THE COMMISSIONER OF INCOME-TAX

v.

M/s. McMILLAN & CO.

1957

October, 16.

(BHAGWATI, S. K. DAS and J. L. KAPUR, JJ.)

Income-Tax—Assessment—Acceptance by Income-tax Officer of he assessee's method of accounting—Power of Appellate Assistant Commissioner in appeal—If can reject such method and adopt another—Indian Income-tax Act (XI of 1922), ss. 31, 13 proviso—Indian Income-tax Rules, R. 33.

The respondent assessee, a non-resident company, sold and published books and magazines in various parts of the world. It submitted for the assessment year in question a return in which a fixed percentage of the marked price of all publications sold in India, printed in India or elsewhere, was adopted as the cost of production and this method of accounting was followed in the return. The Income-tax Officer accepting this method, assessed the income at Rs. 82,623. The assessee preferred an appeal on other grounds to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner was of opinion that the true income of the assessee could not be deduced from the method of accounting followed by him and accepted by the Income-tax Officer and issued a notice under s. 31(3) of the Indian Income-tax Act and after hearing the assessee fixed his assessable income at Rs. 1,11,616 by applying the provisions of Rule 33 of the Indian Income-tax Rules. The assessee appealed to the Appellate Tribunal and the Tribunal, relying on a recent decision of the Bombay High Court, held that the Appellate Assistant Commissioner had no jurisdiction to enhance the income in the way he did and referred the matter to the High Court at the instance of the appellant. The High Court held against the appellant and he appealed. The questions for decision were whether it was open to the Appellate Assistant Commissioner in exercise of his powers under s. 31(3) of the Act to reject the method of accounting, followed by the assessee and accepted by the Income-tax Officer, under the proviso to s. 13 of the Act, and compute the income, profits or gains of the assessee under Rule 33 of the Rules.

Held, (per S. K. Das and Kapur, JJ., Bhagwati, J., dissenting) that the questions must be answered in the affirmative and the appeal must succeed.

There is nothing in s. 31, read with the proviso to s. 13, of the Indian Income-tax Act which prevents the Appellate Assistant Commissioner, in an appeal preferred by the assessee, from exercising the powers which the Income-tax Officer can exercise under the proviso to s. 13 of the Act. Although it is for the Income-tax Officer, in the first instance, to decide what would be the correct method of accounting under the proviso in a particular case, he has, in doing so, to act reasonably and judicially and

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

not subjectively or arbitrarily and any decision he may arrive at cannot be treated as final. Neither s. 13 nor the proviso imposes any limitation on the wide powers conferred on the Appellate Assistant Commissioner by s. 31(3) of the Act once he is in proper seizin of the matter.

Narrondas Manordass, Bombay v. *Commissioner of Income-tax* (1957) 31 I.T.R. 909, approved.

K. F. Vakeel v. *The Commissioner of Income-tax*, I.T. Reference No. 21 of 1950, Bombay High Court, dissented from.

Case-law discussed.

The Appellate Assistant Commissioner has also the power in an appeal to apply the provisions of Rule 33 of the Indian Income-tax Rules for the purpose of a correct computation of the assessee's income although the Income-tax Officer has not done so.

Per Bhagwati, J.—The difference in the language of the two conditions, on the fulfilment of which the method of accounting regularly employed by the assessee can be rejected under the proviso to s. 13 of the Indian Income-tax Act clearly indicates that the Legislature intended that any determination as to the second condition, namely, that the income, profits and gains of the assessee cannot be properly deduced from the method regularly employed by him, must be of the Income-tax Officer alone and no other authority described in the hierarchy of Income-tax authorities and defined by the Act.

K. F. Vakeel v. *The Commissioner of Income-tax*, I.T. Reference No. 21 of 1950, Bombay High Court, approved.

Nor are the powers of the Appellate Assistant Commissioner under s. 31(3) of the Act, in however wide terms they may have been described, absolute in character being circumscribed, as they necessarily are, by the nature of the proceedings before him and are limited to the subject-matter of the assessment.

Narrondas Manordass, Bombay v. *The Commissioner of Income-tax, Bombay*, (1957) 31 I.T.R. 909, referred to.

Case-law discussed.

Section 31(3) of the Act has, therefore, to be read along with s. 13 and its proviso and so read there can be no doubt the Appellate Assistant Commissioner has no power in appeal to nullify the power which the Income-tax Officer alone has under the proviso. He has no power to reject the method of accounting regularly employed by the assessee *suo motu*. If he thinks that the Income-tax Officer was in error in accepting that method as the proper method for computing the assessee's income what he can do is to set aside the assessment and direct the Income-tax Officer to make a fresh assessment under s. 31(3)(b) of the Act. Nor can he in exercising his power of enhancing the assessment under s. 31(3)(a) exercise the power under the proviso to s. 13 which is solely vested in the Income-tax Officer.

The questions must, therefore, be answered in the negative. 1957

CIVIL APPELLATE JURISDICTION. Civil Appeal No. 29 of 1955. *The Commissioner of Income-Tax v. M/s. McMillan & Co.*

Appeal by special leave from the judgment and order dated the 14th March, 1953, of the Bombay High Court in Income-tax Reference No. 27 of 1952.

C. K. Daphtary, Solicitor-General of India, G. N. Joshi and *R. H. Dhebar,* for the appellant.

N. A. Palkhivala, J. B. Dadachanji, S. N. Andley, Rameshwar Nath and *P. L. Vohra,* for the respondents.

1957. October 16. The judgment of S. K. Das and J. L. Kapur JJ. was delivered by S. K. Das J. Bhagwati J. delivered a separate judgment.

S. K. DAS J.—This is an appeal by special leave from the judgment and order of the High Court of Judicature at Bombay, dated March 4, 1953, in Income-tax Reference No. 27 of 1952, by which the said High Court answered certain questions of law referred to it in the negative. The answer to those questions depends upon the true scope and effect of certain provisions of the Indian Income-tax Act (XI of 1922), hereinafter referred as the Act, regarding which there has already been a difference of opinion between two High Courts in India. Unfortunately, we have come to a conclusion different from that of our learned senior brother Bhagwati J., and we are explaining in this judgment, as briefly and clearly as we can, the grounds on which our conclusion is founded. *S. K. Das J.*

Very briefly put, the relevant facts are these. The assessee, respondent before us, is a non-resident company which has its head office in London and branches in India. It sells and publishes books and magazines in various parts of the world. For the assessment year in question, it submitted a return of income in which with regard to all publications sold in India, whether printed in India or elsewhere, a fixed percentage of what was known as the marked price was adopted as the cost of production. This, if one may so put it, was the method of accounting on which the assessee company submitted its return. The Income-

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

tax Officer apparently accepted it and subject to certain minor modifications as respects some items of expenditure and an alleged bad debt with which we are not now concerned, assessed the assessee on an income of Rs. 82,623. The assessee appealed to the Appellate Assistant Commissioner. The latter issued a notice under s. 31(3) of the Act against the assessee, and after hearing the assessee, enhanced the assessment of the assessee company's business income to Rs. 1,11,616. The Appellate Assistant Commissioner found :

"It is noticed that on total turnover of Rs. 16,01,973 for the previous year ending 30th May, 1943, the gross profit amounted to Rs. 4,09,360 working out to just about 25.5 per cent. In the case of World profit and loss account I find that the gross profit earned was £ 231,070 on total sales of £ 628,000 working out to over 37 per cent. The difference in gross profit is so wide that some explanation had to be called for from the appellants, especially in view of the fact that the appellants do not maintain what should be called an Indian trading and profit and loss account on the same lines as the World trading and profit and loss account. The profit and loss account maintained in India shows only the purchases at the rate at which these were charged to the Indian branches by the London head office instead of the real cost of these publications."

He was of the view that inasmuch as the fixed percentage of the marked price adopted by the assessee company as the production cost for its publications sold in India did not correctly represent the actual cost of production, the method of accounting regularly employed is such that a true figure of income, profits and gains is not deducible therefrom. He fixed the income of the assessee company on the basis of the net world profit of the assessee on its world turnover, and applying that basis to its Indian business came to the conclusion that the income of the assessee was Rs. 1,11,616. He did so presumably under the proviso to s. 13 and R. 33 of the Indian Income-tax Rules, 1922.

The assessee company then appealed to the Appellate Tribunal. The Appellate Tribunal remanded the case to the Appellate Assistant Commissioner, but before the remand could be decided came the decision of the Bombay High Court in *K. F. Vakeel* v. *The Commissioner of Income-tax*(1). The Tribunal then held that in view of that decision, the Appellate Assistant Commissioner rad no jurisdiction to enhance the income to Rs. 1,11,616. Thereafter, the Commissioner of Income-tax, Bombay City, appellant before us, asked the Tribunal to submit certain questions of law to the High Court of Bombay. These questions were—

"(1) Whether it is open to an Appellate Assistant Commissioner on appeal to reject the assessee's books of account, which have been accepted by the Income-tax Officer ?

(2) Whether it is open to an Appellate Assistant Commissioner on appeal to invoke the provisions of Rule 33 of the Indian Income-tax Rules for the purpose of computing the income of a non-resident, the Income-tax Officer not having done so ?

(3) Whether it is open to an Appellate Assistant Commissioner on appeal to enhance an assessment in exercise of the powers conferred upon him by section 31(3)(a) of the Indian Income-tax Act, where as a result of definite information he is of opinion that the income of the assessee has been under-assessed ?"

By its judgment and order dated March 4, 1953, the High Court answered the first two questions in the negative and held—rightly in our view—that the third question did not arise. The appellant then asked for and obtained special leave to appeal from the said judgment and order of the Bombay High Court.

The first question appears to us to have been somewhat widely framed and, in the terms in which it has been expressed, is not confined to the *method of accounting* referred to in s. 13 of the Act. The Income-tax Officer, even when he accepts the assessee's method of accounting, is not bound by the figure of profits shown in the accounts. If and when an appeal is

(1) I.T. Reference No. 21 of 1950, Bombay High Court.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

taken by the assessee to the Appellate Assistant Commissioner, the latter can re-examine the books of account to test the correctness of the assessment made. It is not disputed before us that 'accounts' must be distinguished from the 'method of accounting'. Section 13 and its proviso are concerned with the method of accounting. In the context of the statement of the case, however, the first question really means this : is it open to the Appellate Assistant Commissioner, on an appeal preferred by the assessee, to reject for the first time the method of accounting, purporting to act under the proviso to s. 13 of the Act, on the ground that the income, profits and gains cannot be properly deduced therefrom, when the Income-tax Officer although he has not expressly said so must be taken to have accepted the self-same method of accounting ?

The answer to the question depends on a correct interpretation of ss. 13 and 31 of the Act. We shall first read s. 13 of the Act :

"13. Income, profits and gains shall be computed, for the purposes of sections 10 and 12, in accordance with the method of accounting regularly employed by the assessee :

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

The section enacts that for the purposes of s. 10 (profits of business, profession or vocation) and s. 12 (income from other sources) income, profits and gains must be computed in accordance with the method of accounting *regularly* employed by the assessee. The choice of the method of accounting lies with the assessee; but the assessee must show that he has followed the method *regularly* for his own purposes. The section and the proviso read together clearly make such a method of accounting regularly employed by the assessee a compulsory basis of computation unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom.

If the true income, profits and gains cannot be ascertained on the basis of the assessee's method, or where no method of accounting has been regularly employed, the income must be computed upon such basis and in such manner as the Income-tax Officer may determine.

Thus far, there is no divergence of opinion as to the true scope and effect of s. 13 and its proviso. The divergence starts when s. 13 is read along with s. 31, and we come to the powers of the Appellate Assistant Commissioner. Section 31, in so far as it is relevant for our purpose, is in these terms:

"31(3). In disposing of an appeal, the Appellate Assistant Commissioner may, in the case of an order of assessment,—

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment.

.....

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement;

Provided further that at the hearing of any appeal against an order of an Income-tax Officer the Income-tax Officer shall have the right to be heard either in person or by a representative."

On one side, the argument on behalf of the appellant is that s. 31 does not in any way limit or circumscribe the power of the Appellate Assistant Commissioner so as to exclude from the ambit of his jurisdiction the power given by s. 13 and its proviso; on the other side, the argument for the respondent is that by reason of the terms of the proviso, particularly

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

the expression "in the opinion of the Income-tax Officer" occurring therein, the power or duty of rejecting the method of accounting on the ground that the income, profits and gains cannot properly be deduced therefrom is given to the Income-tax Officer alone and not to any other authority in the hierarchy of authorities mentioned in s. 5 of the Act. Ancillary to the aforesaid two main contentions, there is a further divergence of opinion as to whether the determination of the Income-tax Officer under the proviso to s. 13, in so far as such determination depends on his opinion, is final or not. On behalf of the appellant it is contended that it is not final—whether the determination is in favour of the assessee or not—provided an appeal is preferred by the assessee and the Appellate Assistant Commissioner gets seizin of the assessment. For the respondent, the argument is that it is final when the determination is in favour of the assessee, even if the assessee prefers an appeal on any other ground; but it is not final if the determination is against the assessee and the assessee appeals against that determination. These are the rival contentions which now fall for consideration.

Learned counsel for the respondent has drawn a distinction between what he called at one stage of his arguments (i) an objective determination by the Income-tax Officer—a determination based on certain objective facts and leading to certain consequences for or against the assessee—and (ii) a small category of cases where the determination is purely subjective and results in certain consequences for or against the assessee. Learned counsel has expressed the same argument in less philosophical terms by saying that in one class of cases, the determination is by whosoever may be the assessing authority at the initial or appellate stage, and in the other by a *named* authority only. According to him, into the first class of cases the entire hierarchy of Income-tax authorities are included; but in the second class of cases, the decision must be that of the *named* authority only. He has referred us to certain other sections of the Act where, according to him, the determination is also subjective, such as

—s. 4A(a)(iv), s. 10(2)(vi), s. 12B(2), s. 23A, etc. In some other sections, it is pointed out, two or more authorities are named, *e.g.*, ss. 27, 38, 48, etc. By what we must admit is a very adroit and plausible piecing together of some of these sections, learned counsel has built up his argument that in the present case the opinion of the Income-tax Officer that the income, profits and gains can be properly deduced from the method of accounting regularly employed by the assessee is a subjective determination of the Income-tax Officer alone, and the opinion of no other officer or authority can be substituted therefor. The Appellate Assistant Commissioner had, therefore, no jurisdiction to go behind that opinion.

We are unable to accept this line of argument as correct, and our reasons are these. Firstly, we think that learned counsel is reading more into the expression "in the opinion of the Income-tax Officer", occurring in the proviso to s. 13 than what is warranted by the language used. Whether the method of accounting is regularly employed or not is undoubtedly a matter which the Appellate Assistant Commissioner can go into when he has seizin of the appeal. It is not challenged that if the Income-tax Officer decides against the assessee and determines that the income, profits and gains cannot properly be deduced from the assessee's method of accounting, the determination is liable to be set aside on appeal by the assessee. What then is the reason for holding that a subjective determination or the determination of a *named* authority (whatever expression may be used) is inviolate in one case but not so in the other ? We have carefully examined the other sections of the Act to which learned counsel for the respondent has referred; but we are unable to agree with him that the language used therein supports the very subtle distinction that he has drawn. Let us take, for example, s. 23 which deals with assessment. Under sub-s. (3), the Income-tax Officer assesses the total income of the assessee and determines the sum payable on the basis of such assessment; under sub-s. (4) the Income-tax Officer makes the assessment to

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

the *"best of his judgment"*—an expression much stronger than "in the opinion of the Income-tax Officer". It is not disputed that in an appeal from an assessment under s. 23, the Appellate Assistant Commissioner can interfere with the determination or judgment of the Income-tax Officer, and in such an appeal the Appellate Assistant Commissioner can make his own assessment and exercise the power which the Income-tax Officer could exercise. Since 1939 an appeal lies from a "best of judgment" assessment made under sub-s. (4) of s. 23, but the right is restricted to "the amount of income assessed or the amount of tax determined". Why can he not then interfere with the opinion of the Income-tax Officer under the proviso to s. 13 ? It is contended that both sub-ss. (3) and (4) of s. 23 prescribed objective conditions for the exercise of the power referred to therein. It is true that under both sub-sections the assessment must be a fair and honest estimate and not arbitrary or capricious. Apart from that, however, we do not see what other distinctive, objective conditions there are which put those sub-sections in a different category.

The words 'in the opinion of the Income-tax Officer' are not to be construed in the sense of a mere discretionary power; but in the context of the words used in the proviso to s. 13 they impose a statutory duty on the Income-tax Officer to examine in every case the method of accounting and to see (i) whether or not it is regularly employed and (ii) to determine whether the income, profits and gains can properly be deduced therefrom. Section 30 of the Act gives the assessee a right of appeal in respect of certain orders including an order of assessment made under s. 23. Section 31 deals with the hearing of an appeal and powers of the Appellate Assistant Commissioner. Before disposing of the appeal, the Appellate Assistant Commissioner may, if he thinks fit, make a further enquiry himself or cause it to be made by the Income-tax Officer, and in disposing of the appeal he may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment : he may set it aside and order a fresh

assessment. There is nothing in the language of s. 31 of the Act which imposes any restriction on the powers of an Appellate Assistant Commissioner so as to prevent him from exercising the power under the proviso to s. 13. The restriction, if any, must be inferred from the language of the proviso itself. It is contended that the use of the words "in the opinion of the Income-tax Officer" in the second part of the proviso to s. 13 suggests a complete elimination of the Appellate Assistant Commissioner's jurisdiction to decide for the first time that the method of accounting is such that the income, profits and gains cannot be properly deduced therefrom. It is true that the decision as to the method of accounting is to be arrived at first by the Income-tax Officer after a careful scrutiny of the accounts whether they are simple or complicated, and the power is to be reasonably and judicially exercised, which excludes any subjective or arbitrary decision by the Income-tax Officer. It cannot, however, be said that a power so exercised is clothed with finality and would be excluded from review by the Appellate Assistant Commissioner; and in reviewing the order the appellate authority can exercise the same powers which the Income-tax Officer could exercise. Our attention has been drawn to the difference in language in which the two conditions for the application of the proviso have been expressed; the first condition is fulfilled if no method of accounting is regularly employed; the second condition, however, requires an opinion, *viz.*, the opinion of the Income-tax Officer that the income, profits and gains cannot be properly deduced from the method of accounting regularly employed. It is pointed out that the first condition involves an objective determination—not by any *named* authority but by any and every authority which may have to consider whether the condition as to the regularity of the method employed has been fulfilled or not; whereas the second condition involves a determination by a *named* authority. The argument is that by reason of the aforesaid difference in language, the Legislature clearly intended that the opinion of no other officer can be substituted for the opinion of the named authority,

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

viz., the Income-tax Officer, with regard to the fulfilment of the second condition; therefore, once the Income-tax Officer accepts the method of accounting as proper, the Appellate Assistant Commissioner has no jurisdiction to go behind that opinion. We are unable to accept this argument as correct. It is to be remembered that with regard to *both* conditions, the first and initial duty is that of the Income-tax Officer to determine whether the conditions or any of them are fulfilled; secondly, if the opinion of the Income-tax Officer with regard to the second condition is to be inviolate by reason of the difference in language, then it should be inviolate in *all* cases. Why should it be inviolate *in one case* and *not* so when the assessee appeals against a determination made adverse to him ? We feel that the second condition is expressed in the terms in which it has been expressed, because it involves an inferential process and the expression 'in the opinion of the Income-tax Officer' is aptly used as that officer must in the first instance make the determination. It does not necessarily follow that the Appellate Assistant Commissioner cannot revise the determination and exercise the power which the Income-tax Officer could exercise

A reference was also made by counsel for the respondent to the definition of 'Appellate Assistant Commissioner' and 'Income-tax Officer' in ss. 2(3) and 2(7) of the Act. These definitions do not carry the matter any further; because in order to determine the scope of the powers of the Appellate Assistant Commissioner, ss. 30 and 31 must be looked at and they will govern appeals, unless those powers are cut down by the words of ss. 2(3) and 2(7) or any other provision of the Act.

Another distinction which learned counsel for the respondent has drawn with regard to the finality of the determination of the Income-tax Officer under the proviso to s. 13 is this : he has said that where the Income-tax Officer determines that the method is unacceptable in the sense that income, profits and gains cannot be properly deduced therefrom, there is a deci-

sion; where, however, he does not so decide, there is no decision, and it is merely a case of non-exercise of power. This distinction learned counsel for the respondent has drawn in order to get over the anomaly that follows in holding that in one case the determination is final and in another case it is not so. We are not at all impressed by this distinction. For one thing the distinction is much too subtle, then again, looked at from the proper standpoint, a non-exercise of the power under the proviso is also a decision inasmuch as it amounts to an acceptance of the method of accounting on the ground that the income, profits and gains can be properly deduced therefrom. In the instant case the Income-tax Officer has looked into the accounts and the computation on the basis of the method employed has been adopted by him.

Lastly, it seems to us clear that the answer to the question is provided by the language of s. 31. As observed by Chagla C.J. in *M/s. Narrondas Manordass, Bombay* v. *Commissioner of Income-tax*(1), the language is wide enough to enable the Appellate Assistant Commissioner to "correct the Income-tax Officer not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the course of the assessment." We are unable to accept the argument that the proviso to s. 13 imposes a limitation on the powers of the Appellate Assistant Commissioner under s. 31. No doubt, the two sections must be read harmoniously; but s. 13 and its proviso contain no words of limitation or qualification upon the power of the Appellate Assistant Commissioner in enhancing the assessment or setting aside the assessment and directing a fresh assessment to be made by the Income-tax Officer. Dealing with the powers of the Appellate Assistant Commissioner Chagla C.J. in *Narrondas's case*(1) said

"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is

(1) [1957] 31 I.T.R. 909.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer." We are in agreement with these observations.

The substance of the matter as it appears to us is this : the proviso to s. 13 uses the expression "in the opinion of the Income-tax Officer" merely because, in the first instance, it will fall on the Income-tax Officer to determine after considering the method of accounting regularly employed whether income, profits and gains can be properly deduced therefrom, in the same way as any other question of fact has to be determined initially by the Income-tax Officer; the Legislature has not drawn any such nice distinction between objective and subjective determination as is sought to be made out by learned counsel for the respondent. Lastly, the proviso to s. 13 does not import any limitation on the power of the Appellate Assistant Commissioner under s. 31 and the latter section gives the Appellate Assistant Commissioner power to revise every process which leads to the ultimate computation or assessment.

Two other points also require notice at this stage. In the course of the arguments before us, a reference was made to s. 33B, which was inserted by the Income-tax and Business Profits Tax (Amendment) Act, 1948. There can be no doubt that, in view of the language used in s. 33B, the Commissioner of Income-tax may interfere with any order of the Income-tax Officer, including a determination under the proviso to s. 13, provided the other conditions of the section are fulfilled. Section 33B runs counter to the contention

that a determination under the proviso to s. 13 is a subjective determination or a determination of a *named* authority, which is inviolate in character. Any such construction as is contended for by the respondent will render this section nugatory.

The other point is this : assume that a determination under the proviso to s. 13 in favour of the assessee can be gone into by the Appellate Assistant Commissioner when the assessee prefers an appeal on some other ground, and assume also that the Appellate Assistant Commissioner can set aside the assessment if he finds that the Income-tax Officer has not applied his mind to the proviso or has wrongly held that from the method of accounting, the income, profits and gains can be properly deduced; what can he do then ? Can he act under the proviso himself and determine the question or must he only direct the Income-tax Officer to apply his mind afresh to the proviso ? On one side, there is the language of the proviso, and on the other the language of s. 31 which gives wide power to the Appellate Assistant Commissioner. At first sight, there may appear some conflict between the two. But on a closer scrutiny there is, we think, no conflict. As we have said before, the language of the proviso means only this that, in the first instance, the Income-tax Officer must form his own opinion as to whether the income, profits and gains can be properly deduced from the method of accounting regularly employed, if any; but if he fails to apply his mind to the proviso or comes to a wrong determination for or against the assessee in the computation of the income, the Appellate Assistant Commissioner can correct the error in computation, provided he has seizin of the assessment on an appeal filed by the assessee. If the assessee files no appeal, the Appellate Assistant Commissioner does not come into the picture, because the Revenue has no right of appeal from an assessment made by the Income-tax Officer. Whether in a particular case a remand will be the proper order or whether the error can be corrected by the Appellate Assistant Commissioner himself will depend on the circumstances of each case. If it be held that the Appellate Assistant Commissioner can only set aside

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

the assessment in such circumstances, an impossible result may follow. If the Appellate Assistant Commissioner holds that from the method of accounting the income, profits and gains cannot be properly deduced, let us assume that the only order he can pass is to set aside the assessment and direct the Income-tax Officer to make a fresh assessment. But if the opinion of the Income-tax Officer is the only opinion which determines the matter, the Income-tax Officer may adhere to his opinion. That will result in a deadlock. If the proviso to s. 13 does not impose any limitation on the power of the Appellate Assistant Commissioner, as we hold it does not, then the Appellate Assistant Commissioner has the power to correct the error in the way most suitable in the circumstances of the case, provided he acts within the ambit of his power under s. 31 of the Act. Section 31 (3) does not in terms say that the power to vary the assessment including the power to enhance it is subject to any limitation.

We have so far dealt with the questions at issue untrammelled by any authorities. We now turn to such authorities as have been placed before us. We take up first the decision in *K. F. Vakeel* v. *The Commissioner of Income-Tax*(1). The facts of that case were these : the assessee carried on a business of loading and unloading ships from January 1, 1943 to June 30, 1944. On July 1, 1944, the assessee entered into a partnership with his brother. The assessee maintained his accounts on the cash basis and his accounting year was the calendar year. For the calendar year 1943 he was assessed to Income-tax on his accounts which as stated were maintained on cash basis. On July 1, 1944, when the firm of the assessee and his brother came into existence the position was that there were outstandings to the extent of Rs. 2,13,306 and there were liabilities to the extent of Rs. 86,650. Between July 1 and December 31, 1944, the assessee recovered Rs. 2,02,209 and he discharged the liabilities to the extent of Rs. 86,650. Therefore, the nett amount that he realised between July 1 and December 31, 1944, was Rs. 1,15,559. It is this amount which

(1) I.T. Reference No. 21 of 1950.

was the subject-matter of the reference. The contention of the assessee was that as this amount was realised after he ceased to do business, it was a capital receipt which was not subject to tax. His further contention was that as he kept his accounts on cash basis, this amount could not be included in his accounts of the business done from January 1 to June 30, 1944, inasmuch as this amount was not realised during that period but was realised during a period subsequent to the period for which accounts were kept. When the matter went before the Appellate Assistant Commissioner, he took the view that the assessee continued to carry on the business till December 31, 1944; he also held that a sum of Rs. 2,13,306 was recovered from July 1 to December 31, 1944, and not a sum of Rs. 2,02,209 as alleged by the assessee. When the assessee appealed to the Tribunal from the decision of the Appellate Assistant Commissioner, his contention regarding the sum of Rs. 2,02,209 was upheld by the Tribunal. His contention with regard to the termination of his business was also upheld by the Tribunal and the Tribunal held that the business came to an end on June 30, 1944, and not on December 31, 1944. The assessee further contended before the Tribunal that the nett amount of Rs. 1,15,559 which he realised was a capital receipt and not a revenue receipt. The Tribunal came to the conclusion that the assessee should be assessed not on the cash basis but on the accrual basis and, according to the Tribunal, the sum of Rs. 1,15,559 had accrued to the assessee during the period of accounts, *viz.*, January 1, 1944, to June 30, 1944, and therefore it was subject to tax. The Tribunal took the view that it was not possible to discover the profits made by the assessee if the accounts were maintained on cash basis and therefore the proper method of accounting was the mercantile, that is, the accrual basis and not cash basis. The decision of the High Court was based on two grounds : first, the Tribunal was wrong in forming an opinion *suo motu* that the cash basis was not the proper basis from which income, profits and gains can be properly ascertained, because *it was not for the Tribunal to form an*

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

opinion on that question at all; secondly, there was nothing before the Tribunal which could justify it in coming to the conclusion that the Income-tax Officer was not in a position to deduce the income, profits and gains from the method of accounting adopted by the assessee. The actual decision can be easily supported on the second ground itself, because the Tribunal committed an error of law in coming to a finding *on no material or evidence.* Indeed, the learned Advocate-General appearing for the Revenue, conceded in that case that in view of the state of the record it was not possible for him to contend that the Tribunal's decision was correct and further the Tribunal was in error in holding that the assessee could be compelled to adopt the accrual basis in keeping his accounts and give up the cash basis which he had regularly maintained in the past. While, therefore, the actual decision in the case was undoubtedly correct we are unable to accept as correct the following further observations in connection with the first ground :

"But it is for the Income-tax Officer, who is the assessing officer, to be dissatisfied with the method of accounting regularly adopted by the assessee. If he found no difficulty in assessing the income, profits and gains from the method of accounting regularly adopted by the assessee, then it is not for any other authority to come to a different conclusion. It may be that if an opinion is formed by the Income-tax Officer that opinion may be subject to an appeal to the Appellate Assistant Commissioner or the Tribunal; but in the first instance an opinion has to be formed by the income-tax Officer as required by the proviso."

While we agree that, in the first instance, the Income-tax Officer as the *first* assessing officer has to form an opinion about the applicability of the proviso to s. 13, we do not agree that it is not open to any other authority, which is lawfully in seizin of the order of assessment of which the method of accounting under s. 13 is only a part, to come to a different conclusion with regard to the applicability of the proviso. Let us examine this point a little more closely. The Income-

tax Officer may proceed in one of three ways—(1) he may fail to apply his mind to the statutory duty imposed on him by s. 13 and its proviso and may accept the assessee's method of accounting without at all considering if (a) the method was regularly employed and (b) if the income, profits and gains of the assessee can be properly deduced therefrom; (2) he may apply his mind and decide in favour of the assessee that the method is both regular and acceptable (in the sense that income, profits and gains can be properly deduced therefrom); or (3) he may decide against the assessee and hold that the method is either not regularly employed or is unacceptable. In the first case, there is a failure to perform a statutory duty and it has not been seriously disputed that the appellate authority can direct the Income-tax Officer to perform that duty. This is supported by high authority to which we shall presently refer. In the third case, it is conceded that the appellate authority can interfere and set aside the opinion or determination of the Income-tax Officer, and in doing so the appellate authority must form his opinion if the method of accounting is proper and acceptable. The dispute or divergence of opinion relates only to the *second* case and to a part of it only, because it is not disputed that the finding as to whether the method of accounting is regularly employed or not is an objective determination which the appellate authority can revise. Both the Appellate Assistant Commissioner and the Appellate Tribunal have wide powers to go into questions of fact and law, the Appellate Assistant Commissioner under s. 31(3) and the Appellate Tribunal under s. 33(4). Even the Commissioner can revise an order of the Income-tax Officer under s. 33B in certain circumstances stated therein. We see no justification for holding that these powers, so widely expressed by the statute, become ineffective in one particular case only, namely, when the determination or opinion is in favour of the assessee as respects the propriety of the method of accounting. It is true that the Revenue has no right of appeal under s. 30, but that it not a decisive circumstance. The assessee can make any

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

order of assessment by the Income-tax Officer final by not appealing therefrom—whether the order is based on a subjective or objective determination. The point is not what happens when there is no appeal; but the point is when the appellate authority is lawfully in seizin of the matter, what powers it can exercise.

We are, therefore, of the view that though *Vakeel's case* (1) was rightly decided, some of the reasons given in support of the decision are not correct in law.

Next comes the decision of the Punjab High Court in *Oriental Building and Furnishing Company* v. *Commissioner of Income-tax*(2) where a view contrary to that of the Bombay High Court was taken. Though we hold that the conclusion arrived at in this decision is correct, there is no detailed discussion in the judgment of the issues involved, except the bare statement that the powers of the Appellate Tribunal under s. 33 are very wide.

Apart from the aforesaid two decisions which directly bear on the question under our consideration, there are some other decisions which have an indirect but not a decisive bearing on the question. First, in order of priority, is the decision of the Privy Council in *Commissioner of Income-tax* v. *Sarangpur Cotton Manufacturing Co. Ltd.*(3). In that case, the assessees had for years past adopted regularly the method of valuation of stocks by taking some price well below both cost and market price and they followed this method in the relevant accounting year. The object of this striking under-valuation was the creation of a "secret reserve" which involved the retention of profits so as not to be included in the profits shown to the shareholders by the profit and loss account and the balance sheet, but which constituted part of the taxable profits. The Income-tax Officer, without applying his mind to the question whether the true profits could be deduced from the method of accounting regularly employed by the assessees, accepted the accounts and held the assessees bound by the figure of profit shown in the accounts. The Privy Council held

(1) I.T. Reference No. 21 of 1950, Bombay High Court.
(2) [1952] 21 I.T.R. 105 (3) [1938] 6 I.T.R. 36.

that the profit shown in the profit and loss account and the balance sheet was not the true figure for income-tax purposes and the Income-tax Officer could not reasonably conclude that the true profits could be properly deduced from a gross under-valuation. It is clear from the decision that their Lordships proceeded on the footing that the Income-tax Officer had failed to perform the statutory duty imposed on him; they amended the question accordingly, answered it in the negative, and directed that it would be for the Income-tax Officer to proceed to the proper discharge of his duty under s. 13. The decision is clear authority for the view that where there has been a failure to perform the statutory duty imposed on the Income-tax Officer under s. 13 of the Act, his order is liable to be set aside, even though he may have accepted the accounts and held the assessee bound by the figure of profit shown in the accounts.

There are a number of decisions where it has been held that an order of the Income-tax Officer under the proviso to s. 13 against an assessee is liable to be set aside on appeal. We need only mention some of them here: see *Lala Sarju Prasad In re*(1); *Pearey Lal Shukla of Cownpore In re*(2); and *Commissioner of Income-Tax* v. *Kameshwar Singh of Darbhanga*(3). In these cases, it was held that the determination of the Income-tax Officer under the proviso to s. 13 did not exempt his computation from examination on appeal, and the Appellate Assistant Commissioner had jurisdiction, in an appeal against an assessment under the proviso to s. 13, to substitute a different method of computation.

Lastly, we refer to a few only of the decisions in which the power of the Appellate Assistant Commissioner under s. 31 has been held to be confined to the subject-matter of the assessment appealed against, so that he has no power to enhance the assessment by assessing new sources of income : *Jagarnath Therani* v. *Commissioner of Income-Tax* (4); *Gajalakshmi*

(1) [1943] 11 I.T.R. 525.
(2) [1942] 10 I.T.R. 239.
(3) A.I.R. 1933 P.C. 108.
(4) [1925] 2 I.T.C. 4.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

S. K. Das J.

Ginning Factory v. *Commissioner of Income-Tax*(1) *Chowdhury Sharafat Hussain* v. *Commissioner of Income-tax*(2). We do not think that these decisions touch the question at issue before us. The present is not a case where the Appellate Assistant Commissioner has travelled outside the ambit of his jurisdiction under s. 31 of the Act.

For the reasons given above, we would answer question No. 1 in the affirmative. As to question No. 2, only a few words are necessary. Rule 33 of the Indian Income-tax Rules, 1922, is in these terms:

"33. In any case in which the Income-tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purpose of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income-tax Officer may deem suitable."

A similar expression occurs in the rule:—"In any case in which the Income-tax Officer is of opinion etc.". For the same reasons which we have given with regard to question No. 1, the answer to question No. 2 is also in the affirmative.

The appeal must, therefore, be allowed; the judgment and order of the High Court of Bombay dated

(1) [1952] 22 I.T.R. 502.
(2) [1956] 29 I.T.R. 759.

March 4, 1953, is set aside and the two questions referred to the said High Court are answered in favour of the Revenue. In view of the difficulty of interpretation and the divergence of opinion as respects the questions of law involved, we think that the parties must bear their own costs throughout.

BHAGWATI J.—This appeal with special leave from the judgment and order of the High Court of Judicature at Bombay raises an interesting question as to whether the power under the proviso to s. 13 of the Indian Income-tax Act (Act XI of 1922) hereinafter referred to as "the Act" of rejecting the method of accounting regularly employed by the assessee can be exercised by the Appellate Assistant Commissioner while hearing an appeal of the assessee under s. 31 of the Act, if the Income-tax Officer had not done so in the first instance.

The respondent is a limited company registered in England having its registered office at St. Martin Street, London. In India it has its branches at Calcutta, Bombay and Madras. The respondent publishes as well as sells books and magazines in various parts of the world. The Head Office and branches outside India invoice publications to the Indian branches not at cost but at a valuation which is 25% of the marked price for sterling publications and 30% of the marked price for currency publications. For the purposes of computing the profits of its Indian branches, the respondent takes the said valuation as the cost of the publications.

For the assessment year 1944-45 the respondent was assessed under the Act as a non-resident company. Its year of account ended on April 30, 1943. In submitting its return of income for the said assessment year 1944-45 and in the assessment proceedings before the Income-tax Officer for that year, the respondent took the aforesaid invoice value as representing the cost of the books produced by it. The business income returned by the respondent was Rs. 79,131. By his assessment order dated March 24, 1945, the Income-tax Officer accepted the method of accounting employed by the respondent and its books of account

1957

The Commissioner of Income-Tax
v.
M/s. McMillan & Co.

Bhagwati J.

for the Indian business. He, however, added back certain items of expenses shown in the respondent's balance-sheet and profit and loss account and computed the income at Rs. 82,623 and disallowed the respondent's claim for a bad debt of Rs. 3,592.

The respondent appealed against the said disallowance to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner allowed the respondent's claim for bad debt. He was, however, of the view that the assessee's method of accounting, *viz.*, taking the aforesaid invoice value as representing the respondent's actual cost of production was such that the respondent's profits could not be properly deduced therefrom and issued notice to the respondent under the first proviso to s. 31(3) of the Act, calling upon the respondent to show cause why its assessment should not be enhanced. After hearing the respondent the Appellate Assistant Commissioner made an order dated November 10, 1948, calculating the Indian business profits of the respondent on an amount which bore the same proportion to the net world profits of the respondent's business as the Indian turnover bore to the world turnover and enhanced the Indian business income of the respondent by Rs. 1,11,616.

The respondent preferred an appeal to the Income-tax Appellate Tribunal against this order of the Appellate Assistant Commissioner and contended *inter alia* that the Appellate Assistant Commissioner had no jurisdiction to discard the respondent's method of accounting and re-computing the respondent's Indian business profits in the manner he had purported to do and that in any event for the reasons mentioned by the respondent the margin of net world profits could not be applied to the Indian business. By its order dated April 29, 1950, the Tribunal remanded the case to the Appellate Assistant Commissioner with a direction that he should allow the respondent to prove the actual cost of the goods invoiced to and sold in India.

The Appellate Assistant Commissioner submitted his remand report in due course. In the meanwhile, however, the High Court had delivered its judgment

in *K. F. Vakeel* v. *The Commissioner of Income-tax*(1) to the effect that no authority other than the Income-tax Officer had jurisdiction to act under the proviso to s. 13 of the Act.

Relying upon that judgment, the respondent raised two contentions before the Tribunal and they were (a) that it was not competent to the Appellate Assistant Commissioner on appeal to reject the respondent's method of accounting which had been accepted by the Income-tax Officer and (b) that it was not competent to the Appellate Assistant Commissioner on appeal to compute the Indian business profits of the respondent under r. 33 of the Indian Income-tax Rules, the Income-tax Officer not having done so. The Tribunal accepted these contentions of the respondent and by its order dated October 16, 1951, allowed the appeal.

At the instance of the appellant, the Tribunal stated a case and referred the following questions of law to the High Court for its opinion under s. 66(1) of the Act:

"(1) Whether it is open to an Appellate Assistant Commissioner on appeal to reject the assessee's books of account, which have been accepted by the Income-tax Officer ?

(2) Whether it is open to an Appellate Assistant Commissioner on appeal to invoke the provisions of Rule 33 of the Indian Income-tax Rules for the purposes of computing the income of a non-resident, the Income-tax Officer not having done so ?

(3) Whether it is open to an Appellate Assistant Commissioner on appeal to enhance an assessment in exercise of the powers conferred upon him by section 31(3) of the Indian Income-tax Act, where as a result of definite information he is of opinion that the income of the assessee has been under-assessed ?"

The said reference was heard by the High Court on March 4, 1953, and the High Court following its own decision in *K. F. Vakeel's case, (supra)*, answered the referred questions Nos. 1 & 2 in the negative and stated that the referred question No. 3 did not arise.

(1) I.T. Reference No. 21 of 1950, Bombay High Court.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

The appellant applied to the High Court for a certificate of fitness to appeal to this Court under section 66A(2) of the Act but without success. The appellant thereupon applied for and obtained from this Court special leave to appeal under Art. 136 of the Constitution.

The provisions of the Act and the rules framed thereunder that fall to be considered in this appeal are the following:

"*Section* 13 : *'Method of Accounting'* :

Income, profits and gains shall be computed for the purpose of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee :

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine.

Section 31 : *Hearing of Appeal*:

. . . . . .

(3) In disposing of an appeal, the Appellate Assistant Commissioner may, in the case of an order of assessment :

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income-tax Officer to make fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment. . . . . .

. . . . . .

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement;. . . . . .

. . . . . .

Rule 33 of the Indian Income-tax Rules, 1922 :

"In any case in which the Income-tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income-tax Officer may deem suitable."

It is contended by the learned Solicitor-General for the appellant that even though no right of appeal is conferred upon the Revenue against an assessment order made by the Income-tax Officer, once the assessee carries an appeal before the Appellate Assistant Commissioner the assessment order is wholly robbed of its finality and the whole of the assessment is at large before the Appellate Assistant Commissioner with the result that it is then open to the Revenue to urge all the contentions which it could have done before the Income-tax Officer and ask the Appellate Assistant Commissioner to re-open the whole enquiry and, in effect, re-assess the assessee and even enhance the assessment, provided of course, that the Appellate Assistant Commissioner shall not enhance the assessment unless and until he has afforded the assessee a reasonable opportunity of showing cause against such enhancement. It is further contended that the powers which the Appellate Assistant Commissioner thus

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

exercises are not circumscribed by any limitations and are unfettered and in the exercise of such powers it is competent to the Appellate Assistant Commissioner also to reject the method of accounting regularly employed by the assessee even though the Income-tax Officer had not done so provided he, the Appellate Assistant Commissioner, is of the opinion that the method of accounting employed is such that the income, profits and gains cannot properly be deduced therefrom and in that event the Appellate Assistant Commissioner is also entitled to adopt the mode of computation of the income prescribed by r. 33 of the Indian Income-tax Rules.

It is, on the other hand, contended by the learned counsel for the respondent that the determination whether the method of accounting regularly employed by the assessee is such that the income, profits and gains cannot properly be deduced therefrom is within the exclusive province of the named authority, *viz.*, the Income-tax Officer and such determination by the named authority is the condition precedent to a certain consequence following thereupon, *viz.*, the rejection of the method of accounting regularly employed by the assessee. Such determination then cannot be substituted by that of another authority, though while entertaining an appeal at the instance of the assessee such authority might consider whether the named authority has correctly determined the question. Once the named authority has determined that the case does not fall within the proviso, no other authority has jurisdiction to determine that question and the main provision of s. 13 operates and the income, profits and gains of the assessee can only be computed for the purpose of ss. 10 and 12 in accordance with the method of accounting regularly employed by the assessee. Not only is the Income-tax Officer bound in such a case to compute the income, profits and gains in accordance therewith by reason of the mandate contained in the main provision of s. 13 but the Appellate Assistant Commissioner also is similarly bound and the terms of s. 31(3) which gives the Appellate

Assistant Commissioner power even to enhance the assessment cannot be construed as abrogating or setting at naught the imperative terms of s. 13 and the proviso thereto which vest such power only in the named authority and no other.

There is paucity of authority on the construction of s. 13 of the Act. The High Court in deciding the reference in question relied upon an unreported judgment of its own delivered on October 11, 1950, in *K. F. Vakeel* v. *The Commissioner of Income-tax and E. P. Tax*(1). In that case the Tribunal for the first time came to the conclusion that it was not possible to discover the profits made by the assessee if the accounts were maintained on cash basis and therefore the proper method of accounting was the mercantile, *i.e.*, the accrual basis and not the cash basis, even though the Income-tax Officer had accepted the method of accounting regularly employed by the assessee and the Appellate Assistant Commissioner had concurred in the same. The question that arose before the High Court was whether the Tribunal had jurisdiction to do so. The High Court construed the provisions of s. 13 of the Act and was of opinion that :

".....it is for the Income-tax Officer to form the opinion that income, profits and gains cannot properly be deduced from the method adopted by the assessee and if such an opinion is formed by the Income-tax Officer then the computation of income, profits and gains has to be made upon such basis and in such manner as the Income-tax Officer may determine. But it is for the Income-tax Officer, who is the assessing officer, to be dissatisfied with the method of accounting regularly adopted by the assessee. If he found no difficulty in assessing the income, profits and gains from the method of accounting regularly adopted by the assessee then it is not for any other authority to come to a different conclusion. It may be that if an opinion is formed by the Income-tax Officer that opinion may be subject to an appeal to the Appellate Assistant Commissioner or the Tribunal; but in the first instance an opinion has to be formed by the Income-tax Officer as required by the proviso."

(1) I.T. Reference No. 21 of 1950, Bombay High Court.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

On the facts of the case before it, no opinion had been formed by the Income-tax Officer that the method of accounting regularly employed by the assessee was not satisfactory. It was the Tribunal that *suo motu* came to the conclusion that cash basis was not the proper basis from which income, profits and gains could be properly deduced. The High Court was of opinion that the Tribunal was clearly wrong in forming that opinion, forgetting that it was not for it to form an opinion on that question at all. The Tribunal had vested in it the appellate powers and those powers could only be exercised on the opinion formed by the Income-tax Officer. There was nothing before it which could justify it in coming to the conclusion that the Income-tax Officer was not in a position to deduce the income, profits and gains from the method of accounting regularly employed by the assessee or that the Income-tax Officer had formed any opinion whatever on that question. The High Court accordingly set aside the decision of the Tribunal on this point.

As against this decision of the High Court of Bombay, the appellant relied upon a decision of the Punjab High Court at Simla in *Oriental Building and Furnishing Co.* v. *Commissioner of Income-tax, Delhi*(1). In that case the Income-tax Officer while acting under s. 13 read with s. 23(3) of the Act had made certain disallowance which was reduced on appeal by the Appellate Assistant Commissioned. The Department went up in appeal against the order passed by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal upon examining the assessee's method of accounting and the records placed before the Income-tax Authorities came to the conclusion that the basis of computation adopted by the Income-tax Authorities was faulty and the account books did not reflect the correct account of the assessee. It accordingly computed the income of the assessee under the proviso to s. 13 of the Act and the question which arose for the consideration of the Court was whether the Tribunal had jurisdiction to do so. The High Court was of opinion that (1) the Tribunal's

(1 [1952] 21 I.T.R. 105.

power of dealing with an order passed by an Appellate Assistant Commissioner was plenary and had been expressed in s. 33(4) of the Act as widely as could be conceived and (2) in an appeal under s. 33 the Tribunal was competent to decide facts as well as law and possessed authority to substitute its own order of assessment for the order under appeal.

These are the only two decisions bearing on the construction of the proviso to s. 13 of the Act and dealing with the question whether the Appellate Assistant Commissioner or the Income-tax Appellate Tribunal as the case may be, could for the first time exercise the power of rejecting the method of accounting regularly employed by the assessee while entertaining appeals, if the Income-tax Officer had not done so in the first instance. Whereas the High Court of Bombay took the view that they were not competent to do so, the High Court of Punjab took the view that there being no limitation on the power to be exercised by the Tribunal, it could while exercising the appellate powers decide facts as well as law and substitute its own order of assessment for the order under appeal.

Not much help can be derived from the reasoning adopted by the High Court of Punjab, though the High Court of Bombay appears to have applied its mind to the terms of the proviso to s. 13 of the Act and stated that it was for the Income-tax Officer, who was the assessing Officer, to be dissatisfied with the method of accounting regularly employed by the assessee. If he found no difficulty in assessing the income, profits and gains from the method of accounting regularly employed by the assessee, then it is not for any other authority to come to a different conclusion. The Income-tax Officer is really the authority entrusted under the Act with the duty of computing the income, profits and gains of the assessee under the relevant provisions of the Act. It is for him to form an opinion whether the method of accounting regularly employed by the assessee is such that the income, profits and gains cannot properly be deduced therefrom and it is only if he forms such an opinion that the proviso comes into operation and the computation of the

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

income, profits and gains of the assessee is to be made upon such basis and in such manner as the Income-tax Officer may determine.

The appellant also referred to a decision of the High Court of Allahabad in *Pearey Lal Shukla of Cawnpore, In re*(1) where it was held that the basis and manner of assessment applied by the Income-tax Officer under the proviso to s. 13 of the Act was liable to interference on appeal by the Assistant Commissioner and the Commissioner. This decision however throws no light on the question which arises for determination in this appeal for the simple reason that it proceeds on the basis that the Income-tax Officer has formed an opinion that the method of accounting regularly employed by the assessee is such that the income, profits and gains cannot properly be deduced therefrom and the proviso having come into operation the computation of the income has to be made upon such basis and in such manner as the Income-tax Officer may determine. The basis and manner thus adopted by the Income-tax Officer can be examined on appeal by the Appellate Assistant Commissioner or the Commissioner while exercising the appellate powers vested in them under the Act. This case is no authority for the proposition that the power of rejection of the method of accounting regularly employed by the assessee can also be exercised by the Appellate Assistant Commissioner or the Commissioner concerned while entertaining an appeal by the assessee against the order of the Income-tax Officer.

There is, however, a decision of the Privy Council in *Commissioner of Income-tax, Bombay* v. *Sarangpur Cotton Manufacturing Co., Ltd.*(2) which throws some light on the construction of s. 13 and the nature and scope of the power to be exercised by the Income-tax Officer under the proviso thereto. The assessees in that case had employed a regular method of accounting but had also for some years past adopted regularly a method of valuation of stock by taking some price under both cost and market price with the object of creating a "secret" reserve, which involved

(1) [1942] 10 I.T.R. 239. (2) [1938] 6 I.T.R. 36.

the retention of profits as not to be included in the profits shown to the shareholders. The assessees submitted their profit and loss account showing a profit of Rs. 2,64,086 and a return of the total income of the company showing an income of Rs. 1,99,086 which was arrived at by taking into account the result of under-valuation of stock which the company had adopted in the previous years. The Income-tax Officer, without considering whether the true income could be arrived at from the method of accounting employed by the assessees held that the assessees were bound by the profits shown in the balance-sheet. On appeal by the assessee the Appellate Assistant Commissioner confirmed the assessment and the assessees then applied to the Commissioner of Income-tax, Bombay, to review the said order under s. 33 of the Act, or in the alternative, to make a reference of the questions of law to the High Court under s. 66(2) of the Act. The Commissioner declined to review the order and also to make the reference. Thereupon, the High Court on an application made by the assessees under s. 66(3) of the Act required the Commissioner to make a reference and he accordingly made the reference in question. The High Court amended the referred question as follows :

"Whether in the circumstances of the case the Income-tax Officer was entitled to compute the income, profits and gains of the assessees upon the basis of the printed copy of the profit and loss account sent with the letter of the assessees of July 18, 1931, without regard to any under-valuation of the stock which may have been or may be proved to have been made."

The High Court was of opinion that the covering letter formed part of the method of accounting employed by the assessees within the meaning of s. 13 of the Act and that the Income-tax Officer was not entitled to split up the method of accounting and to regard the profit and loss account apart from the covering letter; that the Income-tax Officer had only accepted a portion of the method, without taking the method as a whole, which he was not entitled to do. It, therefore, held that the matter was still at large for

1957

The Commissioner of Income-Tax v M/s. McMillan & Co.

Bhagwati J.

the proper decision of the Income-tax Officer and accordingly answered the amended question in the negative. The Commissioner of Income-tax then carried an appeal to the Privy Council and their Lordships found themselves unable to agree with the view of the High Court as to the meaning of s. 13 of the Act and they were of the opinion that the section related to a method of accounting regularly employed by the assessee for his own purpose and did not relate to a method of making up the statutory return for assessment to income-tax. Secondly, the section clearly made such a method of accounting a compulsory basis of computation unless in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom. The duty of the Income-tax Officer was to determine whether it was possible to deduce the true profits from the account and the judgment of the Income-tax Officer under the proviso must be properly exercised. Their Lordships laid it down that it is the duty of the Income-tax Officer where there is a method of accounting regularly employed by the assessee not to *prima facie* accept the profits and gains shown by the assessee but to consider whether the income, profits and gains can properly be deduced therefrom and to proceed according to his judgment on the question. On the facts of the case before them their Lordships were of the opinion that the Income-tax Officer acted on the same view as that expressed by the Appellate Assistant Commissioner, and did not perform the duty above stated. In so far as the facts showed that the method of accounting regularly employed by the assessees did not show the true income, profits or gains, the question was further amended by them as follows :

"Whether in view of the provisions of Sec. 13 of the Income-tax Act or otherwise, the Income-tax Officer was right in computing for the purpose of Sec. 10 of that Act, the income, profits and gains in accordance with the method of accounting regularly employed by the assessee when that method in fact does not show the true income, profits and gains" and was answered in the negative.

Their Lordships further observed that it would then be for the Income-tax Officer to proceed to the proper discharge of his duty under s. 13 in the light of the opinion therein expressed and reach a proper decision with reference thereto.

This case discards the view that it is *prima facie* duty of the Income-tax Officer concerned to accept the profits shown by the assessee's accounts where there is a method of accounting regularly employed by the assessee and it lays down that it is his duty where there is such a method of accounting to consider whether the income, profits and gains can be properly deduced therefrom. It is incumbent on the Income-tax Officer to come to a determination on that question and if he forms the opinion that the method of accounting is such that the income, profits and gains of the assessee cannot properly be deduced therefrom he is bound to reject such method of accounting and make a computation upon such basis and in such manner as he may determine. The Income-tax Officer has to apply his mind to this aspect of the question and come to his own determination in that behalf and if he does not do so and merely accepts the profits shown by the accounts even though in fact the method of accounting regularly employed by the assessee does not show the true income, profits and gains, he is in error and his action in thus accepting the method of accounting is liable to be set aside at the instance of the higher Tribunal. This leaves open however the question whether if the higher Tribunal comes to that conclusion, it will be open to the higher Tribunal to substitute its opinion for that of the Income-tax Officer concerned and proceed to assess the assessees applying the proviso to s. 13 of the Act. Their Lordships of the Privy Council in the case before them did not do anything of the kind and observed that it would be then for the Income-tax Officer himself to proceed to the proper discharge of his duty under s. 13 of the Act in the light of the opinion expressed in their judgment. They did not send back the case either to the Commissioner of Income-tax, Bombay or to the Assistant

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

Commissioner of Income-tax but after having answered the amended question in the negative simply stated that the Income-tax Officer would doubtless proceed to reach a proper decision in behalf of the applicability of the proviso to s. 13 of the Act having regard to his experience in the preceding years of assessment. They neither left that duty to be performed by the Commissioner of Income-tax nor by the Assistant Commissioner of Income-tax but referred the performance of that duty to the proper authority who was the Income-tax Officer who alone was invested with the duty of performing it under the terms of the proviso to s. 13 of the Act.

Certain decisions bearing on the interpretation of s. 33B of the Act were referred to in this context and reliance was placed on certain observations contained therein in regard to the powers vested in the Appellate Assistant Commissioner while hearing appeals filed before him by the assessee. (*Vide Commissioner of Income-tax* v. *Tejaji Farasram Kharawala*(1); *Commissioner of Income-tax* v. *Amritlal Bhogilal & Co.*,(2) and *Smt. Durgabatti and Smt. Narmadabala Gupta* v. *Commissioner of Income-tax, Bihar and Orissa* (3).

It may be remembered that the Revenue has not been given any right of appeal before the Appellate Assistant Commissioner against the assessment order passed by the Income-tax Officer. It is only the assessee who has such a right conferred upon him under s. 30 of the Act. When the Appellate Assistant Commissioner however hears such appeal though at the instance of the assessee, the Income-tax Officer is given the right to be heard, either in person or by a representative, who appears before the Appellate Assistant Commissioner to justify the assessment order passed by him. The Legislature in its wisdom has not given a substantive right to the Revenue to carry an appeal against the order of the Income-tax Officer. The decision of the Income-tax Officer is *qua* the Revenue invested with a finality and the Income-tax Officer is not regarded as a party aggrieved against

(1) [1953] 23 I.T.R. 412.
(2) [1953] 23 I.T.R. 420.
(3) [1956] 30 I.T.R. 101.

his own decision. He in fact represents the Revenue and there is no question therefore of his ever being able to question his own decision which is considered to all intents and purposes a proper decision given by him having regard to all the circumstances of the case. The assessee is the only person who is given the right of appeal against the decision of the Income-tax Officer. If the assessee does not choose to exercise this right of appeal, the decision of the Income-tax Officer acquires a finality both *qua* the Revenue and himself but if the assessee chooses to exercise the same, the appeal is heard by the Appellate Assistant Commissioner. The Income-tax Officer is as aforestated, then given the right to be heard either in person or by a representative. There also the contest is between the Revenue on the one hand and the assessee on the other. The powers which are vested in the Appellate Assistant Commissioner while hearing such appeals are statutory powers conferred upon him by s. 31 of the Act and in the exercise of these powers the Appellate Assistant Commissioner may in the case of an order of assessment (a) confirm, reduce, enhance or annul the assessment, or (b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment. If the Appellate Assistant Commissioner chooses to exercise the powers conferred upon him under the first alternative and enhance the assessment he is enjoined by the proviso to s. 31(3) of the Act to give to the Appellant a reasonable opportunity of showing cause against such enhancement. There are no doubt limitations grafted on this power of the Appellate Assistant Commissioner but these limitations have to be found from the very nature of the proceedings themselves. These limitations will be indicated at the appropriate place hereafter.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

The High Court of Bombay no doubt expressed the opinion in the *Commissioner of Income-tax* v. *Amritlal Bhogilal & Co.*(1) :

"As pointed out in the last reference, the object of enacting section 33B was to confer a power upon the Commissioner in the interest of revenue to revise orders of the Income-tax Officer which could not be revised under any circumstances if the assessee did not appeal from those orders. However erroneous the order of the Income-tax Officer may be, however prejudicial to the Revenue, the assessee by refusing to exercise his right of appeal could make that order conclusive. In order to fill up this obvious lacuna the Legislature enacted Section 33B. But once the assessee has appealed, there is no difficulty whatsoever in the way of the department in agitating any question before the Appellate Assistant Commissioner which in its opinion should be agitated and decided in the interest of public revenue. Now, it is clear that when an appeal is pending before the Appellate Assistant Commissioner, the Income-tax Officer has the right to be heard either in person or by a representative, and the very point which the Commissioner has taken and on which he has given his decision under section 33B could have been urged under the directions of the Commissioner before the Appellate Assistant Commissioner. It is only when no remedy is open to the Commissioner to revise the order of the Income-tax Officer that this jurisdiction under section 33B arises. But when a legal remedy is given to him to get the orders of the Income-tax Officer revised, he cannot requisition to his aid the power conferred upon him under section 33B. Once the appeal with regard to the year 1949-50 was pending before the Appellate Assistant Commissioner, the Commissioner was given the full right to get the order of the Income-tax Officer revised in any manner he thought necessary in the interest of public revenue."

These are however observations only with regard to the construction of s. 33B of the Act and do not throw any light on the nature and scope of the powers

(1) [1953] 23 I.T.R. 420.

vested in the Appellate Assistant Commissioner under s. 31 of the Act, much less do they throw any light on the nature and scope of the power vested in express terms in the Income-tax Officer under the proviso to s. 13 of the Act of rejecting the method of accounting regularly employed by the assessee if in his opinion the method of accounting is such that the income, profits and gains cannot properly be deduced therefrom. This decision does not help the appellant in its contention that if the Income-tax Officer has not in fact done so it will be open to the Appellate Assistant Commissioner while hearing an appeal filed before him by the assessee to exercise such power in the first instance.

The position contended for by the appellant as emerging from the decision of the High Court of Bombay just referred to is contrary to the one which was enunciated by the learned judges of the High Court of Bombay in *K. F. Vakeel's Case* (*supra*). I am clearly of the opinion that the learned judges of the High Court of Bombay did not intend to lay down any such position.

In fact, in the later unreported decision of theirs in *M/s. Narrondas Manordass, Bombay* v. *The Commissioner of Income-tax, Bombay* (1) the learned judges of the High Court of Bombay laid down that however wide in terms the powers conferred upon the Appellate Assistant Commissioner under s. 31 of the Act may have been worded, they are not absolute but are circumscribed by the very nature of the proceedings themselves. The learned judges in that context observed :

"Now, in order to understand what the competence of the Appellate Assistant Commissioner is and what are the powers conferred upon the Appellate Assistant Commissioner, it is necessary to bear in mind certain salient facts. It is only the assessee who has a right conferred upon him to prefer an appeal against the order of assessment, passed by the Income-tax Officer. If the assessee does not choose to appeal, the order of assessment becomes final subject to any power

(1) [1957] 31 I.T.R. 909.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

of revision that the Commissioner might have under s. 33B of the Income-tax Act. Therefore, it would be wholly erroneous to try and compare the powers of the Appellate Assistant Commissioner with the powers possessed by a Court of Appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal in the sense in which that expression is understood in the Civil Procedure Code. It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party, and in view of this peculiar position occupied by the Appellate Assistant Commissioner, the Legislature, as we shall presently point out, has conferred very wide powers upon the Appellate Assistant Commissioner once an appeal is preferred to him by the assessee. If the assessee chooses to remain content with the order of the Income-tax Officer there is nothing that the Appellate Assistant Commissioner can do, however erroneous the assessment may be; but if the assessment is opened up by the action of the assessee himself, then the powers conferred upon the Appellate Assistant Commissioner are much wider than the powers of an ordinary Court of Appeal. The statute provides that once an assessment comes before the Appellate Assistant Commissioner his competence is not restricted to examining those aspects of the assessment which are complained of by the assessee; his competence ranges over the whole assessment and it is open to him to correct the Income-tax Officer not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the course of assessment.

.....

"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decision of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the

sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer."

The learned judges then cited with approval the observations of the Patna High Court in *Jagarnath Therani* v. *Commissioner of Income-tax*(1) :

"Now this section [section 31(3)] relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must, in my opinion, be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment, and, for all the reasons advanced by the appellant, is in my opinion, not entitled to assess new sources of income."

the observations of the High Court of Madras in *Gajalakshmi Ginning Factory* v. *Commissioner of Income-tax*(2) (approved by the Patna High Court in *Bishwanath Prasad Bhagwat Prasad* v. *Commissioner of Income-tax*(3) at p. 758) :

"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer."

and their own observations in an unreported judgment of theirs in *Sharrif Jima & Co. Ltd., Mombassa* v. *Commissioner of Income-tax, Bombay City*(4) :

"When the Appellate Assistant Commissioner exercises his power of enhancement, he is dealing with

(1) [1925] 2 I.T.C. 4, 8.
(2) [1952] 22 I.T.R. 502, 510.
(3) [1956] 29 I.T.R. 748.
(4) I.T. Reference No. 10 of 1950, Bombay High Court.

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

the subject-matter of appeal before him, and enhancement is confined to the sources or items in respect of which the assessment has been made by the Income-tax Officer."

After considering the various authorities cited above the learned judges finally came to the conclusion :

"We do not think it can be seriously disputed that those powers, are very wide and unfettered, but the only question before us is whether there is any limitation upon those powers, and if there is any limitation upon those powers, what is the nature and character of the limitation. It is not as if the Appellate Assistant Commissioner has completely unqualified powers; his powers are limited to the subject-matter of the assessment and we have attempted to define what the subject-matter of the assessment is."

It follows from the above that even though the powers of the Appellate Assistant Commissioner in the matter of enhancement of the assessment provided in s. 31(3) of the Act are not circumscribed by any limitation thereupon and are as wide as wide can be, there are well-recognized limitations on the same, one of which has been rightly accepted by the learned judges of the High Court of Bombay in their unreported decision above referred to. It now remains to consider whether there is any other limitation on such powers of the Appellate Assistant Commissioner to be found in the provisions of s. 13 of the Act and the proviso thereto.

It is clear that not much light is thrown on this question by the authorities directly bearing on the construction of s. 13 of the Act above referred to except the observations of the learned judges of the High Court of Bombay in *K. F. Vakeel's Case* (*supra*). This judgment of the learned judges of the High Court of Bombay has not been dissented from either in Bombay or elsewhere and stands unchallenged and would *prima facie* go to establish the position canvassed before us by the assessee that it is the Income-tax Officer and the Income-tax Officer alone who is invested with the power to determine whether the method of accounting employed by the assessee is such that

the income, profits and gains of the assessee cannot properly be deduced therefrom.

Not much help can be derived also from the comparison of the various provisions of the Act where the Income-tax Officer is vested with the power of arriving at the determinations on his own, *viz.*, Section 4A (a)(iv), s. 10(5), s. 12B(2), s. 22(2), s. 22(4), s. 23(2), s. 23A, s. 34 and s. 42(2) or where there are several authorities named besides the Income-tax Officer for arriving at determinations of the relative questions, *viz.*, s. 28 (1) and (2), s. 37, s. 38, s. 48, and s. 49E of the Act with the provisions contained in s. 13 and the proviso thereto. It is not necessary to probe into the reasons for the enactment of these several provisions by the Legislature in the manner therein stated. It is sufficient for the present purpose to scrutinise the provisions of s. 13 itself and reach a conclusion on the express terms thereof.

Turning then to the provisions of s. 13 itself, one finds that the main provision thereof enacts the rule that income, profits and gains shall be computed for the purpose of ss. 10 and 12 in accordance with the method of accounting regularly employed by the assessee. If the matter stood there the imperative character of this provision would entail upon the Income-tax Officer and upon all the income-tax authorities in the hierarchy to accept that method of accounting for the computation of income, profits and gains of the assessee for the purpose of ss. 10 and 12 of the Act.

This method of accounting though regularly employed by the assessee is however not invested with a sacrosanct character and is subject to the proviso enacted in s. 13 and it is that if no method of accounting has been regularly employed or if the method employed is such that *in the opinion of the Income-tax Officer* the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. Two conditions are thus attached to the rejection of the method of accounting regularly employed by the assessee and they are

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

expressed in different phraseology: (i) if no method of accounting has been regularly employed; and (ii) if the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom. It is to be noted that these two conditions are couched in quite different terms. In the case of the first condition, the mere fact of no method of accounting having been regularly employed is enough to bring the proviso into operation but in the case of the second condition the Income-tax Officer has to form an opinion that the method of accounting is such that the income, profits and gains cannot properly be deduced therefrom before the proviso can ever come into operation. The determination of the Income-tax Officer concerned to that effect is the condition of the rejection by him of the method of accounting regularly employed by the assessee and unless and until he comes to that conclusion he cannot reject the same and compute the income, profits and gains of the assessee upon such basis and in such manner as he may determine. The difference in the language of these two conditions is advisedly adopted by the Legislature. The fact that no method of accounting has been regularly employed by the assessee would be obvious to any Income-tax Officer merely on a perusal of the statement of account furnished by the assessee and would not require any mental process which can be properly described as a determination. The mental process involved, however, in the case of the second condition is of a much more elaborate character and the Income-tax Officer has to apply his mind to the question whether even though the method of accounting has been regularly employed by the assessee, such income, profits and gains cannot properly be deduced therefrom. Here the Income-tax Officer concerned has to form a definite opinion on the question and if he comes to the conclusion that the income, profits and gains of the assessee cannot properly be deduced from the method of accounting regularly employed by him the proviso at once comes into operation. He is entitled to reject the method of accounting regularly employed by the

assessee and compute the income, profits and gains of the assessee upon such basis and in such manner as he may determine. This is not the mental process of the nature required for the fulfilment of the first condition. It is the application of mind to the question whether income, profits and gains of the assessee can be properly deduced from the method of accounting regularly employed by the assessee and the Income-tax Officer has to come to the conclusion that it cannot be so done. This determination is under the terms of the proviso itself a determination of the Income-tax Officer himself and of no other authority in the hierarchy of the Income-tax Officers. It may be noted that the term "Income-tax Officer" has been defined in s. 2(7) of the Act as distinct from the term "Appellate Assistant Commissioner" defined in s. 2(3) of the Act. The Income-tax Officer, the Appellate Assistant Commissioner and the Inspecting Assistant Commissioner are separate entities each with a jurisdiction of its own and the one cannot by any chance be interpreted to mean the other. If, therefore, the proviso to s. 13 of the Act talks of the Income-tax Officer, it is the Income-tax Officer alone as defined in s. 2(7) of the Act and not the Appellate Assistant Commissioner as defined in s. 2(3) of the Act or any other officer in the hierarchy of Income-tax Officers. Such an interpretation would involve the deletion not only of the term "Income-tax Officer" from the proviso to s. 13 but also the absolute negation of the expression "in the opinion of the Income-tax Officer" mentioned therein. I for one cannot ascribe to the Legislature any negligence or oversight nor can I impute to it any intention to use these words as though they were superfluous or redundant. The words used by the Legislature must be given their full effect and significance and the only way in which these words can be construed is to ascribe to the Legislature the intention to make the determination by the Income-tax Officer a condition of the proviso being brought into operation, with the necessary consequences of the rejection of the method of accounting regularly employed by the assessee and the computation of the income, profits and gains of the assessee upon such basis and

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

in such manner as the Income-tax Officer himself may determine.

To that extent the decision of the High Court of Bombay in *K. F. Vakeel* v. *Commissioner of Income-tax & E. P. Tax*(1) would appear to be correct.

It is however urged that this interpretation would involve the necessary consequence that the determination of the Income-tax Officer within the proviso to s. 13 of the Act would be final so far as the Revenue was concerned as it had no right to appeal against the determination of the Income-tax Officer, whereas the assessee would have the right under s. 30 of the Act to carry an appeal before the Appellate Assistant Commissioner and such a result could certainly not have been contemplated by the Legislature while enacting this measure. It is also contended that once the assessee carries an appeal before the Appellate Assistant Commissioner he himself destroys the finality of the determination made by the Income-tax Officer and the whole matter is at large so much so that even though the Revenue could not have preferred an appeal on its own, once the appeal is entertained by the Appellate Assistant Commissioner it would be able to urge any and every ground including the one which would bring the case within the proviso to s. 13 of the Act even though the Income-tax Officer had not entertained the same in the first instance.

The first contention is wholly untenable for the simple reason that when proceedings are entertained by the Income-tax Officer, he represents the Revenue and the contest then is between the Revenue (as represented by him) on the one hand and the assessee on the other. If the Revenue itself decides the question in a particular manner in the process of assessment, it cannot legitimately be heard to say that it has not been given any right of appeal against the decision of the Income-tax Officer who represents it fully all the way. The party aggrieved by the decision of the Income-tax Officer can only be one and that is the assessee, the Revenue having decided the question in its own favour. The assessee only can, in the circum-

(1) I.T. Reference No. 21 of 1950, Bombay High Court.

stances, therefore, be given the right of appeal against the decision of the Income-tax Officer. Even when the assessee files an appeal before the Appellate Assistant Commissioner, the Revenue is represented by the Income-tax Officer himself who appears before the Appellate Assistant Commissioner either in person or by a representative. So, there also the Revenue is fully represented and has its full say at the hearing of the appeal before the Appellate Assistant Commissioner and the only say which it can ever have would be to support the decision which has been given in the first instance by the Income-tax Officer who is its representative in the assessment proceedings. No grievance can therefore be made that the Revenue has been conferred no right of appeal and that if the assessee does not choose to appeal against the decision of the Income-tax Officer, it has no redress whatever. It has, in fact, no grievance at all which can ever be redressed by the Appellate Assistant Commissioner and if the Revenue cannot by any chance be treated as an aggrieved party the whole of this argument is robbed of significance. It is futile on the part of the appellant therefore to urge that there is finality in one case and no finality in the other.

The second contention put forward by the appellant is equally devoid of substance. The powers of the Appellate Assistant Commissioner are statutory and they are to be found in the four corners of s. 31 of the Act. The nature and scope of these powers have been already discussed above and these powers are not absolute in character but are circumscribed in the manner indicated in the judgment of the High Court of Bombay above referred to. The Income-tax Officer who appears before the Appellate Assistant Commissioner either in person or by his representative is concerned to support his own decision and therefore he cannot be ever heard to say that the decision which he has reached in the matter of the proviso to s. 13 of the Act is wrong in any manner whatever. The Appellate Assistant Commissioner even though he is exercising these appellate powers, cannot on its own or *suo motu* arrive at the conclusion that the method of accounting regularly employed by the assessee is

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

such that the income, profits and gains of the assessee cannot be properly deduced therefrom. He can only arrive at the conclusion on the record before him and on the materials presented before him by the assessee as well as the Income-tax Officer appearing before him either in person or by a representative that the conclusion which has been reached by the Income-tax Officer within the terms of the proviso to s. 13 of the Act is not proper and if he comes to that conclusion the only thing that he can do is to set aside the assessment within the meaning of s. 31(3)(b) of the Act and direct the Income-tax Officer to make a fresh assessment after making such further enquiry which the Income-tax Officer thinks fit or he, the Appellate Assistant Commissioner, may direct. He has no jurisdiction to arrive at a determination of his own as to the method of accounting regularly employed by the assessee being such that the income, profits and gains of the assessee cannot properly be deduced therefrom. That is the function of the Income-tax Officer by the very terms of the proviso to s. 13 itself and he cannot arrogate that function to himself by abrogating or setting at naught the express terms of the proviso to s. 13 which lay down that the power of rejection of the method of accounting regularly employed by the assessee and computation of the income, profits and gains of the assessee upon such basis and in such manner as the Income-tax Officer himself may determine is only vested in the Income-tax Officer as defined in s. 2(7) of the Act. The power of enhancement of the assessment conferred upon the Appellate Assistant Commissioner under s. 31(3)(a) cannot be construed to mean that the Appellate Assistant Commissioner can on his own exercise such power within the meaning of the proviso to s. 13 even though the Income-tax Officer himself has not done so in the first instance. The powers conferred upon the Appellate Assistant Commissioner under s. 31(3)(a) have got to be read with this further limitation that even though he can enhance the assessment, he cannot do so by exercising the power which is vested not in him but is vested

only in the Income-tax Officer concerned under the proviso to s. 13 of the Act. Section 31(3) of the Act has got to be read harmoniously with the provisions of s. 13 and the proviso thereto and if they are so read the only conclusion to which one can arrive is that even though the Appellate Assistant Commissioner exercises the wide powers conferred upon him under s. 31(3) of the Act, he cannot abrogate or set at naught the express power which is vested in the Income-tax Officer under the proviso to s. 13 of the Act.

The learned Solicitor-General urged that if the proviso to s. 13 of the Act was so interpreted it would not only deprive the Appellate Assistant Commissioner of the power to bring the proviso to s. 13 of the Act into operation in a proper case but would also deprive the Commissioner of the power which he has to revise the Income-tax Officer's order of assessment under s. 33B of the Act. As already indicated, the Court is not concerned here with the interpretation of s. 33B of the Act and it may also be noted that there was no such provision to be found in the Act as it stood at the relevant period. Assuming, however, that the power of the Commissioner to revise the Income-tax Officer's orders under s. 33B of the Act has to be considered in this context, there is nothing in the terms of that section which militates against the conclusion arrived at on the construction of the proviso to s. 13 of the Act. If the Commissioner considers that any order passed in the record of any proceedings under the Act by the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue, it is open to him after giving the assessee an opportunity of being heard as he deems necessary to pass such orders thereon as the circumstances of the case justify. If he comes to the conclusion that the Income-tax Officer concerned is in error in the matter of accepting the method of accounting regularly employed by the assessee and ought to have come to the conclusion that the method of accounting employed is such that the income, profits and gains cannot properly be deduced therefrom, it would be open to the Commissioner to record that opinion of his and pass an order

1957

The Commissioner of Income-Tax v. M/s. McMillan & Co.

Bhagwati J.

cancelling the assessment and directing a fresh assessment which would be within his competence and would be the only order thereon which the circumstances of the case would justify. No injustice would be done to the Revenue. The ends of justice would be equally served if the Commissioner in such a case makes an order cancelling the assessment and directing a fresh assessment and remands the case back to the Income-tax Officer with a direction to apply his mind properly to the facts of the case and determine the question which is within his exclusive province under the terms of the proviso to s. 13 of the Act. I cannot see any difficulty of the type envisaged by the learned Solicitor-General and am of opinion that this contention of the appellant also must be negatived.

I am, therefore, of opinion that the conclusion reached by the High Court of Bombay in the instant case was correct and the referred questions Nos. 1 and 2 were rightly answered by the High Court in the negative. As stated by the High Court the question No. 3 did not arise for consideration at all and I would, therefore, dismiss the appeal with costs.

BY THE COURT.—In accordance with the judgment of the majority, the appeal will be allowed. Each party will bear its own costs throughout.

Appeal allowed