

CALCUTTA HIGH COURT

Kooka Sidhwa

Vs.

Commissioner of Income-tax

Income-tax Reference No. 8 of 1960

(P.B. Mukharji and C.N. Laik, JJ.)

27.02.1963

JUDGMENT

Laik, J.

1. This is a consolidated Reference under Section 66 (1) of the Income-tax Act at the instance of the assessee in respect of three assessment years 1944-45, 1945-46 and 1946-47 where the following question has been referred :

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in not admitting the appeals filed by the assessee in respect of the revision of its assessments for the assessment year 1944-45, 1945-46 and 1946-47".

In other words, whether the order passed by the Income-tax Officer revising the original assessment as directed by the Appellate Tribunal would partake the character of procedural law only i.e. whether the appellant had no substantive right to prefer the appeal under Section 30 of the Act.

2. The facts material for the purpose of the Reference are : The applicant-firm Messrs. Kooka Sidhwa and Company, Calcutta, is the Managing Agent of a limited concern, viz., the Globe Theatres Ltd., Calcutta. Under the terms of the agreement of the Managing Agency, Kooka Company was entitled to a remuneration of Rs. 1,000/- per month and 10% of the net profits. On August IV, 1942, the Globe Theatres Ltd. passed a special resolution increasing the remuneration of the Managing Agents to Rs. 2,000/- per month and 25% of the net profits. Despite the resolution, the Income-tax Officer assessing the Globe Theatres for the relevant assessment years, allowed the deduction in respect of Managing Agency Commission at Rs. 2,000/- per month and 10% of the net profits, as permissible expenses under Section 10 (2)(xv) of the Act. The Income-tax Officer disallowed the balance as expenditure not incurred wholly and exclusively for the purpose of the company's business. In the hands of Koolsa Company i.e. the assessee, the Income-tax Officer however assessed the entire amount of the Managing agency remuneration at Rs. 2,000/- per month and 25% of the net profits as the taxable income and excess profits of the firm for the relevant assessment years. The Income-tax Officer negatived the

argument, as unsound which was advanced to the effect, that the Income should not be assessed twice.

3. When the matter came up before the Appellate Tribunal in the first instance, it held that the entire amount of the managing agency remuneration was the income in the hands of the assessee but it was exempt from Income-tax under a Notification of the Central Government, Finance Department, being Notification No. 878-F (Income-tax), dated March 21, 1922, published under the authority of Section 60 of the Indian Income-tax Act. The Tribunal therefore, on August 31, 1950 passed the following order :

"The result is that the three Income-tax appeals are allowed in part. We direct the Income-tax Officer to revise the assessments and authorize him to amend the assessments made on the partners if necessary. The excess-profits-tax appeals are dismissed".

4. In compliance with the said order, the Income-tax Officer revised the assessment of Income-tax and made certain major amendments in the order originally passed by him. The assessee, however, being dissatisfied with the same preferred the appeals, which were admitted and the Appellate Assistant Commissioner went into the merits of the appeals and held on July 26, 1957 that the Income-tax Officer had correctly recomputed the applicant's total income in accordance with the direction of the Tribunal. It might be stated that no objection was raised on behalf of the department before him as to the competence or the maintainability of the appeals or the jurisdiction of the Appellate Assistant Commissioner to deal with such appeals.

5. Being aggrieved by the order of the Appellate Assistant Commissioner the applicant filed appeals before the Appellate Tribunal, now for the second time, in which a preliminary objection was taken on behalf of the department that the appeals were not maintainable, on the ground that the orders passed by the Income-tax Officer under the direction of the Appellate Tribunal given on August 31, 1950 were not orders passed under the provisions of Section 23 (3) of the Income-tax Act and, therefore, the orders passed by the Income-tax Officer were not appealable. The Appellate Tribunal did not go into the merits of the appeals but gave effect to the preliminary objection and dismissed the appeals, holding that they were not maintainable, following the decision of the Supreme Court in the case of *Commissioner of Income Tax, Madras v. Arunachalam Chettiar reported in*¹ In consequence, the Tribunal refused to admit the appeals which give rise to the instant Reference.

6. The provisions of the Income-tax Act 1922 appearing on the question would be firstly Sub-Section (3) of Section 23, which runs as follows :

"23..... (3) on the day specified in the notice issued under Sub-Section (2), or as soon afterwards as may be the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing assess the total income of the assessee and determine the same payable by him on the basis of such assessment".

7. Among other provisions, Section 30 (1) confers on the assessee a right of appeal against orders passed under the sections specified therein. Section 30(2) provides that the

¹(1953) 23 ITR 180 : 1953 SCR 463

appeal shall ordinarily be presented within 30 days of the order of assessment. Section 30(3) provides for the form and the verification in the appeal. Section 31(1) provides for fixing a date and place for the hearing of the appeal and for adjournment of the hearing. Section 31(3) specifies the orders that may be passed in appeals according as they are directed against orders passed under the one or other sections of the Act, which are specified in Section 30 (1). When the appeal is against an order of assessment under Section 23 and this is what we are concerned with in this Reference, it is provided in Section 31 (3) clauses (a) and (b) that in disposing the appeal, the Appellate Assistant Commissioner may (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. Section 33(1) provides for further appeal to the Appellate Tribunal. In short, Section 30 confers a right of appeal on the assessee, Section 31 provides for the hearing and disposal of the appeal and Section 33 confers a right of further appeal against orders passed under Section 31.

8. Now on these provisions, the only question to be decided here is as to whether the order passed by the Income-tax Officer revising the original assessment, on the direction of the Appellate Tribunal, would be an order passed under Section 23 of the Act and would be open to appeal and further appeal.

9. Dr. Debi Pal, appearing on behalf of the assessee-applicant, mainly contended that the principles laid down in the said decision of the Supreme Court in the case of *Arunachallan Chettiar*, (1953) 23 ITR 180 : 1953 SCR 463 (supra) had been impliedly overruled by another decision of the Supreme Court in the case of *Melaram and Sons v. Commissioner of Income Tax, Punjab*, reported in² According to him the facts in the earlier decision are also different. He therefore contended that the ratio of the said earlier decision of the Supreme Court, viz., that of *Arunachallan Chettiar* had been wrongly applied by the Appellate Tribunal in the instant case. Dr. Pal submitted, though generally but forcefully, that it was on duty to follow a later decision of the Supreme Court on the same point even if the earlier decision of the Supreme Court was neither expressly overruled nor followed by their Lordships of the Supreme Court in the later decision and in that event it is the option of the High Court Judges even not to take any notice of the earlier decision.

10. Mr. Meyer, appearing on behalf of the Revenue, argued with equal, rather greater force and took a preliminary objection, so to speak, by contending that it is our duty to follow the decision of the Supreme Court, if the same is not overruled either expressly or by implication by a later decision of the Supreme Court. It is also argued that where the Supreme Court only notices an earlier decision of the same Court but nevertheless does not choose to follow the same, it would still be the duty of the High Court Judges to follow the earlier decision of the Supreme Court.

11. To accept the arguments in the bare abstract forms sought to be made out by the learned Counsel on both sides would be in my view not correct. Again, to hold the contrary, would also be to invite my eyebrows raised almost to a disappearing point. It is no doubt true that the task of the learned Judges of the High Court becomes very heavy

where there are more than one decision of the Supreme Court on the same point, not

²(1958) 29 ITR 607 : 1956 SCR 166 : AIR 1956 SC 367

following or overruling or explaining the other. The subsequent decision, where the earlier decision has been explained and/ or distinguished by their Lordships of the Supreme Court,

presents no difficulty, but where in the later decision the attention of their Lordships of the Supreme Court to the earlier decision was not at all drawn or where in the later decision though the earlier decision is noted but it is neither expressly overruled, explained or followed, the task of the learned Judges of the High Court becomes still heavier. In my view it would be our duty, first and prime, to attempt to reconcile and harmonise all the decisions of the Supreme Court given on the same point, though the most part of our time might be occupied in attempting the said reconciliation, instead of giving our attention to the main problem arising in the case. It is also my view that no attempt should be made by us by ignoring or by passing or by not taking notice of all the Supreme Court decisions, relevant on the point, however much time the hearing of the case might take, causing the piling up of the alleged arrears of work. To do the contrary, might utmost amount to disposals but not decisions. Mr. Meyer's preliminary objection therefore fails.

12. Turning to the merits, in the case of Arunachalam Chettiar, (1953) 23 ITR 180 : 1953 SCR 463 (supra) the facts were that an appeal was preferred by the assessee under Section 30(1) of the Act against an order of Income-tax Officer and the same was dismissed by the Appellate Assistant Commissioner as incompetent. No appeal was filed against this order and it became final. But acting on a suggestion made in the order of the Appellate Assistant Commissioner the assessee filed an original miscellaneous application before the Appellate Tribunal for relief. On this miscellaneous petition the Tribunal set aside the findings of the Income-tax Officer and directed him to make a fresh computation. Thereafter at the instance of the Commissioner of Income-tax, the Tribunal referred the following question under Section 66 (1) of the Act to the Madras High Court:

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

The High Court declined to answer this Reference on the ground that the order of the Tribunal was not one passed in an appeal under the provisions of Section 33(1) of the Act and that in consequence, the Reference under Section 66(1) was itself incompetent. The correctness of the decision was challenged on appeal to the Supreme Court and in affirming the decision of the High Court, the Supreme Court observed at p. 472 of 1953 SCR : (at p. 121 of AIR 1953 SC) as follows:

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

....."

Thereafter the further submissions of the learned Attorney General were noted in the said decision.

13. After quoting the above observations, their Lordships of the Supreme Court, in the said subsequent decision in Mela Ram's case, (1956) 29 ITR 607 : 1956 SCR 166 : AIR 1956 Supreme Court 367 and after discussing the facts in the said case of Arunachalam Chettiar, (1953) 23 ITR 180 : 1953 SCR 463 (supra) and also after discussing several decisions of different High Courts, concluded by finding that the observations made at pp. 474 and 475 of 1953 SCR, in the case of Arunachalam Chettiar could not be

"read as a pronouncement on the question of the maintainability of the appeal, much less as a decision that an order dismissing an appeal as barred by limitation is one, under Section 30(2)."

14. Mr. Meyer appearing on behalf of the Revenue, argued that the observations at pp. 474 and 475 of 1953 SCR referred to in the said later decision of Mela Ram are limited to only those observations beginning with the words "Even If" towards the end of page 474 (of SCR) and not the other observations appearing on the said page 474 (of SCR). I am unable to accept Mr. Meyer's contention because their Lordships in the case of Mela Ram made it clear that the observations referred to in pages 474 and 475 (of SCR) came to be made by way of an answer put forward by the learned Attorney General in support of the appeal. Therefore on the principles in Melaram's case, the appeals giving rise to the instant reference should have been admitted by the Tribunal.

15. As proposed to be done by my learned brother, I need not detain myself in dealing with the scope and meaning of Section 23 of the Act, the true effect of the expressions final assessment, revision and amendment of the assessment on this branch of the law or by referring to the decisions cited at the bar, viz., 3 Privy Council decisions, *Badridas Daga v. Commissioner of Income Tax*³, *Rajendra Nath v. Commr of Income-tax*⁴, *Commissioner of Income Tax, Bombay Presidency and Aden v. M/s. Khemchand Ramdas*⁵, and 2 other decisions of the Supreme Court viz., *C.A. Abraham v. Income-tax Officer, Kottayam*⁶, and *Income-tax Officer V Circle Madras v. S.K. Habibullah*⁷, 3 Calcutta decisions, viz., *Metropolitan Structural Works Ltd. v. Union of India*⁸, *Ladhuram Taparia v. D.K. Ghosh*⁹, *Ajit Kumar Ganguli v. Union of India*¹⁰, 2 Allahabad decisions viz., *Santosh Kumar v. Commr. of I. T., U.P.*¹¹, and *J and K Cotton Spinning and Weaving Mills Co. Ltd. v. Commissioner of Income Tax, U.P.*¹², and the decision of the Madras High Court on the point of the reference being itself incompetent viz., *Ramaswami Chettiar v. Commissioner of Income Tax, Madras*¹³, and of the Punjab High Court viz., *Balbhadarmar Kuthiala v. Commr. of I. T. Punjab*¹⁴, All that I need say with respect that their Lordships of the Madras High Court misread the S. C. decision of

³(1949) 17 ITR 209

⁵65 Ind App 232

⁷(1962) 44 ITR 809

⁴61 Ind App 10

⁶(1961) 41 ITR 425

⁸(1955) 28 ITR 432 : AIR 1956 Cal 396

⁹(1958) 33 ITR 407 : AIR 1957 Cal 667

¹¹(1962) 46 ITR 1236 (All)

¹⁰(1962) 46 ITR 104 (Cal);

¹²(1963) 47 ITR 906 (All)

¹³(1956) 30 ITR 281 : AIR 1957 Mad 32

¹⁴(1957) 31 ITR 930 : AIR 1957 Punjab 284.

A. Chettiar and were wrong in applying the principle to the facts in the case reported in (1956) 30 ITR 281 : AIR 1957 Madras 32 (supra). The Allahabad decision reported in (1963) 47 ITR 906 (All) (supra) did not refer to either of the said two decisions of the Supreme Court, viz., A. Chettiar or Melaram (supra).

B.

16. In my judgment, the forms of the orders passed under Section 23(3) of the I. T. Act, 1922 are not exhaustive. The effect or substance of the order should be looked into to decide whether an appeal lies. The order passed by the Income-tax Officer revising the assessment, made originally under Section 23 of the Act, under the direction of the Appellate Tribunal, would partake the character of a fresh assessment order and would be no less an order as made under Section 23(3) of the Act within the ordinary acceptance of the term from which an appeal would lie to the Appellate Assistant Commissioner. A right of appeal is a creature of the statute conferred on the assesses by Section 30(1) of the Act. The said right, which is substantive, cannot be taken away unless it is expressly provided.

17. In the circumstances, the question should be answered in the negative in favour of the assesses, or in other words, my answer to the Reference is that the tribunal should have admitted the appeals filed by the assesses in respect of the revision of the assessments for the assessment years 1944-45, 1945-46 and 1946-47. The parties would bear their respective costs in these proceedings.

P. B. Mukharji, J.

18. I agree that this Court should return an answer in the negative, to the question asked on this Income-tax Reference. I am satisfied that the Tribunal was not justified in refusing to admit the appeals filed by the assessee in respect of the revision of its assessments for the assessment years 1944-45, 1945-46 and 1946-47.

19. This Reference is a battle for procedure. The controversy raised is a purely procedural controversy. No substantive question of Income-tax law is raised in this Reference. The main question and the only question is whether the Tribunal was justified in refusing to admit the assessee's appeals.

20. In coming to its conclusion the Tribunal holds that in carrying out the directions of a previous Tribunal and in doing what the Income-tax Officer did on the 26th September, 1945, the Income-tax Officer cannot be regarded as having acted under Section 23 or under Section 27 of the Income-tax Act. Therefore, the Tribunal holds no appeal lies from that order of the Income-tax Officer under Section 30(1) of the Act. The Tribunal came to the conclusion that there was no proper appeal before the Appellate Assistant Commissioner such as is contemplated by Section 30(1) of the Act and therefore, the order made by the Appellate Assistant Commissioner cannot be regarded as an order made by him under Section 31(3). The Tribunal gives the reason for this conclusion that an order under Section 31(3) of the Act can only be made in disposing of an appeal properly filed under Section 30 of the Act and consequently no further appeal lies to the Appellate Tribunal under Section 33(1) so as to enable the Appellate Tribunal to make an order under Sub-Section (4) of that Section.

21. In giving these reasons the Tribunal was relying on the decision of the Supreme Court in

1953 SCR 463 . The Tribunal followed the observation of the Supreme Court there that an order founded on an error as to its jurisdiction may be conceivably corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the Sub-Sections of Section 31 and therefore such an order could not come within the purview of Sections 28 and 31 and hence no appeal lay from the Appellate Tribunal under Section 30(1). Following those observations the Tribunal came to the conclusion that these present appeals of the assesses were not maintainable before the Appellate Assistant Commissioner and therefore no second appeal could lie to the Tribunal. The order of the Tribunal was : "The appeals are not admitted".

22. I am of the opinion that the Tribunal misapplied, misunderstood and misread the ratio decidendi in Arunachalam Chettiar's case, 1953 SCR 463 . That case is clearly distinguishable. In that case there was no appeal under Section 33(1) of the Income-tax Act. In the present Reference there is. That is a fundamental distinction. Secondly, in that case there was a "miscellaneous application" made by the assesses which is not provided for in the Income-tax Act. There was a miscellaneous application and a miscellaneous order by the Tribunal. This miscellaneous application and miscellaneous order were unknown to the procedure laid down in the Income-tax Act. But in the present Reference before us and in these proceedings there was a regular appeal from the decision of the Income-tax Officer to the Appellate Assistant Commissioner under Section 33(1) of the Income-tax Act. Before the Appellate Assistant Commissioner no question arose challenging the competence of the appeal to the Appellate Assistant Commissioner. The Revenue authority did not contest such an appeal to the Appellate Assistant Commissioner to be incompetent. The Appellate Assistant Commissioner, therefore, decided the appeal on merits. This question of incompetence of the appeal was raised only when there was a further appeal to the Tribunal. The Tribunal decided in the manner quoted above. Thirdly, the scope of application of the decision in Arunachalam Chettiar's case, 1953 SCR 463 , has been considerably reduced and circumscribed by the subsequent decision of the Supreme Court reported in 1956 SCR 166 : AIR 1956 Supreme Court 367. The original order of the previous Tribunal which started these proceedings was made on the 31st August, 1950 whereby the Tribunal said :

"We direct the Income-tax Officer to revise the assessments and authorise him to amend the assessments made on the partners if necessary."

The Income-tax Officer, pursuant to these directions, made the revision and the amendment of the assessments which he had previously made. It is clear from this order of the Tribunal that this direction to revise and amend the assessment is an order under Section 33(4) of the Income-tax Act although the order itself does not quote this section or refer to it. This order of the Tribunal is well within the ambit and the amplitude of Section 33(4) of the Income-tax Act which provides :

"The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit and shall communicate any such orders to the assessee and to the Commissioner."

This order of the Tribunal dated the 31st August, 1950 directing the Income-tax Officer to revise and amend the assessment is clearly an order within the meaning of Sub-Section (4) of Section

33 of the Income-tax Act. Mr. Meyer, appearing for the Income-tax authorities, has conceded and admitted, as he had to admit on the facts above, that this order is one under Section 33(4).

23. Now once this position is clearly understood that the Tribunal in directing the Income-tax Officer to revise and amend the assessment was acting under Section 33(4) the next question is whether the Income-tax Officer in carrying out these directions and in revising and amending his previous assessment, was doing something outside the Act or inside the Act. He obviously was not doing something outside the Act because he was directed by the Tribunal which had the power to make any order which it thought fit under Section 33(4). It cannot be said that the Income-tax Officer in carrying out the direction of the Tribunal was doing something which was outside the Act or illegal or without jurisdiction. The question, therefore, is reduced to an enquiry - under what section then was Income-tax Officer revising and amending his previous assessment. Obviously, there can be no other section than that under Section 23 of the Income-tax Act. Section 23 of the Income-tax Act deals with assessment. No doubt it is true that it deals with the assessment on the basis of evidence on the return made under Section 22 of the Income-tax Act. His duty under Section 23 of the Act is - "..... he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return," Mr. Meyer has contended that once he has done it the income-tax Officer is functus officio and if he wants to revise and amend the assessment by a direction from the Tribunal under Section 33(4) he cannot any more do it under Section 23 because no fresh return is made under Section 22 nor any further notice is given to the assessee. This argument is based on a fallacy. The Income-tax Officer's duty to assess the total income of the assessee and to determine the sum payable by him on the basis of the return under Section 23 of the Act is the whole process of assessment which may end with his order or may be revised by the higher appellate authorities including the Appellate Assistant Commissioner and the Tribunal recognised by the Income-tax Act. If, therefore, such higher appellate authorities such as the Appellate Assistant Commissioner or the Tribunal directs or orders him to do something again with regard to the assessment he has already made and that by way of revision or amendment, the Income-tax Officer must be held to be still under Section 23 of the Act on the process of assessing the total income of the assessee and determining the sum payable on the basis of the return already filed by him. No other construction or interpretation of Section 23 of the Act seems to me to be sensible or consistent with the scheme of the Act.

24. The Privy Council reported in 65 Ind App 236 , clearly laid down the law on this branch of the procedure of the Income-tax Act. Lord Romer in giving the advice of the Privy Council in that case first referred to the fact that the word 'assessment' is used in the Income-tax Act as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. See Lord Romer's observation at p. 239 of the report (Ind App) : (at pp. 175-176 of AIR) on this point. It was laid down there that once a 'final' assessment has been arrived at, it cannot be reopened by the Income-tax Officer of his own motion, or at the direction of the Commissioner exercising his powers under Section 33 of the Act except in the circumstances and within the time prescribed by Sections 34 and 35 of the Income-tax Act. At p. 248 of the report (Ind App) , Lord Romer accepts the argument on behalf of the appellant that the Income-tax Act does not impose any limit of time within which an assessment under the provisions of Sections 23 and 29 has to be made and that the service of the notice of demand can, therefore, be made at any time. Lord Romer referred to the decision of the Privy Council in 61 Ind App 10 , in that

connection but proceeds to observe –

"But it is not true that after a final assessment under those sections has been made the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time."

But then this observation really refers to the 'final' assessment. The assessment has to be 'final' within the scheme of the Income-tax Act. The Income-tax Officer is the primary authority to assess the income and to determine the sum payable. He is under the Act revisable by his higher authorities - the Appellate Assistant Commissioner and the Appellate Tribunal and both these higher appellate authorities can direct him to revise and amend his assessment and that he does and can only do as part of his duty and obligation under Section 23 of the Act. This particular point is made clear by Lord Romer in *Khemchand Ramdas's case*, 65 Ind App 236 at p. 248 : (AIR 1938 PC 175 at p. 179) in these terms :

"It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end, there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in Sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections."

25. Therefore, Lord Romer makes it clear that the duty of assessing the total income and of determining the sum payable by the assessee, which is cast upon the Income-tax Officer under Section 23 of the Act, is not complete until these further proceedings by way of appeals come to an end. Therefore, it is inescapable that the revision and amendment of the assessment made by the Income-tax Officer under the order of the Tribunal under Section 33(4) must be one under Section 23 of the Income-tax Act.

26. This decision of the Privy Council although not mentioned by the Supreme Court in 1953 SCR 463 is nevertheless followed and approved by the Supreme Court in (1962) 44 ITR 809 at pp. 813-814 : (AIR 1962 Supreme Court 918 at pp. 920-921). This was also approved by the Supreme Court in (1961) 41 ITR 425 at p. 429 : (AIR 1961 Supreme Court 609 at p. 611). The other Privy Council decision which discusses the scope and meaning of Section 23 is reported in (1949) 17 ITR 209 at p. 211 : (AIR 1949 PC 159 at p. 160).

27. This question came up for discussion in a recent decision of the Allahabad High Court reported in (1963) 47 ITR 906 (All), where M.C. Desai, C.J. at pp. 910-11 of the report made the following observations with which I respectfully agree :

"When an Income-tax Officer makes a fresh assessment in compliance with the Appellate Assistant Commissioner's directions, he is of course bound by the directions, but, subject to them, he has the same powers as he had originally when making an assessment under Section 23. The reassessment is nothing but a second assessment in substitution of the

assessment made previously and set aside by the Appellate Assistant Commissioner on appeal. There are no restrictions at all on the powers of the Income-tax Officer when the proceeds to reassess the income, subject to the directions given in the Appellate Assistant Commissioner's order, he has to proceed as if he were making an assessment under Section 23 at the time when he proceeds to reassess. He is not bound or restricted by anything that had happened either when he made the original assessment or when the appeal was heard by the Appellate Assistant Commissioner; he is governed only by the findings of the Appellate Assistant Commissioner. He is not bound by his own findings arrived at in the original assessment; they do not operate as *res judicata* and undoubtedly have not the force of an order. The findings arrived at by the Appellate Assistant Commissioner and the directions given by him are binding on him, not as *res judicata*, but as orders to which he is subject."

The same High Court in another case, reported in (1962) 46 ITR 1236 at p. 1249 (All) emphasises the important basic fact in Arunachalam Chettiar's case, 1953 SCR 463 namely that there the whole procedure originated with a miscellaneous application and ended with a miscellaneous order, unknown to the Income-tax Act.

28. Mr. Meyer, learned Counsel for the Revenue authorities, looking at the array of authorities against his contention made an attempt to reclassify the Tribunal's order to revise in this case by saying that the word 'revise' is loose language to be used by the Tribunal and Mr. Meyer was anxious to remind us to make a contrast by reference to such words as 'confirm', 'reduce', or 'enhance' or 'annul' or 'set aside' as used in Section 31 (3) of the Income-tax Act. I am not impressed by that argument. The word 'revise' certainly comes within the meaning of 'such orders thereon as it thinks fit' in Section 33 (4) of the Income-tax Act. Incidentally Mr. Meyer is further faced with the difficulty that he is to meet in making reference to other sections of the Act and specially the second proviso to Section 34 (3) of the Income-tax Act which says :

"Provided further that nothing contained in this (section limiting the time within which any action may be taken or any order, assessment or reassessment may be made) shall apply to a reassessment made under Section 27 or (to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in) an order under Section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A".

29. That clearly seems to indicate the amenability of the Income-tax Officer to directions and orders of his Appellate authorities and that is natural enough.

30. Then Mr. Meyer embarked on a further refinement of his argument on behalf of the Income-tax authorities. His argument is that if proceedings taken by the Income-tax Officer under the directions of the Tribunal were to be regarded as one under Section 23 then what is the period of limitation for an appeal which the assessee may file against the order of the Income-tax Officer. In support of his argument he refers to Section 30 (2) and submits that on the language of Sub-Section (2) of Section 30 of the Act it will appear that there would be no period of limitation at

all prescribed for appeal against the further order that the Income-tax Officer may pass pursuant to the direction of the Tribunal. The result according to his submission is that the assessee would be able to appeal at any time. That he contends would be a result highly inconvenient to the taxing authorities. He further elaborates his argument by saying that in case of reduction of the assessment no further notice under Section 22 of the Income-tax Act is necessary. But then in that event there would also be no limitation for appeal and yet appeal lies according to the courts' decisions. On this branch of the argument reference was made to the Division Bench decision of this Court reported in (1958) 33 ITR 407 : AIR 1957 Calcutta 667. But this decision explains the previous decision of this Court in (1955) 28 ITR 432 : AIR 1956 Calcutta 396. Both these cases again were considered by another Division Bench of this Court reported in (1962) 46 ITR 104 (Cal) where at p. 121 it was said –

"In (1955) 28 ITR 432 : AIR 1956 Calcutta 396, the second course mentioned above was followed; and it was held that the successive demand notices were legal and limitation would run from the last demand notice."

This line of argument adopted by Mr. Meyer for the Income-tax authorities suffers from many defects. In the first place this argument seems to assume that Section 30 (2) of the Income-tax Act somehow or other refers to notice of demand under Section 22 of the Act it is necessary to point out that no reference to Section 22 of the Act is expressly made in Section 30 (2) of the Act which prescribes the ordinary time for filing appeal to be thirty days of the payment of tax, nor does Section 30 (2) refer expressly either to Section 29 of the Income-tax Act dealing with the notice of demand. All that Section 30 (2) says inter alia is that the thirty days may be computed from the 'receipt of notice of demand relating to each assessment'. Now there is already a notice of demand. The word 'the assessment' includes the assessment which naturally the Income-tax Officer has to make under Section 23 of the Act. "The notice of demand relating to the assessment" as used in Section 30 (2) of the Act would certainly include the demand which the Income-tax Officer will make by an order in writing under Section 23 (3) when he has revised and amended the assessment under the direction of the Tribunal because it says - "The Income-tax Officer shall by an order in writing assess the assessee and determine the sum payable by him on the basis of such assessment". Now the limitation will run only when there is a notice of demand by the Income-tax Officer on this revised and amended assessment and not before. Once such notice of demand is made then the appeal must be filed within thirty days from such demand under Section 30 (2) of the Act. Even if there is no notice of demand the assessee may certainly file an appeal to the Appellate Assistant Commissioner under Section 30 of the Act. But in either view it does not imply or mean that Section 30 (2) cannot be attracted to this proceeding and that no limitation is prescribed for such an appeal. Secondly, the invocation of the cases, (1958) 33 ITR 407 : AIR 1957 Calcutta 667 and (1955) 28 ITR 432 : AIR 1956 Calcutta 396 cannot help the assessee on this point because neither of these two cases had occasion to consider the question which we are considering in this Reference, namely what happens when, as in the present Reference, the higher authority directs the Income-tax Officer to revise and amend the assessment. Incidentally the Division Bench in Taparia's case, (1958) 33 ITR 407 : AIR 1957 Calcutta 667, actually noticed the fact that there was a rectified demand to the assessee and the notice was not under Section 22 but under Section 29 of the Act. See the observations in Taparia's case, (1958) 33 ITR 407 at p. 420 : AIR 1957 Calcutta 667 at p. 673. Thirdly, this argument of Mr. Meyer fails to take into account the consideration that the right of appeal is

statutory and that is provided by Section 30 (1) of the Income-tax Act which inter alia provides that any assessee objecting to the amount of Income-tax assessed under Section 23 may appeal to the Appellate Assistant Commissioner against the assessment. This is the substantive statutory right of appeal. Section 30(2) only prescribes the time and that also is a time which shall be observed 'ordinarily' and which also may be extended and excused if the Appellate Assistant Commissioner is satisfied about sufficient cause for not presenting it within the period prescribed. Section 30 (3) also insists that the appeal shall be in the prescribed form and shall be verified in the prescribed manner. The statutory right of appeal cannot be wiped out by the procedural formalities which the appellant has to observe. Mr. Meyer's argument at best makes a confusion between the right of appeal with the procedural requisites for such appeal. Were it necessary for us to hold that the right of appeal was clearly given under Section 30 (1) but no time limit was prescribed for such appeal we would have held in favour of the right of appeal even though there was no limitation for filing such appeal. To argue back that because the time for presenting the appeal in a particular case was not specially mentioned therefore the substantive right of appeal given in the section must disappear will be really to beg the question. For these reasons we overrule Mr. Meyer's objections on these grounds.

31. The last submission on behalf of the Income-tax authorities is that this Reference itself is incompetent and without jurisdiction and therefore this Court should refuse to answer the question asked. The steps in this argument are first that the Income-tax Officer was without jurisdiction to revise and amend the assessment he has already made even under the orders of the Tribunal under Section 33 (4), secondly it follows from the first premise that the Appellate Assistant Commissioner was also without jurisdiction to entertain the appeal and thirdly, the Tribunal, therefore, in refusing to admit the appeal was also without jurisdiction because it could only entertain an appeal under Section 33 i.e., a properly constituted appeal from the Appellate Assistant Commissioner. In support of this submission Mr. Meyer relied on two decisions - (1) in (1956) 30 ITR 281 : AIR 1957 Madras 32 and (2) reported in (1957) 31 ITR 930 : AIR 1957 Punjab 284. I am unable to accept Mr. Meyer's argument on the incompetence of that Reference. I shall state my reasons briefly.

32. This argument that the Reference itself is incompetent is based on the first premise which is wrong namely, that the Income-tax Officer in revising and amending the assessment acted without jurisdiction. He did not. He was acting under the orders of the Tribunal duly made under Section 33 (4) of the Act. That being so, the order that he made was an order under Section 23 of the Income-tax Act, on the authorities that I have already cited above. Therefore, the basic foundation of Mr. Meyer's argument does not exist. Secondly, there was a regular appeal in this case under Section 30 to the Appellate Assistant Commissioner before whom this point of incompetence of the appeal was not even breathed, far less argued. The Tribunal, therefore, rightly proceeded under Section 33 to make the order in question and which is now being challenged before us. Thirdly, this Reference is competent because this is a question of law arising out of the order of the Tribunal duly made under Section 33 (4) of the Income-tax Act. The Tribunal held that the appeals were not maintainable and that order the Tribunal was making under Section 33 (4) of the Income-tax Act. Naturally under Section 66 (1) of the Income-tax Act, under which this Reference has been made, this question of maintainability of the appeal and jurisdiction is a question of law arising out of the order of the Appellate Tribunal within the meaning of Section 66 (1) of the Act. No doubt if it had originated in a miscellaneous order on a miscellaneous application unknown to the procedure recognised by the Income-tax Act then this

argument of Mr. Meyer would have acquired great force. But the facts do not justify and support this argument in this Reference. The two cases are of no help to Mr. Meyer. The case of (1956) 30 ITR 281 : AIR 1957 Madras 32 is distinguishable. In the first place, in that case the application that was considered was an application not recognised by the Income-tax Act at all as pointed out by Rajagopala Ayyangar, J. at p. 285 (of ITR) where the learned Judge observed that

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"It will be seen that this was not an application contemplated by any of the provisions of the Indian Income-tax Act; and it is for this reason that we have termed it a miscellaneous petition."

In fact, there the original assessment had become final and no appeal had been preferred against that assessment order as pointed out at p. 284 of that report (ITR) . Secondly, there in the Madras case the legal position was not challenged by the learned Counsel for the petitioner and at p. 286 (of ITR) the same learned Judge discussing the Supreme Court decision in 1953 SCR 463 observed —

"But the petition filed by Ramaswami Chettiar in the present case is certainly not one of those enumerated in the Act and no appeal therefore lies from the order passed adversely to the applicant in such an application as the same is not covered by Section 30 of the Act. The Appellate Assistant Commissioner was, therefore, right in the view that no appeal lay to him. In this view we uphold the preliminary objection and decline to answer the question referred to this Court."

These significant facts are absent in this Reference. This is not a miscellaneous petition nor a miscellaneous order. In that view of the distinction it is not necessary for me to say whether the Madras decision was right or wrong on the facts of that case. The other case of (1957) 31 ITR 930 : AIR 1957 Punjab 284 deals first with the questions of law which can be raised under Section 66 and those alone which arise out of an order of the Appellate Tribunal under Section 33 (4) of the Act and secondly holds that events that took place after the order of the Tribunal dismissing the appeal under Section 33 (4) of the Act could not be gone into or taken into consideration. Here I hold that the questions of the competence of this Reference and the maintainability of the appeal are questions of law arising out of the order of the Tribunal under Section 33 (4) of the Act. No question of taking into consideration events after the order of the Tribunal arises in this case. Therefore, the Punjab case also is of no assistance to Mr. Meyer.

33. For these reasons I agree with my learned Brother that this Court should return an answer in the negative to the question asked in this Reference by holding that the Tribunal was not justified in not admitting the appeals filed by the assessee and I also agree that there should be no order as to costs.

Order accordingly.