COMMISSIONER OF INCOME-TAX; MADRAS

v.

MTT. AR. S. AR. ARUNACHALAM CHETTIAR.

1952

Dec. 22.

[MEHR CHAND MAHAJAN, DAS and BHAGWATI JJ.]

Indian Income-tax Act (XI of 1922), ss. 30, 33, 34, 66 (1) and (2)—Order of Appellate Tribunal directing Income-tax Officer to allow certain deductions—Income-tax Officer adding certain other items in computing income—Appeal to Appellate Assistant Commissioner—Maintainability—Order of Appellate Tribunal under inherent powers directing Income-tax Officer to revise his order—Competency of reference.

By an order dated August 20, 1943, the Appellate Tribunal directed that certain deductions claimed by the assessee should be allowed. The matter came back to the Income-tax Officer and he made an order on September 26, 1945, but did not issue any fresh notice of demand. The assessee appealed to the Appellate Assistant Commissioner complaining that in his order of September 26, the Income-tax Officer had wrongly included a sum of Rs. 13,000

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as unassessed foreign income of earlier years. The Appellate Assistant Commissioner held that the order of September 26 was not appealable. The assessee, therefore, made a miscellaneous application to the Appellate Tribunal, which held that the Income-tax Officer acted wrongly in including the sum of Rs. 13,000 at that stage and directed the Income-tax Officer to revise his computation accordingly. The Commissioner of Income-tax, being of opinion that the Appellate Tribunal had no jurisdiction to entertain or make such order on a miscellaneous application applied for a reference to the High Court under s. 66 (1) of the Income-tax Act. The Tribunal referred certain questions and the High Court directed the Tribunal to refer certain other questions also but when the references came on for hearing the High Court held that the references were incompetent. The Commissioner of Income-tax appealed to the Supreme Court with the leave of the High Court :

Held, (i) that in carrying out the directions of the Tribunal and in passing the order of September 26, 1945, the Income-tax Officer cannot be regarded as having acted under s. 23 or s. 27 of the Act and no appeal lay from his order under s. 30 (1). The order made by the Appellate Assistant Commissioner was not therefore an order under s. 31 (3) and no further appeal lay to the Appellate Tribunal under s. 33 (1) so as to enable the Tribunal to make an order under s. 33 (4) and as there was no order under s. 33 (4), no question of law can be said to arise out of an order under s. 33 (4) and there can be no valid reference under s. 66 (1) or s. 66 (2) ;

(ii) even assuming that the order of the Income-tax Officer dated September 26, 1945, was an order under s. 23 or s. 27 and as such appealable, the order made by the Appellate Assistant Commissioner declining to entertain the appeal was not an order under any of the sub-sections of s. 31 and no appeal lay therefrom to the Appellate Tribunal under s. 33 (1) and there could be no order of the Appellate Tribunal under s. 34 (1). The order of the Appellate Tribunal correcting the order of the Income-tax Officer and directing that the sum of Rs. 13,541 should not be included cannot be regarded in any event as an order under s. 33 (4) so as to attract the operation of s. 66 (1) or (2).

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 10 and 10-A of 1952. Appeal from the Judgment and Order dated 11th January, 1950, of the High Court of Judicature at Madras in Cases Referred Nos. 80 of 1946 and 38 of 1948.

M. C. Setalvad, Attorney-General for India, (*G. N. Joshi* and *P. A. Mehta*, with him) for the appellant.

S. Krishnamachariar for the respondent.

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1952. December 22. The Judgment of the Court was delivered by

DAS J.—These two consolidated appeals are directed against the judgment and order made on January 11, 1950, by the High Court of Judicature at Madras in References No. 80 of 1946 and No. 38 of 1948 under section 66 of the Indian Income-tax Act whereby the High Court relying on its earlier decision in *Commissioner of Income-tax, Madras* v. *R. Rm. M. Sm. Sevugan alias Manickavasagam Chettiar*(1) held that the references were incompetent and accordingly refused to answer the questions raised therein. The facts are shortly as follows.

The respondent who is a Nattukotai Chettiar had his headquarters at Karaikudi in India and also carried on his money-lending business at branches at Maubin, Kualalumpur and Singapore. He also had income from properties at Maubin and Singapore. For the assessment year 1941-42 the Income-tax Officer calculated the assessee's accrued foreign income as Rs. 29,403 at Maubin, Rs. 27,731 at Kualalumpur and Rs. 34,584 at Singapore, in all Rs. 91,718. After deducting out of this amount Rs. 4,500 allowed under the 3rd proviso to section 4 (1) of the Act, the Income-tax Officer computed the total assessable foreign income at Rs. 87,218. Out of the total remittances of Rs. 84,352 the Income-tax Officer allocated Rs. 7,900 to the accrued income of Maubin and Rs. 62,315 to those of Kualalumpur and Singapore and the balance of Rs. 14,137 to the taxed income of earlier years. The Income-tax Officer disallowed the claim of the assessee to deductions under several heads. On the basis of the total foreign income of Rs. 67,218 and income from other sources the Income-tax Officer calculated Rs. 23,266-8-0 to be due by the assessee on account of income-tax, super-tax and surcharges thereon and by his assessment order dated January 31, 1942, made this amount payable on or before February 25, 1942. The assessee preferred an

(1) [1948] 16 I.T.R. 59; (1948) 1 M.L.J. 157; A.I.R. 1948 Mad. 118.

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appeal to the Appellate Assistant Commissioner against the disallowance of the several items of his claim including the claim for replantation expenses amounting to $ 498 incurred at Kualalumpur and a bad debt of $ 15,472 at Singapore. The Appellate Assistant Commissioner by his order dated May 25, 1942, allowed some of the several objections but disallowed the items of replantation expenses and bad debt and reduced the assessment to Rs. 22,548. The assessee took a further appeal before the Appellate Tribunal against the disallowance of the several claims by the Appellate Assistant Commissioner including the two items mentioned above. The Appellate Tribunal by its order dated August 20, 1943, held that the replantation expenses "will be allowed to the appellant as expenses." As regards the bad debt the Tribunal held that it was permissible and that "the deduction claimed will, therefore, be allowed." The result was that the appeal was partly allowed.

The matter came back before the Income-tax Officer on September 26, 1945. Deducting Rs. 778 on account of replantation expenses the Kualalumpur income was reduced to Rs. 26,953 and after deducting Rs. 24,175 on account of the bad debt the Singapore income came down to Rs. 10,409. These two reduced amounts together with Rs. 29,403 being the income from Maubin made up the total accrued income of Rs. 66,765. Out of this amount Rs. 4,500 was deducted on account of unremitted profits of Maubin under the 3rd proviso to section 4(1) of the Act, leaving a balance of Rs. 62,265. Out of the remittances the Income-tax Officer allocated Rs. 7,000 towards the accrued income of Rs. 29,403 from Maubin and Rs. 37,362 against the total accrued income of Kualalumpur and Singapore. He also allocated Rs. 24,549 as remittances out of assessed profits of previous years, leaving a balance of Rs. 13,541. This amount the Income-tax Officer considered as remittances out of earlier years' unassessed income and held it to be assessable to tax. After adding Rs. 13,541 to Rs. 62,265 being the net accrued income of the year

from Maubin, Kualalumpur and Singapore the Income-tax Officer arrived at the total foreign income of Rs. 75,806. On the basis of this foreign income together with other income the Income-tax Officer recalculated the amount of income-tax, super tax and surcharges thereon at Rs. 22,802-6-0 and after giving credit for certain amounts, found Rs. 21,211-14-0 as the balance due which by his order dated September 26, 1945, was made payable in equal moiety on or before September 30, 1947, and March 31, 1948. He, however, did not issue any notice of demand under section 29 of the Act.

Being aggrieved by the inclusion of Rs. 13,541 as the alleged unassessed foreign income of earlier years remitted to India during the year of account the assessee preferred an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner was not satisfied that the assessee had any right of appeal under section 30 of the Act for there had been no assessment under section 23 and no notice of demand had been served on the assessee under section 29 of the Act. Accordingly the Appellate Assistant Commissioner by his order dated November 19, 1945, declined to admit the appeal. He, however, expressed the view that the assessee's remedy might lie in a miscellaneous application to the Tribunal complaining that the Income-tax Officer had either misconstrued or had not given effect to the order of the Appellate Tribunal.

The assessee then brought a miscellaneous application to the Appellate Tribunal. The Appellate Tribunal held that the finding of the Income-tax Officer that the sum of Rs. 13,541 was to be assessed as untaxed profits of earlier years remitted to India in the accounting year did not arise in the course of giving effect to the Appellate Tribunal's order and by its order dated February 20, 1946, cancelled that finding and directed the Income-tax Officer to revise the computation accordingly.

The last mentioned order having been served on the Commissioner of Income-tax, Madras, on March 8,

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1946, the latter on May 1, 1946, made an application before the Appellate Tribunal under section 66(1) of the Act and prayed that three questions formulated by him in his petition should be referred to the High Court. The contention was that the Appellate Tribunal had no jurisdiction in law to entertain, consider and pass the order which it did on the miscellaneous application seeing that it was neither an appeal under section 33 of the Income-tax Act nor could it be regarded as a rectification under section 35 of any mistake committed by the Bench. The Appellate Tribunal took the view that although no specific provision was made in the Act by which it could give effect to its order or explain any ambiguity in such an order by a later order in any miscellaneous application filed by any party, such power, nevertheless, was inherent in the Tribunal. The Tribunal accordingly thought that a point of law did arise and on August 23, 1946, referred the following question to the High Court, namely:—

"Whether in the facts and circumstances of this case the order of the Bench dated 20th February, 1946, in the miscellaneous application is an appropriate order and is legally valid and passed within the jurisdiction and binding on the Income-tax Officer."

The Tribunal declined to refer the other questions formulated by the Commissioner. This reference came to be numbered as Case Referred No. 80 of 1946. It appears that pursuant to an order made by the High Court on March 30, 1948, on the application of the Commissioner of Income-tax under section 66 (2) of the Act the Tribunal referred the following question to the High Court:—

"If the answer to the question already referred to the High Court by the order of the Appellate Tribunal dated 23rd August, 1946, is in the affirmative, whether, in the circumstances and on the facts of the case, the recomputation made by the Income-tax Officer pursuant to the decision of the Appellate

Tribunal in R.A.A. No. 53 (Madras) of 1942-43 was valid and correct."

The Appellate Tribunal made this further reference on July 19, 1948, which came to be numbered as Case Referred No. 38 of 1948.

The two referred cases came up for consideration before a Bench of the Madras High Court and it was held that the reference under section 66(1) was incompetent in view of the earlier decision of that Court mentioned above which they felt to be binding on them and accordingly the Bench declined to answer the questions. The Commissioner of Income-tax thereafter applied for and obtained leave to appeal to this Court from the decisions in both the references and obtained such leave on his undertaking to pay the costs of the assessee in any event. The two appeals were thereafter consolidated and have come up before us for final disposal.

Section 66-A (2) gives to the aggrieved party a right of appeal to this Court from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to this Court. Section 66 (5) provides that the High Court upon the hearing of any such case referred to it under section 66(1) and (2) shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded. During the opening of the case by the learned Attorney-General a question arose as to whether the simple refusal of the High Court to hear the case on the ground that the reference was incompetent was a decision and judgment such as is contemplated by section 66(5) of the Act from which alone a right of appeal to this Court is given. While maintaining that the decision and judgment of the Madras High Court fell within the meaning of section 66(5) the learned Attorney-General for greater safety asked that the appeal may be treated as one on special leave granted by this Court under article 136 of the Constitution. The learned Advocate appearing for the

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assessee-respondent did not object to this prayer and accordingly we gave leave to the appellant under article 136 and treated this appeal as one filed pursuant to such leave. In the circumstances it is not necessary for us to express any opinion on the appealability of the order of the High Court under section 66-A of the Act.

The learned Attorney-General contends that the decision relied on by the High Court has no application to the facts of the present case. In that case the Tribunal by its order dated July 11, 1944, allowed an appeal from the Appellate Assistant Commissioner and cancelled the assessment which it held to be illegal. This order was served on the Commissioner shortly thereafter. On October 5, 1944, an application was made to the Tribunal by the Income-tax Officer under section 35 to correct a statement contained in the statement of facts in the order. More than 60 days after the date of the service on him of the order of July 11, 1944, to wit on October 7, 1944, the Commissioner made an application under section 66 (1) of the Act requiring the Tribunal to refer to the High Court the question as to the correctness of its decision embodied in the order of July 11, 1944. Both the applications were disposed of on the same day, namely, January 17, 1945, when the application for rectification was granted and a case was stated for the opinion of the Court as prayed. Section 66 (1) requires the application to be made within 60 days of the date on which the applicant is served with notice of an order under sub-section (4) of section 33. It was held that the granting of an application for rectification under section 35 and correcting the error in the order was not an order under section 33 (4) and, therefore, was not one in respect of which section 66 (1) permitted a case to be stated. It was further held that if the Appellate Tribunal improperly or incorrectly made a reference in violation of the provisions of the statute, the High Court was capable of entertaining an objection to the statement of the case and that, if it came to the

conclusion that the case should not have been stated, the High Court was not compelled to express an opinion upon the question referred. In the case before us there is no question that the present application was not made within time, but the contention is that section 66 (1) only contemplates an application for a reference of a question of law arising out of "such order" which clearly means an order made under section 33(4), and, therefore, if there is no valid order under that section no question of law can be said to arise out of "such order" and consequently the Appellate Tribunal can have no jurisdiction to make any reference to the High Court under section 66(1). Section 66 (2) provides that if on any application being made under sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner may, within the time specified therein, apply to the High Court and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it. The jurisdiction given to the High Court under this sub-section is conditional on an application under sub-section (1) being refused by the Appellate Tribunal. This clearly presupposes that the application under sub-section (1) was otherwise a valid application. If, therefore, an application under sub-section (1) was not well-founded in that there was no order which could properly be said to be an order under sub-section (4) of section 33 then the refusal of the Appellate Tribunal to state a case on such misconceived application on the ground that no question of law arises will not authorise the High Court, on an application under sub-section (2) of section 66, to direct the Tribunal to state a case. 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. The only question for our consideration, therefore, is whether in this case any question

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of law arose out of an order which can properly be said to have been made by the Appellate Tribunal under sub-section (4) of section 33, for if it did not, then the Appellate Tribunal would have no jurisdiction under sub-section (1) of section 66 to refer a case, nor would the High Court have jurisdiction under sub-section (2) of that section to direct the Tribunal to do so.

It was at one stage suggested by the learned Attorney-General that we should in the first instance remit the matter to the High Court for their decision on this question but as the question is one of law depending on the construction of the relevant sections of the Act it will save time if it is decided by us here and now. It is not disputed that we have the power, on the hearing of this appeal, to decide this question.

It will be recalled that when on 19th November, 1945, the Appellate Assistant Commissioner declined to admit the appeal, the assessee did not prefer any appeal but only made a miscellaneous application before the Appellate Tribunal. There is no provision in the Act permitting such an application. Indeed, in the statement of the case the Appellate Tribunal states that in entertaining that application and correcting the error of the Income-tax Officer it acted in exercise of what it regarded as its inherent powers. There being no appeal under section 33 (1) and the order having been made in exercise of its supposed inherent jurisdiction, the order cannot possibly be regarded as one under section 33 (4) and there being no order under section 33 (4) there could be no reference under section 66 (1) or (2) and the appellate Court properly refused to entertain it.

The learned Attorney-General submits that this Court should not take such a narrow and technical view but should treat that miscellaneous application as really an appeal under section 33. Turning now to section 33 we find that any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within the time specified in

sub-section (1) which time, however, may be extended by the Tribunal under sub-section (2A). Under sub-section (4) the Appellate Tribunal is given power, after giving both parties to the appeal an opportunity to be heard, to pass such order thereon as it thinks fit. It is thus clear that the Appellate Tribunal can make an order under section 33 (4) only on an appeal from an order passed by the Appellate Assistant Commissioner under section 28 or section 31. If, therefore, there is no order which may properly be said to have been made by the Appellate Assistant Commissioner under section 28 or section 31 then there can be no appeal under section 33 (1) and consequently there can be no order under section 33 (4). Section 28 is not relevant for our present purpose. Section 30 provides for filing of appeals against assessments made under the Act. Sub-section (1) of that section prescribes the different decisions against which an appeal will lie. Sub-section (2) prescribes the time within which the appeal is to be filed. Sub-section (3) prescribes the form in which the appeal is to be made. Then comes section 31 which gives power to the Appellate Assistant Commissioner to hear and dispose of such appeal. Sub-section (3) of section 31 empowers the Appellate Assistant Commissioner in disposing of an appeal under section 30 to make one or other order under one or other of the several clauses of that sub-section. It is, therefore, clear that in order that the Appellate Assistant Commissioner may exercise his jurisdiction and make an order under section 31, there must be an appeal as contemplated by section 30. The learned Attorney-General only relies on the opening part of sub-section (1) of section 30 and contends that the appeal before the Appellate Assistant Commissioner was with respect to the amount of income assessed under section 23 or section 27. It will be recalled that the Appellate Tribunal held that the two sums claimed by the assessee would be allowed to him and concluded by saying that the appeal was partly allowed. The power of the Appellate Tribunal under section 33(4)

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is indeed wide, for on an appeal properly before it, it can make such order as it thinks fit. Therefore, the order made by the Appellate Tribunal in this case on August 20, 1943, must be read and construed as a direction to the Income-tax Officer to carry out the directions by allowing the two deductions in question. When the matter again came before the Income-tax Officer his function was only to carry out the order of the Appellate Tribunal. He could not otherwise reopen the assessment already made by him under section 23. Therefore, in carrying out the directions of the Tribunal and in doing what he did on September 26, 1945, the Income-tax Officer cannot be regarded as having acted under section 23 or section 27 of the Act and that being the position no appeal lay from that order of the Income-tax Officer under section 30 (1) of the Act. The result of it was that there was no proper appeal before the Appellate Assistant Commissioner such as is contemplated by section 30 (1) and, therefore, the order made by the Appellate Assistant Commissioner cannot be regarded as an order made by him under section 31 (3), for an order under section 31 (3) can only be made in disposing of an appeal properly filed under section 30, and consequently no further appeal lay to the Appellate Tribunal under section 33 (1) so as to enable the Appellate Tribunal to make an order under sub-section (4) of that section. In the premises, there being no order which may properly be said to have been made under section 33 (4), no question of law can be said to arise out of an order made under section 33 (4) and consequently there can be no valid reference under section 66, sub-section (1) or sub-section (2). If, therefore, the reference was incompetent for want of jurisdiction both under section 66 (1) or section 66 (2) surely the High Court could decline to entertain it as it did.

Even if the order dated September 26, 1945, made by the Income-tax Officer after the matter came back to him to give effect to the decisions of the Appellate Tribunal be regarded as an order made by him under

section 23 or section 27 and as such appealable under section 30 (1) then the order made by the Appellate Assistant Commissioner on November 19, 1945, declining to admit the appeal clearly amounted to a refusal on his part to exercise the jurisdiction vested in him by law. An order thus founded on an error as to his jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the sub-sections of section 31. Such an order not coming within the purview of section 28 or section 31, no appeal lay therefrom to the Appellate Tribunal under section 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under section 33 (4) and if there was no order under section 33 (4) there could be no reference under section 66, sub-section (1) or sub-section (2). It follows, therefore, that the order of the Appellate Tribunal correcting the order of the Income-tax Officer directing that the sum of Rs. 13,541 should not be included in the assessment cannot be regarded as an order passed by the Appellate Tribunal under section 33 (4) so as to attract the operation of section 66.

The learned Attorney-General urged that having under section 66 (2) of the Act directed the Appellate Tribunal to state a case the High Court could not afterwards refuse to answer the question thus referred to it. Whether the High Court was so precluded or not requires no decision on this occasion, for even conceding but not deciding that the High Court was so precluded, this Court, at any rate, can surely entertain the question of the competency of the reference.

The result, therefore, is that we dismiss these appeals with costs.

Appeals dismissed.

Agent for the appellant: *G. H. Rajadhyaksha.*

Agent for the respondent: *M. S. K. Aiyangar.*