Rs. 5,000 also in the assessee's bank.
3. Rs. 34,778 in the assessee's personal account out of which Rs. 18,350 were dated after the 31st March, 1947.
4. Rs. 5,000 also in the assessee's bank accounts, all of which were before the 31st of March, 1947.

It is necessary to see as to what was raised before the various officers and tribunals at various

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stages by the assessee. When the matter was taken to the Income-tax Appellate Assistant Commissioner the question with regard to Rs. 40,000 was raised in the form that this Rs. 40,000 which was in deposit in the name of the wife of the assessee was obtained by her by selling her jewellery for a sum of Rs. 20,000 and that she took a loan of Rs. 15,000 from her father and the balance was made up out of the savings which she was able "to collect from the personal expenses." This statement was not accepted by the Income-Tax Officer nor by the Assistant Commissioner.

In regard to the sum of Rs. 34,778 the Income-Tax Officer refused to accept the explanation of the assessee, and the only question which seems to have been raised before the Appellate Assistant Commissioner is shown by his order at page 17 of the paper book and that was whether there was sufficient material before the Income-Tax Officer to come to the conclusion that this sum was undisclosed profits, and after taking into consideration the explanation given by the assessee the Assistant Commissioner allowed a deduction of Rs. 5,778 on this account.

Similarly in regard to Rs. 5,000 the Assistant Commissioner accepted the explanation of the assessee and held that only Rs. 3,500 remained unexplained and he thus allowed a deduction of Rs. 1,500.

The grounds of appeal filed by the assessee before the Income-Tax Appellate Tribunal have not been placed before us but the order shows what was urged before the Tribunal at the appellate stage.

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In regard to Rs. 40,000 it was urged that this was the belongings of the wife and it was also submitted that the first transaction of the business having taken place in August, 1946, no profits could have arisen as early as the 16th of July, 1946. The Tribunal then went on to discuss the case which had been put forward on behalf of the Revenue and then discussed the case which was put forward by the assessee as to how the Rs. 40,000 had been obtained, and after considering all that the Tribunal observed—

> "We are satisfied that, for the reasons given by him, the Appellate Assistant Commissioner was right in refusing to admit the affidavit of the goldsmith produced at the belated stage for the first time before him. In our view, the assessee has not satisfactorily explained the receipt of Rs. 20,000 out of the so-called deposit of the sum of Rs. 40,000 and we therefore uphold Rs. 20,000 under this item and delete the balance of Rs. 20,000."

With regard to other items Nos. 2 and 3 the Tribunal upheld the order of the Appellate Assistant Commissioner and gave reasons why the explanation given by the assessee could not be accepted. They thus reduced the sum of Rs. 40.000 by Rs. 20,000 but did not interfere with the order of the Appellate Assistant Commissioner in regard to the rest.

Notice was served on the assessee on the 18th of August, 1951 and he made an application under section 66 (1) of the Indian Income-Tax Act. This application is printed at page 4, but the printed copy does not show as to when it

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was filed. We take it that it must have been filed within the sixty days allowed by section 66(1) of the Income-Tax Act. The assessee sought to raise six questions of law and I need only refer to the first question which was—

> 1. Whether on the facts and in the circumstances of the case the Tribunal was correct in law in finding that out of Rs. 40,000, a Fixed Deposit Receipt, the assessee had not been able to prove the source of Rs. 20,000 ?"

On the 26th of October, 1952 the assessee made an application under section 35 of the Income-Tax Act and in clause (3) he stated—

> "* * * The following items included in Rs. 29,000 do not fall within the financial year covering the assessment year 1948-49, on the other hand, as indicated by the dates, the same fall within the year preceding i.e. assessment year 1947-48. * *"

The Income-Tax Appellate Tribunal by an order dated the 17th February, 1953 have drawn up a statement of the case and have referred the following two questions for decision of the Court :—

> "(1) Whether a reference to the High Court is competent on the point indicated in the question following, which was not raised before or considered by the Tribunal ?
>
> (2) If the answer to the above question is in the affirmative, whether cash credits the nature and source of which

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were not satisfactorily explained and which came to the surface in the financial year 1946-47 were properly assessed as the assessee's income from undisclosed sources for the assessment for 1948-49 ?"

It is necessary to say that in the sixth paragraph of the statement the following was added :—

> "The Commissioner wishes us to add that the questions above set out were not raised in the assessee's application under section 66 (1) either That is true. The omission may preclude the assessee from insisting on a reference being made to the High Court on such questions, but cannot fetter the Tribunal's discretion in any manner. This fact also will no doubt be kept in mind by the High Court in arriving at a decision on the first question."

It was urged before the Tribunal that "the assessment for 1948-49 made in respect of the cash credits which came to the surface before 1st April, 1947 (that is, before the financial year 1947-48), is illegal." A reference is then made to certain rulings for and against the point that a reference under section 66 is competent if on the facts found by the Tribunal a question of law can be fairly raised, though the question might not have been considered by the Tribunal. It is under these circumstances that two questions of law were referred for decision by this Court and the first one has been referred for the opinion of the Full Bench.

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In order to decide the question that has been referred, that is, whether a reference to the High Court is competent on a question which was not raised before or considered by the Tribunal it is necessary to refer to the scheme of the Act.

Section 30 provides for appeals to the Appellate Assistant Commissioner against an assessment under the Act. It runs—

> "(1) Any assessee objecting to the amount * * * or denying his liability to be assessed * * * may appeal to the Appellate Assistant Commissioner against the assessment * * *."

This appeal has to be presented within thirty days of the receipt of notice of demand and has to be in the prescribed form which is to be verified in the prescribed manner; and the form is prescribed under rule 21 made under section 59 of the Income-Tax Act. At the hearing of an appeal before the Appellate Assistant Commissioner an appellant can be allowed to go into any ground of appeal not specified in the grounds of appeal if the Appellate Assistant Commissioner allows it.

Appeals against the order of an Appellate Assistant Commissioner are provided in section 33 of the Act for which a period of sixty days is prescribed. This appeal also has to be in the prescribed form and has to be verified in the prescribed manner and is to be accompanied by a fee of Rs. 100. The prescribed form requires that grounds of appeal should be separately paragraphed.

The order of the Income-Tax Appellate Tribunal is final subject to the provisions of section 66.

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Now, section 66 (1) provides for a statement of the case by the Appellate Tribunal to the High Court and when quoted it runs as under :—

"66. *Statement of case by appellate Tribunal to High Court.*—(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 the assessee or the Commissioner may, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court :

Provided that if, in the exercise of its powers under sub-section (2), the Appellate Tribunal refuses to state a case which it has been required by the assessee to State, the assessee may, within thirty days from the date on which he receives notice of the refusal to state the case, withdraw his application and, if he does so, the fee paid shall be refunded."

Thus, according to this section, after an application is made within the prescribed time on the prescribed form with the requisite fee the Tribunal has to draw up a case and refer it to the High Court, and if it refuses to state the case which it has been required by the assessee to state,

the assessee may within the prescribed time withdraw his application, and sub-section (2) of Section 66 provides that if the Appellate Tribunal refuses to state the case on the ground that no question of law arises, an application can be made to the High Court for an order to the Appellate Tribunal to state the case and refer and the Appellate Tribunal is then bound to state the case and refer it to the High Court.

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Sub-section (3) of section 66 provides that if the Appellate Tribunal rejects the application on the ground that it is barred by time an application is made to the High Court by the assessee and if the Court is not satisfied as to the correctness of the decision, the Court can order the Appellate Tribunal to treat the application as if it was made within time.

Sub-section (4) provides that if the High Court is not satisfied that the statements in a case referred under section 66 are sufficient to enable it to determine the question raised, then it may refer the case back to the Tribunal to make such additions or alterations as the Court may direct.

Under sub-section (5) the High Court at the hearing is bound to decide the questions of law which are raised.

Under section 59 of the Act rules have been made giving the prescribed form for an application under section 66 and sub-section (5) of this section makes the rules published under this section as if they were enacted in the Act. Rule 22-A gives the form for reference under section 66 (1). In clause 4 it requires the applicant to mention the questions of law which arise out of the order of the Tribunal, and clause 5 requires the applicant to indicate the questions out of the questions mentioned in clause 4 on which he requires a reference to be made to the High Court.

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A combined reading of section 66 and the statutory rules made under section 59 shows that an application for reference to the High Court has to be made—

(i) within sixty days from the date of service of the order ;

(ii) on a prescribed form;

(iii) the applicant has to indicate the questions which he wants to be referred to the High Court and on which he requires the case to be stated;

(iv) the Tribunal cannot *suo motu* refer any question which is *dehors* paragraph 5 of the application made on the prescribed form.

Rules have also been made in regard to the proceedings and powers of the Appellate Tribunal. These are the Appellate Tribunal Rules, 1946. Rule 12 of these Rules provides that an appelant cannot before the Tribunal be heard on any ground which he has not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, is not confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under the rule. Rule 36 makes certain rules applicable *mutatis mutandis* to an application under sub-section (1) of section 66, but it must be noted that rule 12 is not one of them and, therefore, at the time when an application for making a reference under section 66 (1) is heard the Tribunal is confined to the ground set forth in the application for reference and a *fortiori* cannot *suo motu* raise a question of law which has not been set forth in paragraph 5 of the prescribed form.

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In a Division Bench judgment of this Court *Punjab Distilling Industries Limited* v. *Commissioner of Income-tax* (1), the assessee had applied to the Appellate Tribunal under section 66 (1) of the Income-Tax Act to state a case on certain questions and at the time of the hearing of the application raised two other questions also which the Appellate Tribunal refused to raise, and it was held that the Tribunal was right in not allowing the assessee to urge or be heard in support of two additional questions because rule 12 has not been made applicable to applications under section 66 (1) of the Act. Thus it was held that the Tribunal had no discretion to raise questions which were not in the application made on the form prescribed for applications under section 66 (1). This, in my opinion, supports the construction placed on section 66 (1) read with rules made under section 59 of the Act that the Tribunal cannot raise a question of law *suo motu*.

But Mr. Kundan Lal Gosain submitted that the correct view is that any question can be raised irrespective of whether it is in the grounds or not and he sought to support his submission with the observation of Mangalmurti, J. in *Mohan Lal Hira Lal* v. *Commissioner of Income-tax* (2) where the learned Judge said at page 462—

> "The Appellate Tribunal seems to think that it is not bound to decide an appeal before it by applying the appropriate law to the facts found by it simply because the assessee has erroneously relied on wrong provisions in support of his relief ; and that it is not bound to refer to the High Court the question

(1) (1952) 22 I.T.R. 232
(2) (1952) 22 I.T.R. 448

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of law that really arises on the facts found by it if the assessee does not raise the question of law in a particular form at the hearing of the appeal before the Tribunal or in his application under section 66 (1) of the Act."

This it was held "is a serious misconception about the duties of the Appellate Tribunal."

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With great respect I am unable to accept the view taken by Mangalmurti, J. and for reasons which I have given above. Besides, the rules under section 59 which are deemed to be a part of the statute do not seem to have been considered by the learned Judges.

In *Seth Gurmukh Singh* v. *Commissioner of Income-tax, Punjab* (1), it was held by the Full Bench that 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.

The form of the question before us, however, is confined to the power of the Tribunal to refer a point which was not raised before or considered by the Tribunal, and in this case this particular question was not in the prescribed application, nor was it raised within the sixty days allowed by section 66 (1) of the Income-tax Act, and the question referred to us has to be read in the light of paragraph 6 which shows that objection was taken as to the assessee's right to get a reference made on this point, but the reference was made by the Tribunal *suo motu.* and I have already held that a reference *suo motu* is not within the contemplation of law.

(1) 12 I.T.R. 393 at P. 402

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The question arises, and that seems to be the purport of the question of law which has been referred to this Court, as to whether any point which was not raised before or considered by the Tribunal can be said to fall within section 66 (1) of the Income-tax Act. The assessee contended that if the facts have been found by the Tribunal in its appellate order and from those facts a question of law can be fairly deduced, then it would fall within section 66 (1) and must be taken to arise out of the order of the Tribunal, whether that question of law was raised before or considered by the Tribunal or not.

The scheme of section 66 indicates that in order that the jurisdiction of the High Court may be invoked the question must have been raised, considered and decided by the Tribunal. Under sub-section (2) of section 66 it is only when the Appellate Tribunal refuses to state a question of law on the ground that no such question of law arises and the High Court is not satisfied with the correctness of this decision that it can call upon the Tribunal to state the case and refer it. Similarly, in sub-section (3) the jurisdiction of the power of the High Court requiring the Appellate Tribunal to treat the application made under sub-section (1) of section 66 as within time arises if the Appellate Tribunal has rejected the application on the ground that it is barred by time. Under sub-section (4) it is again when a statement is made to the High Court and it is not satisfied that the statement is sufficient to determine the question raised it can send it back to the Appellate Tribunal to make such additions or alterations as the High Court may direct.

The words of the section, therefore, show that the jurisdiction of the High Court arises when a case is stated or is directed to be stated, and a

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case can only be stated if an application in that behalf is made on the prescribed form or if the High Court finds that the Tribunal has wrongly refused to state a case on the ground that no question of law arises. It shows therefore that a case must be raised before the Tribunal before it can make the reference or refuse to make the reference, and in these circumstances it cannot be said that a question would arise merely because the facts justify the deduction of a question of law from the facts found even though the question is never raised before the Tribunal.

In support of the view that unless a question has been raised and decided by a Tribunal no question of law can be said to arise there is a large number of authorities. In this Court this matter was decided by a Division Bench consisting of Khosla and Harnam Singh JJ. in *Punjab Distilling Industries Limited* v. *Commissioner of Income-tax* (1). It was held in this case after referring to rules 12 and 36 of the Appellate Tribunal Rules that the Tribunal could not be directed to state a question of law which had not been decided by the Tribunal. The reference there was to two questions Nos. 3 and 4 which had not been raised before the Tribunal and, therefore, could not be considered or decided by the Tribunal.

In *T. N. Swami and Co.* v. *Commissioner of Income-tax, Delhi* (2), it was contended that under section 66 (1) it is sufficient to state in an application that the Tribunal may refer to the High Court questions of law arising out of the order of the Tribunal. In other words, it is not for the assessee to formulate the questions of law and state those questions of law in the application but this

(1) (1952) 22 I.T.R. 232
(2) (1951) 20 I.T.R. 601

contention was repelled because of rule 22-A of the Indian Income-tax Rules, 1922, which gives the form of application under sub-section (1) of section 66 of the Act.

The jurisdiction of a High Court is advisory. What it means is that in every case where the Tribunal decides a question of law it can approach a High Court with the prayer to give a finding as to whether the view taken by the Tribunal on a question of law is correct. That the jurisdiction is merely advisory has been consistently held in the cases which have been cited before us including those upon which the assessee relies : see *Madanlal Dharnidharka* v. *Commissioner of Income-tax, Bombay City* (1).

In *Raja Bahadur Sir Rajendra Narayan Bhanja Deo* v. *Commissioner of Income-tax, Bihar and Orissa* (2), it was held by the Privy Council that under section 66 the function of the High Court is advisory only and is confined to considering and answering the actual question referred to it, and it was for this reason that the Privy Council deprecated as irregular the practice of the High Court formulating questions itself and deciding them. The Privy Council in *Commissioner of Income-tax, Bihar and Orissa* v. *Sir Kameshwar Singh* (3) said—

> "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 question of law raised' by the case referred to them by the

(1) (1948) 16 I.T.R. 227 p. 233
(2) (1940) 8 I.T.R. 495
(3) (1933) 1 I.T.R. 94

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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 * * * *."

The same opinion was expressed by the Privy Council in *National Mutual Life Association of Australasia, Ltd.* v. *Commissioner of Income-tax, Bombay Presidency and Aden* (1), where the High Court had decided a case on an argument submitted to them for the first time, and the Privy Council pointed out at page 50 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 submitted.

In *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace and Company* (2), it was held that a question framed by the Commissioner which is not happily worded can be recast so as to make it more precise.

After reference to all these cases a Full Bench of the Lahore High Court in *Seth Gurmukh Singh* v. *Commissioner of Income-tax, Punjab* (3), at P. 404 held that the word 'any' before the words 'question of law arising out of such order' 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

(1) (1936) 4 I.T.R. 44
(2) I.L.R. 59 Cal. 1343
(3) (1933) 1 I.T.R. 94

"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)?" According to this case the assessee has to make an indication of the questions of law which he wishes to raise and he can require any one of them to be referred to the High Court, and in the case of refusal the jurisdiction of the High Court arises if there is its dissatisfaction with the order. This is a case which is in favour of the Revenue, in that the question to be referred must be raised, considered and decided by the Tribunal before any reference can be made.

It might also be stated at this stage that the proceedings under sub-section (2) of section 66, for instance, are in the nature of a *mandamus*, and the officer concerned must first be given an opportunity to perform his duty before dissatisfaction can arise, that is, there must be a demand and refusal. And how can there be a *mandamus* if the question has never been raised at all.

(1) (1938) 6 I.T.R. 297

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In *Som. Chand Maluk Chand* v. *Commissioner of Income-tax* (1), it was held that the jurisdiction of the High Court under section 66 (3) is confined only to those matters which are contained in the application made to the Commissioner under subsection (2) of section 66 and it is only in relation to such matters that the refusal of the Commissioner to State the case can be investigated by the High Court and therefore if a point is not raised before the Commissioner, his refusal to state the case cannot be declared to be unjustified.

In *T. N. Swami and Co.* v. *Commissioner of Income-tax, Delhi* (1) the question decided was that no application lies under section 66 (2) of the Act for requiring the Tribunal to refer the question for decision if in the application under section 66 (1) the assessee did not raise that question. In this case it was held that directions under section 66(2) are in the nature of "mandamus" and a direction will not ordinarily be issued to the Tribunal unless the Tribunal was required to do and had an opportunity of considering the question, in other words unless there was evidence of a distinct demand and such a demand was met by refusal.

Thus it comes to this that according to the nature of the proceedings under section 66 which gives to the High Court not a supervisory but merely an advisory jurisdiction the High Court can be asked to give an opinion on a question which has been stated by the Tribunal or which the High Court calls upon the Tribunal to state, and in the latter case it can only arise where the Tribunal was asked by the assessee in the form indicated by section 66 (1) to consider the question and to state it to the High Court.

(1) (1938) 6 I.T.R. 297.
(2) (1951) 20 I.T.R. 601

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What then is the meaning of the words "any question of law arising out of such order", that is, the order of the Tribunal. The Revenue contended that the question can only arise if it is raised before the Tribunal and considered by it. *Seth Gurmukh Singh's case* (1), supports this contention.

Reliance was also placed on *Jamna Dhar Potdar and Co., Limited* v. *Commissioner of Income-tax Punjab* (2). It was held in this case by Addison and Sale JJ, that if a question is not raised in the appeal before the Assistant Commissioner of Income-tax, it cannot be said to arise out of an order made by him under section 31 and the assessee has no right to require the Commissioner to refer the question. This case was severely criticised on the ground that no reason had been given by the learned Judges but in my opinion if the decision, and I say so with respect, is confined to the facts of that case no fault can be found with it.

In Madras the same view was taken in *A. Abboy Chetty and Co.* v. *Commissioner of Income-tax, Madras* (3), which was a petition under section 66 (2) of the Income-tax Act. The questions on which directions of the High Court were sought under section 66 (2) were not referred to the High Court in the first instance because they were not raised at the hearing before the Tribunal. After referring to section 66 (1) and 66 (2) Patanjali Sastri, J. was of the opinion that a question of law which an Appellate Tribunal can be required to refer under section 66 (1) is a question of law arising out of such an order, that is, the order of the Appellate Tribunal passed on appeal, and when it was contended that

(1) (1944) 12 I.T.R. 393 at p. 404
(2) (1935) 3 I.T.R. 112
(3) (1947) 15 I.T.R. 442.

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though the question had not been raised before the Tribunal it can well be said to arise out of its order if on the facts of the case appearing from the order the question fairly arises, Patanjali Sastri J. observed—

> "I am of opinion, that a question of law can be said to arise out of an order of the Appellate Tribunal only if such order discloses that the question was raised before the Tribunal."

and the learned Judge followed the judgment of the Lahore High Court in *Jamna Dhar Potdar and Company's case* (1) and held that *Vadilal Lallubhai Mehta* v. *Commissioner of Income-tax. Bombay* (2), was inapplicable to the facts of that case, and referring to the Privy Council decision in *M. E. Moola Sons Limited* v. *Burjorjee* (3), the learned Judge said that the case could not furnish a useful analogy as the scope of the remedy under section 66 of the Indian Income-tax Act has to be determined with reference to the language of the statute. This judgment has been criticised by counsel for the assessee on the ground that if literally applied it would make it possible for the shutting out of a question of law being raised in the High Court where although a question has been raised and argued before a Tribunal but has been absolutely ignored even though such a question may be of very great importance, but the observations of the learned Judge must be confined to the facts of that case where the two questions which were then sought to be raised had never been either raised or argued before the Tribunal. It cannot apply to other set of circumstances which may have a different answer. But when we are considering the powers of the

(1) (1935) 3 I.T.R. 112
(2) (1935) 3 I.T.R. 152
(3) (1932) I.L.R. 10 Rang. 242 P.C.

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Tribunal we must presume that they will be exercised in accordance with law in that all questions which are in the grounds of appeal and are raised and argued before the Tribunal will be decided by it, and if they are not so discussed it is open to the assessee or the Commissioner, as the case may be, to indicate in the application made under section 66 (1) that the questions were raised and argued but not decided, and if even then the case is not stated an application under section 66 (2) might be a proper remedy. But it is not necessary to decide this question really because it does not arise on the facts of the present case.

In two other cases the Madras High Court has taken the same view as was taken by Patanjali Sastri, J. in *Abboy Chetty's case* (1). In *Commissioner of Income-tax* v. *Modern Theatres Ltd.* (2) it was held that the question as to the apportionment of profits between British India and Indian States could not be raised as it was not a question referred to the High Court and as it was not a question raised before the Appellate Tribunal it could not be said that it was a question which arose out of the order of the Appellate Tribunal. *Abboy Chetty's case* (1) was followed. It was argued in this case that the questions actually referred to the High Court were wide enough to cover the question of apportionment of Profits but it was observed that the Court had to understand the questions referred in the light of the statement of facts and of the case which is the basis of the reference to the Court and after referring to *Abboy Chetty's case* (1) it was *held* that the question can arise out of the order of the Tribunal only if the order discloses that the question was raised before it. The order in that case showed that question of apportionment was not raised

(1) (1947) 15 I.T.R. 442
(2) (1951) 20 I.T.R. 588

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before the Tribunal nor before the Appellate Assistant Commissioner. The Court observed—

> "The question of apportionment was not raised before the Appellate Tribunal, not to speak of the Appellate Assistant Commissioner. In these circumstances it is impossible to hold that it is a question which arises out of the order of the Appellate Tribunal and which is covered by the questions that are actually referred to us."

The next Madras case is *The Trustees, Nagore Durgah* v. *Commissioner of Income-tax* (1), and it was there held that question of law would arise out of an order of the Appellate Tribunal only if it had been raised and dealt with before the Tribunal. Before the Appellate Tribunal counsel appearing for the assessee had conceded that section 41 would not directly apply to the facts of the case as the section is applicable in the case of a trust if it is declared by a duly executed instrument in writing. The words "arising out of such order" were dealt with at page 812 and they were held to mean that a question would arise out of an order only if it had been raised and dealt with before the Appellate Tribunal. Reliance was placed on *Allahabad Bank Ltd.* v. *Commissioner of Income-tax* (2), and *Abboy Chetty's case* (3), and reference was made to a judgment of the Supreme Court in *Commissioner of Income-tax, West Bengal* v. *Calcutta Agency Limited* (4), where it was pointed out by that Court that as the statement of the case prepared by the Appellate Tribunal under the rules framed under the

(1) (1954) 26 I.T.R. 805
(1) (1952) 21 I.T.R. 169.
(3) (1947) 15 I.T.R. 442
(4) (1951) 19 I.T.R. 191

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Income-tax Act is prepared with the knowledge of the parties concerned and they have a full opportunity to apply for an addition or deletion from that statement, the High Court in dealing with the question should confine and restrict itself to the facts contained in the statement of the case and it should answer the question of law on that footing. It should not depart from that rule and convert itself into a fact-finding authority which is no part of its advisory jurisdiction. It was because of this that the assessee was not allowed to raise the question which he had expressly conceded before the Tribunal. In this Madras case —*The Trustees, Nagore Durgah* v. *Commissioner of Income-tax* (1). it was observed—

> "The question was not one which was raised and debated and considered by the Appellate Tribunal and by no stretch of language can it be said that the applicability of Section 41 is a question of law arising out of such order. It is, therefore, not open to us to consider the applicability of Section 41 to the facts of the present case."

The same view was taken in the Calcutta High Court. In *Chainrup Sampatram* v. *Commissioner of Income-tax* (2) the assessee made an application under section 66 of the Income-tax Act raising several questions, one of which was rejected on the ground that it did not arise out of its order and the other questions were not referred because they were questions of fact. On an application being made under section 66 (2) of the Act it was held by the High Court that as the question was not raised before the Tribunal it

(1) (1954) 26 I.T.R. 805 at p. 813
(2) (1951) 20 I.T.R. 484

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did not arise out of its order and, therefore, it was not open to the High Court to go behind that decision. Discussing this matter at page 494 it was said that it could not even be argued that the question arose out of the Tribunal's order because that point was expressly abandoned before the Appellate Assistant Commissioner. The Court was of the opinion that the jurisdiction of the High Court was purely advisory and strictly limited and that after a case had been disposed of by the Tribunal in appeal a reference can be made to the High Court for its advice on the question decided but the question must be the same which was actually raised before the Tribunal and dealt with by it, for, "the section says that it must arise out of the Tribunal's order. If the Tribunal declines to make a reference on the ground that no question of law arises, the applicant has the right to move the High Court, and the High Court may, if it is satisfied that the decision of the Tribunal in refusing to make a reference was not correct, direct a case to be stated and referred." Construing the words "no question of law arises", the Court observed—

> "It cannot possibly mean that no question of law of any kind arises but it can only mean that the question, of which a reference has been asked for by the applicant, does not arise. A contrary view would lead to the manifestly absurd position that where the Tribunal agrees with the applicant that the question of law proposed for a reference to the High Court does arise, only that question will be referred, but if the Tribunal disagrees with the applicant, then the rights of the applicant are enlarged and he is entitled to a consideration of any question that might arise

out of the facts. Such cannot possibly be the intention of the sub-section and the phrase I have quoted must be read as meaning that in the view of the Tribunal no question, such as the question formulated by the applicant, arises."

The same view was taken by Harries, C. J., and Banerjee, J. in *Commissioner of Excess Profits Tax* v. *Jeewanlal Ltd.* (1), and the following observations from that judgment are relevant :-

"We are unable to take that view. It has been clearly laid down in *Abboy Chetty* v. *Commissioner of Income-tax, Madras* (2), that a question of law can be said to arise out of an order of the Appellate Tribunal only if such order discloses that the question was raised before the Tribunal. A question of law not raised before the Appellate Tribunal cannot be said to arise out of its order even if on the facts of the case appearing from the order, the question fairly arises. We respectfully agree with the view expressed by the Madras High Court. The decision of the Madras High Court accords with the principle underlying a *mandamus*".

The next Calcutta case is *Allahabad Bank* v. *Commissioner of Income-tax* (3), where it was held that in a reference under Section 66 (1) of the Income-tax Act the proper course for the High Court to adopt is to limit itself severely to the questions arising out of the order of the Tribunal and to proceed on the view that only those

(1) (1951) 20 I.T.R. 39
(2) (1947) 15 I.T.R. 442
(3) (1952) 21 I.T.R. 169

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questions arise out of the order which have been dealt with by it and that of such questions again, those only should be considered and answered by the High Court which have been actually referred. The High Court may reframe a question referred in order to clarify its meaning or to bring out the real point of controversy to the surface but it cannot add some questions to those referred, whether on the ground that they were dealt with by the Tribunal or on the ground that though they were dealt with by the Tribunal or on the ground that though they were not so dealt with, they arise out of the facts of the case. At page 174 it was observed—

> "In my opinion, it is not proper to overlook the fact that the jurisdiction of the High Court upon a reference under Section 66 (1) of the Income-tax Act, is purely advisory, that the sole task of the Court is to answer the question actually referred on the case stated and that it is no part of its duty or right to give further advice or to set about raising other questions and proceeding, to decide them. Oftener than not, questions are framed in such a way as to ask whether a particular order is warranted by a particular section of the Income-tax Act. As is well-known, questions which may conceivably arise under any section of the Act are legion and it would be intolerable if the High Court, in dealing with a reference, was called upon, and took it upon itself, to consider and decide all such questions. In my view, the proper course for the High Court to adopt is to limit itself

severely to the questions arising out of the order of the Tribunal and to proceed on the view that only those questions arise out of the order which have been dealt with by it and that, of such questions again, those only should be considered and answered by the High Court which have been actually referred."

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It was also said that in dealing with a reference the Court is not revising the assessment itself but only answering a particular question or questions. Reference was made to *Madanlal Dharnidharka* v. *Commissioner of Income-tax, Bombay* (1), *Aboy Chetty's case* (2), and to the Privy Council deprecating the practice of departing from the strict terms of the question referred (*Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj Kameshwar Singh* (3), *National Mutual Life Association of Australasia* v. *Commissioner of Income-tax, Bombay Presidency* (4), *and Sir Rajendra Narayan Bhanja Deo* v. *Commissioner of Income-tax, Bihar and Orissa* (5). In the last case Luxmoore L. J., delivering the judgment of the Board observed that "although the question actually referred did not arise, but some other question might emerge with regard to the assessee's liability to income-tax in respect of the same income, it would be clearly contrary to their Lordships' practice to attempt to formulate any such question even if they had before them the material for so doing." It is true that this last case has reference only to the practice of the Privy Council but it is significant that the Privy

(1) (1948) 16 I.T.R. 227
(2) (1947) 15 I.T.R. 442
(3) (1933) I.T.R. 94 at 107
(4) (1936) 4 I.T.R. 44 at 53
(5) (1940) 8 I.T.R. 495

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Council has pronounced decisively in favour of the stricter view of section 66 (1) of the Income-tax Act.

The view taken in Patna also accords with the Madras and the Calcutta views. In *Maharaj Kumar Kamal Singh* v. *Commissioner of Income-tax* (1), it was held that section 66(1) and (2) of the Income-tax Act does not confer upon the High Court a general jurisdiction to decide a question that may possibly arise out of the income-tax assessment. The section confers a special and limited jurisdiction upon the High Court to decide upon specific questions of law which have been raised between the assessee and the department before the Tribunal and upon which questions the parties are at issue and the correct interpretation of section 66 (1) is that the question of law which a party seeks to refer must be a question of law which has been actually raised before the Tribunal or actually dealt with in its order. In this case it was contended that the expression "any question of law arising out of such order" in section 66 (1) should be construed to mean that the question of law should fairly arise out of the facts appearing from the order and not necessarily that the question of law should have been actually argued before the Tribunal or dealt with in the Tribunal's order but this contention was repelled. Reliance was placed on *Chatturam Horilram's case* (2), the Madras case *A. Abboy Chetty and Co.* v. *Commissioner of Income-tax* (3), on the Calcutta case *Commissioner of Excess Profits Tax* v. *Jeewanlal Ltd.* (4). In *Chatturam's case* (2) it was held that the jurisdiction with which the High Court is invested under the Income-tax Act is of an exceptional

(1) (1954) 26 I.T.R. 79
(2) (1951) 19 I.T.R. 600
(3) (1947) 15 I.T.R. 442
(4) (1951) 20 I.T.R. 39

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nature and in hearing the reference the High Court has seisin only of such question of law as has been duly raised before the Appellate Tribunal and upon which there is statement of the case. In another Patna case *Commissioner of Income-tax* v. *Ranchi Electric Supply Co. Ltd.* (1), it was held that the special jurisdiction of the High Court under section 66 (2) depends upon the strict fulfilment of the preliminary conditions required by the section and unless the question of law was actually raised by the parties before the Tribunal or dealt with in the order of the Tribunal the High Court has no jurisdiction to discuss and answer that question. The High Court, therefore, has no jurisdiction to call for a statement of the case on a question of law which was not raised before the Tribunal and was not dealt with by it in its appellate order.

Coming now to this High Court and the Lahore High Court in *Punjab Distilling Industries* v. *Commissioner of Income-tax* (2), a case which I have already referred to, a Division Bench held that two questions which had not been raised before the Appellate Tribunal could not be said to arise from the order passed by it as a perusal of the order showed that the questions of law sought to be raised were nowhere decided by the Tribunal and, therefore, they did not arise from the order passed by the Tribunal. In an older Lahore case *Jamna Dhar Potdar and Co* v. *Commissioner of Income-tax, Punjab* (3) which was an application for *mandamus* and where a question of law was not raised in the appeal to the Assistant Commissioner or decided by him, it was held that it did not arise out of

(1) (1954) 26 I.T.R. 89
(2) (1952) 22 I.T.R. 232
(3) (1935) 3 I.T.R. 112

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the order under section 31. It is true that there are no reasons beyond reference to section 31 but this view is in accord with the opinion given in the Full Bench decision in *Seth Gurmukh Singh's case* (1), and was also the opinion of this Court in *Punjab Distilling Industries* v. *Commissioner of Income-tax* (2), decided by Khosla and Harnam Singh, JJ. and to which I have already referred.

The assessee relied on the *Commissioner of Income-tax* v. *Punjab National Bank, Ltd.* (3), which was a case decided by Khosla and Falshaw, JJ. It was held in this case that it cannot be said that under no circumstances can a point of law be said to arise out of an order of the Appellate Tribunal under section 33 (4) of the Income-tax Act simply because the point has not been raised and discussed in the order itself. In this case two questions were sought to be referred and both were regarding jurisdiction. The Tribunal refused to refer these questions and it was contended on behalf of Revenue that the subject of a reference to the High Court under section 66 need not necessarily be one which had been raised and discussed in the appellate order and that fundamental question such as want of jurisdiction is one which was said to arise out of the order of the Tribunal, whether it had been raised in the appeal or discussed in the appellate order or not and this contention was accepted. Now, this was a question of jurisdiction and the question had been raised before the Tribunal under section 66 (1) and, therefore, there was no defect due to there being no application on the prescribed form within the period of limitation and whether such fundamental questions as the question of jurisdiction should

(1) (1944) 12 I.T.R. 393
(2) (1952) 22 I.T.R. 232
(3) (1952) 21 I.T.R. 526

or should not be held to arise out of the appellate order of the Tribunal is not the matter before us in the present case and it is not necessary, therefore, to express any opinion as to the correctness of this judgment and it must be confined to the facts of that particular case.

Reliance was then placed by the assessee on *Madanlal Dharnidharka* v. *Commissioner of Income-tax* (1). In this case the High Court had called upon the Tribunal to state the case and the Tribunal had made the reference. Under section 66 (5) the High Court, it has been held in many cases, is bound to decide the questions of law raised thereby meaning on a case stated by the Tribunal itself or under the directions of the High Court or after the High Court has required some additions to be made and they have been made. The statement of the case as given at page 231 of the report shows that the question of law sought to be raised was included in the grounds of appeal before the Appellate Tribunal but was not argued and a question of considerable importance affecting the jurisdiction of the Court was raised by the Advocate-General in that as the question was not dealt with by the Tribunal it was not open to the Tribunal to raise it nor was it open to the High Court to decide it. Tendolkar, J. referring to this objection said—

> "Since the Tribunal has, although the question was not argued before it, raised the question of law and referred it to us we are bound to determine it under sub-section (5)."

and in this view of the matter the learned Judge did not discuss the wider question as to the correct meaning to be placed on the words "question of law arising out of such order" and was of

(1) (1948) 16 I.T.R. 227

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the opinion that these words would fall to be determined only under an application under section 66 (2) of the Income-tax Act. Chagla, C. J., although he recognised that the question had been given up and not argued before the Tribunal and that the case had been stated by the Tribunal, gave his opinion as to the meaning of the words "arising out of such order" and said—

> "Now, looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression. This Court has no jurisdiction to decide questions which have not been referred by the Tribunal. If the Tribunal does not refer a question of law under Section 66 (1) which arises out of the order then the only jurisdiction of the Court is to require the Tribunal to refer the same under Section 66 (2). It is true that the Court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties but it is not open

to the Court to raise new questions which have not been referred to it by the Tribunal."

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It was recognised that if the Tribunal does not refer a question of law under section 66 (1) if it arises out of the order, then the only jurisdiction of the Court is to require the Tribunal to refer the same under section 66 (2) and that the Court has no jurisdiction to decide questions, which have not been referred by the Tribunal. But in interpreting the expression "arising out of such order" the learned Chief Justice gave it a wider meaning because he thought that that was warranted by the ordinary grammatical construction of that expression, but this view of the law is not shared by the other High Courts or at least a very large majority of them. In my opinion, these observations of the learned Chief Justice were *obiter* because the case having been stated by the Appellate Tribunal, the question had to be answered under section 66 (5). At the bottom of page 235 the learned Chief Justice said in so many words that the Tribunal had actually raised the question of law and referred it for the opinion of the Court and under section 66 (5) they were bound to decide the question and it was not open to the Advocate-General once a question of law had been raised by the Tribunal to ask the Court not to give its opinion. At page 236 the learned Chief Justice said—

"It may be that a particular question may be irrelevant or unnecessary and we may refuse to give our opinion on such a question, but I do not think that it is competent to a party to challenge the jurisdiction of

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this Court to answer a question which has been raised by the Tribunal. The Tribunal wants our advice on a particular question of law and it is our statutory duty to give that advice to the Tribunal."

Besides being *obiter* the observations of the learned Chief Justice are not in accord with the scheme of section 66 and the rules made under section 59 of the Act which show that section 66 becomes operative only if the jurisdiction is invoked in a particular manner and if the Tribunal was first invited to give its decision on the questions sought to be referred. This view finds further support from the language of sub-sections (2), (3) and (4) of section 66 where the satisfaction of the High Court with the order of the Tribunal is indicated and this can only arise if the Tribunal has been called upon and has given its decision on the question sought to be raised. I, therefore, respectfully dissent from the view taken by Chagla, C.J., that a question can be said to arise out of the order of a Tribunal if it can fairly be deduced from the facts found even if it is not raised before the Tribunal or is expressly given up and is, therefore, not discussed or referred to in its order.

Counsel then referred to a judgment of the Privy Council in *Commissioner of Income-tax, Bombay & Aden* v. *Khemchand-Ramdas* (1). The matter came on a reference under a *mandamus*. Notices were issued to the assessees at Shikarpur under section 22 of the Income-tax Act, but they ignored the notices. The duty of the Income-tax Officer in such circumstances as prescribed in section 23(4) is to "make the assessment to the best of his judgment." An appeal was taken to the Assistant Commissioner against an assessment under this section and he dismissed it upon its merits. He did not deal with the

(1) (1938) 6 I.T.R. 414

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question of competency of the appeal. He merely held that the order of assessment was valid and merely confirmed the tax. He must have been acting under the powers given to him under section 31(3)(a) of the Act, but he expressed no opinion whether such assessment was one made under section 23(4). The matter was taken to the Commissioner and subsequently an application was made for stating the case to the Judicial Commissioners which was refused by the Commissioner. Thereupon the matter was taken to the Judicial Commissioner's Court who ordered the Commissioner under section 66(3) of the Act to state a case and refer it to them for their decision and the decision of that Court was in favour of the assessees and an appeal was then taken to the Privy Council. No doubt, in his judgment Lord Rommer said that the Commissioner could not refuse to state the case because one of the questions that arose was whether the appeal to the Assistant Commissioner was competent and by deciding the question himself adversely to the assessee the Commissioner could not deprive him of the right of having the question decided by the Court and this was the view which was taken by the Judicial Commissioners also but in spite of that this case does not interpret the expression "any question arising out of the appellate order" nor did any such question arise because the reference was on a *mandamus* being issued by the High Court.

Another case which was relied upon is *Vadilal Lallubhai Mehta* v. *Commissioner of Income-tax* (1). This case was expressly dissented from by the High Court of Lahore in *Seth Gurmukh Singh's case* (2). Referring to this Din Mohammad, J., was of the opinion that if it was laid down in this judgment that new questions can be put and not merely that the

(1) (1935) 3 I.T.R. 152
(2) 1944) 12 I.T.R. 393 at p. 404

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form of questions can be recast, then the interpretation put upon the words of sub-section (2) of section 66 was erroneous. Beaumont, C.J., in *Vadilal's case* (1), was of the opinion that under section 66(2) the assessee was not required to formulate precise questions of law. What he had to do was to require the Commissioner to refer to the High Court any questions of law arising out of the order or decision of the Assistant Commissioner, and then the Commissioner had to draw up a statement of the case within sixty days and refer it with his own opinion thereon. It is not only the High Court of Lahore which has dissented from this view, but a Full Bench of the Rangoon High Court also in *Commissioner of Income-tax* v. *C. P. L. E. Chettyar* (2), has taken a contrary view. In this case the assessees under section 66(2) applied to the Commissioner requiring him to refer three questions of law which they contended arose out of the order of the Assistant Commissioner which the Commissioner refused to do. The assessees then applied under section 66(3) for an order requiring the Commissioner to state the case and referred two questions for the determination of the High Court and it was contended that the Court had power under section 66(3) to order the Commissioner to state a case and refer any question of law which the Court was of opinion arose out of the order of the Assistant Commissioner notwithstanding that such question of law was not duly raised before either the Assistant Commissioner or the Commissioner. A Special Bench of the Rangoon High Court held that the Court has no jurisdiction to order the Commissioner to state a case which the assessee has not duly required the Commissioner to refer under section 66(2) and it was also observed that under

(1) (1935) 3 I.T.R. 152
(2) A.I.R. 1934 Rang. 132

section 66(3) the Court at the hearing of an application by the assessee has seisin only of such questions of law as have duly been raised by or before the Commissioner and upon which the Commissioner has expressed his opinion. The ambit of section 66(3) is not wider than that of section 66(2). The reference here is to the law as it existed before the Appellate Tribunals were constituted.

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The Bombay Court in *Vadilal's case* (1), however, refused to accept the view taken by the Rangoon High Court and was of the opinion that an assessee can require the Commissioner to refer to the High Court any question of law arising out of an order or decision of the Assistant Commissioner which, at any rate, would not be the law now particularly in view of the requirements of an application in a prescribed form under section 66 (1) of the present Income-tax Act.

New Piecegoods' case (2), was decided by a Full Bench of the Bombay High Court, but in this case it was not that the question of law was not raised but one of the two aspects of the same question was not raised as is clear from the statement of the case as given at page 322. The question raised and decided by the Tribunal was that on a proper construction of section 9 the amount paid for municipal taxes and urban immovable property tax should be allowed as a deduction in computing the income from property, and the two aspects of the question were—

> "(1) that this tax should be deducted in the first instance before arriving at the *bona fide* annual value, and
>
> (2) that the annual value of the property being ascertained these are permissible deductions under heads (iv) and (v) of sub-section (1)."

(1) (1935) 3 I.T.R. 152
(2) (1947) 15 I.T.R. 319

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Therefore, this case also does not support the proposition.

Mohanlal-Hiralal v. Commissioner of Income-tax (1), is the judgment of the Nagpur High Court where a *mandamus* was issued to refer a question that had not been raised before the Tribunal. In this case observations of Chagla, C.J., were followed and it was held that it is a fundamental principle of administration of justice that a litigant has a right to present at any stage any question of law arising from the facts found by a Tribunal and that the assessee has to plead facts and not law and the Tribunal is always under an obligation to apply the appropriate law to the facts found by it. This view of the law I would ~~respectively~~ respectfully say is too widely stated and is opposed to the whole scheme of the Income-tax Act which I have already discussed. Ordinarily, a Tribunal has to decide those questions which are raised before it and it does not and cannot decide questions which are not raised before it or are given up and in income-tax matters the jurisdiction is very much more limited because the function of the Court is nothing more than advisory and it has to advise the Tribunal as to whether the decision made by it on questions of law is correct or not. Of course, the power of *mandamus* is also there but that also arises subject to section 66 (1) of the Act.

Mr. Gosain also relied on the judgment of Atkin, L.J., in *Attorney-General* v. *Avelino Aramayo* (2), but that is under another statute and the law in India is different as has been pointed out in *Maharaj Kumar Kamal Singh* v. *Commissioner of Income-tax* (3), at p. 86 "the High Court has jurisdiction to answer any question of law which may arise out of the facts set out in the statement of the case." In the

(1) (1952) 22 I.T.R. 448
(2) (1925) 1 K.B. 86, 108
(3) (1954) 26 I.T.R. 79

English case cited, commissioners had jurisdiction subject to certain formalities being complied with. There was an appeal to the Special Commissioner from the assessment and then they were required to state a case upon their determination and having so invoked the jurisdiction of the Commssioners, it was held that the applicants cannot afterwards be heard to say that there was no jurisdiction at all.

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Mr. Kundan Lal Gosain also relied upon a judgment of the Supreme Court in *Commissioner of Income-tax* v. *M/s. Ogale Glass Works Ltd.* (1), but in that case nobody contended that the question which was referred to the High Court did not arise out of the Tribunal's order or had not been properly referred to the High Court, on the other hand it was said that a question of law having been referred under sub-section (1) of section 66, the High Court had to deal with it and answer it in exercise of its jurisdiction under sub-section (5). At page 434 Das, J., said—

> "The language of the question clearly indicates that the question of law has to be determined "on the facts of this case." To accede to the contention of the assessee, will involve the undue cutting down of the scope of the question by altering its language. Seeing that the High Court permitted this argument to be advanced before them we are not prepared to shut it out."

As a matter of fact when cases are stated or are asked to be stated the High Court cannot refuse to answer the question as in the view of the Supreme Court and as was held in *Khushiram Murarilal* v.

(1) A.I.R. 1954 S.C. 429

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Commissioner of Income-tax (1) and *Bisheshwar Singh* v. *Commissioner of Income-tax* (2), that where a question does not arise out of the order of the Tribunal but the High Court calls for a statement of the case and the Tribunal refers the question of law to the High Court, the Bench to whom the reference was made must deal with the question and answer it on the merits and cannot refuse to answer on the ground that it did not arise out of the Tribunal's order.

The cases that have been discussed above show that—

(i) The jurisdiction of the High Court under the Income-tax Act is advisory and a limited one;

(ii) only such questions of law arise out of an order of the Tribunal which have been raised and dealt with by it;

(iii) in order to raise a question of law the assessee or the Commissioner, as the case may be, must make an application within a specified time on a prescribed form raising the questions of law which arise out of the order and specify the question on which reference is sought;

(iv) on such an application being made it is for the Appellate Tribunal to decide whether the questions are questions of law and if they are questions of law, to refer them for the opinion of the High Court;

(v) if the Appellate Tribunal refuses to refer the questions the applicant can approach the Court under section 66(2) to direct that a reference be made;

(1) (1954) 25 I.T.R. 572
(2) (1955) 27 I.T.R. 376

(vi) the jurisdiction of the High Court is limited to the questions raised and referred. The High Court cannot raise any question which has not been referred to it either under section 66(1) or section 66(2) ;

(vii) the Tribunal itself has no power to raise a question *suo motu*. Its powers are also limited to the provisions of section 66(1) and section 66(2) ; and

(viii) once the question is properly raised and reference made to the High Court, the High Court is bound to answer the question.

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In this view of the law I am of the opinion that if a question of law has not been raised and decided by the Tribunal, no reference can be made to the High Court because the question cannot be held to arise out of the order of the Appellate Tribunal. I would, therefore, answer the question referred to the Full Bench in the negative.

FALSHAW, J. I have had the advantage of perusing the exhaustive judgment of my learned brother Kapur, J., and agree with him that the first of the questions propounded for our consideration in this case should be answered in the negative.

Falshaw, J.

In the first place, although it does not arise directly out of the question, but only out of the sixth paragraph of the Statement of the case, I agree with his view that the matter contained in the second question was never properly before the Tribunal under section 66(1) of the Income Tax Act, and should never have been allowed to be raised at all on this ground alone.

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I am also in general agreement with the proposition that no party can be allowed to set up a new case at the stage contemplated by section 66, or to attempt to have points of law raised and stated which have not been raised before even if, in the widest sense of the term, they can be said to arise out of the facts as found in the appellate order of the Tribunal, and I am of the opinion that the present case is one which is covered by this proposition.

It is therefore with some diffidence and regret that I express the opinion that the view expressed by so many High Courts and adopted by my learned brother, that in no case, if a question of law has not been raised and decided by the Tribunal, can a reference be made to the High Court, is too sweeping as it stands and requires some qualification. I feel it necessary to do so because all aspects of the question what is meant by a point arising out of a judgment have been argued ably and at length before us and our opinion has been invited thereon.

The learned Advocate-General while arguing that the first question in the present case should be answered in the negative nevertheless expressed the view that the decision of Khosla, J., and myself in *Commissioner of Income-tax* v. *Panjab National Bank Ltd.* (1), was correct. There we decided that it could not be said that under no circumstances could a point of law be said to arise out of the appellate order of the Tribunal simply because it had not been raised and discussed in the order itself. The matter in issue in that case was the jurisdiction of the Appellate Tribunal itself to deal with the appeal, and I am still of the opinion that a fundamental issue of

(1) (1952) 21 I.T.R. 526

this kind can be raised under section 66 even if it has not been raised and dealt with in the appellate order. I think that the suggestion of the learned Advocate-General that a point of this kind should be deemed to have been dealt with, and so to arise out of the appellate order, was sound and sensible.

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The other kind of case I have in mind is one when a point has been raised and argued in the appeal but from inadvertence or because the point was considered to be unworthy of serious consideration, it has not been referred to in the appellate order. If the views of the various High Courts recapitulated by my learned brother, and apparently his own view, are taken literally, such a point, even if of substance, cannot be raised and made the substance of a reference under section 66 because it " does not arise out of " the appellate order. This could lead to unfortunate consequences, and I do not think that the remedy suggested by Mr. Pathak for the aggrieved party, that he shou'd go to the High Court under Article 226 of the Constitution for a *mandamus* directing the Tribunal to write a fresh appellate order dealing with the point in question, is very satisfactory. It is certainly cumbersome, and in my opinion it would be much simp'er to allow the point to be raised under section 66 by deeming it to have been decided against the party raising it by the omission to mention it in the judgment. In this wav it could be said to arise out of the judgment.

With these qualifying remarks I agree that the first of the questions referred to us should be answered in the negative.

A. N. BHANDARI, C. J.—I agree that the first question referred to us should be answered in the negative.

A. N. Bhandari, C. J.