law from other companies doing identical business. There is no reason why a co-operative banking society should treat its employees otherwise than as laid down under the industrial law. If we were satisfied that there was some reason or principle which would lead us to put upon this notification the interpretation which Mr. Parpia suggests we might have put such an interpretation on the notification, but all the considerations are in favour of the interpretation suggested by Mr. Rane. There is nothing in the notification which prevents us from giving the interpretation which we have ultimately decided to give to this notification. Therefore, we are of the opinion that the petitioners are doing business of banking and are registered under an enactment relating to companies which is the Co-operative Societies Act. The learned Judge was right in taking the view that he had jurisdiction to deal with the matter. The petition fails and is dismissed with costs.

1955

MAJOOR SAHAKARI BANK LTD. v. N. M. MAJMUDAR

Chagla C. J.

Application dismissed.

K. B. S.

INCOME-TAX REFERENCE

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

MESSRS H. A. SHAH & CO., APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX AND EXCESS PROFITS TAX, BOMBAY CITY, RESPONDENT.*

1955 *Sept. 13*

Indian Income-Tax Act (XI of 1922), ss. 5, 28 and 37—Whether Income-Tax Appellate Tribunal part of machinery of assessment?—Whether Income-Tax Authorities including Tribunal bound by decision in earlier assessment?—Limitations on powers of such authorities to revise in later assessment their decisions on points decided in earlier assessment—Whether Tribunal stands on same footing as High Courts in respect of application of res judicata *or of principle of estoppel by record?*

The decision of an Income-Tax Authority is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made; the decision given in an earlier assessment has no binding force upon either the assessee or the Income-Tax Authorities. But it does not follow that the Income-tax Authorities may at their sweet will come to a conclusion which is contrary to the one arrived at in their earlier assessment. Even though so far as the Income-tax Authorities are concerned the principles of *res judicata* or estoppel by record do not apply, it is very desirable that there should be finality and certainty even in matters arising out of the Income-Tax Act. Therefore, an earlier decision of an Income-tax Authority cannot be re-opened if (i) that decision is not arbitrary or perverse, (ii) it has been arrived at after due inquiry and (iii) no fresh facts are placed before the Income-

*Income-tax Reference No. 2 of 1955.

1955

H. A. SHAH & Co.. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

Tax Authority giving the later decision, and the Authority giving the earlier decision has taken into consideration all material evidence.

Sankarlinga Nadar v. *Commissioner of Income-Tax, Madras*,[1] *Tejmal Bhojraj* v. *Commissioner of Income-Tax*,[2] *Kamalpat Motilal* v. *Commissioner of Income-Tax U. P.*,[3] *Ram Datta Sita Ram of Basti, In re*,[4] *The Trustees, Nagore Durgah* v. *Commissioner of Income-tax, Madras*[5] and *Kaniram Ganpat Rai* v. *Commissioner of Income-tax*,[6] referred to.

There is a further limitation on the power of Income-Tax Authorities to revise their decision on a point decided in an earlier assessment. The effect of revising this decision ought not to lead to injustice. If the Court is satisfied that by reason of the Income-tax Authority departing from its earlier decision, the assessee has lost some important advantage or benefit which he could have got under the Indian Income-Tax Act, it may prevent such Authority from doing something which would be unjust and inequitable.

The Income-Tax Appellate Tribunal is as much part of the machinery of assessment as the Income-Tax Officer or the Appellate Assistant Commissioner and the rule enunciated hereinabove applies to the decisions of the Income-Tax Appellate Tribunal as well. The position of the High Court is entirely different under the Income-Tax Act, 1922; it is not part of the machinery of assessment. Therefore even though principle of *res judicata* may apply to the decision given by the High Court on reference under s. 66 of the Act, it has no application to the decisions of the Income-Tax Appellate Tribunal on appeal preferred to it by the Department or the assessee.

Held, on the facts and circumstances of the case that the Income-Tax Appellate Tribunal was justified in departing from its findings in the earlier assessment.

Facts appear in the Judgment.

N. A. Palkhivala with *S. P. Mehta,* for the Applicants.

M. P. Amin, Advocate General with *G. N. Joshi,* for the Respondent.

Chagla C. J.—The assessee before us is the firm of H. A. Shah & Co., and the assessment years are 1942-43, 1943-44 and 1944-45. It appears that one Hiralal Shah had three sons, Shantilal, Kantilal and Vasantlal, and the father and the sons constituted a joint and undivided Hindu family. This family was disrupted on April 16, 1938. At that date Shantilal and Kantilal were majors, but Vasantlal was a minor and he attained majority on October 13, 1943. On this disruption applications were made by Hiralal under 25 A of the Income Tax Act, but the Income Tax Authorities did not accept the disruption of the joint family and the application of Hiralal was refused. Two appeals in this connection went before the Income Tax Tribunal. One was the appeal with regard to the refusal of the Income Tax Authorities to recognize the fact of disruption under s. 25 A and the other with regard to the assessment of the firm of Shantilal Shah & Co., which had come into existence on the disruption of the joint family, and in these appeals the Tribunal took the view

1. [1930] 53 Mad. 420 F. B.
2. [1952] 22 I. T. R. 208.
3. [1950] 18 I. T. R. 812.
4. [1947] 15 I. T. R. 61.
5. [1954] 26 I. T. R. 805.
6. [1941] 9 I. T. R. 332.

that the view taken by the Income Tax Authorities that there was no disruption of the joint family in 1938 was erroneous and that there was no joint family in existence after 1938, and it also took the view that Hiralal was a partner in the partnership not in his own right but as a trustee of Vasantlal. In deciding this the Tribunal took into consideration a partnership deed which was executed on the December 13, 1939 between Hiralal and his two sons Shantilal and Kantilal, and the question that arose for its consideration was whether Hiralal was a partner under this deed of partnership in his own right or he was really there on behalf of Vasantlal who was at that time a minor. This decision of the Tribunal was arrived at for the assessment year 1941-42. With regard to the assessment for 1942-43, 1943-44 and 1944-45 appeals were preferred to the Income Tax Tribunal both by Hiralal the individual and the firm of H. A. Shah & Co., and in these appeals the Tribunal held that Hiralal was a partner in his own right. This decision was given both in the assessment of the individual Hiralal and also in the assessment of the firm, and the question that we have to consider is whether the Tribunal which considered the assessment for 1942-43, 1943-44 and 1944-45 was justified in law in departing from the previous finding given by the Tribunal that Hiralal was not a partner in his own right but was a Trustee of the minor Vasantlal.

A large number of authorities have been cited and before we look at them or consider them we might consider what is the principle of law involved in the question that has been raised for our consideration. A Court is prevented from coming to a different or contrary conclusion to the one arrived at by itself earlier mainly on the ground of *res judicata* or on the ground of estoppel by record. Courts of law have adopted this particular rule of *res judicata* in order to give finality to litigation and also to confer the characteristic of conclusiveness to its decisions. Therefore, if a matter is litigated between parties and a decision is arrived at by a Court, that decision is binding between the parties and it is not open to either of the parties to reagitate the question covered by that decision. The first question that obviously arises is this. Does the principle of *res judicata* as we have just explained apply to Tribunals set up under the Indian Income Tax Act and dealing with assessments from year to year of assessees who come up before it? The principle has been well stated by Hanworth, Master of the Rolls, in *I. R.* v. *Snear*.[7]

"The assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. No doubt a decision reached in one year would be a cogent factor to the determination of a similar point in the following year, but I cannot think that it is to be treated as an estoppel binding upon the same parties for all years."

7. (1932) 17 T. C. 149 at 163.

1955

H. A. SHAH & CO. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

Therefore the very basis of an assessment is that it is self-contained and the decision given by the Income Tax Authorities is a decision relating to that particular assessment and binding upon the parties to the extent of that assessment. When these Authorities consider the case of the assessee with regard to a different assessment year they the dealing with an entirely new case and the decision given in the earlier assessment has no binding force upon either the assessee or the Income Tax Authorities in the next assessment. This is a principle which is not merely helpful to the Income Tax Authorities but it is equally helpful to the assessee because if the Income Tax Authorities are not bound by any decision given in an assessment in favour of the assessee, equally so an assessee is not bound by any decision given in favour of the Department in any assessment.

Now, can it be said that because the principle of *res judicata* does not apply, an Income-tax Authority is entitled to go back upon a finding given in an earlier decision without any limitation whatsoever? We are considering this question on the basis that the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal stand on the same footing. We will later on deal with the contention of Mr. Palkhiwala that the Tribunal stands on a different footing. In this very case a decision was arrived at that Hiralal was not a partner in his own right but he was merely a trustee for Vasantlal. That decision was very important both from the point of view of Hiralal and from the point of view of Vasantlal. Can it be said that in the subsequent year when that very question arises it is open to the Income Tax Authorities at their sweet will to come to a conclusion which is contrary to the one arrived at in the earlier assessment. While taking the view that the principle of estoppel or *res judicata* does not strictly apply to the Income Tax Authorities, we wish to make it clear that we do not suggest that it is open to a Tribunal to come to a different conclusion to the one arrived at by that very Tribunal earlier without any limitation whatsoever, and we shall presently indicate what in our opinion are the limitations upon the right of an Income Tax Authority not to be bound by the earlier decision or the right to revise the earlier decision. If the first decision was not an arbitrary decision or a perverse decision, if the first decision was arrived at after due inquiry and if no fresh facts were placed before the Tribunal giving the second decision, would it still be open to the second Tribunal to come to a contrary conclusion? Two or three different positions may arise. The first Tribunal may come to a particular decision on a construction of a particular document. Take this very case. The partnership deed referred to have played an important part in the decision arrived at by both the Tribunals. If the first Tribu-

nal took a particular view as to the construction of that document, would it be open to the second Tribunal, without more, to come to a different conclusion on the construction of that document? In our opinion it would not be open to the second Tribunal to disturb the decision given by the first Tribunal because we must bear in mind that the construction of the partnership deed is not a matter of computation or a matter of reckoning which may alter from year to year or from assessment to assessment. If the partnership deed is the very basis of the decision as to whether Hiralal is a partner in his own right or is a trustee for Vasantlal, then it is a decision with regard to the construction of the partnership deed and is a decision which is bound to affect not only that particular assessment but subsequent assessments, and therefore it seems to us that the mere fact that the Second Tribunal may look upon the decision of the first Tribunal as erroneous in law would not justify it in coming to a contrary conclusion or reversing the finding of the first Tribunal. Nor are we satisfied that in order to enable the second Tribunal to depart from the finding of the first Tribunal it is essential that there must be some fresh facts which must be placed before the second Tribunal which were not placed before the first Tribunal. If the first Tribunal failed to take into consideration material facts, facts which had a considerable bearing upon the ultimate decision, and if the second Tribunal was satisfied that the decision was arrived at because of the failure to take into consideration of those material facts and that if these material facts had been taken into consideration the decision would have been different, then the second Tribunal would be in the same position to revise the earlier decisions as if fresh facts had been placed before it. On principle there is not much difference between fresh facts being placed before the second Tribunal and the second Tribunal taking into consideration certain material facts which the first Tribunal failed to take into consideration. It may be said that even though the first Tribunal may take into consideration all the facts, still its decision may be so erroneous as to justify the subsequent Tribunal in not adhering to that decision. In a case like this, which indeed must be an extreme case, it could be said that the decision of the first Tribunal was a perverse decision, and if the decision of the first Tribunal was either arbitrary or perverse it would justify the second Tribunal in departing from the decision arrived at by the first Tribunal. Therefore in our opinion an earlier decision on the same question cannot be reopened if that decision is not arbitrary or perverse, if it has been arrived at after due inquiry, if no fresh facts are placed before the Tribunal giving the later decision, and if the Tribunal giving the earlier decision has taken into consideration all material evidence. We should also like to sound a note of

1955

H. A. SHAH & Co. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

warning, especially with regard to a Tribunal like the Appellate Tribunal, that it should be extremely slow to depart from a finding given by an earlier Tribunal. Even though the principle of *res judicata* may not apply, even though there may be no estoppel by record, it is very desirable that there should be finality and certainty in all litigations including litigation arising out of the Income Tax Act. It is not a very satisfactory thing that an assessee should feel a grievance that one Tribunal came to one conclusion and another Tribunal came to a different conclusion and that the two conclusions are entirely inconsistent with one another. Therefore, the second Tribunal must be satisfied that the circumstances are such as to justify it in departing from the ordinary principles which apply to all Tribunals to try and give as far as possible a finality and a conclusiveness to a decision arrived at. We should also like to lay down a further limitation upon the power of the Tribunal to revise the decision given earlier by that very Tribunal. The effect of revising this decision should not lead to injustice and the Court must always be anxious to avoid injustice being done to the assessee. If the Court is satisfied that by depriving the assessee of his rights under the later decision in an earlier year the assessee lost an important advantage or lost some benefit which he could have got under the Income Tax Act, then the Court may take the view that departing from the earlier decision leads to injustice or denial of justice and the Court may prevent an Income Tax Authority from doing something which would be unjust and inequitable. We may state that when Mr. Palkhivala was contending that the result of reopening the decision of the first Tribunal was to cause injustice to the assessee, the Advocate General very fairly agreed that the Department will see that no injustice was done to the assessee. What was pointed out by Mr. Palkhivala was that when in the assessment for 1941-42 the Tribunal took the view that Hiralal was a trustee of Vasantlal there were losses in the assessee firm and a part of those losses were allocated to the share of Vasantlal. What Mr. Palkhivala says and rightly says is that these losses cannot be set off against subsequent profits by Hiralal. If in 1942-43, 1943-44 and 1944-45 Hiralal is considered to be the partner of the assessee firm and if the assessee firm has made profits for these years, Hiralal has lost the right of setting off the losses of 1941-42 against those profits, which right he would have had if in 1941-42 also the Tribunal had taken the view that Hiralal was a partner in the assessee firm. We are sure that the Department will see that no injustice is caused to Hiralal by the erroneous view, as it now turns out, taken by the Tribunal in 1941-42 that Hiralal was a trustee of Vasantlal and not a partner in his own right.

But the interesting point that has been raised by Mr. Palkhivala is that although these principles may apply to Income Tax Authorities they do not apply to the Appellate Tribunal which stands on a different position to the Income Tax Authorities. It is pointed out that under the Income Tax Act under s. 5, the Income Tax Authorities are set out who are Income Tax Officers, Appellate Assistant Commissioners and Commissioners of Income-tax, and it is Chpt. II-A which deals with the Appellate Tribunal which is not an Income Tax Authority. Therefore it is contended that although the principle of *res judicata* may not apply as far as an Income Tax Officer and the Appellate Assistant Commissioner is concerned, it should apply to a judicial Tribunal like the Appellate Tribunal which is not in any way under the control or authority of the Central Board of Revenue or the Income Tax Commissioner. In order to appreciate this argument we must consider what role does the Appellate Tribunal play under the Income Tax Act. It is clear that the Tribunal is a part of the machinery of assessment. It may be the final link in the sense that it is the final appellate authority on facts. But when the Income Tax Act sets up a complete comprehensive assessment machinery, the Income Tax Tribunal plays an important part in that machinery and it will be entirely erroneous to contend that the Income Tax Tribunal stands outside that machinery and has nothing to do with that machinery. The Advocate General has drawn our attention to s. 37 where the Income Tax Officer, the Appellate Assistant Commissioner, Commissioner and the Appellate Tribunal are all grouped together for the purpose of vesting in them certain powers under the Civil Procedure Code. Again, under s. 28 power is given to all these authorities to impose a penalty for certain income-tax offences.

It has been argued by Mr. Palkhivala that certain decisions have taken the view that as far as High Court is concerned when it decides a question of law on a reference under s. 66 that decision, if it is not merely concerned with the particular assessment but is of an enduring character, is binding upon the Income Tax Authorities not only for that assessment year but also for subsequent assessment years, and the attempt of Mr. Palkhivala was to equate the position of the Tribunal with that of the High Court. In our opinion, the position of the High Court under the Income Tax Act is entirely different from the position of the Tribunal. The High Court is not a part of the assessment machinery. It has nothing whatever to do with the assessment of the assessee. Its jurisdiction is purely advisory and all that it does is to decide questions of law which are either referred to it by the Tribunal or which it directs the Tribunal to refer on the application of the assessee or the Commissioner of Income-tax. Therefore, even though the principle

1955

H. A. SHAH & CO. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

of *res judicata* may apply to the decision given by the High Court on a reference under s. 66, it would be fallacious to urge that, therefore, by analogy the same principle should apply when the Tribunal gives a decision in appeal where an appeal is preferred to it by the Income Tax Officer or the assessee.

Turning to the authorities, the authority that was strongly relied upon by Mr. Palkhiwala and on which several other High Courts have relied is a Full Bench decision of the Madras High Court in *Sankaralinga Nadar* v. *Commissioner of Income-tax, Madras.*[8] The Full Bench was really concerned with the power of the Income Tax Officer and what it held was that the Income Tax Officer was not bound by the rule of *res judicata* or estoppel by record. But the Full Bench made it clear that the power of the Income Tax Tribunal to reopen a matter was not unlimited and the limitation they laid down was this. At page 435 the judgment states:

"It seems to us that where income-tax officials have, after enquiry, proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry, they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. The position is just like the position of any two parties who have proceeded on a certain basis in their relations. It may be open to one party to reopen the matter. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor we think he is entitled to reopen the question. But if there are no fresh facts, it is difficult to see how he can arbitrarily go behind the finding of his predecessor. The same principles of natural justice or judicial dealing, which Courts impose upon Income-tax Officers, would prevent them capriciously setting aside the orders of their predecessors based on enquiry."

Therefore, what is emphasised in this statement of the law is that the Full Bench of the Madras High Court limited the power of the Income Tax Authorities to reopen a settled question only if there were fresh facts which would justify a different conclusion. With respect to the Full Bench, we are not prepared to accept that that is the only ground on which an Income Tax Authority would be entitled to reopen a settled matter, and really when one carefully studies this passage the emphasis is upon the second Tribunal acting arbitrarily or capriciously and we with respect are in agreement to that extent that the second Tribunal would certainly not be justified in reopening a matter arbitrarily or capriciously. But we do not understand why, if the second Tribunal takes into consideration matters which were not taken into consideration by the first Tribunal, it could be said that the second Tribunal was acting arbitrarily or capriciously. As we shall presently point out, the different High Courts whose judgments Mr. Palkhivala has relied upon have all in their turn put some gloss or other upon this statement

8. [1930] 53 Mad. 420, F. B.

of the law of the Madras Full Bench. If there was uniformity as to the view taken by all the High Courts, undoubtedly according to the convention we ourselves have laid down, whatever our own view might have been, we would have accepted that position. But as we shall now proceed to point out, far from there being uniformity, the different High Courts have taken different views as to the right of an Income Tax Authority to reopen a matter which was decided by an earlier Authority.

Turning first to the Nagpur High Court, in *Tejmal Bhojraj* v. *Commissioner of Income-tax,*[9] the learned Judges deduced certain propositions from the decision of the Madras Full Bench and the propositions are (p. 212):

"(i) The doctrine of *res judicata* or estoppel by record does not apply to the decisions of Income-tax authorities;

(ii) a previous finding or decision of such an authority may however be reopened and departed from in subsequent years in the following circumstances, namely—

(a) the previous decision is not arrived at after due enquiry;

(with respect, that is not the test laid down by the Madras Full Bench):

(b) the previous decision is arbitrary;

(what the Madras Full Bench says is not that the previous decision is arbitrary, but that the subsequent decision should not be arbitrary or capricious);

or

(c) if fresh facts come to light which on investigation would entitle the officer to come to a conclusion different from the one previously reached;

(iii) in the absence of such circumstances, the Income-tax Officer cannot arbitrarily depart from the finding reached after due enquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings."

Therefore, to apply the test of the Nagpur High Court, if the previous decision has not taken into consideration material evidence or material facts, can it be said of that previous decision that it was arrived at after due inquiry?

Then we have the judgment of the Allahabad High Court in *Kamlapat Motilal* v. *Commissioner of Income-tax, U.P.*[10] The Allahabad High Court was really dealing with the question of *res judicata* as applying to a decision of the High Court, a question which really does not arise for our decision, and what the learned Chief Justice laid down was that (p. 818):

"if any question of right or title which is not peculiar to the year of assessment has been decided by a competent Court, the decision may be treated as *res judicata* in subsequent years. Even if the question has not been expressly decided but the decision is by implication, either because the point was not raised or was conceded, the same result would follow. But if the decision is of the Income Tax Authorities, that decision cannot operate as *res judicata.*"

9. [1952] 22 I. T. R. 208 at p. 212.

10. [1950] 18 I. T. R. 812.

1955

H. A. SHAH & CO. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

Therefore, the learned Chief Justice is at pains to distinguish between the position of the High Court and the position of the Income Tax Authorities. In our opinion, in this wide expression the learned Chief Justice was not only thinking of the Income Tax Officer or the Appellate Assistant Commissioner, but he was also thinking of the Income Tax Tribunal which in the wider sense is an Income Tax Authority, being a part of the assessment machinery.

Then we might refer to an earlier judgment of the Allahabad High Court which is *Ram Datta Sita Ram of Basti, In re.*,[11] where the view taken by the two learned Judges of that High Court about the powers of the Income Tax Authorities is very different from what the Full Bench of the Madras High Court suggests, and this is what the learned Judges say at page 86:

"It is no doubt true, that in income-tax matters, the decision concerning a particular year is not *res judicata* and does not create an estoppel. But all the same, it has to be seen if there was any good and valid *ground for taking* a different view in 1938-39 from that taken in 1933."

With respect, "any good and valid ground" is a wide enough expression to cover a multitude of things and with respect we will not agree to give the Income Tax Authorities the wide power to interfere with a decision already arrived at on any good and valid ground.

Then there is a decision of the Madras High Court itself in *The Trustees, Nagore Durgah,* v. *Commissioner of Income-tax, Madras,*[12] and in that case the learned Judges read the decision of the Full Bench to mean at p. 815:

"The principles of natural justice require that if there is prior determination by the Income-tax department, *ordinarily there should be no* variation from that decision unless there are fresh circumstances to warrant a deviation from the previous decision."

So, what this decision of the Madras High Court has emphasised is fresh circumstances being present to justify a departure from the earlier decision. Fresh circumstances are not necessarily the same as fresh facts brought before the Tribunal considering revising the earlier decision, and in our opinion "fresh circumstances" is a much wider expression than merely "fresh facts brought before the authority."

Reference was also made to a judgment of the Patna High Court in *Kaniram Ganpat Rai* v. *Commissioner of Income Tax.*[13] The learned Judges of that High Court followed the decision of the Madras Full Bench and at page 337 this is what they state:

"It may be open to one party to reopen the matter. But if he wants to do so there should be facts which would entitle him to do it. If fresh *facts come to light* which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor we think he is entitled to reopen the question. But if there are no fresh

11. [1947] 15 I. T. R. 61.
12. [1954] 26 I. T. R. 805.
13. [1941] 9 I. T. R. 332.

facts, it is difficult to see how he can arbitrarily go behind the finding of his predecessor."

It will be noticed that emphasis is placed by the learned Judges on the second decision being an arbitrary decision on the earlier occasion, but in our opinion even if there are no fresh facts and if material facts have not been taken into consideration, it could not be said of the later decision that it is an arbitrary interference with the earlier decision.

It is not necessary strictly to consider what the position of the High Court is with regard to the question of *res judicata*. But Mr. Palkhivala has drawn our attention to the view taken by the Madras Full Bench where it considered two decisions of the Privy Council which at first blush may appear to be inconsistent and which are reported in the same volume, *Hoystead* v. *Commissioner of Taxation*,[14] and *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*.[15] This is the principle that the Madras Full Bench deduces at page 434:

"The principle to be deduced from these two cases is that, where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e. g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income, such questions, if decided by a Court on a reference made to it, would be *res judicata* in that the same question cannot be subsequently agitated. But if the question is decided by a Court on a reference which depends upon considerations which may vary from year to year, e. g., the case in 1926 A. C. 94 in which the average valuation had to be taken, there could be no question of *res judicata*."

What Mr. Palkhivala wants us to do is to apply this principle, which the Madras High Court in terms applied to a decision of a Court, to the decision of a Tribunal. As we have already pointed out, in our opinion the Tribunal stands on a very different footing from the High Court, and even assuming that the principle laid down by the Madras High Court would apply to a decision of the High Court on a reference, it does not necessarily follow that the same principle would apply to the Tribunal. In this connection Mr. Palkhivala strongly urged upon us to consider that the position of the parties before the Income Tax Tribunal was very different from the position of the parties before the Income Tax Officer. There was no *lis* before the Income Tax Officer, there were no two parties, and the Income Tax Officer was really representing his department and trying to assess the assessee according to his view of the liabilities of the assessee. But according to Mr. Palkhivala when the matter comes before the Tribunal there is a *lis*, there are two parties to that *lis*—the Income Tax Officer on the one side and the assessee on the other—, and the decision of the Tribunal is a proper judicial decision in the same sense in which a Court would

14. [1926] A. C. 155.

15. [1926] A. C. 94.

1955

H. A. SHAH & CO. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

decide after hearing parties, and therefore we should not hesitate to apply the principle applicable to the decisions of the High Court to the decisions of the Tribunal. If what Mr. Palkhivala says is true, then the same principle must apply to the decision of the Appellate Assistant Commissioner because whatever the position before the Income Tax Officer might be, as far as the Appellate Assistant Commissioner is concerned he has a *lis* also to decide, he has also two parties to the *lis*, and he gives his decision after hearing both parties. To that Mr. Palkhivala's answer is that whereas the Appellate Assistant Commissioner is not an independent judicial Tribunal, the Appellate Tribunal is. Really, we fail to understand what the significance of the expression "independent" in this context is. We take it that it is not suggested that the Appellate Assistant Commissioner in deciding an appeal is partial or biased in favour of the Department. The duty is cast upon him by the Income Tax Act to decide the appeals judicially and although he may be an Income Tax Authority and even though administratively he may be under the Income Tax Commissioner or the Central Board of Revenue, when he sits in appeal as an Appellate Assistant Commissioner he acts judicially and must show the same independence that the Income Tax Tribunal does, and therefore it is impossible to differentiate between the position of the Appellate Assistant Commissioner and the Income Tax Tribunal. Therefore, if the principle laid down by the Madras Full Bench as applicable to the High Court were to apply to the Tribunal, there is no reason why the same principle should not apply to the Appellate Assistant Commissioner, and even Mr. Palkhivala finds some difficulty in supporting the view that the Appellate Assistant Commissioner also would be bound by the principles of *res-judicata* and would not be able to reopen decisions given earlier by himself or by another Appellate Assistant Commissioner.

Strong reliance was placed by Mr. Palkhivala on the statement of the law with regard to *res judicata* or estoppel by record appearing in Halsbury, Volume 13, page 449, and paragraph 506 states:

"The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have jurisdiction, whether by the law of this country, or by the consent of parties, or by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have, submitted themselves."

The matter is further elaborated in paragraph 510 at page 451.

"The principle of conclusiveness has been applied to decisions not of record in numerous cases, of which the following are examples: A sentence of expulsion passed by a college; of deprivation by a college visitor; of trustees dismissing a school-master; an order of the General Medical Council; the award of an arbitrator."

It will be noticed that what is emphasised is the conclusive nature of the decision given by the Tribunal. It will also be

noticed that the cases mentioned in this paragraph are cases of a Tribunal dealing with a specific issue which is not likely to arise again. It is perfectly true that when a Tribunal decides a particular issue, that issue becomes conclusive with regard to the rights of parties between whom that issue was decided. But what we have to consider in this reference is entirely a different matter, and what we have to consider is the power of one Tribunal to revise or reopen a decision given by another Tribunal in a different assessment. Income Tax Tribunals deal with different assessments, and it could not be said that when the first Tribunal gave a decision the issue was at an end and the question could not be raised again, because when a fresh assessment came before the later Tribunal the question did arise but it arose in a different assessment. Therefore, the principle enunciated by Halsbury, though with respect perfectly correct with regard to special tribunals dealing with specific issues, does not necessarily apply to a case of an Income Tax Tribunal which is dealing with the same question not in the same assessment but in a different assessment, and here again the basic principle to which we have drawn attention earlier should be borne in mind that every assessment is a self-contained assessment.

Applying the principles to the facts of the case before us, really there is not much difficulty in deciding this question of law. The Tribunal in its statement of the case has expressly stated that it went into the question in much greater detail in the later years and relied upon the following evidence, and the evidence relied upon by the Tribunal is set out in the statement of the case. There are three documents on which reliance has been placed by the Tribunal and those three documents are applications by the firm for registration under s. 26-A of the Income Tax Act. All these applications are signed by the parties to the firm as indeed they have got to be so signed, and in all these three applications the name of Hiralal Shah appears as a partner. Therefore, by these applications he represented to the Income Tax Authorities that he was a partner along with Shantilal and Kantilal, two of his sons, in the firm of which registration was sought. When we turn to the earlier order of the Tribunal for which finality is claimed, there is no reference whatsoever to these three documents. Mr. Palkhivala says that the Tribunal might have considered them and might not have referred to them and it would not be right to infer that merely because the order does not mention these documents therefore no consideration was given to these documents. We can understand a judicial authority not referring to all relevant documents brought before it, but when a document is material and it has a considerable bearing upon the very issue that the Tribunal has to decide, a complete omission to consider that

1955

H. A. SHAH & Co. v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

document may justifiably lead to the inference that that particular document was not considered by the Tribunal in arriving at its conclusion, and that is exactly the view taken by the present Tribunal. It seems to have taken the view that the earlier Tribunal came to its conclusion on materials which were not complete nor detailed, whereas more detailed and more elaborate materials were gone into by the present Tribunal in coming to the conclusion which it did. We are bound by the statement of the case submitted to us.

The answer therefore to the question that is submitted to us, which is:

> "Whether in the circumstances of the case the Tribunal was justified in law in departing from its previous finding that Hiralal was a trustee for the minor Vasantlal?"

must be in the affirmative. We would like to emphasise the fact that we are answering this question on the specific facts and circumstances set out in the statement of the case.

A notice of motion has been taken out by the assessee which has been argued by Mr. Palkhivala, and the notice of motion wants a supplementary statement of the case to be submitted by the Tribunal. The fresh facts which the assessee wants to be placed before us are the various documents which according to the assessee were placed before the first Tribunal and from that it is sought to be argued that the first Tribunal in coming to its decision carefully weighed all the materials before it. We do not understand how the fact that certain materials were before the Tribunal can help us to come to the conclusion that that Tribunal necessarily considered those materials. The only way to find out whether a Tribunal considered materials placed before it is by looking at the judgment of the Tribunal. It would neither be possible nor proper to enter into the minds of Judges who decide a particular case. The mind of the Judge is only apparent from his judgment and if in the judgment the Judge has not referred to material evidence or material documents, as we said before, the only inference that can be drawn is that he did not consider those materials. The notice of motion also indirectly attempts to satisfy us that on all the materials which were before the two Tribunals the decision of the first Tribunal was correct and the decision of the later Tribunal was not correct. We are not concerned with the merits of the decision of the second Tribunal, nor do we wish to adjudicate between the competing claims of the first Tribunal and the second Tribunal as to the correctness of their respective decisions. It may be that the first Tribunal was right in its decision and the second Tribunal was wrong, but all that we have to consider on this reference is whether in law the second Tribunal had the power and authority to reopen the decision given by the first Tribunal. If the second Tribunal had that power, then as

1955

H. A. SHAH & Co., v. INCOME-TAX AND EXCESS PROFITS-TAX, BOMBAY

Chagla C. J.

to whether the power was properly exercised or not or whether its decision was correct and valid is a question that does not arise on this reference. The notice of motion is therefore dismissed with costs.

The assessee must pay the costs of the reference.

Attorneys for Applicants: *Daphtary Ferreira & Divan.*

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.

BHOGILAL LAHERCHAND, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY-I, BOMBAY, RESPONDENT.*

1955 *Sept.* 15

Indian Income-Tax Act (XI of 1922), s. 16 (3) (a) (ii)—Minor admitted to benefits of partnership between father and son—Accounts of such partnership made on Diwali every year—Minor attaining majority during middle of year and electing to continue as partner—Death of such minor thereafter—Whether Taxing Department entitled to include in father's income minor's share of profits as computed upto date of majority?

B. and his major son P. carried on business in partnership to the benefits of which B.'s minor sons A. and M. were admitted. The accounts of such partnership were made on the Diwali every year. A. attained majority on August 22, 1950 and on his electing to remain a partner of the firm a deed of partnership was executed between B. P. A. and M. on August 26, 1950. A died on August 31, 1950 in an Air-crash. The Income-Tax Department calculated the proportionate profits in the partnership coming to the share of A. as of August 22, 1950 at Rs. 2,49,459 and included such sum in the assessment of his father B. under s. 16 (3) of the Indian Income-Tax Act, 1922. The Income-Tax Appellate Tribunal confirmed the order passed by the Department. On the question whether the Department was entitled to include such sum in B.'s total income for the assessment year,

Held, that the profits or the losses of the partnership from the commercial point of view could only be ascertained when the accounts of the partnership are made up on the Diwali of each year and it would be impossible to predicate of this partnership that it had made any profit or any loss on any day prior to the Diwali of the particular year. Moreover, the only right which A. acquired on his election to continue as a partner was to receive his share of profits not as of date on which he attained majority but when the accounts were made up at Diwali or whenever partnership came to an end on dissolution or by operation of law, e. g. death.

Held, further, that before any income could be deemed to be the income of the father under s. 16 (3) of the Act, it must in the first place be the income of the minor.

Held, therefore, that the sum of Rs. 2,49,459 could not be included in the income of the father as A. himself had acquired no right to receive that amount on the date on which he attained majority.

*Income-tax Reference No. 9 of 1955.