Privy Council Appeal No. 26 of 1932.

Khan Sahib Mian Feroz Shah - - - - - - *Appellant*

v.

The Income Tax Commissioner, Punjab and N.W.F. Province, Lahore - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD MACMILLAN.

[*Delivered by* LORD BLANESBURGH.]

This appeal is concerned with an assessment to income tax in respect of the profits of his business, made upon the appellant under the provisions of the Indian Income Tax Act, 1922, by the Income Tax Officer at Peshawar.

Apart from an objection to the competency of the appeal, to which reference will at a later stage be made, the sole question for determination by their Lordships is whether two findings of the Income Tax Officer, upon which the assessment was based and to which the appellant takes exception, were other than findings of fact placed by the Act beyond the review of any Court. That the findings were of that description was the conclusion arrived at in India by all the authorities concerned, including the High Court of Judicature at Lahore.

Although the provisions of the Indian Income Tax Act immediately relevant are not unfamiliar, it will be convenient,

if only for facility of subsequent reference, and before going further to set them forth as they stood in 1928.

They are as follows :—

"S. 3.—Where any Act of the Indian Legislature enacts that income tax shall be charged for any year . . . tax . . shall be charged for that year . . . in respect of all income profits and gains of the previous year of every individual. . . .

"S. 10 (1).—The tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him.

"S. 13.—Income, profits and gains shall be computed for the purpose [of Section 10] . . . in accordance with the method of accounting regularly employed by the assessee.

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

"S. 22 (2).—In the case [of such a person as the appellant] the Income Tax Officer shall serve a notice upon him requiring him to furnish . . . a return in the prescribed form and verified in the prescribed manner, setting forth . . . his total income during the previous year.

"S. 23 (2).—If the Income Tax Officer has reason to believe that a return made under s. 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him . . . either to attend at the Income Tax Officer's office, or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return.

"(3) . . . 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 sum payable by him on the basis of such assessment.

"S. 30.—Any assessee objecting to the amount or rate at which he is assessed under s. 23 . . . may appeal to the Assistant Commissioner against the assessment. . . .

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

(*a*) Confirm . . . the assessment.

"S. 33 (1).—The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him. . . .

"(2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit :

"Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

"S. 66 (2).—Within [the time prescribed after being] served with notice of an order under s. 31 or s. 32 the assessee . . . may . . . require the Commissioner to refer to the High Court any question of law arising out of such order. . . .

"(3) If on any application being made under subs. (2) the Commissioner refuses to state the case on the ground that no question of law arises the assessee may . . . apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case."

It is against the refusal of the High Court of Judicature at Lahore to require the Commissioner to state a case with reference to the questions raised by the appellant that the present appeal is brought. The objection taken to its competence, already referred to, is that no appeal to His Majesty in Council lies from such refusal.

The facts are short.

The appellant, the assessee, is a timber merchant carrying on business at Nowshera, in the North-West Frontier Province. His present complaint is with reference to the profits of his business assessable to income tax for the year ending the 31st March, 1928.

As has been seen, the effect of Section 3 of the Income Tax Act is that the profits of the previous year are for the purpose of income tax to be taken to be the profits of the year of assessment. Accordingly, in response to a notice from the Income Tax Officer, pursuant to Section 22 (2) of the Act, served upon the appellant with reference to the year of assessment, he made a return which showed his total income received during the previous year to have been Rs. 9,167. The officer refused to accept this return, and to test its accuracy called, under Section 23 (2), for evidence in its support. In response, the appellant's business books were produced. From them it appeared that his sales of timber therein recorded for the year in question produced Rs. 4,37,339 only, there having been omitted all record of some further sales actually effected during the year for an aggregate purchase price of Rs. 90,618.

These further sales, although so effected, were not brought into charge until the month of April, 1927, after the expiration, that is to say, of the previous year. With these sales included in that year, as the Income Tax Officer held they ought to have been, the appellant's total sales for the year amounted to Rs. 5,27,958, and on the basis of that figure of sales the officer assessed the appellant to income tax in respect of his business profit.

Here, according to the appellant, the officer went wrong. The sum of Rs. 4,37,339, representing the sales recorded in his books for the year, was the only true basis of assessment, and the addition of Rs. 90,618 to that sum is the first of the two matters to which he takes exception.

The second is this. The Income Tax Officer in order to arrive at the appellant's profits from his business, applied a flat rate of 32½ per cent. to the above sum of Rs. 5,27,958, stating, in his order of assessment, that no profit and loss account had been prepared by the appellant and that the rate of profit could not be deduced from his books. This rate, in its amount, is objected to by the appellant. His objection is not to a flat rate as such, but to this particular flat rate as being excessive and in the circumstances unwarranted.

Dissatisfied with the assessment upon him, the appellant, under Section 30 of the Act, appealed to the Assistant Commissioner of Income Tax, Rawalpindi. His grounds of appeal, in effect, were (1) that according to his method of book-keeping, a transaction of sale was not entered in his books until the day when the hundi in respect of it was received from his purchaser, and that the hundis for the Rs. 90,618 were received in, that is, were not received before, April, 1927; and (2) that the officer was not correct in working out the profits at a flat rate of so much as 32½ per cent.

The Assistant Commissioner dismissed the appeal by an order dated the 22nd November, 1927. In his view, as in that of the Income Tax Officer, the appellant's books were normally kept on a system, which he termed the mercantile system, an outstanding feature of which is that sales are recorded on the dates when they are effected, whether cash payment is then made or not. In respect of the Rs. 90,618, the appellant had for his own purposes departed from this system, and had recorded the transactions not on the dates when the sales were effected, but on a date after cash payment for all of them had been received. With regard to the second objection, the flat rate of profit was the same as that which, without objection, had been charged in the previous year, and there was no proof adduced in support of the appellant's allegation that the profit was in fact lower proportionately than it then had been.

On the 19th December, 1927, the appellant petitioned the respondent Commissioner to refer to the High Court of Judicature at Lahore, under Section 66 (2) of the Act, the questions of law involved in his objections to the assessment made upon him. By an order of the 5th December, 1928, the Commissioner dismissed the petition. He held that the objections taken by the appellant to the assessment related to questions of fact only and that no question of law was involved.

Thereupon on the 5th February, 1929, the appellant filed a petition in the High Court of Judicature at Lahore, under Section 66 (3) of the Act, praying that Court to order the respondent Commissioner to refer to it certain points of law which in the course of the hearing were formulated as follows:—

"(1) That the finding of the Assistant Commissioner of Income Tax that the appellant kept his accounts in accordance with the mercantile system was not based on any evidence whatever or in any case was an inconsistent finding.

"(2) That mere credit entries of sales of timber appearing in the books during the accounting year could not be regarded as including profits accruing in that year when, as a matter of fact, the prices of such timber were neither realised nor credited as income during that year; and

"(3) That there was no legally admissible evidence justifying the Income Tax Officer in estimating the profits at a flat rate of 32½ per cent."

The Court, by order of the 28th November, 1929, dismissed the petition. The learned Judges found and held that the findings of the Income Tax Officer and of the Assistant Commissioner as to the appellant's system of accounting were findings of fact, based upon evidence. As to the assessment at a flat rate of profit of 32½ per cent., they pointed out that no objection had been taken by the appellant to the same assessment for the two preceding years, 1924–5 and 1925–6, and it had not been shown that the Income Tax Officer was not well warranted in maintaining the same percentage in respect of the year of assessment. The question was one of fact for him to decide.

The present appeal is from that order of dismissal of the 28th November, 1929, and their Lordships are satisfied that it is an appeal without foundation. It was mainly rested on the contention that the assertion of the Income Tax Officer as to the appellant's accounts being kept on the mercantile system could not in point of law be supported. A profit and loss account and a valuation of stock were, it was contended, essential to a mercantile system of accounting, and no such account had been prepared by the appellant, while no valuation of stock had, it was conceded, been made. Their Lordships do not propose to discuss this question, which hardly seems to them to be one of law. Too much emphasis has, they think, throughout the case been attached to the use by the Income Tax Officer and the Assistant Commissioner of the term "mercantile system." The finding of both, in its essential substance, was that the appellant's system of accounting, by whatever name called, required the inclusion in his accounts of 1926–27 of the Rs. 90,618 referred to, and the only question open to judicial determination is whether there was any evidence before these officers upon which they might so find.

It appears to their Lordships that such evidence was not wanting. Different descriptions of his system, inconsistent with the finding put forward by the appellant, failed to stand the test of examination. The appellant's contention, before the Assistant Commissioner, for example, that transactions of sale were only entered in his books when one-fourth of the price was paid in cash and hundis received for the balance was shown on examination of his books to be without warrant, and with reference to the disputed figure of Rs. 90,618 itself, his statement in his grounds of appeal to the Assistant Commissioner that hundis for the entire amount were received in April, 1927, is contradicted in his own petition of the 19th December, 1927, when, speaking of Rs. 48,712·6, being sales to the O.R. Railway, he says that no hundis or part-payment is given in the case of sale to Government, and it was admitted that the accounts for that amount had been accepted by the railway company in March. Further, it was admitted that a part-payment of Rs. 12,438, another portion of the Rs. 90,618, was made to the appellant on the 30th

March, 1927, yet no receipt in respect of that payment was entered until the 3rd April, 1927. When, finally, in the High Court it was explained by Counsel for the appellant that to include this figure of Rs. 90,618 in the accounts of the " previous year " would have exposed the appellant to liability for super-tax in the year of assessment, confirmation is not lacking of the Assistant Commissioner's statement that sales are recorded in his books as it suits the appellant best or as he likes.

In these circumstances it is, in their Lordships' judgment, impossible to say that there was not evidence before the Income Tax Officer and the Assistant Commissioner upon which they might find, as they did, that this item of Rs. 90,618 was excluded from the appellant's accounts of 1926–27 out of the ordinary course and for reasons not to be justified.

With regard to the flat rate of 32½ per cent., their Lordships are in agreement with the judgment of the High Court on that head. The principle of assessment at a flat rate not being contested, its amount must be for the Income Tax Officer to determine. Their Lordships would only add that the Commissioner, acting under Section 33 of the Act, caused further inquiry to be made into this matter, and as a result he found no reason for interfering with the Income Tax Officer's finding.

The result is that the appeal fails on the merits and it becomes unnecessary for their Lordships to deal with the objection to its competence, already referred to. The objection is a serious one. Admittedly, such an appeal as the present is not authorised by the Indian Income Tax Act itself. If open at all, it must be justified under Clause 29 of the Letters Patent of the Lahore High Court as being an appeal " from a final judgment decree or order made in the exercise of original jurisdiction " by a Division Bench of the Court. And this present appeal was held by the Full Court to be so justified.

Before the Board the question was not fully argued, and their Lordships accordingly refrain from expressing any opinion whatever upon it. It is desirable, they think, that it should await final determination in a case where it is not, as it has here become, purely academic.

Their Lordships will humbly advise His Majesty that this appeal be dismissed, and with costs.

In the Privy Council.

KHAN SAHIB MIAN FEROZ SHAH

v.

THE INCOME TAX COMMISSIONER, PUNJAB AND N.W.F. PROVINCE, LAHORE.

DELIVERED BY LORD RLANESBURGH.

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