guilty because it was not proved against them that they deliberately or wilfully committed the breach of the award. We must, therefore, allow the appeal, set aside the order of acquittal passed by the learned Chief Presidency Magistrate and convict the accused of the offence under s. 29. We would accordingly direct both the accused to pay a fine of Rs. 50 each.

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UNION OF INDIA v. CAUFIELD HOLLAND LTD.

Gajendragadkar J.

Appeal allowed.

M. W. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

RAMGOPAL GANPATRAI AND SONS LTD. (APPLICANTS) v. THE COMMISSIONER OF EXCESS PROFITS TAX, BOMBAY CITY, BOMBAY (RESPONDENT).*

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Excess Profits Tax Act (XV of 1940), s. 6 (1) proviso 2: s. 21—Indian Income-tax Act (XI of 1922), s. 66 (1)—Jurisdiction of the Appellate Assistant Commissioner and Income-tax Appellate Tribunal to allow and consider point of law not raised before the Excess Profits Tax Officer—Whether business of new Managing Agent appointed after cancellation of the Managing agency agreement of the previous Managing Agents is the same business or new business—Function of the High Court on reference under above Acts.

The assessee Company wanted to raise before the Appellate Assistant Commissioner a point of law which it had not urged before the Excess Profits Tax Officer. The Appellate Assistant Commissioner did not permit the assessee to raise the point. On appeal the Income-tax Appellate Tribunal also held that it was not open to the assessee to challenge the order of the Excess Profits Tax Officer on a ground not urged before such Officer. On reference,

Held, that every Appellate Tribunal has inherent jurisdiction to decide a question of law arising out of an order of the subordinate Court or Tribunal when such order is before it in appeal;

Held, therefore, that the Appellate Assistant Commissioner had jurisdiction to allow the assessee to raise before it and consider on merits a point of law not urged before the Excess Profits Tax Officer. The Income-tax Appellate Tribunal, too, had jurisdiction to allow the assessee to raise a point of law in appeal before it.

* Income-Tax Reference No. 34 of 1952.

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RAMGOPAL GANPATRAI v. COMMISSIONER OF INCOME-TAX BOMBAY

Chagla C. J.

D. Mills appointed 'R. D' as their Managing Agents on July 13, 1935. By a tripartite agreement dated September 3, 1937, between D. Mills, R. D. and a Hindu undivided family R. G., the Managing Agency Agreement appointing R. D. as the Managing Agent was cancelled and the Hindu undivided family, R. G. was appointed Managing Agents of the Mills. On June 23, 1943, R. G. & Sons, Ltd., the assessee Company was incorporated. R. G. assigned the Managing Agency to the assessee Company as from July 1, 1943. The assessee Company claimed to exercise the option under 2nd proviso to s. 6 (*1*) of the Excess Profits Tax Act 1940 on the ground that the business of the assessee Company was commenced after March 31, 1936. The Excess Profits Tax Department on the other hand contended that the business of the assessee Company viz. the managing agency of the D. Mills was commenced on July 13, 1935. On reference,

Held, that R. D.'s business ceased to exist when his Managing Agency agreement was cancelled. Therefore, the Managing Agency of the Hindu undivided family R. G. was not the same business as that of R. D., but a new business. The mere fact that the nature of this business is the same does not mean that the business is the same;

Held, therefore, that the business of the assessee Company viz. the managing Agency of the Mills was commenced after March 31, 1936 and therefore the assessee Company was entitled to exercise the option given by second proviso to s. 6 (*1*) of the Excess Profits Tax Act, 1940.

The function of the High Court on a reference to it is not to point out to the Taxing Officers how they should assess the profits of the assessee; the function is to advise on questions of law and it is for the taxing department to tax and assess in accordance with the answers given by the Court to those questions.

Facts material to the report are fully set out in the judgment.

The following questions of law were referred to the High Court:—

(1) Whether the Appellate Assistant Commissioner erred in law in not allowing the assessee Company to raise the additional ground of appeal referred to in its Solicitor's letter dated September 23, 1949 and to consider it on merits.*

(2) Whether the Appellate Tribunal erred in law in not allowing the assessee Company to raise this ground of appeal before it in the appeals filed by it and to consider it on merits.*

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* Questions Nos. (1) and (2) were reframed by the High Court as follows:—

(1) Whether the Appellate Assistant Commissioner had jurisdiction to allow the assessee Company to raise the additional ground of appeal referred to in the letter dated September 23, 1949.

(2) Whether the Appellate Tribunal had jurisdiction to allow the assessee Company to raise the ground of appeal before it in the appeals filed by it.

(3) Whether in connection with the Excess Profits Tax assessment for the chargeable accounting period April 1, 1944 to March 31, 1945:

(*a*) the assessee Company is entitled to the option given by the second proviso to s. 6 (*1*) of the Excess Profits Tax Act.

(*b*) if the answer to question (*a*) is in the negative is the assessee Company entitled to the minimum standard profits of Rs. 36,000 referred to s. 6 (*4*) of the Excess Profits Tax Act?

or

was the Excess Profits Tax Officer right in law in computing the standard profits at Rs. 38,005?

or

Should the standard profits of the assessee Company be computed in any other manner;

(c) if the standard profits of the assessee Company were correctly computed at Rs. 38,005, whether the sum of Rs. 83,968 should be added in arriving at the profits for the chargeable accounting period ending March 31, 1945 and if so, whether the capital employed in the business should also be increased under rule 2A, sch. II to the Excess Profits Tax Act.

N. A. Palkhivala with *Sir Jamshedji B. Kanga,* for the applicants.

Sir Nusservanji P. Engineer with *G. N. Joshi,* for the respondent.

Chagla C. J. Two sets of questions have been submitted to us on this reference; one set raised by the assessee and the other set by the Commissioner; and a few facts may be stated in order to understand how these questions arise. Raja Dhanrajgirji was appointed the managing agent of the Dhanraj Mills Ltd. on July 13, 1935. On September 3, 1937 a tripartite agreement was arrived at between the Mills, Raja Dhanrajgirji and the Hindu undivided family of Ramgopal. By this tripartite agreement Raja Dhanrajgirji gave up his managing agency of the Mills and Raja Dhanrajgirji requested the Hindu undivided family to accept the managing agency on certain terms and conditions. The Mills thereupon cancelled the managing agency of Raja Dhanrajgirji and by a fresh managing agency agreement appointed the Hindu undivided family as the managing agents. On the June 23, 1943 the assessee company was incorporated and the managing agency of the Hindu undivided family was assigned to it by an agreement as from July 1, 1943.

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The assessments we are concerned with are under the Excess Profits Tax Act and the three periods in question are the chargeable accounting period from July 1, 1943, to March 31, 1944, April 1, 1944, to March 31, 1945, and April 1, 1945, to March 31, 1946. After the Excess Profits Tax Officer had made his assessment, the assessee company appealed to the Appellate Assistant Commissioner and before the Appellate Assistant Commissioner it wanted to raise a certain contention of law which had not been stated in the grounds of appeal to the Appellate Assistant Commissioner, and the question of law was that under the managing agency agreement the managing agency commission was due on the 1st of April immediately next ensuing the accounting year of the company and is payable after the accounts were passed at the general meeting of the company and therefore it was contended that as the assessee company was incorporated on July 1, 1943, the first commission that was due to them would be on April 1, 1944. Therefore according to this contention there was no liability whatever to pay any tax with regard to the period July 1, 1943 to March 31, 1944, because according to the assessee company no commission either accrued or became payable to the assessee company during this period. The Appellate Assistant Commissioner did not permit the assessee company to raise this contention. The Appellate Assistant Commissioner gave no reason why he refused the assessee company to raise this question of law. The assessee company then went in appeal to the Tribunal and it made a grievance that the Appellate Assistant Commissioner had not allowed the company to raise this question of law, and in the alternative it urged upon the Tribunal itself to consider this question of law, and the view taken by the Tribunal was that it is not open to an assessee, who has not challenged a particular assessment before the Excess Profits Tax Officer on a particular ground of law, to challenge it subsequently either before the Appellate Assistant Commissioner or before the Tribunal, and the first two questions arise out of this decision of the Tribunal.

Now, the right of appeal under the Excess Profits Tax Act is given under s. 17 and the right is given to any person who is aggrieved by a decision made in pursuance of s. 8 or who is objecting to the amount of excess profits tax for which he is liable as shown by the Excess Profits Tax Officer or denies his liability to be assessed under the Act, and for other grounds with which we are not concerned, and the appeal lies to the

Appellate Assistant Commissioner. In this case the assessee company appealed to the Appellate Assistant Commissioner objecting to the amount of excess profits tax for which it was made liable and it was that order of the Excess Profits Tax Officer that was being challenged before the Appellate Assistant Commissioner. It is difficult to understand how it is possible to contend that an Appellate Tribunal has not the jurisdiction to deal with an order which is in appeal before it on any ground, even though such a ground was not taken in the trial Court. If the appellant challenges the order of the trial Court and wishes to contend that the order is wrong by certain provisions of the law, even though he had not taken that contention in the Court below, it is impossible to urge that the appellate Court has no jurisdiction to reverse that order on the ground urged by the appellant. We are not suggesting that the appellate Court has no discretion to refuse the appellant to urge a ground not taken in the Court below, but what we are concerned with in this reference is not the discretion of the Appellate Court but the competency and the jurisdiction of the Appellate Court to allow a point of law to be taken before it which was not taken in the Court below. It must be borne in mind that when a statute confers a right of appeal and permits an order of a trial Court to be challenged, the appellate Court has full jurisdiction to reverse or modify that odrer on any ground which is open to it in law. The appellate Court may even reverse or modify the order on a point of law taken by itself *suo motu* without being asked to do so by the appellant. The Tribunal has taken the view that because the Excess Profits Tax Officer could have dealt with the point if it was taken and possibly given relief to the appellant, therefore there would have been no occasion for an appeal at all, and therefore it was not competent to the appellant to raise the question which he had not raised in the Court below. With respect, we find it difficult to understand or appreciate this argument. Merely because an appellant would have succeeded on a question of law before the Court below can surely be no ground for debarring him from taking that ground before the appellate Court, and therefore in our opinion, apart from any statutory restriction, it is the inherent jurisdiction of every Appellate Tribunal to decide any question of law arising out of an order of the subordinate Court or Tribunal, which order is before it in appeal, and if that be the true position, then once the right was given to the assessee

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company to appeal against an order of the Excess Profits Tax Officer, the Appellate Assistant Commissioner had every jurisdiction to deal with that order on any ground of law which applied to the facts on which that order was based.

The Tribunal has suggested another reason why this procedure is not permissible to an appellant. It draws attention to s. 31 sub-s. (*2a*) of the Income Tax Act. That sub-section deals with appeals from the Income Tax Officer to the Appellate Assistant Commissioner and it provides:

> "The Appellate Assistant Commissioner may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Appellate Assistant Commissioner is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable."

Now, it would be erroneous to contend that s. 31 (*2a*) confers a power upon the Appellate Assistant Commissioner to permit an appellant to raise a ground not specified in the grounds of appeal. Sub-s. (*2a*) must be rather looked upon as controlling the discretion of the Appellate Assistant Commissioner with regard to his right to refuse an appellant to raise a new ground, and the Legislature suggests that ordinarily the Appellate Assistant Commissioner should allow a new ground to be taken unless he is satisfied that the omission on the part of the appellant was wilful or unreasonable. But even this sub-section does not deal with a case where an appellant takes a ground in the grounds of appeal. According to the Tribunal, even though the appellant may take a ground in the grounds of appeal to the Appellate Assistant Commissioner, if he had not taken that ground before the Income Tax Officer, he would be debarred from doing so. Therefore, in our opinion s. 31 (*2a*) does not in any way help the discussion on the rights of an Appellate Court to hear an appeal on grounds not taken in the Court below. In our opinion the Tribunal was in error in holding that the assessee company was not permitted in law to take a new ground or that either the Appellate Assistant Commissioner or the Tribunal was debarred from deciding the point which the assessee company wanted to raise.

The questions raised by the Commissioner are rather detailed and go into various computations, and we must point out to the Tribunal that the form of questions raised is not the proper form. Some of the questions almost require this Court to assist the taxing officers or to point out to the taxing officers how

they should assess the profits of the assessee company. That is not the function of this Court. The function of this Court is an advisory function, to advise on questions of law, and the questions of law should be so framed as to be capable of a simple answer, and once the answer is given by this Court it is for the taxing department to tax and to assess in accordance with the answers given by this Court. But fortunately it is not necessary for us to go into these rather labyrinthine details which have been attempted to be expounded before us by Mr. Joshi, because these questions are being capable of shortly disposed of on a very narrow point urged by Mr. Palkhivala. The real question that arises is this. The assessee company claimed the benefit of proviso 2 to s. 6 (*1*) of the Excess Profits Tax Act, and that benefit is only permissible to a business which commenced on or after the March 31, 1936. We are not concerned with the exact nature of the concession allowed to such a business under this proviso, and the question that we have to decide is whether for the purpose of this proviso it could be said that the business of the assessee company commenced on or after March 31, 1936. The contention of the assessee company is that its business commenced on or after March 31, 1936, and the contention of the Commissioner is that it commenced prior to March 31, 1936. The facts on this point are very clear. It is not disputed that the assessee company, which was incorporated on June 23, 1943, succeeded to the same business that was carried on by the Hindu undivided family. Therefore what we have to consider is whether the business that was started by the Hindu undivided family as managing agents on September 3, 1937, was a new business or whether that family in its turn succeeded to some earlier business, and the contention of the Commissioner is that the business really commenced on July 13, 1935, when Raja Dhanrajgirji was appointed the managing agent, that the Hindu undivided family succeeded on September 3, 1937, and the assessee company in its turn succeeded the Hindu undivided family on June 23, 1943. It is from this point of view that it is contended that the business of the assessee company was not commenced after March 31, 1936, but was commenced on July 13, 1935. In our opinion the contention of the Commissioner is entirely untenable. It is clear that on September 3, 1937, the Dhanraj Mills cancelled the managing agency agreement in favour of Raja Dhanrajgirji and Raja Dhanrajgirji ceased to be the managing agent. It was by a new agreement

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and by a fresh appointment that the Hindu undivided family came to be the managing agents on September 3, 1937. When one talks of a succession, there must be a subsisting business which can be handed down to a successor. If Raja Dhanrajgirji's business ceased to exist by his managing agency being cancelled, there was nothing he could hand down to the Hindu undivided family and there was nothing which the Hindu undivided family could succeed to. Mr. Joshi says that both Raja Dhanrajgirji and the Hindu undivided family were doing the same business, viz. the business of the managing agents. That again is fallacious. The mere fact that the nature of the business is the same does not mean that in law the businesses are the same. Clearly there was a discontinuance of the business which Raja Dhanrajgirji was doing when his managing agency was terminated and the business which the Hindu undivided family started was a new business and they did not continue the same business which Raja Dhanrajgirji was doing. Mr. Joshi relies on the tripartite agreement to show that the Hindu undivided family really succeeded to the business of Dhanrajgirji. Far from the tripartite agreement supporting the case of the Commissioner, it supports the case of the assessee company, because the tripartite agreement clearly shows that a new party was being brought in, viz. the Hindu undivided family, and the new party was being induced to accept the managing agency and was also being induced to advance moneys to the Mills which was in a bad way and for this purpose Raja Dhanrajgirji was going out and making room for the new managing agents.

Therefore, in our opinion, on the facts on the record and on the documents on the record, it is clear that the Hindu undivided family did not succeed to the business of Raja Dhanrajgirji, but that there was a discontinuance on September 3, 1937, and a new business was commenced. Mr. Joshi has applied that we should remand the matter back to the Tribunal to find the necessary facts on this particular aspect of the matter. In our opinion the Tribunal has dealt with this question, the contention was raised by the assessee company that they came under the second proviso to s. 6 (*1*), and all the facts necessary to decide this question are before us in the statement of the case submitted by the Tribunal.

The result therefore is that the first question as reframed will read as follows:

"Whether the Appellate Assistant Commissioner had jurisdiction to allow the assessee company to raise the additional ground of appeal referred to in the letter dated September 23, 1949."

We answer it in the affirmative. The second question will read:

"Whether the Appellate Tribunal had jurisdiction to allow the assessee company to raise the ground of appeal before it in the appeals filed by it."

We answer it in the affirmative. With regard to question 3 (*a*) our answer is in the affirmative. The rest of the questions do not arise. Commissioner to pay the costs.

Attorneys for applicant: *Manilal, Kher, Ambalal & Co.*

Attorney for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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THE RAGHUVANSHI MILLS LTD., BOMBAY, APPELLANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 23A (1), third proviso—Explanation to sub-section—Company in which the public are substantially interested—"Shares held by the public"—Proper meaning of—Actual 'de facto' control by a director or directors over shareholder essential before it can be said that shareholder is not member of the public.

If the share-holders of a company are under *de facto* control of a director or directors of the Company, they cannot be deemed to be members of the public and shares held by them are not shares held by the public within the meaning of the Explanation to sub-s. (*1*) of s. 23A of the Indian Income-tax Act, 1922. But before it is found that a share-holder is not a member of the public within the meaning of the Explanation it must be found as a fact that there was actual control by a director or directors over him. The mere possibility of the voting power of a

* Income Tax Reference No. 37 of 1952.

(1) (1941) 24 T. C. 57.