

rate. Thus, the method adopted by the Tribunal is the correct one. We accordingly answer the following questions :—

- “(1) Is the mode of computation of super-tax as adopted by the Tribunal valid and in accordance with the provisions of section 17 of the Indian Income-Tax Act?
- (2) Whether on the facts and circumstances of the case the effect of section 17(3) is to be given before proportionately increasing the super-tax under section 17(4) (a) or after?”

which have been referred for our opinion as under :—

- (4) The first question is answered in the affirmative. The second question is answered as follows :—
- (5) The effect of section 17(3) is to be given after proportionately increasing the Super-tax under section 17(4) (a) of the Income-Tax Act, 1922.
- (6) In the circumstances, we make no order as to costs.

B. S. G.

INCOME TAX REFERENCE.

Before D. K. Mahajan and Bal Raj Tuli, JJ.

THE COMMISSIONER OF INCOME-TAX, PATIALA,—*Applicant*

versus

M/s. HARGOPAL BHALLA & SONS, CHHEHARATA,—*Respondent.*

Income Tax Reference No. 17 of 1969

November 10, 1970.

Income-Tax Act (XLIII of 1961)—Sections 143(3), 271(1)(c) and 297 (2)(a)—Income-Tax Act (XI of 1922)—Section 23(3)—Return filed before the commencement of the 1961 Act—Assessment made under section 143(3) of 1961 Act instead of section 23(3) of 1922 Act—Such assessment—Whether valid—Penalty proceedings on the basis of the assessment—Whether legal.

Held, that the provisions of section 23(3) of Income-tax Act, 1922 are pari materia with the provisions of section 143(3) of Income-tax Act, 1961

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and deal with the same subject matter, that is, assessment. There is slight difference in the language but purport of the provisions in both the Acts is the same. Where a return of income is filed before the commencement of 1961 Act and the Income-tax Officer instead of passing an order of assessment under section 23(3) of the 1922 Act, as required by section 297(2)(a) of the 1961 Act, passes the order under section 143(3) of the 1961 Act, the order can be legitimately held to have been passed in exercise of the power vested in the Income-Tax Officer under section 23(3) of the 1922 Act. Wrong reference to the power under which an order is made does not *per se* vitiate the order if there is some power under which the order can lawfully be made. Penalty proceedings initiated in the course of such assessment proceedings and penalty levied in pursuance thereof are also valid in law.

(Para 4)

Reference made under Section 256(1) of the Income-tax Act, 1961 by the Income-tax Appellate Tribunal (Delhi Bench) for decision of the following questions of law involved in the case in Re: R.A. Nos. 680 and 681 of 1968-69 arising out of Income Tax Appeal Nos. 16068 and 16360 of 1965-66 (Assessment year 1961-62):—

1. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the assessment order passed by the Income Tax Officer?"
2. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law to hold that the penalty proceedings were invalid and cancel the order of penalty passed by the Inspecting Assistant Commissioner of Income Tax?"

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the applicant.

NEMO, for the respondent.

JUDGMENT

The Judgment of this Court was delivered by :—

TULI, J.—(1) The following questions of law have been referred to this Court for opinion by the Income-tax Appellate Tribunal, Delhi Bench 'C' :—

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the assessment order passed by the Income-Tax Officer?
2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law to hold that the penalty

proceedings were invalid and cancel the order of penalty passed by the Inspecting Assistant Commissioner of Income Tax?

(2) The assessment year in question is 1961-62 for which a return declaring an income of Rs. 63,576 was filed by the assessee on March 31, 1962, before the Income Tax Act, 1961, came into force. Later on, the assessee filed a revised return on November 15, 1962, declaring its income as Rs. 71,137. The Income Tax Officer made the assessment under section 143(3) of the 1961 Act, instead of under section 23(3) of the Income Tax Act, 1922. Admittedly, according to the provisions of section 297(2) (a) of the 1961 Act, the assessment had to be made under section 23(3) of the 1922 Act. The Income Tax Appellate Tribunal has set aside the assessment on the ground that it has not been made under the appropriate provision of law. The Income Tax Officer had added an income of Rs. 37,025 to the return filed by the assessee as its income from undisclosed sources and after notice to the assessee, the Inspecting Assistant Commissioner imposed a penalty of Rs. 31,000 on the assessee on the ground that it had concealed income of Rs. 37,025. The assessee finally filed appeals before the Income Tax Appellate Tribunal against the order of assessment as well as the order of penalty and both the appeals of the assessee were accepted. The Income Tax Appellate Tribunal held that the assessment order passed by the Income Tax Officer could not be assumed to have been passed under section 23 of the Income Tax Act, 1922 and, therefore, the assessment order passed by him was without jurisdiction and void in law. On that ground, the assessment order was set aside. In the appeal relating to penalty, it was held that the expression "any proceeding under the Act" in section 271(1) (c) of the 1961 Act, referred to a valid proceeding and since the proceedings for assessment were void in law, no penalty could be imposed. The Commissioner of Income Tax, being dis-satisfied with those orders of the Tribunal, asked for the reference of the two questions, set out above, for opinion to this Court.

(3) The submission of the learned counsel for the petitioner is that the order of assessment should have been considered to have been passed under section 23(3) of the Income Tax Act, 1922 and should not have been held to be void in law having been passed under section 143(3) of the 1961 Act. Strong reliance is placed in support of this submission on a judgment of their Lordships of the Supreme Court in *L. Hazari Mal Kuthiala v. Income Tax Officer*, Special

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Circle, Ambala Cantt. and another, (1), wherein an order of the Commissioner of Income Tax passed under sections 5(5) and 5(7-A) of the Indian Income Tax Act, 1922 was attacked as *ultra vires* and incompetent for the reason that the correct provision to be invoked for the assessment in question was section 5(5) of the Patiala Income Tax Act. Their Lordships upheld the order treating the same as one passed under section 5(5) of the Patiala Income Tax Act, observing:—

“The exercise of a power would be referable to a jurisdiction which conferred validity upon it and not to a jurisdiction under which it would be nugatory.”

This judgment was followed by a Division Bench of the Madras High Court in *R. P. Kandaswami and others v. Commissioner of Income Tax, Madras* (2), wherein it was pointed out:—

“— — — — — that the jurisdiction of any Tribunal does not depend upon the wrong provisions of law upon which the Tribunal might have purported to act, but upon the question whether the Tribunal had jurisdiction on a proper view of the functions and powers with which it is clothed under the law or the statute creating it. In order words, the Tribunal will not lose its jurisdiction which it undoubtedly has in a particular case because of its having misquoted the provision of law under which it exercised the jurisdiction.”

(4) Recently this matter against came up for consideration before a Division Bench of the Madras High Court in *Vr. C. Rm. Adaikappā Chettiar v. Commissioner of Income Tax, Madras* (3), and following the judgments referred to above, it was held that the order passed under section 154 of the new Act was valid although it should have been passed under section 35 of the 1922 Act. The order was not

(1) (1961)41 I.T.R. 12.

(2) (1963)49 I.T.R. 344.

(3) (1970) 78 I.T.R. 285.

held to be invalid or void in law because of the wrong quotation of the section under which it was passed. The learned Judges observed as under :—

“A wrong reference to the power under which an order is made does not *per se* vitiate the order if there is some other power under which the order could lawfully be made. The validity of the impugned order has to be tested by reference to the question whether the Income Tax Officer had any power at all to make an order of this nature. If the power is otherwise established, the fact that the source of power has been incorrectly described would not make the order invalid. As there is no difference in the nature and content of the power whether it is exercised under section 35 of the old Act or under section 154 of the new Act, the order of rectification cannot, therefore, be assailed on the ground that it has been made in exercise of power which did not exist.”

We respectfully agree with the observations of the learned Judges of the Madras High Court and hold that the order passed by the Income Tax Officer under section 143(3) of the 1961 Act should have been considered to have been passed under section 23(3) of the 1922 Act, and could not be declared to be without jurisdiction and void in law. The provisions of section 23(3) of the 1922 Act are *pari materia* with the provisions of section 143(3) of the 1961 Act and deal with the same subject-matter, that is, assessment. There is slight difference in the language but purport of the provisions in both the Acts is the same. The order of the Income Tax Officer passed under section 143(3) of the 1961 Act could, therefore, be legitimately held to have been passed in exercise of the powers vested in the Income Tax Officer under section 23(3) of the 1922 Act. We are, therefore, of the opinion that the decision of the Appellate Tribunal was wrong in law. Accordingly, we answer the questions referred to us in the negative, that is, in favour of the Revenue and against the assessee. There is no order as to costs as there is no representation on behalf of the respondent.

B. S. G.