1962

November, 2.

THE PETLAD TURKEY RED DYE WORKS CO. LTD., PETLAD

v.

THE COMMISSIONER OF INCOME-TAX, BOMBAY, AHMEDABAD

(S. K. DAS, J. L. KAPUR, A. K SARKAR, M. HIDAYATULLAH and RAGHUBAR DAYAL, JJ.)

Income Tax—Reference to High Court—Order calling for supplemental statement of case and allowing further evidence—Validity—Appeal against the order to Supreme Court—Competence—Indian Income-tax Act, 1922 (11 of 1922), ss. 66, 66A(2).

The assessee company carried on the business of dyeing and selling dyed yarn as Petlad in the erstwhile State of Baroda and its status during the relevant assessment years was that of a non-resident. In respect of sales made to purchasers in what was British India the Income-tax Officer found that the sale price was received by the company at Petlad by means of cheques, drafts and hundis which were admittedly sent by post. These cheques etc., were sent back by the compauy either to its creditors in British India in payment of its liabilities or to the credit of its accounts with its bankers in British India. The assessee company claimed that as the sale price was received by it at Petlad, the profits on the aforesaid sales were not taxable in the taxable territories. The Appellate Tribunal held that the cheques etc., which were sent by the assessee to its bankers and creditors were received by them as agents of the assessee and therefore the profits were received in British India and were liable to tax. On an application made by the assessee under s. 66(1) of the Indian Income-tax Act, 1922, the Tribunal referred the question to the High Court as to whether the profits or any part thereof were received by or on behalf of the assessee company in British India. In the statement of the case the Tribunal pointed out that no attempt had been made at a previous stage to investigate as to whether the post office had acted as the agent of the company or of the buyers. On September 23, 1955, the High Court passed an order calling for a supplemental statement of the case and giving the parties liberty to adduce further evidence. The Tribunal, after recording evidence as directed by the High Court, sent a supplemental statement in which a finding was given that "in the circumstances of the case and on the evidence and in the absence

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of correspondence we must necessarily infer an implied request by the assessee to remit by post....." On April 21, 1960, the High Court answered the question referred in the affirmative and against the assessee. In the appeal filed against that judgment the assessee challenged the validity of the order of the High Court dated September 23, 1955, asking for a supplemental statement of case after taking additional evidence, on the ground that it was without jurisdiction. For the Commissioner of Income-tax, it was contended that as no appeal had been filed against the order of the High Court dated September 23, 1955, the question as to the validity of that order could not be raised at the later stage.

Held, that the order of the High Court dated September 23, 1955, calling upon the Appellate Tribunal to make a supplemental statement of the case was not a final order, nor a judgment within the meaning of s. 66(5) or s. 66A(2) of the Indian Income-tax Act, 1922, and was not appealable.

Tata Iron & Steel Co. v. *Chief Revenue Authority*, (1923) L. R. 50 I. A. 212, *Delhi Cloth & General Mills Co. Ltd.* v. *Income-tax Commissioner*, (1927) L. R. 54 I. A. 421 and *Sardar Syedna Taher Saifuddin Sahib* v. *State of Bombay*, [1958] S. C. R. 1007, relied on.

Held, further, that though the High Court had power to direct a supplemental statement to be made, it was not competent to direct additional evidence to be taken.

Under s. 66 of the Act when the High Court finds it necessary to have a supplemental statement of the case in order to answer the question of law which is raised, it can direct such statement to be submitted with such additions and alterations as it may direct, but the statement must be based on facts which are already on the record, and the High Court cannot ask for additional facts to be brought in, because those would not be in regard to a question which arises from the order of the Tribunal but would be a statement based on something which was not before the Appellate Tribunal when it passed its appellate order.

The New Jehangir Vakil Mills v. *The Commissioner of Income-tax*, [1960] 1 S.C.R. 249, *Mrs. Kusumben D. Mahadevia* v. *Commissioner of Income-tax, Bombay*, [1960] 3 S.C.R. 417 and *Zoraster & Co.* v. *Commissioner of Income-tax*, [1961] 1 S.C.R. 210, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 158 and 159 of 1962.

Appeals from the judgment and order dated 21, 1960, of the Bombay High Court in Income-tax Reference No. 16 of 1955.

Purshottam Tricumdas, R. J. Kolah and *I. N. Shroff,* for the appellant.

Gopal Singh and *R. N. Sachthey,* for the respondent.

1962. November 2. The Judgment of the Court was delivered by

KAPUR, J.—These two appeals pursuant to a certificate are from the decision of the High Court of Bombay in Income-tax Reference No. 16 of 1955 answering the question referred by the Income-tax Appellate Tribunal in the affirmative and against the assessee company. The appellant in both the appeals is the assessee company and the Commissioner of Income-tax is the respondent.

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The facts of these appeals are shortly as follows: The assessee company was registered in the erstwhile Baroda State and its status during the assessment years was that of a non-resident. The relevent assessment years were 1941-42 and 1942-43 the previous years being the calendar years 1940 and 1941. It carried on the business of dyeing and selling dyed yarn. It effected sales of dyed yarn of the total value of Rs. 14,22,996/- and Rs. 19,22,107 in the previous years relevant to the assessment years 1941-42 and 1942-43 respectively. The sales were made to purchasers both in the Indian States and in what was British India. During the previous year relevant to 1941-42 out of the total sales of the value of Rs. 14,22,996/-, Rs. 11,88,063/- were to merchants in British India and out of these some sales were to Calcutta merchants which are not now in dispute and the balance amounting to Rs. 9,53,304/- were to

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purchasers in other parts of British India and dispute in regard to that year relates to the assessment on the profits of those sales. Similarly in the previous year relevant to 1942-43 out of the total sales of a sum of Rs. 6,04,588/- were made to purchasers in British India and assessment in regard to profits out of that sum is in dispute. The Income-tax Officer found that the sale price was received by the assessee company at Petlad in the erstwhile Baroda State by means of cheques, drafts and hundis in the years relevant to the two assessment years and it is not disputed that they were sent by post. These cheques, drafts and hundis were sent back by the assessee company either to its creditors in British India in payment of its liabilities or to the credit of its accounts with its bankers in British India. The contention of the assessee company was that these sums were received by it at Petlad in the erstwhile Baroda State and therefore the profits on these sales were not taxable in the taxable territories in asmuch as they were received in an Indian State. After appeal was taken to the Appellate Assistant Commissioner appeal to the Income-tax Appellate Tribunal which held that the cheques and hundis which were sent by the assessee company to its bankers and creditors were received by them as agents of the assessee company and therefore the profits were received in British India and were liable to tax. Against that order the assessee company applied under s. 66 of the Income-tax Act for a statement of the case to the High Court. On February 21, 1955, the Appellate Tribunal referred the following question to the High Court :—

> "Whether the proportionate profits on the sale proceeds aggregating Rs. 9,53,304/- for the assessment year 1941-42 and Rs. 6,04,588/- for the assessment year 1942-43 or any part thereof were received by or on behalf of the assessee company in British India ."

The Appellate Tribunal in the statement of the case remarked that no attempt had been made at a previous stage to investigate as to whether the post office had acted as the agent of the assessee company or of the buyers. The High Court on September 23, 1955, made the following order calling for a supplemental statement :

> "The same question arises on this reference as in the last reference (I.T. Reference No. 15 of 1955) and we want a supplemental statement of the case on the same lines as we have indicated in the last reference. The supplemental statement of the case will be confined to the two amounts mentioned in the question raised on this reference viz., Rs. 9,53,304/- for the assessment year 1941-42 and Rs. 6,04,585 for the year 1942-43."

The parties by this order were allowed to adduce further evidence. Thereupon the case was sent back to the Appellate Tribunal for a supplemental statement of the case and after recording evidence as directed by the High Court the Tribunal gave the following findings :—

> "Therefore in the circumstances of the case and on the evidence and in the absence of correspondence we must necessarily infer an implied request by the assessee to remit by post, the parties having adopted the normal accepted commercial practice for making the payment in such type of cases".

The High Court on April 21, 1960, answered the question in the affirmative and against the assessee. It also observed that the mode of payment accepted by the assessee company was that the payment had to be made by sending the cheques, drafts and hundis by post from British India and it could not be said that

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there was no evidence before the Appellate Tribunal for holding that there was an implied request by the assessee company to the buyer to send the cheques etc., by post. Against that judgment and order these two appeals have been brought pursuant to a certificate by the High Court.

For the appellant two contentions were raised : (1) the order of the High Court dated September 23, 1955, asking for a supplemental statement and allowing additional evidence was without jurisdiction; (2) that on the statement of the case the answer to the question submitted should have been in the negative and in favour of the assessee. A third question has been raised and that was by counsel for the respondent, the Commissioner of Income-tax, that as no objection was taken to the calling for a supplemental statement and as that order was not appealed against, the question whether the order was within jurisdiction of the High Court or not cannot be raised at this stage. We shall first deal with the objection taken on behalf of the Commissioner of Income-tax as that is of a preliminary nature and relates to jurisdiction. The nature and the amplitude of the jurisdiction of the High Court in regard to cases dealing with income-tax are contained in s.66 of the Income-tax Act. Sub-section (1) of that section provides that if any question of law arises out of the order of the Appellate Tribunal and it is required by the assessee or the Commisssoner to be referred to the High Court the Appellate Tribunal shall draw up a statement of the case and refer it to the High Court for its opinion. If the Tribunal refuses to state the case then under sub-s. (2) of s. 66 on an application being made to it, the High Court can, if it is not satisfied with the correctness of the Appellate Tribunal's decision require the Tribunal to draw up a statement of the case and refer it to the High Court. By sub-s. (4) of s. 66 the High Court

may if not satisfied with the statement contained in the case referred to it refer the case back to the Appellate Tribunal for additions or alterations. Under sub-s. (5) of s. 66 the High Court is required to decide the question of law raised and to deliver its judgment thereon containing the grounds on which such decision is founded and thereafter a copy of the judgment is to be sent to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with the judgment of the High Court. This shows that the jurisdiction of the High Court is purely advisory. On the advice being given to it the Appellate Tribunal shall be guided by the decision given and shall make the assessment accordingly, the ultimate result being that an assessment is made at an amount which, in conformity with the opinion of the High Court, is considered to be correct and it is then that the tax liability is definitely fixed or concreted. The judgment of the High Court does not in any manner enforce the discharge of that liability. The Privy Council held that the High Court's judgment is merely the expression of the opinion as to whether a certain question of law which arises during the course of assessment has to be used one way or the other and that the word "judgment" is not used in s. 51 of the Income-tax Act, now s. 66 of that Act, in its strict legal and proper sense. *Tata Iron & Steel Co.* v. *Chief Revenue Authority* (1). *Delhi Cloth & General Mills Co. Ltd.* v. *Income-tax Commissioner* (2). In *Tata Iron & Steel Co's. case*(1) appeal was taken to the Privy Council against the judgment of the High Court given under s. 51(3) of the Income-tax Act, now s. 66(5), on a certificate of the High Court. A preliminary objection was taken in the Privy Council that the appeal was incompetent as the decision of the High Court on a reference made by the Chief Revenue Authority under s. 51 of the then Income-tax Act was not a final judgment within cl. 39 of the Letters Patent of the Bombay High Court. The Privy

(1) [1923] L.R. 50 I.A. 212, 223. (2) [1927] L.R. 54 I.A. 421.

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Council held that where the case is stated for the opinion of the High Court under the Income-tax Act the judgment is merely advisory and therefore it was not a final judgment within the meaning of cl. 39 of the Letters Patent. This led to the enactment of what is now s. 66A of the Income-tax Act. Even after the introduction of that provision the Privy Council held in *Delhi Cloth & General Mills Co's. case* (1) that that section had no retrospective operation and therefore it did not apply to those judgments under s. 51(3) of the then Income-tax Act which had become final at the date when it came into force and that appeal was competent only if certified to be a fit one for appeal.

Section 66A was introduced in the Income-tax Act by s. 8 of the Indian Income-tax (Amendment) Act (24 of 1926) to provide for appeals against judgments of the High Courts to the Privy Council and by the Adaptation Order of 1950 to the Supreme Court. Sub-section (2) of s. 66A provides :—

> "An appeal shall lie to the Supreme Court from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to the Supreme Court".

No appeal lies to the Supreme Court unless it falls within that section, one of the requirements being a certificate of the High Court. See also *Delhi Cloth & General Mills Co's. case* (1). We are not here concerned with Art. 136 of the Constitution. Under sub-s. (3) of s. 66A the provisions of the Code of Civil Procedure have been made applicable in the case of appeals under s. 66A "so far as may be" which confines the right of appeal under the statute to cases mentioned in sub-s. (2). *Delhi Cloth & General Mills Co's. case* (1). Before the enactment of s. 66A no appeal was competent against a judgment under the

(1) [1927] L.R. 54 I.A. 421.

then s. 51(3) now s. 66(5) of the Income-tax Act. The word "judgment" under s. 51(3) as under the present s. 66(5) of the Act is the decision of the High Court of the question of law referred to it and the grounds on which such decision is based. It is not used in the section in its strict and proper sense. *Tata Iron & Steel Co's. case*(1). An order asking for a supplemental statement of the case does not fall within that definition and is therefore not appealable under s. 66A(2).

This Court in *Seth Premchand Satramdas* v. *The State of Bihar* (2), which was a case under the Bihar Sales Tax Act and in which the High Court refused to direct the Board of Revenue to state a case and refer it to the High Court, held the order of refusal not to be a final order within cl. 31 of the Letters Patent of the Patna High Court inasmuch as the jurisdiction exercised by the High Court was advisory and standing by itself the order did not bind or affect the rights of the parties. The court relied on the decision in *Tata Iron & Steel Co's. case* (1). At p. 805 Fazal Ali, J., observed as follows :—

> "But the High Court acquired jurisdiction to deal with the case by virtue of an express provision of the Bihar Sales Tax Act. The crux of the matter therefore is that the jurisdiction of the High Court was only consultative and was neither original nor appellate."

Even in cases tried under the civil jurisdiction of the courts it has been held that an order is final if it decides the rights of the parties in a civil proceeding but if after the order the proceedings have still to be continued and rights in dispute between parties have to be determined then the order is not final within Art. 133. *Jethanand & Sons* v. *State of U. P.* (3) *and Sardar Syedna Taher Saifuddin Sahib* v. *The State of Bombay*(4). Considering the history of legislation of s. 66A of the Income-tax Act and the fact

(1) (1923) L.R. 50 I.A. 212, 223.
(2) [1950] S.C.R. 799.
(3) A.I.R. 1961 S.C. 794.
(4) [1958] S.C.R. 1007.

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that the High Court was exercising its advisory jurisdiction and that it passed an interlocutory order calling upon the tribunal to make a supplemental statement of the case it cannot be said that it was a judgment against which an appeal was competent under the provisions of s. 66A(2) of the Income-tax Act.

We shall next deal with the question whether the order passed asking for a supplemental statement with a direction for taking additional evidence was permissible to the High Court under s. 66(4) of the Income-tax Act. As we have said the jurisdiction of the High Court is only advisory and is acquired by virtue of an express provision of the Income-tax Act and is limited to answering the questions stated to the High Court for the purpose of soliciting its opinion on those questions and those questions must arise out of the order passed in appeal by the Appellate Tribunal. This is clear from sub-ss. (1) and (2) of s. 66. Under those provisions the only question of law which can be referred to the High Court is any question of law arising out of the order of the Tribunal and thus if a question does not arise out of the order of the Appellate Tribunal it cannot be referred to the High Court. For the drawing up of the statement of the case the Tribunal has before it facts admitted or found and they form the basis of the statement submitted to the High Court. If necessary facts which will lay the foundation of raising a question of law are not there then there in no basis for reference of that question to the High Court because only on the basis of facts found by the Tribunal or admitted before it can a question of law arise. Thus only on the basis of facts admitted or found on the record can a statement of case be submitted. When the case stated comes to the High Court and the High court finds it necessary to have a supplemental statement of the case in order to answer the question of law which is raised then it can direct such

statement to be submitted with such additions and alterations as it may direct but the statement must necessarily be based on facts which are already on the record and the High Court cannot ask for additional facts to be brought in because these would not be in regard to a question which arises from the order of the tribunal but would be a statement based on something which was not before the Appellate Tribunal when it passed its appellate order. Therefore although the High Court has the power to direct a supplemental statement to be made it has no power to direct additional evidence being taken. It was so held in *The New Jahangir Vakil Mills* v. *The Commissioner of Income-tax*(1). That was a case similar to the one before us and the question for decision there was whether the sale proceeds had been received at Bhavnagar because the cheques etc., were sent to Bhavnagar. The High Court held that the mere receipts of cheques by post at Bhavnagar was not conclusive in the absence of a further finding whether the cheques were sent by post by request, express or implied, of the assessee. In that case the High Court asked for a supplemental statement of the case and also allowed additional evidence to be given and this Court held that s. 66(4) did not empower the High Court to direct additional evidence being taken and that additions and alterations mentioned in that sub-section related only to such facts as already formed part of the record but had not been included by the Appellate Tribunal in the statement of the case. In a latter case *Mrs. Kusumben D. Mahadevia* v. *Commissioner of Income-tax, Bombay*(2) the assessee received dividends out of the profits of a company which had accrued partly in British India and partly in Baroda State. The assessee did not bring the income into British India and claimed benefit of para 4 of the Merged States (Taxation Concessions) Order. The Appellate Tribunal held that the income did not accrue to the assessee in Baroda State but did not decide the question whether she was entitled to the

(1) [1960] 1 S.C.R. 249. (2) [1960] 3 S.C.R 417.

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benefit of Taxation Concessions Order. The High Court held that the Taxation Concessions Order did not apply to the assessee but did not decide the question as to whether the income had accrued to the assessee in Baroda State. Thus the Appellate Tribunal raised one question and the High Court answered another. This Court held that the High Court had exceeded its jurisdiction in going out of the point raised by the Appellate Tribunal and decided a different point of law and that s. 66 of the Income-tax Act empowered the High Court to answer a question of law arising out of the order of the Appellate Tribunal and it did not confer any jurisdiction to decide a different question of law not arising out of such order but it was possible that the same question of law may involve different facets and the High Court could amplify the question to take in all the facets but the question must still be one arising out of the Appellate Tribunal's order which was before the Tribunal or was decided by it. It could not decide an entirely different question.

In a later case *Zoraster & Co.* v. *Commissioner of Income-tax*[1], the assessee supplied to the Central Government F.O.R. Jaipur certain goods and payment was received by cheques which were also received at Jaipur. The assessee contended that the income was received at Jaipur outside the taxable territories. This contention was not accepted by the Income-tax Appellate Tribunal. The assessee then applied for reference to the High Court under s. 66(1) of the Income-tax Act and a question of law was referred to the High Court. The High Court remanded the case to the Appellate Tribunal for a supplemental statement of case to find whether cheques were sent to the assessee by post or by hand and what direction, if any, had been given by the assessee firm to the Government department. It was held that such a supplemental statement could be called for and in the absence of anything expressly

(1) [1961] 1 S.C.R. 210.

stated in the order of the High Court to the contrary it cannot be said that the direction given would include the admitting of any fresh evidence as that had been prohibited by the *New Jehangir Vakil Mill's case*(1). At p. 219 the Court observed :—

> "It follows from this that the enquiry in such cases must be to see whether the question decided by the Tribunal admits the consideration of the new point as an integral or even an incidental part thereof. Even so, the supplemental statement which the Tribunal is directed to submit must arise from the facts admitted and or found by the Tribunal, and should not open the door to fresh evidence."

Another case where the scope of s. 66(1) was defined is *Commissioner of Income-tax* v. *Scindia Steam Navigation Co. Ltd.*(2). It was there held that the High Court acted purely in its advisory capacity on a reference which properly came before it under s. 66(1) or (2). It gave advice to the Appellate Tribunal but ultimately it was for the Tribunal to give effect to that advice. The Court interpreted the words "any question of law arising out of" in sub-s. (1) of s. 66. Supplemental statement of the case was also called for in *Commissioner of Income-tax* v. *Ogale Glass Works* (3) but no additional evidence was ordered to be taken. In that case no objection was taken to the order for a supplemental statement.

Thus it appears that the jurisdiction of the High Court is advisory under s. 66 of the Income-tax Act. Under that section a question of law can be referred soliciting its opinion but the jurisdiction of the High Court is confined to giving an opinion on that question of law arising out of the order of the Appellate Tribunal. It has no jurisdiction to raise another question or to answer a different question. In order to answer the question raised in the statement

(1) [1960] 1 S.C.R. 249. (2) [1962] 1 S.C.R. 788.
(3) [1955] 1 S.C.R. 185, 188.

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of the case the High Court may ask for a supplemental statement but that statement also is to be confined to the placing of facts already on the record. The supplemental statement of the case may contain alterations or additions as the High Court may direct but those facts must be already on the record as the High Court has no power to ask for additional evidence to be taken. Secondly, when the supplemental statement of the case is directed to be submitted it is not a judgment or a final order as understood in its strict legal and proper sense nor a judgment in the sense it is used in the Income-tax Act i. e., s. 66(5) or s. 66A (2) i. e., a judgment which sets out reasons for the opinion which the High Court gives on the question submitted to it.

In this view of the matter we are of the opinion that the High Court had no jurisdiction to direct the Tribunal to submit a supplemental statement of the case after taking additional evidence. As was done in the *New Jehangir Vakil Mill's* (1) case the order of this Court is that the appeals be allowed and the matter remitted to the High Court to give its decision on the question of law referred to it as required under s. 66(5) of the Act. We express no opinion on the question whether the High Court should, in this case, ask for a supplemental statement of the case confined to the facts already on the record. That is a matter which should be left to the High Court. The respondent will pay the costs of the appellant in this Court and in the High Court.

Appeals allowed. Cases remitted.

(1) [1960] 1 S.C.R. 249.