

# **BOMBAY HIGH COURT**

Commissioner of Income-Tax

Vs

Hazarimal Nagji & Co

(V.S. Desai and Y Tambe, J.)

06.10.1961

## **JUDGMENT**

**V.S. Desai, J.**

1. At the instance of the Commissioner of Income-tax, the Income-tax Appellate Tribunal has referred to this court, under section 66(1) of the Indian Income-tax Act, the following two questions :

"1. Whether on the facts and in the circumstances of the case the Tribunal exercised its discretion judicially in permitting the assessee respondent to raise the fresh ground at the Tribunal stage, viz., the 'previous year' for income from an undisclosed source could only be the financial year and as such assessable in the assessment year 1948-49 and not in 1949-50 ? and

2. Whether the refusal by the Tribunal to give a direction under the provisions of section 34(3) of the Act was valid ?"

2. The assessee is a registered firm carrying on business in cloth. In the assessment of the firm for the assessment year 1949-50, corresponding to the accounting year of Samvat year 2004, extending from 13th November, 1947, to 1st November, 1948, the Income-tax Officer found cash credits in the accounts of the firm aggregating to Rs. 90,000 in the names of four non-resident persons. All these credit entries appeared in the months of December, 1947, and January, 1948, the earliest being on the 13th December, 1947, and the last on the 9th January, 1948. The Income-tax Officer before whom no explanation was offered by the assessee with regard to this amount of Rs. 90,000 treated it as income of the assessee from an undisclosed source and added the amount to its assessable income. In the appeal to the Appellate Assistant Commissioner, the case was remanded and thereafter the explanation offered by the assessee in respect of this amount of Rs. 90,000 was accepted, and its addition to the assessable income was deleted. The department took an appeal to the Tribunal against the order of the Appellate Assistant

Commissioner. The Tribunal was of the view that the burden was on the assessee to explain the source of the cash credits and the burden had not been properly discharged by the assessee. Before the Tribunal, however, a new point was raised by the assessee which had not been raised either before the Income-tax Officer or before the Appellate Assistant Commissioner, and that was since the credits had arisen in the financial year 1947-48, and since they constituted, according to the view taken by the Income-tax Officer, income from an undisclosed source, the relevant previous year in respect of that income was the financial year 1947-48 and it, therefore, could only have been taxed in the assessment year 1948-49, and could not be taxed in the assessment year 1949-50. The Tribunal allowed the point to be raised by the assessee and accepted it in its favor, relying on the decision in Commissioner of Income-tax v. P. Darolia & Sons. The department requested the Tribunal, in the view that it was taking, to give a direction under section 34(3) that the said sum be brought to tax in the assessment year 1948-49. The Tribunal declined to give any such direction, because, in its opinion, no useful purpose would be served by giving such a direction in view of the decision of this court in Hiralal Amritlal Shah v. K.C. Thomas, I Income-tax Officer, M-Ward, Bombay. On an application by the department under section 66(1), the Tribunal drew up a statement of the case and referred to this court the two questions which we have set out at the beginning of the judgment.

3. Now, the first question as it is framed presumes that the Tribunal had jurisdiction to permit the assessee-respondent to raise a fresh ground at the Tribunal stage, and the inquiry which it raises is whether the discretion, which it has, has been judicially exercised by it. Now, if it be disputed that the Tribunal has jurisdiction, then there will be no difficulty in holding that the discretion has been exercised judicially, because the reason which the Tribunal has given for permitting the question to be raised is that all the facts necessary for the determination of the point raised were already on record and the question was one of pure law. Mr. Joshi, learned counsel for the revenue, has however argued that the question as raised does not bring out the real dispute or the real contention which was raised by the department, which is that a respondent in an appeal before the Tribunal is not entitled to raise a fresh ground not raised by him before the lower authorities, and the Tribunal has no jurisdiction to permit him to raise such a ground. We will, therefore, reframe the first question as :

"Whether, on the facts and in the circumstances of the case, the Tribunal has erred in law in permitting the assessee-respondent to raise the fresh ground at the Tribunal stage, viz., the 'previous year' for income from an undisclosed source could only be the financial year and as such assessable in the assessment year 1948-49 and not in 1949-50 ?"

4. Section 33 which deals with appeals to the Tribunal states in sub-section (4) therefore that "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". It is argued by Mr. Joshi that the powers extend to pass orders on the appeal before it, and the word thereon appearing in the sub-section limits the power to deciding the case on the grounds of appeal set up before it in the said appeal. Rule 12 of the Appellate Tribunal Rules provides that "the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth, in the memorandum of appeal; but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule, provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground". Rule 27 states as follows : "The respondent, though he may not have appealed, may support the order of the Appellate Assistant Commissioner on any of the grounds decided against him." Mr. Joshi argues that under rule 12, it is permissible for the appellant, by leave of the Tribunal, to take a new ground which is not set forth in the memorandum of appeal. No such provision exists permitting a respondent to raise a new ground for the first time before the Appellate Tribunal. Under rule 27, a respondent is, no doubt, entitled to support the decision of the Appellate Assistant Commissioner in his favour not only on the grounds which he has decided in his favour, but also on the grounds which he has decided against him; but the grounds on which the respondent can rely must be such as have been raised before the lower authorities. If a ground has not been agitated at all before the Income-tax Officer or before the Appellate Assistant Commissioner, the respondent before the Appellate Tribunal will not be entitled to take up such a ground, and the Tribunal will have no jurisdiction to permit him to do so.

5. Now, reading the provisions of section 33(4) and the relevant rules to which our attention has been drawn by Mr. Joshi, it seems to us that the powers of the Appellate Tribunal are similar to the powers of the appellate court under the Civil Procedure Code. That also is the view which this court has taken in *New India Life Assurance Co. Ltd. v. Commissioner of Income-tax*, where it is observed that "the position of the Appellate Tribunal is the same as a court of appeal under the Civil Procedure Code and its powers are 'identical' with the powers enjoyed by an appellate court under the Code." Now, a respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. A respondent, unless he has filed an appeal himself or filed cross-objections in the appeal filed by his opponent, will not be entitled to challenge that part of the lower court's decree which is against him, and the appellate court will have no power or jurisdiction to permit him to do so. But, in so far as he only wants to maintain the decree of the lower court which is against the appellant and in his favour, he will be entitled to support it on fresh grounds also if he can do so, and the appellate court also will have jurisdiction to permit him to do so, provided, of course, that the fresh grounds which he wants to urge do not require a further investigation into facts which

are not already on record and are not based on facts which were neither alleged nor admitted nor proved and which the other side was never called upon to meet in the lower court. But, if all the facts necessary to sustain a fresh ground which he wants to urge are undisputed facts which are already on record and the contention which he wants to raise is a pure question of law, we do not see why there should be any difficulty in his way in raising the same, or any difficulty in the way of the appellate court to allow him to do so.

6. Mr. Joshi says that if the fresh ground which the respondent wants to raise has the effect of affecting the appellant adversely, such a ground cannot be permitted to be raised by the respondent, and he says that this submission which he is making is supported by some decisions of out court. Now, if what is meant by saying that a ground cannot be permitted to be taken by the respondent which affects the appellant adversely is that a ground cannot be permitted to be taken by the respondent which relates to that part of the decree against the respondent and in favour of the appellant or relates to the modification of the decree passed by the lower court in favour of the respondent; we agree with Mr. Joshi that such a ground cannot be allowed to be taken unless the respondent has filed a cross-appeal or has filed cross-objections in the appeal of the appellant. But, if the fresh ground sought to be urged has no such effect and is only for the purpose of maintaining the decree of the lower court as it is, we do not think that it is a ground which affects the appellant adversely. A ground which would affect the appellant adversely is a ground which in the event or its succeeding puts the appellant in a position worse than that in which he was under the decree of the lower court. If the appellant in his challenge to the decree of the lower court is entitled to take a new ground not agitated in the court below by leave of the court, there appears to be no reason why a respondent in support of the decree in his favour passed by the lower court should not be entitled to agitate a new ground in the same way and subject to the same limitations. Taking the present case, for instance, suppose the decision of the Income-tax Officer instead of being reversed by the Appellate Assistant Commissioner had been confirmed by him and the assessee had come up in appeal to the Tribunal and had not only sought to challenge the decision of the lower authorities on the grounds decided against him, but had also sought to urge the fresh ground, which he has now tried to raise as a respondent, he could have urged this additional ground in the memorandum of appeal, and there would have been no want of jurisdiction in the Tribunal to allow him to agitate the same. Since the decision of the Appellate Assistant Commissioner was wholly in his favour, the assessee could not appeal, and had no occasion also to file any cross-objections. If the view is taken that a respondent, who could not have appealed or filed cross-objections because that decree was wholly in his favour, cannot be permitted to raise a new ground available to him in support of the decree, although the same ground would have been available to him if he was in the position of an appellant, it would amount to putting him in a worse position as a respondent than as an appellant. In our opinion, therefore, the Tribunal had jurisdiction to allow the assessee-respondent to urge a fresh ground

which it sought to raise in the present appeal before it.

7. The decisions to which Mr. Joshi has invited our attention do not, in our opinion, go contrary to the view which we are inclined to take. In *Motor Union Insurance Co. Ltd. v. Commissioner of Income-tax* it was held : "The word 'thereon' used in section 33(4) of the Indian Income-tax Act only means 'on the appeal' which must mean on the grounds raised in the appeal. The subsection only gives power to the Appellate Tribunal to give its decision and pass orders in respect of all grounds urged on behalf of the appellant in respect of the decision appealed against. In deciding those grounds it can pass appropriate orders. But it is not open to the Tribunal itself to raise a ground or permit the party, who has not appealed, to raise a ground, which will work adversely to the appellant. The words of the section are not wide enough to include a power of enhancement, without an appeal by the Commissioner." In that case, the income-tax authorities had held that the assessee company, which was a non-resident company, had invested Indian money in the United Kingdom, and it was, therefore, liable to be taxed under section 42(1) of the Indian Income-tax Act. The Income-tax Officer computed the amount of interest which was held to have been earned by the company out of Indian prima by the application of rule 6 of the schedule. From the order passed by the Income-tax Officer, the assessee company had appealed to the Appellate Assistant Commissioner, and, on the dismissal of the appeal by the Appellate Assistant Commissioner, had taken a second appeal to the Tribunal. In this appeal, the Tribunal took the view that in arriving at the income in the shape of the interest, the Income-tax Officer ought not to have proceeded under rule 6 of the schedule, and that rule 8 was the proper rule to be applied. The result of the view taken by the Tribunal was that the interest item was increased to a larger amount than the amount at which it was determined by the income-tax authorities. Now, it must be remembered that the department had not appealed from the decision, nor had it filed any cross-objections asking for computation under rule 8. The effect of application of rule 8 was to modify the decision of the income-tax authorities not in favour of the appellant who had gone to the Tribunal, but in favour of the respondent who had neither appealed nor cross-objected. It was, therefore, a clear case where the fresh point entertained by the Tribunal was one which affected the appellant adversely. Mr. Joshi argues that even in the present case the appellant is being affected adversely inasmuch as the item is deducted from assessment on a ground not taken by the assessee. If the assessee were to be confined only to such grounds as it had taken before the income-tax authorities, the tax could not have been avoided. It is only because of the new ground urged that the tax is being avoided and, therefore, the appellant is being affected adversely. In our opinion, the submission made by Mr. Joshi is not a correct one. The dispute before the Income-tax Officer was whether the amount of Rs. 90,000 was subject to tax. The Income-tax Officer had held that it was subject to tax and had added it to the income. The Appellate Assistant Commissioner had deleted it. The dispute before the Tribunal was whether it should be taxed or not and the respondent-assessee was supporting the decision of the

Appellate Assistant Commissioner that it was not subject to tax. Whether the ground that it was urging in support of the decision of the Appellate Assistant Commissioner was the one on which the Appellate Assistant Commissioner had relied or some other ground did not make any difference. The appellant was not being affected adversely in the sense that the permitting of the ground to be raised by the respondent was to affect the decision of the lower authorities which was against the appellant to a further detriment of the appellant as in the case referred to by Mr. Joshi. In our opinion, what is meant by the observation that the respondent will not be permitted to raise a ground which will work adversely to the appellant is that the respondent will not be entitled to raise a ground which he can only raise provided he has cross-appealed or cross-objected. We may refer, in this connection, the following observations which appear in the decision, at page 282 of the report :

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favor."

8. The next case to which Mr. Joshi has referred is *New India Life Assurance Co. Ltd. v. Commissioner of Income-tax*. The question agitated in that case was whether it was open to the Tribunal under section 33(4) to decide a case on a question which was not raised by the appellant in the grounds of appeal, and the court held that the Appellate Tribunal had power to give leave to the appellant to raise the question, and must be presumed to have given such leave in the circumstances of the case, and it was competent to the Tribunal to reverse the decision of the Appellate Assistant Commissioner on that ground. The decision, therefore, was not with reference to the respondent's right to raise a fresh ground in the appeal. Mr. Joshi, however, has relied on certain observations in the said case, relating to the right of the respondent. Thus, in dealing with the case of *Motor Union Insurance Co. Ltd. v. Commissioner of Income-tax* (which was cited before the court), it was observed that it was a case of a respondent and not of an appellant who was seeking to raise a fresh ground, and it was also observed : "So far as the respondent is concerned, he cannot raise a new ground" and further "therefore, again, what is being emphasized is that the Tribunal should not give a relief to the respondent which relief was not given to him by the trial court and which relief he has not himself sought by either cross-appealing or cross-objecting." Now, these observations were made in the context of distinguishing the case which was cited before the court from the case with which the learned judges were dealing. In our opinion, from these observations, it could not be said that this court

took the view that the respondent was not entitled to support the decree in his favour on a ground other than the one on which the lower court had decided in his favour. Another decision to which Mr. Joshi has invited our attention is *Rajkumar Mills Ltd. v. Income-tax Appellate Tribunal*. It was held in that case that "that the jurisdiction of the Appellate Tribunal under section 33 in an appeal against an order of the Appellate Assistant Commissioner is limited to the grounds of appeal raised before it and the Tribunal is only entitled to determine the objections raised by the appellant, does not preclude the Tribunal from determining the matter on the basis of facts canvassed before the Income-tax Officer and the Appellate Assistant Commissioner, on which either the Income-tax Officer or the Appellate Assistant Commissioner might have recorded a finding but considered that finding not necessary for the determination of the assessment because he took a particular view of the assessee's liability, which view the Tribunal dissents from; and the position is the same where the Tribunal accepts that view, but upon a reference the High Court holds that that view is wrong." Now, the actual decision in the case has no application to the case before us. Mr. Joshi, however, has pointed out that, in deciding the case, the court has considered the scope of the jurisdiction of the Tribunal in its appellate powers and has observed that "if the case which was put forward by the department before it was a new case, the Tribunal would have had no jurisdiction to make the order that it did. If, on the other hand, it was not a new case for the department, but has always been its case, then the Tribunal would have jurisdiction to make the order that it did." Mr. Joshi says that applying these tests, the case which the assessee made before the Tribunal and which the Tribunal entertained was a case which had not been the case of the assessee at any stage before the lower authorities. It was, therefore, a new case which the Tribunal had no jurisdiction to entertain. In our opinion, the observations referred to by Mr. Joshi were made in the context of that particular case, and were not intended to mean that in the appeal before the Tribunal, the Tribunal had no jurisdiction to entertain a new ground not made out in the lower courts either on behalf of the appellant or the respondent. Another case referred to by Mr. Joshi is *Commissioner of Income-tax v. T.M. Bhumraddi*. It was held in that case that "it was not open to the Commissioner to raise for the first time a new case before the Tribunal when the assessee was the appellant" and it was observed : "In supporting the decision of the Appellate Assistant Commissioner appealed from, the Commissioner of Income-tax may no doubt support it on any ground other than the one on which the Appellate Assistant Commissioner based his decision. But such ground must arise on the record of the assessment proceedings and must have been raised on behalf of the department at some stage in the proceedings. No new ground may be raised for the first time before the Tribunal by the respondent." What the income-tax department had sought to urge for the first time before the Tribunal was entirely a new basis which had not been set up in the courts below, and the facts in respect of which had not been found until the stage the assessee filed an appeal to the Tribunal, and was sought to be based on an opinion expressed by the Appellate Assistant Commissioner in

his remand report and which opinion was beyond the scope of the remand. It was in these circumstances that the observations, to which Mr. Joshi has drawn our attention, were made by this court. Now, the circumstances of the case before us are entirely different. On the facts as stated by the Tribunal, the contention raised in the present case was one purely, in law, on the facts as they existed all along before the Income-tax Officer as well as the Appellate Assistant Commissioner, though the legal argument available on those facts was not urged before either of the authorities. In our opinion, none of the decisions to which Mr. Joshi has invited our attention, goes contrary to the view which we are inclined to take in the matter. In our opinion, therefore, it was within the jurisdiction of the appellate powers of the Tribunal to permit the assessee-respondent to raise the question, which it sought to raise for the first time before the Tribunal, and the Tribunal, therefore, could not be said to have erred in permitting the assessee-respondent to do so. Our answer, therefore, to the question No. 1, as reframed by us, is in the negative.

9. Coming to the second question, the argument of Mr. Joshi is that the Tribunal was not justified in refusing to give a direction which the department had requested it to give. If a new contention was permitted to be raised by the assessee-respondent for the first time in appeal before the Tribunal, it was but fair and proper that a direction, as was prayed for by the department, should have been given by the Tribunal under section 34(3) of the Income-tax Act. Moreover, says Mr. Joshi, the reason which the Tribunal gave in refusing to give a direction, viz., that no useful purpose will be served by giving such a direction in view of the decision of this court in *Hiralal Amritlal Shah v. K.C. Thomas, I Income-tax Officer, M-Ward, Bombay*, is erroneous. In the first place, the mere circumstance that no useful purpose will be served by giving a direction, should not be a reason for not giving a direction when otherwise it is just and proper to give such a direction. Secondly, the view of this court in *Hiralal Amritlal Shah v. K.C. Thomas, I Income-tax Officer, M-Ward, Bombay* is not a sound view of the relevant legal provisions and a contrary view is taken by the Madras High Court in *K. Simrathmull v. Additional Income-tax Officer, Ootacamund*. Mr. Joshi has also stated that the decision of this court in *Hiralal Amritlal Shah's* case is pending in an appeal before the Supreme Court, and, in view of the circumstance, the reason given by the Tribunal that no useful purpose will be served, cannot be regarded as a good reason because, if the said decision is reversed and the contrary view taken by the Madras High Court is accepted by the Supreme Court, a useful purpose may indeed be served if the direction which was sought was given by the Tribunal.

10. Now, the question which is before us is whether the refusal of the Tribunal is a valid one. In view of the question which is before us, we are not so much concerned with the correctness or otherwise of the refusal. But, what we are concerned with is the legality of the refusal. It is not argued that it was obligatory on the Tribunal to give such a direction. If it was obligatory, and the Tribunal had refused to give a direction, the refusal would indeed have not been valid. But, if it

was not obligatory to give a direction, we cannot see how we can say that the refusal is not valid. It seems to us that it cannot also be said, so far as the Tribunal is concerned, that it was not justified in refusing to give a direction. The decision of this court in Hiralal Amritlal Shah's case was binding on the Tribunal and, in view of that decision, it was indeed permissible for the Tribunal to take the view that no useful purpose will be served even if the Tribunal were to give a direction such as was required. In our opinion, therefore, the refusal by the Tribunal to give a direction under the provisions of section 34(3) of the Income-tax Act was a valid refusal and the second question, therefore, must be answered in the affirmative. We answer accordingly. The department will pay the costs of the assessee.

11. Questions answered accordingly :

