The Commissioner of Income-Tax, Bombay

Vs

The Scindia Steam Navigation Co. Ltd.

Civil Appeal No. 501 of 1957

(T. L. Venkatarama Ayyar, S. K. Das, J. L. Kapur, M. Hidayatullah, J. C. Shah JJ)

06.04.1961

JUDGMENT

VENKATARAMA AIYAR, J. –

The respondents were the owners of a steamship called "El Madina". That was requisitioned by the Government during the last world war, and was lost by enemy action on March 16, 1944. As compensation therefor, the Government paid the respondents Rs. 20,00,000 on July 17, 1944; Rs. 23,00,000 on December 22, 1944; and Rs. 33,333 on August 10, 1946. The original cost of the ship was Rs. 24,95,016 and its written-down value at the commencement of the year of account was Rs. 15,68,484. The difference between the cost price and the written-down value viz., Rs. 9,26,532 represents the deductions which had been allowed year after year on account of depreciation. As the total compensation received exceeded the cost price, the respondents have recouped themselves all the amounts deducted for depreciation.

On these facts, the point in controversy between the respondents and the Department is whether the amount of Rs. 9,26,532 is liable to be included in the total income of the company for the year of assessment which is 1946-47. The provision of law under which the charge is sought to be imposed is s. 10(2)(vii) of the Indian Income-tax Act, 1922, hereinafter referred to as the Act, and that is, omitting what is not relevant, as follows :-

> "(2) Such profits or gains shall be computed after making the following allowances, namely :-
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> #.....##
>
> (vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value :
>
> #.....##
>
> Provided further that where any insurance, salvage or compensation moneys are received in respect of any such building, machinery or plant as aforesaid, and the amount of such moneys exceeds the difference between the written down value and the scrap value no amount shall be allowable under this clause and so much of the excess as does not exceed the difference between the original cost and the written-

> down value less the scrap value shall be deemed to be profits of the previous year in which such moneys were received:".

It is not disputed by the respondents that the sum of Rs. 9,26,532 would be profits liable to be taxed under this proviso, if it applies. Equally it is not disputed by the appellant that apart from this proviso the amount in question could only be regarded as capital receipt, not liable to be taxed. Before the income-tax authorities, the respondents sought to avoid the application of this proviso on the ground that on representations made by them with reference to this very matter, the Board of Revenue had directed that for the purpose of Rule 4, Schedule II, of the Excess Profits Tax Act, 1940, the amount payable as compensation (both the initial advance as well as any further payment that may be made) should be taken into account as though it had actually been received within thirty days of the date of the loss of the ship; and that in consequence the amount should be deemed to have been received on April 16, 1944. If that contention is correct, the amounts would have been received not in the year of account which was July 1, 1944, to June 30, 1945, but in the year previous thereto, and they could not therefore be included in the income of the company for the year of assessment. This contention, however, was rejected by all the income-tax authorities. Dealing with it, the Appellate Tribunal observed in its Order dated July 15, 1953, that the concession which the Board of Revenue had intended to give was limited to excess profits tax, and could not in any event be relied on for the purpose of cutting down the operation of the statutory provision enacted in the relevant proviso in s. 10(2)(vii); and that the material date was when the compensation was in fact received - and that was in the year of account and not when it became due and payable, in the year previous thereto. In the result, the Tribunal held that the amount was liable to be included in the total income of the company.

The respondent then filed an application before the Tribunal, under s. 66(1) of the Act, requiring certain questions to be referred to the court, and one of them was as follows :

> "Whether in view of the fact that the 4th proviso to section 10(2)(vii) of the Indian Income-tax Act did not apply to the assessment for the Assessment year 1945-46 and under the law in force as applicable to that assessment year the sum of Rs. 9,26,532 which accrued in the previous year relevant to that Assessment year was not taxable at all, and the fact that having regard to the Assessee's method of accounting the said sum should not be assessed in any other year, the Assessment in respect of the said sum in the subsequent Assessment year 1946-47 was valid in law."

By its order dated February 9, 1954, the Tribunal referred the following question for the opinion of the court:-

> "Whether the sum of Rs. 9,26,532 was properly included in the assessee company's total income computed for the assessment year 1946-47."

The reference came up for hearing before a Bench of the Bombay High Court consisting of Chagla, C.J., and Tendolkar, J., and then the respondents raised the contention that the proviso to s. 10(2)(vii) under which the charge was made could not be taken into account in making the present assessment, as the same had been introduced by the Income-tax (Amendment) Act, 1946 (VII of 1946), which came into force on May 4, 1946, whereas the liability of the company to be taxed fell to be determined as on April 1, 1946, when the Finance Act, 1946, came into force. The appellant raised a preliminary objection to this question being raised for the first time before the court, on the ground that it did not arise out of the Order of the Tribunal, having been neither raised before it nor

dealt with by it, and that further it had not been referred to the court. Overruling this objection, the learned Judges observed that the form in which the question was framed was sufficiently wide to take in the new contention, that even if the particular aspect of the question had not been argued before the Tribunal, it was implicit in the question as framed, and that therefore the assessee could raise it. On the merits they held that as the proviso was not retrospective in its operation, the amount in question was not liable to be included in the taxable income and answered the question in the negative. It is against this decision that the present appeal by special leave is directed.

The main contention urged before us by the appellant is that it was not open to the High Court in the present reference to go into the question as to the applicability of the proviso to s. 10(2)(vii), as it was neither raised before the Tribunal nor considered by it, and could not therefore be said to be a question arising out of the order of the Tribunal, which alone could be referred for the decision of the court under s. 66(1). The court had no jurisdiction, it is argued, to allow a question to be raised before it, which could not be referred to it under the section. The contention of the respondents is that all questions of law which arise on the findings given by the Tribunal in its order can properly be said to arise out of its order, and that in making a reference under s. 66(1), the Tribunal is not limited to those questions only which were raised before it and dealt with in its order, nor even to those questions which were raised in the application for reference under s. 66(1). It is further contended that in the present case, the question as framed and referred was wide enough to take in the contention as to the applicability of the proviso and that the High Court was in consequence within its power in entertaining it and deciding the reference on it.

We may now refer to the provisions of law bearing on the question. Section 66(1) of the Act confers on the assessee and the Commissioner a right to apply to the Tribunal in the prescribed form to refer any question of law arising out of its order for the decision of the High Court. If the Tribunal is satisfied that a question of law arises, then it has to draw up a statement of the case and refer it to the decision of the High Court. But if it considers that no question of law arises on its order, and dismisses the application under s. 66(1), then the assessee or the Commissioner, as the case may be, has a right to move the court under s. 66(2), and if the court is not satisfied about the correctness of the decision of the Tribunal, it can require it to state the case and refer it to its decision. Under s. 66(4) the High Court can, for the purpose of disposing of the reference which comes to it under s. 66(1) and (2), call for additional statement from the Tribunal. Under s. 66(5) the High Court is to decide the question of law raised in the case and send a copy of its judgment to the Tribunal and the latter is to pass appropriate orders for giving effect to it.

> Section 59 of the Act confers on the Central Board of Revenue power to make rules for carrying out the purpose of the Act and under sub-section (5), the rules made thereunder shall on publication in the official gazette have effect as if enacted under the Act. Rule 22A framed under this section provides that : "An application under sub-section (1) of section 66 requiring the Tribunal to refer to the High Court any question of law shall be in the following form." The form is R(T) of which paragraphs 3 to 5 are relevant for the present discussion, and they are as follows :-
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> "3. that the facts which are admitted and/or found by the Tribunal and which are necessary for drawing up a statement of the case, are stated in the enclosure for ready reference.
>
> 4. that the following questions of law arise out of the order of the Tribunal :-

> #(1).....(2).....(3).....
> .....##
>
> 5. that the applicant, therefore, requires under sub-section (1) of section 66 of the aforesaid Act that a statement of the case be drawn up and the questions of law numbered..... out of the questions of law referred to in paragraph 4 above be referred to the High Court."

On these provisions, the question that arises for decision is whether in a reference under s. 66, the High Court can consider a question which had not been raised before the Tribunal and/or dealt with by it in its order even though it be one of law. On the answer to be given to it there has been a difference of opinion among the High Courts and that turns on the meaning to be given to the words, "any question of law arising out of" the order of the Tribunal. There is no pronouncement of this Court which concludes this question, though there are decisions which afford guidance in the determination thereof. These decisions will now be considered.

In Commissioner of Income-tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar [[1953] S.C.R. 463, 471.], an order of assessment made by the income-tax officer was corrected by the Appellate Tribunal not in an appeal under s. 33(4) but in a miscellaneous application presented to it under s. 35. The Commissioner being dissatisfied with the order applied for a reference under s. 66(1). The Tribunal was of the opinion that the order in question could be made in the exercise of its inherent jurisdiction and referred the question of its legality to the court under s. 66(1). The Madras High Court declined to answer it on the ground that as the order was not one passed in an appeal, the reference under s. 66(1) was incompetent, as under that provision the power of the Tribunal to refer was limited to questions of law arising out of an order passed in an appeal. In affirming this decision, this Court observed :

> "The jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under section 33(4) and a question of law arising out of such an order."

This is an authority for the position that the jurisdiction of the Tribunal to make, and of the High Court to hear, a reference must be strictly sought within the four corners of s. 66.

In The Commissioner of Income-tax, Bombay South v. Messrs. Ogale Glass Works Ltd. [[1955] 1 S.C.R. 185, 197.], the question referred by the Tribunal under s. 66(1) was whether certain amounts received by the assessee from the Government by cheques drawn on the Reserve Bank at Bombay were income received in British India within s. 4(1)(a) of the Act. The High Court had held that as the cheques were received in the State of Aundh, in unconditional discharge of the claim, the receipt was not in British India. On appeal to this Court, it was contended that as the cheques were posted in British India, the income must be held to have been received in British India. An objection was put forward to this contention being raised, on the ground that it was not argued before the Tribunal or decided by it and that therefore it did not arise out of its order as required by s. 66(1). But this Court held that as the question as framed and referred was of sufficient amplitude to cover the new point urged, and as no contention was raised that the question had not been properly referred under s. 66(1), it could be decided under s. 66(5), and that in that view, it was not necessary "to express any opinion on the larger question as to the scope, meaning and import of the words 'any question of law arising out of' the Tribunal's order on the interpretation of which there exists a wide divergence of judicial opinion". There was accordingly no decision on the point now under consideration.

In New Jehangir Vakil Mills Ltd v. Commissioner of Income-tax [[1960] 1 S.C.R. 249.] the point under discussion was whether the High Court was competent under s. 66(4) to call for additional statement with reference to a question which had not been referred to it under s. 66(1) or s. 66(2). This Court held that the scope of a reference under s. 66(2) was coextensive with that of one under s. 66(1) of the Act, that therefore the court had no power under s. 66(2) to travel beyond the ambit of s. 66(1), that under both these provisions it is only a question of law arising out of the order that could be referred, that the object of s. 66(4) was to enable the court to obtain additional statements only for the purpose of deciding questions referred under s. 66(1) and (2) and that accordingly no investigation could be ordered in respect of new questions which were not and could not be the subject-matter of a reference under s. 66(1) and (2). Here again there was no decision on the meaning of the words, "any question of law arising out of" the order of the Tribunal.

In Kusumben D. Mahadevia v. Commissioner of Income-tax [[1960] 3 S.C.R. 417, 422.], the question actually referred under s. 66(1) to the court was whether a sum of Rs. 47,120 received by the assessee had accrued to her in the former State of Baroda or whether it had accrued or should be deemed to have accrued to her in British India. On this reference the High Court re-settled the question so as to raise the contention as to whether the assessee was entitled to any concession under the Merged States (Taxation Concessions) Order, 1949, as regards the income of Rs. 47,120, and holding that she was not, answered the reference against her without deciding the question as to where the income accrued. Against this Judgment, the assessee appealed to this Court and contended that the High Court was in error in not deciding the question which was actually referred. This Court accepted this contention and remanded the case to the High Court for hearing on that point. So far this decision does not bear on the present controversy. But a further point was discussed and considered by this Court, and that was that it was not open to the court to raise the question about the applicability of the Merged States (Taxation Concessions) Order, 1949, as that was not a question which was raised before or considered by the Tribunal or referred under s. 66(1). In agreeing with this contention, this Court observed :-

> "Section 66 of the Income-tax Act which confers jurisdiction upon the High Court only permits a reference of a question of law arising out of the order of the Tribunal. It does not confer jurisdiction on the High Court to decide a different question of law not arising out of such order. It is possible that the same question of law may involve different approaches for its solution, and the High Court may amplify the question to take in all the approaches. But the question must still be one which was before the Tribunal and was decided by it."

These observations bear on the question now under consideration but the actual decision was one remanding the case with a direction to the High Court to decide the question that was referred to it.

In Zoraster & Co. v. Commissioner of Income-tax [[1961] 1 S.C.R. 210.], the assessees were manufacturers of certain kinds of goods in Jaipur. The Government of India purchased these articles and paid the price by cheques on the Bombay branch of the Reserve Bank of India. The Tribunal held that the profits of these sales had been received in British India, but on the application of the assessees referred that question to the court. The High Court remanded the case to the Tribunal under s. 66(4) for a supplemental statement observing that "it would be necessary for the Appellate Tribunal to find, inter alia, whether the cheques were sent to the assessee firm by post or by hand and what directions, if any, had the assessee firm given to the Department in the matter." The correctness of this order was challenged by the assessee on the ground that the court had no power to call for a fresh statement for the investigation of a new point and reliance was placed on the

decision in New Jehangir Vakil Mills Ltd. v. Commissioner of Income-tax [[1960] 1 S.C.R. 249.]. This Court held, following that decision, that the jurisdiction to call for supplemental statement was confined (a) to the facts on record and/or found by the Tribunal, and (b) to the question which would arise from the Tribunal's order; and that further it could be exercised with reference to a new question, if it was an integral or even incidental part of the question which had been referred. This decision also proceeds on the view that a question which is unconnected with the question already referred cannot be agitated for the first time in the reference.

There being thus no direct decision of this Court on the precise meaning of the words "any question of law arising out of" the order of the Tribunal, we must examine the decision of the High Courts on the question, and as already stated they are in a state of conflict.

In A. Abboy Chetty and Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 442, 444.], the application of the assessee under s. 66(1) required the Tribunal to refer a question of res judicata to the court. The Tribunal declined to do so on the ground that that question had not been argued before it. The assessee then moved the court under s. 66(2) for an order requiring the Tribunal to refer that question. Dismissing that application, Patanjali Sastri, J., as he then was, observed as follows :-

> "Mr. Radhakrishnayya for the petitioner contends that a question, though not raised before the Appellate Tribunal, can well be said to 'arise out of its order', if, on the facts of the case appearing from the order, the question fairly arises. I am unable to agree with that view. I am of opinion that a question of law can be said to arise out of an order of the Appellate Tribunal only if such order discloses that the question was raised before the Tribunal."

Adverting to the contention that the Privy Council had in M. E. Moola Sons Limited v. Burjorjee [[1932] I.L.R. 10 Rang. 242.] allowed a question of law arising on the facts found, to be raised for the first time before it, the learned Judge observed : "The case furnishes no useful analogy as the scope of the remedy under s. 66 of the Indian Income-tax Act has to be determined with reference to the language of the statute". This decision was followed by the Madras High Court in Commissioner of Income-tax v. Modern Theatres Ltd., [[1951] 20 I.T.R. 588.] and in The Trustees, Nagore Durgah v. Commissioner of Income-tax [[1954] 26 I.T.R. 805.].

In G. M. Chenna Basappa v. Commissioner of Income-tax [[1958] 34 I.T.R. 576.], the Andhra High Court followed the decision in A. Abboy Chetty and Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 442, 444.] and observed that a question not raised before the Tribunal "cannot be said to arise out of its order even if it could be sustained on the facts in the statement of the case by the Tribunal", and that further the order of the Tribunal should disclose that the point of law was raised before it. The same view was adopted by the Patna High Court in Maharaj Kumar Kamal Singh v. Commissioner of Income-tax [[1954] 26 I.T.R. 79, 86.]. There, discussing the question with reference to the language of s. 66(1) and (2) and Rule 22A, the court observed as follows :-

> "The provisions of Section 66(1) and Section 66(2) do not confer upon the High Court a general jurisdiction to correct or to decide a question of law that may possibly arise out of the income-tax assessment. The section, on the contrary, confers a special and limited jurisdiction upon the High Court to decide any specific question of law which has been raised between the assessee and the Department before the Income-tax Tribunal and upon which question the parties are at issue."

It was accordingly held that only a question of law which had been actually raised before the Tribunal or actually dealt with by it that could be referred under s. 66(1).

This is also the view consistently held by the Calcutta High Court. In Commissioner of Excess Profits Tax v. Jeewanlal Ltd. [[1951] 20 I.T.R. 39.], it was held, agreeing with the decision in A. Abboy Chetty and Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 443, 444.], that a question of law not raised before the Tribunal could not be said to arise out of its order even if on the facts of the case appearing from the order the question fairly arises. In Chainrup Sampatram v. Commissioner of Income-tax [[1951] 20 I.T.R. 484, 495.], the assessee had applied under s. 66(1) of the Act to refer the question whether a sum of Rs. 2,20,887 was on a true construction of s. 14(2)(c) of the Act assessable to tax. The Tribunal dismissed the application on the ground that the question sought to be raised had not been mentioned at the hearing of the appeal and had not been dealt with by the Tribunal and was therefore not one which arose out of its order. The question having been brought up before the court under s. 66(2), Chakravartti, J. held that under s. 66(1) it was only a question that arose out of the Tribunal's order that could be referred, and that that must be some question which was actually raised before the Tribunal and dealt with by it; and that under s. 66(2) the words, "no question of law arises" could only mean that the question of which reference had been asked for by the applicant did not arise, and that the High Court could not require the Tribunal to refer some question which was not proposed before it. The learned Judge then went on to observe :

> "The Indian Income-tax Act has not charged the High Court with the duty of setting right in all respects all assessments that might come to its notice; its jurisdiction is not either appellate or revisional; nor has it a general power of superintendence under Section 66. Its sole duty is to serve as the appointed machinery for resolving any conflict which may arise between an assessee or the Commissioner on the one hand and the Tribunal on the other regarding some specific question or questions of law. If, on an application under section 66(2), the High Court finds that the question which the applicant required the Tribunal to refer was not a question that arose out of the Tribunal's appellate order, it ought, in my view, to refuse to require the Tribunal to refer any such question."

The same view was taken in Allahabad Bank Ltd. v. Commissioner of Income-tax [[1952] 21 I.T.R. 169.] and in Commissioner of Income-tax v. State Bank of India [[1957] 31 I.T.R. 545.].

In Mash Trading Co. v. Commissioner of Income-tax [[1956] 30 I.T.R. 388.], a Full Bench of the Punjab High Court had to consider the true character of the jurisdiction under s. 66. Therein Kapur, J., as he then was, held, on an examination of the section and on a review of the authorities that under s. 66(1) it is only questions which had been raised before and dealt with by the Tribunal that could be referred to the High Court, that the power of the High Court under s. 66(2) to direct a reference is limited to questions which could be referred under s. 66(1) and which the applicant required it to refer, that the Tribunal has no power to raise a question suo motu, and likewise the High Court cannot raise any question which had not been referred to it either under s. 66(1) or s. 66(2), but when once a question is properly raised and referred to the High Court, the High Court is bound to answer that question. In this view, it was held that a reference to the High Court on a question which was not raised before or considered by the Tribunal was not competent. Falshaw, J., while generally agreeing with this view considered that there might be cases in which a strict adherence to this view might work injustice, as for example when a point raised before the Tribunal had not been dealt with by it owing to mistake or inadvertence, or when its jurisdiction itself was

questioned. The learned Judge added that in the former case the point might be deemed to have been decided against the assessee in the order, thereby attracting s. 66. It should be noted that all the Judges agreed in holding that the reference in question was incompetent as the point had not been raised before the Tribunal.

We must now consider the decisions which have taken a somewhat different view. Vadilal Lallubhai Mehta v. Commissioner of Income-tax [[1935] 3 I.T.R. 152.] was a case under s. 66 of the Act, as it stood prior to the amendment of 1939 and what was held there was that even though the assessee had not stated in his application for reference the questions which really arose out of the order, it was for the Commissioner to formulate the correct questions and refer them to the court, and where he had failed to do so, the court could direct him to do so. This is not a decision on the question as to whether questions not raised before or decided by the Commissioner could be held to be questions arising out of his order.

In New Piecegoods Bazar Co. Ltd. v. Commissioner of Income-tax [[1947] 15 I.T.R. 319.], the question that was referred under s. 66(1) was whether taxes paid on urban immovable property by the assessee were an allowable deduction under s. 9(1)(iv) and s. 9(1)(v) of the Indian Income-tax Act. An objection was raised before the court that the question as to the application of s. 9(1)(iv) had not been argued before the Tribunal and therefore it could not be referred. Repelling this contention, Kania, J., as he then was, observed that the specific question had been put forward as a ground of appeal, and that was "quoted by the Tribunal in its judgment" but not dealt with by it, and that in the circumstances the proper order to pass was to refer the case back to the Tribunal and "invite it to express its opinion on this aspect of the contention and raise a proper question of law on that point also." This judgment again proceeds on the view that it is only a question raised before and dealt with by the Tribunal that could be referred under s. 66(1), and that is clear from the observations of the learned Judge that the decisions of the Privy Council in Commissioner of Income-tax v. Kameshwar Singh [[1933] 1 I.T.R. 94.] and National Mutual Life Association v. Commissioner of Income-tax [[1936] 4 I.T.R. 44.], deprecating the practice of raising new questions in the stage of argument on the reference in the High Court did not stand in the way of the case being referred back to the Tribunal.

In Madanlal Dharnidharka v. Commissioner of Income-tax [[1948] 16 I.T.R. 227, 233, 234.], the Tribunal referred under s. 66(1) the following question for the decision of that court :-

> "Whether the remittance of Rs. 2,01,000 out of profits, made by the assessee in the years preceding the Maru year 1999-2000 as a non-resident, could be included under section 4(1)(b)(iii) of the Indian Income-tax Act in his total income of the year of account in which he was a resident in British India ?"

This question had not been argued before the Tribunal, but the Tribunal itself referred it because it considered that it arose out of its order. The reference was heard by Chagla, C.J., and Tendolkar, J. Before them an objection was raised that the Tribunal could not refer this question under s. 66(1) as the same had not been raised before it. Chagla, C.J., observed :

> "In my opinion it is necessary clearly to re-state the jurisdiction of this court. This is not a Court of appeal. This court merely exercises an advisory jurisdiction. Its judgments are in the nature of advice given on the questions submitted to it by the Tribunal. Its advice must be confined to questions referred by the Tribunal to this court and those questions must be questions of law which must arise out of the order

> made by the Tribunal. Now, looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression. This court has no jurisdiction to decide questions which have not been referred by the Tribunal. If the Tribunal does not refer a question of law under section 66(1) which arises out of the order then the only jurisdiction of the court is to require the Tribunal to refer the same under section 66(2). It is true that the court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties but it is not open to the court to raise new questions which have not been referred to it by the Tribunal."

Expressing next his disagreement with the decision of the Madras High Court in A. Abboy Chetty & Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 442.], the learned Judge observed :

> "The decision of the Madras High Court would also result in this extraordinary situation. An assessee may raise a question and argue it before the Tribunal, but if the Tribunal thought fit to ignore that argument and not to refer to that point of law in its order, then the court would have no jurisdiction to call upon the Tribunal to refer that question of law to the High Court. It is true that the Income-tax Act is a very technical statute, but I see no reason why when the plain grammatical construction of the section does not make it necessary to come to that conclusion it is necessary to do so and arrive at such an anomalous result."

In Mohanlal Hiralal v. Commissioner of Income-tax [[1952] 22 I.T.R. 448, 452-453.] a Bench of the Nagpur High Court, hearing a reference under s. 66(1), held that on the statement of the case by the Tribunal, the question of law as framed was not correct. Then observing that in view of the decision of the Privy Council in Commissioner of Income-tax v. Kameshwar Singh [[1933] 1 I.T.R. 94], it could not itself resettle it, called for a fresh statement from the Tribunal under s. 66(4). Thus far the judgment is on the same lines as in New Piecegoods Bazar Co. Ltd. v. Commissioner of Income-tax [[1947] 15 I.T.R. 319.] and an earlier decision of the Nagpur High Court in Beohar Singh v. Commissioner of Income-tax [[1948] 16 I.T.R. 433.]. When the case came back on the further statement under s. 66(4), criticising certain remarks therein, that the court had no power to direct the Tribunal to refer a question not argued before it, the Court observed that they were made under a misconception, and quoted the observations of Chagla, C.J., in Madanlal Dharnidharka v. Commissioner of Income-tax [[1948] 16 I.T.R. 227, 233. 234.] extracted above, with approval. This can hardly be said to be a decision on the present point.

It will be seen from the foregoing review of the decisions that all the High Courts are agreed that s. 66 creates a special jurisdiction, that the power of the Tribunal to make a reference and the right of the litigant to require it, must be sought within the four corners of s. 66(1), that the jurisdiction of the High Court to hear references is limited to questions which are properly referred to it under s. 66(1), and that such jurisdiction is purely advisory and extends only to deciding questions referred to it. The narrow ground over which the High Court differ is as regards the question whether it is competent to the Tribunal to refer, or the High Court to decide, a question of law which was not

either raised before the Tribunal or decided by it, where it arises on the facts found by it. On this question, two divergent views have been expressed. One is that the words, "any question of law arising out of" the order of the Tribunal signify that the question must have been raised before the Tribunal and considered by it, and the other is that all questions of law arising out of the order of the Tribunal. The latter is the view taken by the Bombay High Court in Madanlal Dharnidharka v. Commissioner of Income-tax [[1948] 16 I.T.R. 227.], and approved by the Nagpur High Court in Mohanlal Hiralal v. Commissioner of Income-tax [[1952] 22 I.T.R. 448.]. The former is the view held by all the other High Courts. Now the argument in support of the latter view is that on the plain grammatical construction of s. 66(1), any question of law that could be raised on the findings of fact given by the Tribunal, would be a questions that arise out of the order, and that, to hold that they meant that the question must have been raised before the Tribunal and decided by it, would be to read into the section words which are not there.

In support of this contention Shri Viswanatha Sastri, learned Counsel for the respondents, argued that it was a fundamental principle of jurisprudence that the duty of the litigants was only to state the facts and that it was for the court to apply the appropriate law to the facts found, and he relied on the observations of Atkin, L.J., in Attorney-General v. Avelino Aramavo & Co., [[1925] 1 K.B. 86.],that the court was not limited to particular questions raised by the Commissioners in the form of questions on the case, and that if the point of law or the erroneous nature of the determination of the point of law was apparent on the case as stated and there were no further facts to be found, the court could give effect to it. He also maintained that the position under the Indian law was the same as under the British statute, because under s. 66(1) of the Act, the Tribunal has to refer not only questions of law arising out of its order, but also a statement of the case, that under s. 66(2) the court can likewise require the Tribunal to state the case and refer it and that under s. 66(5) the court has to decide the question of law raised by the case. We are unable to agree with this contention. Under the British statute when once a decision is given by the Commissioners, it is sufficient that the assessee should express his dissatisfaction with it and ask that the matter be referred to the decision of the High Court. It is then for the Commissioners to draw up a statement of the case and refer it for the decision of the court. The British statute does not cast, as does s. 66(1) of the Act, a duty on the assessee to put in an application stating the questions of law which he desires the Commissioners to refer to the court and requiring them to refer the questions which arise out of that order. In Commissioner of Income-tax, Madras v. Mtt. Ar. S. Ar. Arunachalam Chettiar [[1953] S.C.R. 463, 471.], this Court has decided that the requirements of s. 66(1) are matters affecting the jurisdiction to make a reference under that section. The attempt of the respondents to equate the position under s. 66(1) of the Act with that under the British statute on the ground that the Tribunal has to draw up a statement of the case and refer it, and that the court is to decide questions of law raised by it, must break down when the real purpose of a statement in a reference is kept in view. A statement of case is in the nature of a pleading wherein all the facts found are set out. There is nothing in it which calls for a decision by the court. It is the question of law referred under s. 66(1) that calls for decision under s. 66(5) and it is that constitutes the pivotal point on which the jurisdiction of the court hinges. The statement of the case is material only as furnishing the facts for the purpose of enabling the court to decide the question referred. It has been repeatedly laid down by the Privy Council that the Indian Act is not in pari materia with the British statute and that it will not be safe to construe it in the light of English decisions, vide Commissioner of Income-tax v. Shaw Wallace & Co. [(1932) L.R. 59 I.A. 206.]. In view of the difference between s. 66(1) and the corresponding provision in the British statute, we consider that no useful purpose will be served by referring to the English decisions for interpreting s. 66.

But the main contention still remains that the language of s. 66(1) is wide enough to admit of

questions of law which arise on the facts found by the Tribunal and that there is no justification for cutting down its amplitude by importing in effect words into it which are not there. There is considerable force in this argument. But then there are certain features, which distinguish the jurisdiction under s. 66, and they have to be taken into consideration in ascertaining the true import of the words, "any question of law arising out of such order." The jurisdiction of a court in a reference under s. 66 is a special one, different from its ordinary jurisdiction as a civil court. The High Court, hearing a reference under that section, does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal. It acts purely in an advisory capacity, on a reference which properly comes before it under s. 66(1) and (2). It gives the Tribunals advice, but ultimately it is for them to give effect to that advice. It is of the essence of such a jurisdiction that the court can decide only questions which are referred to it and not any other question. That has been decided by this Court in New Jehangir Vakil Mills Ltd. v. Commissioner of Income-tax [1960] 1 S.C.R. 249.]; Kusumben D. Mahadevia v. Commissioner of Income-tax [[1960] 3 S.C.R. 417.] and Zoraster & Co. v. Commissioner of Income-tax [[1961]] 1 S.C.R. 210.]. If the true scope of the jurisdiction of the High Court is to give advice when it is sought by the Tribunal, it stands to reason that the Tribunal should have had an occasion to consider the question so that it may decide whether it should refer it for the decision of the court. How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the court should be sought ?

It was argued for the respondents, that, in view of the fact that the court could compel the Tribunal to refer a question of law under s. 66(2) for its decision, not much significance could be attached to the advisory character of its jurisdiction. It is not conceivable, it was said, that any authority should have a right to compel another authority to take its advice. We see no force in this contention. Section 66(2) confers on the court a power to direct a reference only where the Tribunal was under a duty to refer under s. 66(1), and it is, therefore, subject to the same laminations as s. 66(1). That has been held by this court in New Jehangir Vakil Mills Ltd. v. Commissioner of Income-tax [[1960] 1 S.C.R. 249.] and in Zoraster & Co. v. Commissioner of Income-tax [[1961] 1 S.C.R. 210.]. Moreover, the power of the court to issue direction to the Tribunal under s. 66(2) is, as has often been pointed out, in the nature of a mandamus and it is well settled that no mandamus will be issued unless the applicant had made a distinct demand on the appropriate authorities for the very reliefs which he seeks to enforce by mandamus and that had been refused. Thus, the power of the court to direct a reference under s. 66(2) is subject to two limitations - the question must be one which the Tribunal was bound to refer under s. 66(1) and the applicant must have required the Tribunal to refer it. R(T) is the form prescribed under Rule 22A for an application under s. 66(1), and that shows that the applicant must set out the questions which he desires the Tribunal to refer and that further, those questions must arise out of the order of the Tribunal. It is, therefore, clear that under s. 66(2), the court cannot direct the Tribunal to refer a question unless it is one which arises out of the order of the Tribunal and was specified by the applicant in his application under s. 66(1). Now, if we are to hold that the court can allow a new question to be raised on the reference, that would in effect give the applicant a right which is denied to him under s. 66(1) and (2), and enlarge the jurisdiction of the court so as to assimilate it to that of an ordinary civil court of appeal.

It is again to be noted that, whereas s. 66(1), as it stood prior to the amendment of 1939, conferred on the Commissioner a power to refer a question of law to the court suo motu, that power has been taken away under the present section and it has accordingly been held that under s. 66(1), as it now stands, there is no power in the Tribunal to refer a question of law suo motu for the decision of the court. If, as contended for by the respondents, the court is to be held to have power to entertain in a reference, any question of law, which arises on the facts found by the Tribunal, its jurisdiction under

s. 66(5) must be held to be wider than under s. 66(1) and (2). The correct view to take, in our opinion, is that the right of the litigant to ask for a reference, the power of the Tribunal to make one, and the jurisdiction of the court to decide it are all co-extensive and, therefore, a question of law which the applicant cannot require the Tribunal to refer and one which the Tribunal is not competent to refer to the court, cannot be entertained by the court under s. 66(5). In view of the above considerations, we are unable to construe the words, "any question of law arising out of such order," as meaning any question of law arising out of the findings in the order of the Tribunal.

One of the reasons given by Chagla, C.J., in Madanlal Dharnidharka v. Commissioner of Income-tax [[1948] 16 I.T.R. 227, 233, 234.] for differing from the decision in A. Abboy Chetty and Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 442.] that it is only a question which was raised before the Tribunal that could be said to arise out of its order was that that view must result in great injustice in a case in which the applicant had raised a question before the Tribunal but it had failed to deal with it owing to mistake or inadvertence. In such a case, it was said, the applicant would be deprived, for no fault of his, of a valuable right which the legislature had intended to give him. But we see no difficulty in holding that in those cases the Tribunal must be deemed to have decided the question against the appellant, as Falshaw, J. was disposed to do in Mash Trading Co. v. Commissioner of Income-tax [[1956] 30 I.T.R. 388.]. This is only an application of the principle well-known to law that a relief asked for and not granted should be deemed to have been refused. It is on this footing that Kania, J. held in New Piecegoods Bazar Co. Ltd. v. Commissioner of Income-tax [[1947] 15 I.T.R. 319.] that, in the circumstances stated above, the court could call upon the Tribunal to state a supplemental case after giving its own decision on the contention. That was also the procedure adopted in Mohanlal Hiralal v. Commissioner of Income-tax [[1952] 22 I.T.R. 448.]. Such cases must be exceptional and cannot be founded on for putting a construction different from what the language of s. 66(1) would otherwise warrant.

There was also some argument as to the position under s. 66(1) when the Tribunal decides an appeal on a question of law not raised before it. That would undoubtedly be a question arising out of the order, and not the less so because it was not argued before it, and this conclusion does not militate against the construction which we have put on the language of s. 66(1).

The result of the above discussion may thus be summed up :

> (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.
>
> (2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is therefore one arising out of its order.
>
> (3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.
>
> (4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

In this view, we have next to consider whether the question which was raised before the High Court was one which arose out of the order of the Tribunal, as interpreted above. Now the only question on which the parties were at issue before the income-tax authorities was whether the sum of Rs. 9,26,532 was assessable to tax as income received during the year of account 1945-46. That having been decided against the respondents, the Tribunal referred on their application under s. 66(1), the question, whether the sum of Rs. 9,26,532 was properly included in the assessee company's total income for the assessment year 1946-47, and that was the very question which was argued and decided by the High Court. Thus it cannot be said that the respondents had raised any new question before the court. But the appellant contends that while before the income-tax authorities the respondents disputed their liability on the ground that the amount in question had been received in the year previous to the year of account, the contention urged by them before the court was that even on the footing that the income had been received in the year of account, the proviso to s. 10(2)(vii) had no application, and that it was a new question which they were not entitled to raise. We do not agree with this contention. Section 66(1) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that s. 66(1) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of s. 66(1) of the Act. That was the view taken by this Court in The Commissioner of Income-tax, Bombay v. Messrs. Ogale Glass Works Ltd. [[1955] 1 S.C.R. 185.] and in Zoraster & Co. v. Commissioner of Income-tax [[1961] 1 S.C.R. 210.], and we agree with it. As the question on which the parties were at issue, which was referred to the court under s. 66(1), and decided by it under s. 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it.

It is argued for the appellant that this view would have the effect of doing away with limitations which the legislature has advisedly imposed on the right of a litigant to require references under s. 66(1), as the question might be framed in such general manner as to admit of new questions not argued being raised. It is no doubt true that sometimes the questions are framed in such general terms that, construed literally, they might take in questions which were never in issue. In such cases, the true scope of the reference will have to be ascertained and limited by what appears on the statement of the case. In this connection, it is necessary to emphasize that, in framing questions, the Tribunal should be precise and indicate the grounds on which the questions of law are raised. Where, however, the question is sufficiently specific, we are unable to see any ground for holding that only those contentions can be argued in support of it which had been raised before the Tribunal. In our opinion, it is competent to the court in such a case to allow a new contention to be advanced, provided it is within the framework of the question as referred.

In the present case, the question actually referred was whether the assessment in respect of Rs. 9,26,532 was proper. Though the point argued before the income-tax authorities was that the income was received not in the year of account but in the previous year, the question as framed is sufficient to cover the question which was actually argued before the court namely that in fact the assessment is not proper by reason of the proviso being inapplicable. The new contention does not involve re-

framing of the issues. On the very terms of the question as referred which are specific, the question is permissible and was open to the respondents. Indeed the very order of reference shows that the Tribunal was conscious that this point also might bear on the controversy so that it cannot be said to be foreign to the scope of the question as framed. In the result, we are of opinion that the question of the applicability of the proviso is really implicit, as was held by Chagla, C.J., in the question which was referred, and, therefore, it was one which the court had to answer.

On the merits, the appellant had very little to say. He sought to contend that the proviso though it came into force on May 5, 1946, was really intended to operate from April 1, 1946, and he referred us to certain other enactments as supporting that inference. But we are construing the proviso. In terms, it is not retrospective, and we cannot import into its construction matters which are ad extra legis, and thereby alter its true effect. Then it was argued that the amount of Rs. 9,26,532 having been allowed as deduction in the previous years, may now be treated as profits received during the year of assessment, and thereby subjected to tax. But this is a point entirely new and not covered by the question, and on the view taken by us as to the scope of a reference under s. 66(1), it must be disallowed. In the result, this appeal is dismissed with costs.

SHAH, J. –

The Income-tax Appellate Tribunal, Bombay Bench "A" referred the following question to the High Court of Judicature at Bombay under s. 66(1) of the Indian Income-tax Act :

> "Whether the sum of Rs. 9,26,532 was properly included in the assessee company's total income computed for the assessment year 1946-47."

The question comprehends two component parts, (1) whether the amount of Rs. 9,26,532 was properly included in the assessee's income, and (2) whether the amount was properly included in the taxable income of the assessees for the assessment year 1946-47. The amount sought to be taxed was part of compensation received by the assessees from the Government of India for loss in 1944 by enemy action of their ship "El Madina." The assessees maintained before the taxing authorities and the Tribunal that the compensation accrued to them on April 16, 1944. This plea was rejected, but rejection of that plea was not sufficient to make the amount taxable. It had still to be decided whether the amount which was received in the months of July and December, 1944, was taxable as income. It is common ground that before the amendment by Act 8 of 1946 of s. 10, sub-s. (2), cl. (7), by the inclusion of the fourth proviso, compensation received for loss of a capital asset like a ship was not taxable as income under the Indian Income-tax Act. The tribunal observed that the compensation accrued when it was ascertained and was received by the assessees in the year of account and the amount was therefore rightly brought to tax in the year of assessment 1946-47. Manifestly, the tribunal directed its attention to the statutory provision on the application of which the exigibility of the tax depended. But proviso IV to s. 10, sub-s. (2), cl. (7) came into force on May 4, 1946. It was not in force on April 1, 1946, the day on which the liability to pay tax for the year of assessment 1946-47 crystallized. The tribunal erroneously assumed that the amending Act was in force at the date of commencement of the year of assessment and the assessees did not attempt to remove that misapprehension. But the question whether the amount sought to be taxed was properly included did arise out of the order of the tribunal, the tribunal having held that the amount of compensation was taxable by virtue of s. 10, sub-s. (2), cl. (7), proviso IV. The question whether the statutory provision relied upon to tax the assessees was applicable to the amount sought to be assessed as income was as much a question arising out of the order of the tribunal as the question whether the interpretation placed by the tribunal upon that proviso was correct, may be.

The assessees had maintained that they were not liable to be taxed under s. 10, sub-s. (2), cl. 7, proviso IV because the amount sought to be taxed was received before the year of account relevant for the assessment year 1946-47. The tribunal held, negativing the contention, that it was taxable under s. 10, sub-s. (2),cl. (7), proviso IV. A question of law whether the amount was properly included in the taxable income for the year of assessment clearly arose and that question was referred by the tribunal to the High Court. The High Court under s. 66, cl. (5), of the Income-tax Act has to record its opinion on the questions arising out of the order of the tribunal and not on the arguments pro and con advanced before the tribunal. In my view, the High Court had jurisdiction on the question arising out of the order of the tribunal and referred, in deciding that the Act which made the amount taxable was not in operation at the material date.

This would be sufficient to dispose of the appeal : but counsel for the revenue submits that as it was never urged before the tribunal by the assessees that the amending Act 8 of 1946 which made the compensation received by the assessees, taxable as income, was brought into operation after the commencement of the year of assessment 1946-47, and the tribunal never directed its attention to that plea, it had no jurisdiction to refer that question to the High Court and the High Court was not competent to answer that question even if on the facts found the question clearly arose out of the order of the tribunal. Counsel urges that the question arising out of the order of the tribunal is only that specific question which has been raised and argued before the tribunal and on which the tribunal has given its decision.

We have heard elaborate arguments on the true meaning of the expression "any question of law arising out of such order" and the nature of the jurisdiction exercised by the High Court under s. 66 of the Income-tax Act. There is wide divergence of opinion on the true import of this clause. Before I refer to the authorities, it would be useful to set out the scheme of the Income-tax Act relating to reference of questions to the High Court under s. 66, and the nature of the jurisdiction which the High Court exercises.

> "(1) Within sixty days of the date upon which he is served with notice of an order under sub-s. (4) of s. 33 the assessee or the Commissioner may, by application in the prescribed form.... require the Appellate Tribunal to refer to High Court any question of law arising out of such order and the Appellate Tribunal shall... draw up a statement of the case and refer it to the High Court :
>
> #Provided.....##
>
> (2) If on any application being made under sub-s. (1) the Appellate Tribunal refuses to state a case on the ground that no question of law arises, the assessee or the Commissioner, as the case may be, may.... apply to the High Court, and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition the Appellate Tribunal shall state the case and refer it accordingly.
>
> #(3).....##
>
> (4) If the High Court is not satisfied that the statements in a case referred under this section are sufficient to enable it to determine the question raised thereby, the court may refer the case back to the Appellate Tribunal to make such additions thereto or

alterations therein as the court may direct in that behalf.

(5) The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment.... to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.

#(6) .....(7) .....(7A) .....(8) ....."##

Under the scheme of the Indian Income-tax Act, the appellate tribunal is the sole judge of facts. The High Court indisputably exercises a special advisory jurisdiction to record its opinion on questions submitted by the tribunal; it does not act as a court of appeal or revision on questions of law or fact. After the disposal of the appeal by the tribunal under s. 33(4) of the Income-tax Act, the revenue or the taxpayer may call upon the tribunal to state a case on the questions of law arising out of the order. If the tribunal refuses to state a case, the party aggrieved may move the High Court to call upon the tribunal to state a case and the High Court may so direct if it is not satisfied as to the correctness of the decision of the tribunal refusing to state a case. The question must be one of law and not of fact and not merely academic; it must be a concrete problem bearing directly on the rights and obligations of the revenue or of the assessees. The power of the High Court is to require the tribunal to state a case only if it is satisfied that the view of the tribunal (not on the merits of the order under s. 33, cl. (4)) but on the application under s. 66(1) is erroneous. If the tribunal is not called upon to refer a question, the High Court cannot arrogate to itself the power to call upon the tribunal to refer questions which arise out of the findings recorded by the tribunal but which the tribunal was not called upon to refer. But there is in my judgment no warrant for the view that the question which the tribunal may refer or which the High Court on the refusal of the tribunal may call upon the tribunal to refer, must be a question which was raised and argued before the tribunal at the hearing under s. 33(4). The statute dose not specifically impose such a restriction nor is it implied. To import in the meaning of the expression "any question of law arising out of such order" the concept that the question must have been argued before and dealt with by the tribunal in its judgment deciding the appeal, is to impose a fetter upon the jurisdiction of the High Court not warranted by the plain intendment of the statute. The source of the question must be the order of the tribunal; but of the question it is not predicated that the tribunal must have been asked to decide it at the hearing of the appeal. It may very well happen and frequently cases arise in which the question of law arises for the first time out of the order of the tribunal. The tribunal may wrongly apply the law, may call in aid a statutory provision which has no application, may even misconceive the question to be decided, or ignore a statutory provision which expressly applies to the facts found. These are only illustrative cases : analogous cases may easily be multiplied. It would indeed be perpetrating gross injustice in such cases to restrict the assessee or the Commissioner to the questions which have been raised and argued before the tribunal and to refuse to take cognisance of questions which arise out of the order of the tribunal, but which were not argued, because they could not (in the absence of any indication as to what the tribunal was going to decide) be argued.

A concrete question of law having a direct bearing on the rights and obligations of the parties which may be founded on the decision of the tribunal is one which in my judgment arises out of the order of the tribunal even if it is not raised or argued before the tribunal at the hearing of the appeal. It is the duty of the tribunal to draw up a statement of the case and to frame questions; that duty can only be performed adequately if specific questions relating directly to the dispute between the parties are raised. If the import of the question is unduly large, the High Court has, and is indeed bound in

dealing with it to restrict it to its true content in the light of the findings recorded by the tribunal. But in dealing with the question, the High Court may not only entertain those aspects of the case which were argued before the tribunal, but all such aspects as have fairly a direct bearing on the dispute. The jurisdiction of the High Court is by statute not expressly circumscribed to recording its opinion on arguments advanced before the tribunal, and the nature of the jurisdiction exercised by the High Court does not demand that such a limitation should be implied. The court has jurisdiction to decide questions which arise out of the order of the tribunal, and not merely those which were raised and argued before the tribunal.

On the meaning of the expression "question of law arising out of such order," judicial opinion in the High Courts is divided, and this court has not expressed any authoritative opinion thereon. No useful purpose will be served by entering upon an analysis of the decisions of the High Courts - and there are many - on this question. The decisions fall into two broad divisions. On the one hand it is ruled that "a question of law can be said to arise out of an order of the Appellate Tribunal within the meaning of s. 66(1) of the Indian Income-tax Act, only if such order discloses that the question was raised before the tribunal. A question not raised before the tribunal cannot be said to arise out of its order even if on the facts of the case appearing from the order the question fairly arises." The leading cases in support of this view are A. Abboy Chetty & Co. v. Commissioner of Income-tax, Madras [[1947] 15 I.T.R. 442.] and The Commissioner of Excess Profits Tax, West Bengal v. Jeewanlal Ltd., Calcutta [[1951] 20 I.T.R. 39.]. This view has been adopted with some variations in the norms of expression in the following cases : Maharaj Kumar Kamal Singh v. Commissioner of Income-tax [[1954] 26 I.T.R. 79.], G. M. Chenna Basappa v. Commissioner of Income-tax, Hyderabad [[1958] 34 I.T.R. 576.] and Punjab Distilling Industries Ltd. v. Commissioner of Income-tax, Punjab [[1952] 22 I.T.R. 232.].

On the other hand is the view expressed by Chagla, C.J. in Madanlal Dharnidharka v. Commissioner of Income-tax [[1948] 16 I.T.R. 227.] where the learned Chief Justice recorded his conclusion as follows :

> "I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression."

For the reasons already set out, in my view, the interpretation placed by Chagla, C.J. on the expression "arising out of such order" is the correct one.

Appeal dismissed.

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