INCOME-TAX CASE.

Before Bhandari, C. J. and Chopra, J.

M/s R. B. L. BANARSI DASS AND CO., LTD.,—*Petitioners.*

versus

INCOME-TAX APPELLATE TRIBUNAL, DELHI BENCH, DELHI AND ANOTHER,—*Respondents.*

Income-tax Case No. 7 of 1953

1958

July, 31st

Income-tax Act (XI of 1922)—Section 66(2)—Petition under Matter to be considered by the High Court—Income-tax Appellate Tribunal—When bound to make a reference —Question relating to the competence of the appellant to file the appeal—Whether question of Law—Section 35—Order passed under, whereby previous order passed under section 33(4) amended—Reference against that order—Whether competent—Section 66—Power and jurisdiction of the High Court—Nature and extent of.

Held, that in deciding a petition under section 66(2) of the Indian Income-tax Act the High Court is not concerned with the merits or ultimate decision of the objection, whether it would be in favour of or against the petitioner. What has to be seen is whether there is a point of law upon which a case should have been stated. The law leaves very little discretion in the matter with the Tribunal. If the question is one of law and arises out of an order of the Appellate Tribunal under section 33(4), and other requirements of the section are satisfied, the case has to be stated and the question referred.

Held, that the question whether the appeal before the Appellate Tribunal was filed by the proper person raises a point of law and is not so frivolous as needs no consideration. The question is also not one of an academic nature; it relates to the proper presentation of the appeal decided by the Tribunal and goes to the very root of the case. The question cannot also be said to be so simple that the answer to it is self-evident.

Held, that the Tribunal after making a separate and distinct order under section 35 implemented the same by incorporating the changes in the original order and inserting a note at the end, "amended as per order dated 14th May, 1952, under section 35". The rectification having been made under section 35, the amended order cannot be regarded as one made under section 33(4) and the questions that arise therefrom cannot be regarded as questions arising out of the original order under section 33(4). The extent of authority of the Tribunal under section 35, whether it had the authority or not to make the instant order under that section, is not a matter for the High Court to determine in those proceedings nor can any question regarding it be required to be referred. Whatever other remedy may or may not be open to the petitioners, the order having been expressly made under section 35 and not being one under sub-section (4) of section, 33, no notice of it can be taken in these proceedings under section 66(2).

Held, that under section 66 the High Court is not constituted a Court of Appeal or Revision against the orders of the Income-Tax Appellate Tribunal. The jurisdiction which the High Court exercises under this section is a strictly limited jurisdiction and the limits of that advisory jurisdiction are clearly laid down in the section itself. The right of the assessee or the Commissioner to approach the High Court in income-tax matter, which arises out of the provisions of section 66, can only be exercised if the requirements of that section are fully satisfied. A reference under this section lies only in ~~aspect~~ of an order of the Appellate Tribunal passed in appeal under section 33(4) and in respect of no other order.

Petition under Section 66(2) of the Indian Income-Tax Act praying that the respondents be required to state the case and to refer it to the High Court for the decision of the legal questions which arise out of the two orders of the Tribunal, dated 2nd April, 1949 and 14th May, 1952.

H. L. SIBBAL, for Petitioner.

S. M. SIKRI, Advocate-General and H. R. MAHAJAN, for Respondents.

ORDER.

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CHOPRA, J. This is a petition under section 66(2) of the Income-tax Act for an order requiring the Income-tax Appellate Tribunal, Bombay Bench "A" Camp, Delhi, to state a case and refer certain questions of law which allegedly arise out of two orders of the Tribunal, dated 2nd April, 1949 and 14th May, 1952. In the petition as many as nine questions were stated so to arise and were sought to be referred, but Mr. Sibal, learned counsel for the petitioner, has confined his arguments to the following three questions and wants these alone to be referred:—

1. "Whether, under the facts and circumstances of the case, the appeal before Appellate Tribunal was filed by the proper person.

5. Whether there is any material on record affording sufficient justification to support the conclusion drawn by the Tribunal for restoring the addition of Rs. 90,000 out of Rs. 1,50,000 totally deleted by the Appellate Assistant Commissioner.

6. Whether under the facts and circumstances of the case and having rectified the figure of 35 Chhataks to 17 Chhataks the Tribunal could, instead of deleting the entire addition of Rs. 1,50,000 revise the original order so as to include in the income a sum of Rs. 90,000".

The facts relevant for the purposes of this petition are these: The petitioner is a private limited company of Ambala. The assessment on the petitioner for the year 1945-46 was made by the

Income-tax Officer, 'D' Ward, Amritsar, on 28th March, 1946. The assessee preferred an appeal which was substantially accepted by the Appellate Assistant Commissioner. The Income-tax Officer had made certain additions in the assessable income out of which some were eliminated by the Appellate Assistant Commissioner. The only item which is now in dispute is one of Rs. 1,50,000 and relates to "additions made for excessive shortage in wheat claimed". Under the directions of the Commissioner of Income-tax, Delhi, the Income-tax Officer of the Companies Circle, New Delhi, preferred a further appeal to the Income-tax Appellate Tribunal from the order, dated 21st July, 1948, of the Appellate Assistant Commissioner. Besides pointing out certain formal defects in the appeal presented to the Tribunal, the assessee contended that since the assessment was made by the Income-tax Officer, 'D' Ward, Amritsar, the Income-tax Officer, Companies Circle, New Delhi, was not competent to file the appeal. The Tribunal overruled the objections raised by the assessee and partly accepted the Department's appeal,—*vide* its decision, dated 2nd April, 1949. The result was that the add-back amounting to Rs. 1,50,000 made by the Income-tax Officer and deleted by the Appellate Assistant Commissioner was restored. This is what the Tribunal stated on the point—

> "The Assessee's stock account showed milling gains to the extent of 15,814 maunds which worked out to about 19 Chhataks per maund as compared to 35 Chhataks per maund shown by the Assessee last year. There is no reason why the milling gains should have dropped to this huge extent. If the stock accounts were to be amended to show milling gains of

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35 Chhataks as shown by the Assessee himself last year, the addition made by the Income-tax Officer can be justified on this basis alone.

* * * * *

We are satisfied that as the assessee had not maintained correct stock accounts from day to day, the normal milling gains had to be estimated by the Income-tax Officer. The disallowance of Rs. 1,50,000 calculated by the Income-tax Officer was, therefore, justified."

Subsequently, it was discovered that in fact the milling gains in weight of wheat handled during the last year as shown in the books of the assessee worked out to about 17 Chhataks and not to 35 Chhataks per maund, as worked out to 29 Chhataks or more per maunds. In some of the earlier years, according to the books of the assessee, the milling gains worked out to 29 Chhataks or more per maund. In the year under assessment they were shown as 19 Chhataks per maund. To get rid of the above decision of the Tribunal, based as it was on a wrong assumption of fact, the assessee submitted an application under section 35(2) of the Income-tax Act for rectification of the mistake. The same day, viz., on 21st July, 1949, the assessee submitted another application under section 66(1) of the said Act for a statement of the case and reference of a number of questions of law which according to the assessee, arose out of the Tribunal's decision. The question formulated by the assessee on the point in question was—

"Whether there is sufficient material on record to legally support the conclusions

drawn by the Tribunal and for restoring the addition of Rs. 1,50,000 deleted by the Appellate Assistant Commissioner of Income-tax."

The Tribunal first dealt with the application under section 35. The Tribunal arrived at the conclusion that the mistake was apparent on the record and that it needed rectification . By its order, dated 14th May, 1952, the Tribunal reduced the amount of add-back from Rs. 1,50,300 to Rs. 90,000 and substituted the following for the passage already quoted:—

"The Assessee's stock account showed milling gains to the extent of 15,814 mds. which worked out to about 19 Chhataks per maund as compared to over 29 Chhataks per maund shown by the assessee in earlier years except the next preceding year. There is no reason why the milling gains should have dropped to this huge extent. If the stock accounts were to be amended to show milling gains of 29 Chhataks per maund, which appears to be a fair minimum average of such gains over a number of years as shown by the assessee himself, the addition made by the Income-tax Officer can be justified to the extent of about Rs. 90,000.

* * * * *

We are satisfied that as the assessee had not maintained correct stock accounts from day to day, the normal milling gain has to be estimated as above. The disallowance of Rs. 1,50,000 calculated by the Income-tax Officer is, therefore, reduced to Rs. 90,000."

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After this order was made and before their application under section 66(1) was taken up, the assessee submitted an application to the Tribunal for amendment of the questions sought to be referred and set them in the form reproduced in the opening part of this order. By its order, dated 2nd January, 1953, the Tribunal rejected the application of the assessee under section 66(1) holding that question No. 1 regarding the competency of the Income-tax Officer, Companies Circle, New Delhi, to file an appeal was "so tenuous that it would be wasting the time of the Court to refer it under section 66(1)", and that the matter raised in the other two questions was purely one of fact, on which the decision of the Tribunal was final.

As regards question No. 1, it is not disputed before us that it does raise a point of law and that it is not so frivolous as needs no consideration. At this stage we are not concerned with the merits or ultimate decision of the objection, whether it would be in favour of or against the petitioner. What has to be seen is whether here is a point of law upon which a case should have been stated. The question is not one of an academic nature, it relates to the proper presentation of the appeal decided by the Tribunal and goes to the very root of the case. The question cannot also be said to be so simple that the answer to it is self-evident. subsection (1) of section 66 lays down that within sixty days of the date upon which he is served with notice of an order under subsection (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. The law leaves very little discretion in the matter with the Tribunal. If the question is one of law and arises out of an order of the Appellate Tribunal under section 33(4), and other requirements of the section are satisfied, the case has to be stated and the questions referred. Under subsection (2) of section 66, the High Court may, if it is not satisfied of the correctness of the order of the Tribunal under subsection (1) of the section, require the Appellate Tribunal to state the case and to refer it. The Tribunal appears to have been over-cautious regarding the time of this Court and with its view I am not inclined to agree.

The other two questions evidently arise out of the order of the Tribunal under section 35 of the Income-tax Act. With respect to them, an obection is taken that they cannot be required to be referred under section 66(2) of the Act. The very language of section 66(1) makes it clear that the questions of law which can be referred to the High Court must arise out of an order of the Appellate Tribunal under subsection (4) of section 33 of the Act and the questions can be referred only within sixty days of the date upon which the assessee or the Commissioner, as the case may be, is served with notice of that order of the Tribunal According to subsection (2) of section 66 only these questions of law which the Tribunal could but has refused to refer to the High Court, may be required to be so referred. Section 33 rlates to appeals against orders of Appellate Assistant Commissioner and under subsection (4) of this Section the Appellate Tribunal, to whom the appeals, lie, may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the

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Commissioner. That order of the Tribunal in the present case was made on 2nd April, 1949. The questions that are now sought to be referred related to and arise out of the order of the Tribunal made on 14th May, 1952, on an application of the petitioner under section 35 of the Act. Mr. Sibal contends that the Tribunal's order dated, 14th May, 1952, simply made certain corrections and alterations in the original order of the Tribunal under section 33(4) and, therefore, the later order ought to be regarded as a part and parcel of the parent order and onemade within the provisions of section 33(4). It is further submitted that the Tribunal had exceeded its authority under section 35 in reassessing the amount of the addition with respect to the milling gains while correcting a mistake regarding the wrong assumption of fact. According to the counsel, the Tribunal in such a case ought to have accepted the milling gains mentioned in the assessee's books as correct and deleted the entire amount of Rs. 1,50,000 as done by the Appellate Assistant Commissioner. To me, the contention appears to be without force. Whatever the Tribunal did on 14th May, 1952, about three years after the order under section 33(4), was done in exercise of its powers under section 35 and that too, at the request of the assessee himself. The Tribunal after making a separate and distinct order under section 35 implemented the same by incorporating the changes in the original order and inserting a note at the end, "amended as per order, dated 14th May, 1952, under section 35". The rectification having been made under section 35, the amended order cannot be regarded as one made under section 33(4) and the questions that arise, therefrom, cannot be regarded as questions arising out of the original order under section 33(4). The extent of authority of the Tribunal under section 35, whether it had the authority or

not to make the instant order under that section, is not a matter for this Court to determine in these proceedings, nor can any question regarding it be required to be referred. Whatever other remedy may or may not be open to the petitioners, the order having been expressly made under section 35 and not being one under subsection (4) of section 33, no notice of it can be taken in these proceedings under section 66(2).

Under section 66, the High Court is not constituted a Court of Appeal or Revision against the orders of the Income-tax Appellate Tribunal. The jurisdiction which the High Court exercises under this section is a strictly limited jurisdiction and the limits of that advisory jurisdiction are clearly laid down in the section itself. The right of the assessee or the Commissioner to approach the High Court in income-tax matters, which arises out of the provisions of section 66, can only be exercised if the requirements of that section are fully satisfied. A reference under this section lies only in respect of an order of the Appellate Tribunal passed in appeal under section 33(4) and in respect of no other order.

I am supported in the view that I take by decision of a Division Bench of this Court in *Commissioner of income-tax, Delhi* v. *Shri Yodh Raj Bhalla* (1). My Lord the Chief Justice dealing with an identical point in that case observed:—

> "The language of section 66 of the Indian Income-tax Act, 1922, makes it quite clear that a reference under subsection (1) can be made in respect of an appellate order under section 33(4). As the

(1) (1953) 23 I.T.R. 371

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express mention of one thing implies the exclusion of another, the -express men tion of section 33(4) implies the exclusion of section 35".

A similar view was taken by the Madras High Court in *Commissioner of Income-tax, Madras* v. *O. Rm. M. Sm. Sy. Sevugan* (1), and it was held—

> "The rectification of an error under section 35 in an order passed by the Appellate Tribunal under section 33(4) cannot be said to be the passing of a new order which gives a right to either party to apply to the Tribunal requiring a case to be stated referring a question or questions for the opinion of the High Court arising out of the order in which correction is made. The granting of the application for rectification and correcting the error in the order is not an order within section 33(4) nor one in respect of which section 66(1) enables a case to be stated."

In *Commissioner of Income-tax, Madras* v. *Veltingri Gousder and Brothers* (2), the Income-tax Officer, some time after he had made the assessment order, acting under section 35, rectified certain mistakes and enhanced the assessable income. The assessee appealed against this order but the Appellate Assistant Commissioner held that the appeal was incompetent . The Tribunal, on further appeal, held that the appeal to the Appellate Assistant Commissioner was competent and remanded the case. On a reference under section 66(1) of the question whether an appeal lay to the Appellate Assistant Commissioner against the

(1) (1948) 16 I.T.R. 59
(2) (1953) 24 I.T.R. 166

order of the Income-tax Officer under section 35, it was held that no appeal lay to the Appellate Assistant Commissioner against the order of the Income-tax Officer under section 35, and, therefore, no appeal lay to the Appellate Tribunal against the order of the Appellate Assistant Commissioner and that the order of the Appellate Tribunal was, therefore, not an order under section 33(4) and the reference under section 66(1) was incompetent.

This very Bench has had the occasion to consider a similar question, though under somewhat different circumstances, in *Balbhadhar Mal Kuthiala* v. *Commissioner of Income-tax, Punjab* (1). In that case, an appeal presented by the assessee under section 33 of the Income-tax Act was dismissed by the Appellate Tribunal for default of the appellant's appearance. On being informed of the order, the assessee submitted an application before the Tribunal for restoration of his appeal and for its decision after affording an opportunity to him of being heard in support of the contentions raised in the appeal. This application was accompanied by an affidavit of the assessee that the registered letter referred to in the Tribunal's order was never presented to him by the postal authorities and that he had never refused to accept it. The application for restoration of the appeal was rejected by the Tribunal. Simultaneously, the assessee had presented another application under section 66(1) and in those proceedings the assessee prayed that the draft statement should also include a reference to his having made a miscellaneous application for setting aside the *ex-parte* order, to the affidavit filed by him in support of the application and to the order of the Tribunal dismissing the application. This prayer of the assessee was refused by the Tribunal. On some other points

(1) (1957) 31 I.T.R. 930

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which arose out of the Tribunal's order under section 33(4) the case was stated and certain questions of law were referred. The assessee then presented an application to this Court under subsection (4) of section 66 for a direction that the subsequent events be included in the statement of the case referred to by the Tribunal. This prayer was refused on the short ground that the questions did not arise out of the order of the Tribunal under section 33(4). In the course of my judgment dealing with the point, it was observed—

> "Now, it is a well-settled principle of law that the jurisdiction of the High Court, which is only advisory and a limited one, is confined to the determination of the questions raised and referred by the Appellate Tribunal. The High Court cannot raise and start determining any question which has not been referred either under subsection (1) or (2) of section 66. The section makes it further clear that reference can only be made with respect to a question of law which arises out of an order of the Appellate Tribunal under subsection (4) of section 33 of the Act. No reference would, therefore, be permissible from an order of the Tribunal made under any other provision of law or in exercise of its inherent jurisdiction."

In *Commissioner of Income-tax, Madras* v. *Mitt. Ar. S. Ar. Arunachalam Chettiar* (1). The assessee, after an order of the Tribunal under section 33(4) partly accepting his appeal had been made, presented a miscellaneous application to the Appellate Tribunal and obtained an order in his

(1) (1953) 23 I.T.R. 180

favour. At the instance of the Commissioner certain questions of law arising out of this subsequent order of the Tribunal were referred to the High Court under section 66(1), and some others were required to be referred by the High Court under subsection (2) of section 66. When these references came up for hearing, the High Court relying on its earlier decision in *Commissioner of Income-tax, Madras* v. *O. Rm. M. Sm. Sy. Sevagan* (1); held that the references were incompetent and refused to answer the qustions referred. In an appeal preferred by the Commissioner, the Supreme Court held that the subsequent order of the Appellate Tribunal could not be regarded as an order passed by the Appellate Tribunal under section 33(4) so as to attract the operation of section 66 and, therefore, the High Court could decline to entertain the references. It was further observed that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under section 33(4) and a question of law arising out of such an order.

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The only decision referred to by Mr. Sibal in this connection is *Sidhramappa Andannappa Manvi* v. *Commissioner of Income-tax, Bombay* (2). But in that case no decision on the point was given and no opinion thereon was expressed.

In the result, the petition is partly accepted and the Appellate Tribunal is required to state a case in respect of question No. 1 and refer it to this Court. No order is made as to costs. Counsel's fee to be Rs. 150.

BHANDARI, C.J.—I agree:

Bhandari, C. J.

B.R.T.

(1) (1948) 16 I.T.R. 59
(2) (1952) 21 I.T.R. 333