stigma on his service career, of which the effect is penal, inasmuch as it is going to effect his future chances of promotion. So that his reversion is by way of a penal consequence and as undeniably provisions of Article 311(2) have not been complied with, the learned Judge was correct in his approach in accepting the petition of the respondent and quashing the order of his reversion and other consequent orders made in the wake of the same. This appeal fails and is dismissed, but there is no order in regard to costs.

K.S.K.

INCOME-TAX REFERENCE

Before Mehar Singh, C.J. and Bal Raj Tuli, J.

M/S JHANDHU MAL TARA CHAND,—*Applicants*

versus

THE COMMISSIONER OF INCOME-TAX, PATIALA,—*Respondent.*

Income-tax Reference No. 76 of 1964

August 13, 1968

Income-tax Act (XI of 1922)—Proviso to S. 13—When applicable—Low profits and absence of stock register of an assessee—Whether material for a finding and assessment under the proviso—Determination of method of computation by Income-tax Officer—Whether necessary for acting under the Proviso—Income-tax Officer—Whether can arbitrarily add a round figure to the assessable profits of an assessee—Assessee dealing in controlled commodity—His account-books not doubted by Food and Civil Supplies Department—Such books—Whether should be doubted by the Income-tax Officer.

Held, that before an Income-tax Officer applies proviso to section 13 of the Income-tax Act, 1922, he must give a definite finding that the income, profits and gains of an assessee cannot be deduced from the method of accounting employed by him (assessee). Neither low profits nor the absence of a varietywise or regular stock register is material on the strength of which such a finding under the proviso can be based and assessment thereunder made. The Income-tax Officer must discover evidence or material aliunde before he gives the finding.

(Paras 7 and 10)

Held, that under the proviso to section 13 of the Income-tax Act, 1922, once the Income-tax Officer comes to the conclusion that the income, profits and gains cannot properly be deduced from the method of accounting employed by the assessee, then he has to make the computation upon such basis and in such manner as he may determine. It is, therefore, necessary for him to determine some basis and manner and then to compute the income, profits and gains in accordance therewith. Without determining any basis or manner of computation, the Income-tax Officer is not justified in arbitrarily adding a round figure to the income of an assessee. Merely because the yield of rice in the case of the assesse-firm is lower than the yield of some other dealer is not sufficient ground to apply the proviso to section 13 of the Act. (Para 20).

Held, that where an assessee deals in a controlled commodity and the Food and Civil Supplies Department does not doubt the correctness of the accounts maintained by him, the Income-tax Officer should be slow to disbelieve these accounts unless very strong evidence is available to prove that the accounts maintained are false and do not exhibit the correct position. It is a serious matter for the assessee if the purchase or production and sale of the controlled commodity are not accepted by the Food and Civil Supplies Department because it involves criminal prosecution and the cancellation of the licence of the assessee. (Para 10)

Case referred by the Income-Tax Appellate Tribunal (Delhi Bench), under section 66(2) *of the Indian Income-tax Act,* 1922, *in compliance with this Court order dated 8th August,* 1963 *passed in Income-tax Reference No.* 6 *of* 1962 *for decision of the following questions* :—

(1) *Whether on the facts and circumstances of the present case, the proviso to sec.* 13 *was applicable* ?

(2) *Whether the amount of Rs.* 15,000 *was rightly and properly added on the facts of this case* ?

ANAND SARUP, SENIOR ADVOCATE WITH J. C. VERMA WITH HIM, for the Applicants.

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the Respondent.

JUDGMENT

TULI, J.—The assessee-firm, Messrs Jhandu Mal Tara Chand, in the year ending 31st March, 1958, relevant to the assessment year 1958-59 husked 71,822 *maunds* of paddy which yielded 44,997 *maunds* of polished rice, giving an average of 25 *seers*, 1 *chattack* per *maund* or 62.6 per cent. The assessee-firm had sheller as well as Huller types of machines for husking the paddy. During the previous years also, the yield of rice was almost the same, i.e., a little more than 62 per cent which had been accepted as the correct yield by the Income-tax Officer in those years. The method of keeping accounts by the firm was also not challenged or doubted by the Income-tax Officer in the previous years. While making assessment for the assessment year 1958-59, the Income-tax Officer considered that the yield of polished

rice hown by the assessee-firm was on the low side and, therefore, called upon the assessee-firm to prove that the yield of rice shown by it was correct. The explanation of the assessee-firm was that most of the paddy had been purchased in the months of October, November and December (55,665 *maunds*) and the paddy purchased during these three months was highly moist and, therefore, the yield was low. The other reason given by the assessee-firm was that the paddy purchased by it was of inferior quality as compared with the quality purchased by the other dealers in the market and in proof of this assertion, *bahi* of Dalals Association, New Mandi, Karnal, was produced. The assessee-firm also produced a certificate from the District Food and Supplies Controller, Karnal, certifying that the assessee-firm purchased 36,880 ags (71,822 *maunds* and 26 *seers*) of paddy for the period 1st April, 1957 to 31st March, 1958, and total rice produced from the paddy came to 44,997 *maunds*, 26 *seers* and 13 *chattacks* which gave an average of 25 *seers* and 1 *chattack* per maund of paddy. These facts had been verified by the I.F.S., Karnal, from the *rokar* and the rice stock register maintained by the assessee-firm and that paddy stocks had been mostly purchased by the assessee-firm during the months of October to December, 1957, when the paddy was highly moist. The Income-tax Officer applied proviso to section 13 of the Indian Income-Tax Act, 1922 (hereinafter called the Act) and after rejecting the accounts of the assessee-firm, determined the yield of rice as 26 *seers* per *maund* of paddy, thereby adding Rs. 32,053 to the income disclosed by the assessee-firm on account of the price of 1,687 *maunds* of rice at the rate of Rs. 19 per *maund*. The reason given by the Income-tax Officer for applying the proviso to section 13 of the Act was that no day to day dryage register had been maintained and that the assessee-firm had shown in a register known as paddy register, the incomings of paddy as well as its outgoings in bags only and no measurements had been given in *maunds*. According to the Income-tax Officer, it was not possible to verify the contention of the assessee-firm regarding the excessive moisture as well as the state of quality of the paddy purchased by it in the absence of day to day dryage register. The Income-tax Officer in his order stated that in a comparative case, where the nature of purchases and the months of purchases were the same as shown by the assessee-firm, the yield came to 26 *seers* and 2 *chattacks* which had been considered satisfactory by the Income-tax Appellate Tribunal, Delhi Bench, Delhi. No particulars of that case have been mentioned nor any data given from that case. The Income-tax Officer examined the *bahi* of Dalals Association and found that the assessee-firm purchased all qualities of

paddy, inferior as well as superior, but he has not noted the quantity of the inferior paddy and the superior paddy purchased by the assessee-firm.

(2) Against the order of the Income-tax Officer, the assessee-firm went in appeal to the Appellate Assistant Commissioner of Income-tax who agreed with the Income-tax Officer that the proviso to section 13 of the Act was applicable in this case. On the question, whether the yield shown by the assessee-firm was reasonable and the additions made by the Income-tax Officer were not reasonable, the Appellate Assistant Commissioner stated that it would be reasonable to fix the yield at about 25 *seers* and 8 *chattacks* and sustained an addition of Rs. 15,000 only in round figure. The reasons given by the Appellate Assistant Commissioner for not accepting the yield determined by the Income-tax Officer are as under:—

(1) The assessee-firm had purchased both inferior and superior quality of paddy, which fact has been admitted by the Income-tax Officer himself, and, therefore, it was not reasonable to expect the same yield in the case of the assessee-firm as in other cases where the quality of paddy purchased was wholly superior and of better quality;

(2) The purchase of paddy in the beginning of the season is normal feature in such cases and the extent of the purchases made in the beginning of the season is a relevant factor to consider the yield and its probable dryage;

(3) The Income-tax Officer has not taken into account the fact that there was yield of rice polish, the sale proceeds of which were Rs. 8,972 as shown in the account books of the assessee-firm; and

(4) The assessee-firm had pointed out that out of the total yield, the yield of Basmati was 12,748 *maunds* and the remaining yield, i.e., 32,250 *maunds* was of coarse rice. Admittedly, the yield of Basmati is comparatively less.

(3) The assessee-firm, not being satisfied with the order passed by the Appellate Assistant Commissioner, filed an appeal before the income-tax Appellate Tribunal which was decided by the Delhi

Bench of the Tribunal on 8th February, 1962. The order of the Appellate Tribunal is a short one and is reproduced below:—

"1. The assessee-firm carries on business of milling paddy.

2. For several reasons given by the Income-tax Authorities, the proviso to section 13 was brought into operation. The main reason that weighed with the Appellate Assistant Commissioner in upholding its application was that there was absolutely no check on the dryage claimed by the assessee. It was frankly admitted before us that there was no such check as held by the Appellate Assistant Commissioner. Thus there are absolutely no means to verify whether all the purchases made are accounted for by paddy sent for milling. A register was produced before us to show the amount of rice obtained from the amount of paddy milled, but the amount of paddy entered in this register remained unverified in relation to the purchases debited in the account books. We, therefore, uphold the Appellate Assistant Commissioner's conclusion that proviso to section 13 has been properly applied.

3. As already pointed out, the trading results were rejected and the Income-tax Officer made an addition of Rs 32,053 by taking the yield at 65 per cent as against yield of 62.6 per cent disclosed by the account books. The Appellate Assistant Commissioner took the yield at 25½ *seers* per *maund*, i.e., 63.7 per cent and sustained an addition of Rs. 15,000 only. It was pointed out that in the earlier years yield of little over 62 per cent was accepted. At the same time having regard to our experience in this class of cases and particularly in the absence of any check on the dryage claimed by the assessee, we would uphold the estimate as made by the Appellate Assistant Commissioner.

4. Appeal fails and is dismissed."

(4) The assessee-firm applied to the Income-tax Appellate Tribunal for drawing up a statement of the case and to refer the following two points of law to the High Court for decision:—

"(1) Whether on the facts and circumstances of the present case, the proviso to section 13 was applicable?

(2) Whether the amount of Rs. 15,000 was rightly and properly added on the facts of this case?"

(5) The application was refused by the Appellate Tribunal with the result that the assessee-firm filed a petition under section 66(2) of the Act in this Court and by order dated 8th August, 1963, this Court directed the Appellate Tribunal to draw up the statement of the case and refer it to this Court for decision. In compliance with that order, the Appellate Tribunal has drawn up an agreed statement of the case and has referred the two questions of law set out above for decision by this Court.

(6) From the order of the Income-tax Appellate Tribunal, it is apparent that the proviso to section 13 of the Act was held applicable on the ground that there was no check on the dryage claimed by the assessee-firm which fact had been admitted by it before the Appellate Tribunal. From this, the Appellate Tribunal observed that there were no means to verify whether all the purchases made were accounted for by paddy sent for milling. The register produced before the Appellate Tribunal showed the amount of rice obtained from the paddy but the amount of paddy entered in the register remained unverified in relation to the purchases debited in the account books. It may be remembered that neither the Income-tax Officer nor the Appellate Assistant Commissioner doubted that the assessee-firm had purchased and husked 71,822 *maunds* of paddy. Therefore, there was no question of the quantity of the paddy remaining unverified. The Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal have not stated how the day to day dryage register could be kept and how would it help the Income-tax Officer to determine the correct yield from paddy. It has not also been stated by the Income-tax Officer that other firms dealing in husking of rice maintained such a register. The assessee-firm had adopted a method of accounting which had been accepted in the previous years and on the basis of which the profit of the assessee-firm had been computed. How the difficulty arose in the assessment year 1958-59 has not been disclosed and the only material on which the account books of the assessee-firm on the method of accounting adopted by it had been discarded was that in another case, yield of rice came to 26 seers and 2 chattacks per *maund* of paddy which had been accepted as satisfactory by the Income-tax Appellate Tribunal, Delhi Bench, Delhi. To that, it was added that the correct figure of the yield of rice could not be

arrived at because day to day dryage register had not been maintained. In my opinion, these were not sufficient grounds for applying proviso to section 13 of the Act to the facts of this case.

(7) The learned counsel for the assessee-firm has relied upon a Division Bench decision of this Court (Khosla and Kapur, JJ.), in *Pandit Bros v. Commissioner of Income-tax, Delhi* (1). In that case, the assessee carrying on a business returned an income and filed a statement of profit and loss. The Income-tax Officer, however, addthat the profit disclosed by him was low and there was no stock register. The assessee maintained regular accounts of his purchases and sales and the Income-tax Officer did not say that the method employed by the assessee was such that in his opinion "the income, profits and gains could not properly be deduced therefrom". On these facts, it was held that there was no definite findings by the Income-tax Officer that the case fell within the proviso to section 13. Even if such a finding were to be implied from his order, it could not be said that there was material before him which would enable him to come to such a finding. The fact that the profits appeared to him to be insufficient and the fact that no stock register was maintained by the assessee were not materials upon which such a finding could be given, but there were circumstances which might provoke an enquiry. The Income-tax Officer must discover evidence or material aliunde before he could give such a finding. In increasing the taxable income, the Income-tax Officer did not adopt any method or basis and he was not acting according to the provisions of the statute. It was also observed that in all cases which fell under section 13 of the Indian Income-tax Act, 1922, there must be material before the Income-tax Officer to lead him to the conclusion that the method employed was defective or that the case required reconsideration and a new computation must be made.

(8) The second case relied upon by the learned counsel for the assessee-firm is *C. Arumugaswami Nadar* v. *Commissioner of Income-tax, Madras* (2). In that case, in reassessment proceedings of the assessee, who carried on the business of match manufacturing, for the calendar years 1946 and 1948, the Income-tax Officer

(1) (1954) 26 I.T.R. 159.
(2) (1961) 42 I.T.R. 237.

brought to assessment the sums of Rs. 12,000 and Rs. 15,000 respectively, as income escaping assessment on the ground that the consumption of chlorate for the manufacture of matches was excessive. When the matter was before it, the Tribunal, while conceding that a uniform standard for chlorate consumption could not be adopted by reason of the very nature of the trade, yet adopted an estimated consumption of 17 pounds per 100 gross matches and directed the recomputation of the additions. The average consumption for the calendar years 1946, 1947 and 1948 had actually worked out to 19.4, 18.7 and 20.8 pounds per 100 gross matches, respectively, but the Tribunal based its estimate on the average consumption for the years 1950, 1951 and 1952 during which years the assessee had restricted production to only one or two varieties and the production was much larger than that in the years 1946 and 1948. A test lot of matches produced at the assessee's factory had been sent for chemical analysis to two laboratories. The Madras Analytical Laboratory found that the big, medium and small matches accounted for consumption of 21.74, 19.63 and 20.64 pounds of chlorate per 100 gross matches, and the Alipore Test House found the corresponding figures to be 20.74, 18.20 and 17.30 and had observed that the match heads were not uniform and appeared to be somewhat bigger in size than those of the usual machine-made matches. But the Appellate Tribunal brushed aside the analysis reports as serving no purpose. On these facts, it was held:—

"(i) that in view of the difficulties obtaining in the manual manufacture of matches noticed by the Appellate Tribunal itself, the maintenance of a daily mixture account could not possibly help in the correlation of the issues of chlorate with the manufacture of matches. The absence of a daily mixture account, the maintenance of which was not at any earlier time insisted upon by the Department, did not lead to the conclusion that the book results of the assessee were not reliable;

(ii) that the adoption of 17 pounds per 100 gross matches by the Tribunal was not justified by the facts;

(iii) that the Tribunal was not justified in concluding that the rate of consumption of chlorate for the years 1950 and 1951 could be adopted for the years 1946 and 1948;

(iv) that although the fact that the officers of the Police and Revenue Departments, who made periodical checks on the stocks and consumption of chlorate in the assessee's factory, had made no complaints as regards the quantity of consumption, was not conclusive, yet the assessee was entitled to rely upon that fact to show that in so far as the consumption of chlorate was concerned, it was really accounted for by the match production; and

(v) that it could not be said that the accounts maintained by the assessee were incapable of reflecting his true income and there was no scope for invoking the proviso to section 13 of the Income-tax Act."

(9) The next case referred to by the learned counsel for the assessee-firm is *Harakchand Radhakishan* v. *Commissioner of Income-Tax, Assam* (3). The assessee-firm, in that case, carried on business in oil and oil-cake. For the assessment year in question, it submitted a return showing the quantity of seeds crushed and quantity of oil and oil-cake obtained. The Income-tax Officer did not reject the account books of the assessee but on the basis of previous year's assessment presumed that the rate of yield must be much higher, and estimated that the yield of oil and oil-cake must be 32 per cent and 66 per cent, respectively, and refraction 2 per cent and added Rs. 27,445 and Rs. 4,740 for shortage of oil and oil-cake. It was held that in the absence of any material to show that the quality of the seeds in the previous year was the same, the percentage of estimated yield in the previous year could be no material for ascertaining the actual yield in the assessment year. The order of the Income-tax Officer estimating the yield of oil and oil-cake at 32 per cent and 66 per cent respectively and allowing a refraction of 2 per cent was based purely on conjecture and his assessment could not be upheld.

(10) The learned counsel for the assessee-firm has then referred to *S. Veeraiah Reddiar* v. *Commissioner of Income-tax, Travancore-Cochin, Bangalore* (4) in which it was held that no assessment under the proviso to section 13 could be sustained if the Income-tax Officer (or the appellate authority, in cases of appeal) had not considered and recorded a finding against the assessee as to whether he had been regularly employing a method of accounting or whether

(3) (1962) 46 I.T.R. 196.
(4) A.I.R. 1959 Kerala 220.

his income, profits and gains could properly be deduced from his method of accounting if he had been regularly employing a method of accounting, and the Income-tax Officer's decision on these matters was not to be a subjective or arbitrary decision but a judicial decision and could not be accepted if there was no material to support his finding. Thus, neither low profits nor the absence of a varietywise or regular stock register was material on the strength of which a finding under the proviso to section 13 could be based and an assessment thereunder could be made. It was further observed that when the assessee had a method of accounting and he had been regularly employing it, it was for the Department to consider whether there were sufficient materials for rejecting that method of accounting and computing the profits on other basis and not for the assessee to prove that his method of accounting ought not to be rejected. In that case, the Income-tax Authorities had applied proviso to section 13 of the Indian Income-tax Act on the ground that the assessee had not maintained a varietywise stock register, as a result of which, the stock position could not be verified.

(11) It may be noticed at this stage that the milling of paddy and the sale of rice were controlled in the assessment year 1958-59 under the Essential Supplies Act and the stocks in the possession of rice dealers and millers were from time to time checked by the Food and Civil Supplies Department. The District Food and Supplies Controller had given his certificate which showed that that Department did not doubt the correctness of the accounts maintained by the assessee-firm. It was a serious matter for the assessee-firm if the purchases of paddy or the production of rice and sale thereof were not accepted by the Food and Civil Supplies Department as it involved criminal prosecution and the cancellation of the licence. The Income-tax Officer in such a case should have been slow to disbelieve the accounts maintained by the assessee-firm unless very strong evidence was available to him to prove that the accounts maintained were false and did not exhibit the correct position. He only doubted the correctness of the accounts on the ground that the yield of rice from paddy was rather on the low side as compared with some other dealer and in the absence of day to day dryage register, the correct quantity of paddy milled could not be verified but he nowhere recorded his finding that in the absence of day to day dryage register, the income, profits and gains could not properly be deduced from the method of accounting which had been regularly employed by the assessee-firm. In my opinion, the Income-tax

Authorities, in this case, were not justified in applying proviso to section 13 of the Act.

(12) The learned counsel for the Commissioner of Income-tax has relied upon the Supreme Court judgment in *Chhabildas Tribhuvandas Shah and others* v. *Commissioner of Income-tax, West Bengal* (5), in which the Income-tax Officer had rejected the trading accounts of the assessee and added the sum of Rs. 75,000 to the income returned by it on the grounds that the profits disclosed by the accounts for the relevant year, in comparison with the earlier years, were too low and that there were no day to day stock details for the purpose of verification. The Appellate Tribunal upheld the addition on the grounds (i) that the assessee was doing business in the main on wholesale basis and, in the absence of a tally of quantities in respect of major items of the trading account, the fall in the margin of profits could not be satisfactorily explained; and (ii) that the fall in the margin of profits was all the more difficult to explain in view of the fact that the assessee had a quota of imports worth about Rs. 8 lakhs which could have given the assessee a handsome margin of profit. On these facts, it was held that there was material to support the finding of the Appellate Tribunal and no question of law arose out of its order. In cases involving the applicability of the proviso to section 13 of the Indian Income-tax Act, 1922, the question to be determined by the Income-tax Officer was a question of fact, namely, whether the income, profits and gains could or could not be properly deduced from the method of accounting regularly adopted by the assessee. There was nothing special about this question of fact, and generally the only question of law that could possibly arise was whether there was any material for the finding. On the basis of this judgment, the learned counsel has urged that it is not open to this Court to go behind the finding given by the Income-tax Officer supported by the Appellate Assistant Commissioner and the Appellate Tribunal with regard to the applicability of the proviso to section 13 of the Act in the present case. The Supreme Court case is distinguishable as in that case, the materials before the Income-tax Authorities were the profits of the previous years of the same assessee and the fact that the assessee had a quota of imports worth about Rs. 8 lakhs which could have given him a handsome margin of profits which was not reflected in

(5) (1966) 59 I.T.R. 733.

his accounts. The comparison was not made with the profits of any other firm and it was felt by the Income-tax Authorities that in the circumstances, the absence of stock register materially affected the determination of the correct income, profits and gains of the business. In the instant case, the yield shown by the assessee in the assessment year under dispute was slightly higher than the yield shown in the previous years and the method of accounting was the same which had not been objected to in the previous years nor was the assessee-firm required to maintain a day to day dryage register. Merely because the yield of rice in the case of the assessee-firm was lower than the yield of some other dealer was not sufficient ground to apply the proviso to section 13 of the Act in this case. This case is, therefore, covered by the exception made in the Supreme Court judgment.

(13) The next Supreme Court case relied upon by the learned counsel for the Commissioner of Income-tax is *S. N. Namasivayam Chettiar* v. *Commissioner of Income-tax, Madras* (6), in which it had been held by the Appellate Tribunal that the correct profits of the assessee could not be deduced from the books produced by him for the following reasons:—

"(1) Vouchers for several purchases made in Colombo had not been produced and for purchases of over Rs. 3 lakhs no vouchers were forthcoming and without the vouchers the entries in the account books could not be verified;

(2) There was no quantitative tally for the grains and for other materials purchased by the assessee and it was not possible to accept the books of account, where the turn-over was as large as Rs. 17 lakhs without a quantitative tally;

(3) A fairly big sum of money was alleged to have been paid towards purchasing of licences for export from India; and Rs. 19,000 worth of purchases were made in Tuticorin when only a small sum of money in cash was shown in the assessee's accounts;

(4) Several outsiders' cheques had been entered in the accounts of the assessee without any proof as to why those cheques were paid to the assessee; and

(6) (1960) 38 I.T.R. 579.

(5) A fairly big sum of money had been invested in India in the purchase of property without money being received from Colombo."

(14) On these facts, the Supreme Court held that the Appellate Tribunal had correctly applied the proviso to section 13 of the Act. This case is clearly distinguishable as the Tribunal had come to the finding that proper income, profits and gains could not be deduced from the account books of the assessee for the various reasons given and not merely on the basis of low profits or absence of any register.

(15) The last Supreme Court judgment relied upon by the learned counsel for the Commissioner of Income-tax is *Commissioner of Income-tax, Bangalore* v. *K. Y. Pilliah and Sons* (7), in which for the assessment year 1951-52, the respondent-firm declared in its return the sum of Rs. 18,679 as the income from its business of purchase and sale of cloth. Its books of account disclosed a turnover of Rs. 9,42,524 and a gross profit of Rs. 38,857 which worked out at 3.8 per cent. Upon making detailed enquiries, the Income-tax Officer discovered that the firm had carried out transactions in the names of a son of its principal partner and of its Accountant to the extent of Rs. 1,05,031. These transactions, besides other transactions, the extent of which could not be ascertained, were not entered in its account books. The Income-tax Officer rejected the figures disclosed in its accounts as unreliable because, (i) they did not include sales kept out of the accounts, (ii) the gross profit disclosed was wholly inadequate in the light of profits disclosed by other dealers in the same business, since it worked out at 6 or 7 per cent in their case. He accordingly estimated the turnover at Rs. 12 lakhs and the rate of gross profit on the turnover at 6.5 per cent. It was held on these facts that the Income-tax Officer could exercise the power to estimate the turnover of the firm, and, as the firm furnished no explanation at all as to why profit at the normal rate was not earned, it was open to the Income-tax Officer to estimate the gross profit at a rate at which profit was earned in similar business by other merchants. It was also laid down that the power to estimate the turnover where the accounts were un-

(7) (1967) 63 I.T.R. 411.

reliable must be exercised not arbitrarily but judicially in the light of relevant materials and once the books of account of the assessee were rejected and the rate of gross profit earned by him was found unreliable, it was open to the Income-tax Officer to estimate the gross profit at a rate at which profit was earned in similar business by other merchants. The facts of that case as stated are entirely different from the facts of the instant case.

(16) The learned counsel for the Commissioner of Income-tax has also relied upon a Division Bench judgment of this Court in *Punjab Trading Co. Ltd.*, v. *Commissioner of Income-tax, Simla* (8), the facts of which case were entirely different and the account books of the assessee who carried on the business of ginning cotton showed that the yield of cotton was low in the accounting year compared with the earlier years. The explanation of the assessee was not believed by the Income-tax Officer, and relying upon the low yield and the fact that the assessee had not kept any register from day to day about the consumption of raw cotton and production of ginned cotton, the Income-tax Authorities applied the proviso to section 13 of the Income-tax Act. It was held by this Court that there was sufficient material in the case for invoking the provisions of the proviso to section 13. In that case, the low yield was compared with the yield in the previous years of the assessee and the register containing the consumption of raw cotton and production of ginned cotton could have been easily maintained. In the instant case, it was stressed by the assessee-firm that it was not possible to keep day to day dryage register and, secondly, it has not been shown by the learned counsel for the Commissioner of Income-tax as to how the keeping of such a register, assuming it was possible to keep one, could help in the determination of the correct profits of the business.

(17) The learned counsel for the Commissioner of Income-tax has argued that the particulars of the firm whose case was considered comparable and which had the yield of 26 *seers* and 2 *chattacks* per *maund* must have been disclosed to the assessee-firm by the Income-tax Officer as he made no grievance on this score before the Appellate Authorities and cannot now make a grievance in this Court. The order of the Income-tax Officer does not show the particulars of that case and the Appellate Assistant Commissioner has not referred to that case but he gave his own four reasons for not accepting the rate of yield determined by the Income-tax Officer.

(8) (1964) 53 I.T.R. 335.

(18) He on his own estimate thought 25 *seers* and 8 *chattacks* to be the reasonable yield but did not base this estimate on any material on the record. When the matter went before the Appellate Tribunal, the Tribunal observed:—

> "It was pointed out that in the earlier years, yield of little over 62 per cent was accepted. At the same time having regard to our experience in this class of cases and particularly in the absence of any check on the dryage claimed by the assessee, we would uphold the estimate as made by the Appellate Assistant Commissioner."

(19) It is quite apparent that even the Appellate Tribunal sustained the addition made by the Appellate Assistant Commissioner on their experience of similar cases and not on any material on the record. The difference between the yield estimated by the Appellate Assistant Commissioner and the Appellate Tribunal and the yield returned by the assessee-firm is so small that it cannot be concluded therefrom that the correct profits could not be deduced from the method of accounting applied by the assessee-firm.

(20) It is quite apparent from the above discussion that my answer to the first question is in the negative from which it follows that the answer to the second question must also be in the negative. But assuming that my answer to the first question is not correct, I am still of the opinion that answer to the second question must be in the negative. The reason is that under the proviso to section 13 of the Act, once the Income-tax Officer comes to the conclusion that the income, profits and gains cannot properly be deduced from the method of accounting employed by the assessee, then he has to make the computation upon such basis and in such manner as he may determine. It is, therefore, necessary for the Income-tax Officer to determine some basis and manner and then to compute the income, profits and gains in accordance therewith. Neither any basis nor any manner of accounting has been determined by the Income-tax Officer, the Appellant Assistant Commissioner or the Appellate Tribunal, in this case. The extent of moisture which was reasonable in the case of the assessee-firm has not been determined nor have the separate quantities of inferior and superior paddy purchased by the assessee-firm been determined. The learned Income-tax Officer added 1687 *maunds* to the yield of rice returned by the assessee-firm and while dealing with that, the learned Appellate Assistant Commissioner has noticed that the sale proceeds of the rice polish were Rs. 8,972 which should have been taken into

account by the Incometax Officer. The price of this rice polish has not been stated. If my recollection is correct, the price of rice polish varied between Rs. 4 and Rs. 5 per *maunds* in those days and assuming it to be Rs. 5 per maund, the sale proceeds of Rs. 8,972 on account of rice polish will account for about 1,800 *maunds* which figure is more than 1,687 *maunds* added by the Income-tax Officer to the yield of rice returned by the assessee-firm.

(21) The learned counsel for the assessee-firm argued on the basis of the Supreme Court judgment in *Dhakeswari Cotton Mills Ltd.* v. *Commissioner of Income-tax, West Bengal* (9), that the Income-tax Officer was not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. As held in that judgment, there must be something more than bare suspicion to support the assessment under section 23(3) of the Act.

(22) Another Supreme Court judgment to which he has drawn our attention is *M/s Raghubar Mandal Harihar Mandal* v. *State of Bihar* (10), It was a case under the Sales Tax Act and in para 5 of the judgment, it was observed:—

> "In so estimating the gross turnover, they did not refer to any materials at all. On the contrary, they indulged in a pure guess and adopted a figure without reference to any evidence or any material at all. Let us take, for example, the assessment order for the quarter ending 30th June, 1946. The Sales Tax Officer said : 'I reject the dealer's accounts and estimate a gross turnover of Rs. 4,00,000. I allow a deduction at 2 per cent on the turnover and assess him on Rs. 3,92,000 to pay sales tax of Rs. 6,125.'
>
> For the quarter ending on 30th September, 1946, the Sales Tax Officer said 'I reject his irregular account and estimate a gross turnover of Rs. 3,00,000 for the quarter and assess him on Rs. 2,94,000 to pay tax of Rs. 4,593-12-0.' These and similar orders do not show that the assessment was made with reference to any evidence or material; on the contrary, they show that having rejected the books of account, the assessing authorities indulged in pure guess and made an assessment without reference to any evidence or any material at all. This the assessing authorities were

(9) A.I.R. 1955 S.C.6 5.
(10) A.I.R. 1957 S.C. 810.

not entitled to do under clause (b) of sub-section (2) of section 10 of the Act."

I find considerable force in this argument of the learned counsel for the assessee-firm.

(23) In reply, the learned counsel for the Commissioner of Income-Tax has referred to the Privy Council judgment in *Commissioner of Income-Tax, Central and United Provinces* v. *Lazminarain Badridas* (11), to the effect that under section 23(4) of the Income-Tax Act, the officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns, by and assessments of, the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense too the assessment must be, to some extent arbitrary. The section places the officer in the position of a person whose decision as to amount is final and subject to no appeal, but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by section 33.

(24) The discretion of the Income-tax Officer under sections 23(3) and 23(4) of the Act is much wider than the one under the proviso to section 13. The Income-tax Authorities not having determined any basis or manner for computation of the true income, profits and gains of the assessee-firm were not justified in arbitrarily adding the sum of Rs. 15,000 in round figure to the income of the assessee-firm.

(25) For the reasons given above, the answer to both the questions referred to us is in the negative. The assessee-firm will have its costs from the Commissioner of Income-Tax. Counsel's fee Rs. 250.

MEHAR SINGH, C.J.—I agree.

K.S.K.

(11) (1937) 5 I.T.R. 170.

10978 ILR 1200—8-4-1969 Govt. Press, Chandigarh.