INCOME TAX REFERENCE

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

BRIJ BHUSHAN LAL,—*Appellant*

versus

THE COMMISSIONER OF INCOME-TAX, PUNJAB, PATIALA,—
Respondent.

Income Tax Reference No. 42 of 1969

November 11, 1970.

Indian Income Tax Act (XI of 1922)—Section 34—Reassessment—Assessee a building contractor not producing account books of the contract and allowing best judgment assessment being made—Income-tax Officer—Whether entitled to apply flat rate of percentage of profit on the value of the contract as a whole.

Held, that where an assessee, a building contractor of Military Engineering Service, does not produce his accounts to satisfy the Income-Tax Officer as to the true profits or income made by him from a contract and leaves it to him to determine, on best judgment basis, the profits or income made by the assessee, the Income-Tax Officer is entitled to calculate and determine the net income assessable on the basis of the value of the contract as a whole and not on the value of the contract after deducting the cost of the materials supplied by the M.E.S. Department. The percentage of profit in such a case is not determined with reference to each item of the material involved in the performance of the contract but on the amount of the whole contract which cannot be divided into different parts according to the nature and source of supply of the materials used for that purpose. The price of the Stores supplied by the Military authorities can be included and flat rate of percentage of profit can be applied to the receipts of the assessee.

(Para 2)

Reference made under Section 66(2) *of the Indian Income-tax Act,* 1922, *read with Section* 256(2) *of the Income-tax Act,* 1961 *by the Income-tax Appellate Tribunal, Delhi Bench 'A',*—vide *its order. dated 29th November,* 1968, *for opinion on the below mentioned questions of law in R.A.* 950 *of* 1961-62 *arising out of I.T.A. No.* 10883, 10884, 10885 *and* 10886 *of* 1959-60 *for the assessment years* 1950-51, 1951-52, 1952-53 *and* 1954-55.

1. *Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee had waived his objection to the validity of the notice under section* 34(1) *of the Income-tax Act,* 1922?

2. *If the answer to question No.* 1 *is in the negative, whether the Tribunal was justified in law in holding that the case fell under section* 34(1)(*a*) *of the Act of* 1922?

3. *Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the price of the stores supplied by the military authorities was to be included before applying the flat rate to the assessee's receipts?*

4. *Whether on the facts and in the circumstances of the case, the Tribunal was justified in applying the same flat rate to the price of stores supplied by the Department as was applied to the other receipts of the assessee?*

J. N. KAUSHAL, SENIOR ADVOCATE, WITH ASHOK BHAN, S. P. JAIN AND R. N. MITTAL, ADVOCATES, for the appellant.

D. N. AWASTHY, SENIOR ADVOCATE WITH B. S. GUPTA, ADVOCATE, for the respondent.

JUDGMENT.

The Judgment of this Court was delivered by :—

TULI, J.—(1) The assessee, Brij Bhushan Lal, was a Contractor who used to undertake the construction of building work for the M.E.S. Department. For the assessment years 1950-51, 1951-52, 1952-53 and 1954-55, assessments were made under the *Indian Income Tax Act*, 1922, (hereinafter referred to as the Act), on the basis of net profits determined at 10 per cent, 12.5 per cent, 12.5 per cent and 10 per cent, respectively, of the amounts received by the assessee from M.E.S. Department. Later on, it came to the knowledge of the Income Tax Officer that the costs of materials supplied by the Military authorities to be used in the building works by the assessee had not been disclosed by him and, therefore, notices under section 34 of the Act were issued to him. The orders of re-assessment were made by adding the amounts representing the cost of materials supplied by the Military authorities which amounts were Rs. 23,234, Rs. 8,940, Rs. 29,636 and Rs. 46,424, respectively, for the four years mentioned above. The same percentage was applied to determine the net profits on these amounts and the amount of income-tax levied was accordingly enhanced. The assessee filed appeals before the Appllate Assistant Commissioner who upheld the orders of re-assessment made by the Income Tax Officer with regard to the addition of amounts made but determined the net income from the added amounts at the rate of 6¼ per cent instead of the percentages applied by the Income Tax Officer. The assessee as well as the Income Tax Officer filed appeals before the Income Tax Appellate Tribunal and the

Tribunal made the percentage uniform at 10 per cent of the entire amount and thus accepted the appeals in part. The assessee then applied for a reference under section 66(1) of the Act which was rejected by the Income Tax Appellate Tribunal. On the application of the assessee under section 66(2) of the Act, this Court directed the Income Tax Appellate Tribunal to state the case and refer the following questions of law for opinion to the High Court, by order dated December 9, 1965 :—

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee had waived his objection to the validity of the notice under section 34(1) of the Income Tax Act, 1922 ?

2. If the answer to question No. 1 is in the negative, whether the Tribunal was justified in law in holding that the case fell under section 34(1) (a), of the Act, of 1922?

3. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the price of the stores supplied by the Military authorities was to be included before applying the flat rate to the assessee's receipts?

4. Whether on the facts and in the circumstances of the case, the Tribunal was justified in applying the same flat rate to the price of stores supplied by the Department as was applied to the other receipts of the assessee?

(2) The learned counsel for the petitioner has vehemently argued that the materials supplied by the M.E.S. Department were the property of that Department and were to be used only in the construction of the works undertaken by the assessee. Those materials were to remain in the custody of the M.E.S. Department and the petitioner cannot be said to have made any profits with regard to them. According to the contracts, the cost of those materials was included in the amount of the contract and was deducted from the bills of the petitioner after the works were completed. After careful consideration of the arguments, we are of the opinion that the submission made by

the learned counsel is without any substance. If an assessee does not produce his accounts to satisfy the Income Tax Officer as to the true profits or income made by him from a contract and leaves it to him to determine, on best judgment basis, the profits or income made by the assessee, the Income Tax Officer naturally will calculate and determine the net income assessable on the basis of the value of the contract as a whole and not on the value of the contract after deducting the cost of the materials supplied by the Department. That the Income Tax Officer purported to do that in the case of the petitioner is not in doubt because the notices under section 34 were issued to the petitioner on the ground that the cost of materials deducted from his bills had not been disclosed to the Income Tax Officer at the time of the regular assessment. The percentage of profit in such a case is not determined with reference to each item of the material involved in the performance of the contract but on the amount of the whole contract which cannot be divided into different parts according to the nature and source of supply of the materials used for that purpose. We are, therefore, of the opinion that no fault can be found with the order passed by the Income Tax Appellate Tribunal on this part of the case.

(3) No arguments have been addressed by the learned counsel for the parties on the subject-matter of questions 1 and 2 set out above, but after perusal of the order of the learned Tribunal we are of the opinion that the Tribunal was not right in law in holding that the assessee had waived his objection to the validity of the notice issued to him by the Income Tax Officer under section 34(1) of the Act. We are further of the opinion that the Tribunal was justified in holding that the case fell under section 34(1) of the Act.

(4) For the reasons given above, the answer to question No. 1 is in the negative, that is, in favour of the assessee while the answers to the other three questions are in the affirmative, that is, in favour of the Revenue. The Commissioner of Income Tax will be entitled to the costs of this reference which are assessed at Rs. 200.00.

B. S. G.