INCOME-TAX REFERENCE.

Before D. K. Mahajan and Bal Raj Tuli, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB,—
Applicant.

versus

M/s. RAM SANEHI GIAN CHAND,—
Respondent.

Income-tax Reference No. 11 of 1970.

November 18, 1970.

Income-tax Act (XLIII of 1961)—Sections 68, 143 and 254—Income-tax (Appellate Tribunal) Rules (1963)—Rule 11—Income-tax Appellate Tribunal—Whether has discretion to allow a new ground to be raised in an appeal before it—Intangible additions made in the income of an assessee in previous years—Unexplained investment by such assessee in a subsequent year—Such assessee—Whether entitled to take advantage of those intangible additions in explaining the source of such 'unexplained investment'—Claim by the assessee to take advantage of the past intangible additions—Whether raises a question of law.

Held, that it is clearly spelt out from rule 11 of the Income-tax (Appellate Tribunal) Rules (1963) that the Income-tax Appellate Tribunal has the discretion to allow a new contention to be raised in the appeal before it, and the requirement of the rule would be satisfied if the party who may be affected is given an opportunity of being heard on that new ground.

(Para 11)

Held, that if the Income-tax Authorities made additions to the assessable income of the assessee in the previous years as income from undisclosed sources, the assessee is entitled to take advantage of those added incomes to explain the source of what is considered by the Income-tax Department as income from undisclosed sources in the subsequent year. It is fair and equitable to allow him to do so as in such a case the assessee has already paid the necessary income-tax on that amount. Hence the past intangible additions made in the case of an assessee should be taken into account in considering the unexplained investment made by it.

(Paras 1 and 14)

Held, that the question, as to whether the assessee can take advantage of the intangible additions made in the prior years to explain the source of what is considered by the Revenue as income from undisclosed sources in the subsequent year, is a point of law as the same does not require any investigation into new facts. The intangible additions made in a particular

year or in the previous years are on the record of the Income-tax office and only a reference has to be made to the previous assessment orders.

(Paras 12 and 13)

Reference made under Section 256(1) *of Income-tax Act*, 1961, *by the Income-tax Appellate Tribunal, Delhi Bench 'B', New Delhi, for opinion of this Court on the following important questions of law arising from its order dated* 19*th May*, 1969, *passed in Income-tax Appeal No.* 16961 *of* 1967-68, *regarding Assessment year* 1964-65—

"1. *Whether on the facts and in the circumstances of the case the Tribunal was right in law in entertaining the new contention raised on behalf of the assessee that past intangible additions made in the assessee's case explained the discrepancy in the capital figures ?*

2. *Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that past intangible additions made in the case of an assessee should be taken into account in considering the unexplained investment made by it ?*"

D. N. Awasthy and Mr. B. S. Gupta, Advocates, for the appellant.

N. C. Jain and G. C. Garg, Advocates, for the respondent.

JUDGMENT

The judgment of this Court was delivered by :—

Tuli, J.—The Income-tax Appellate Tribunal, Delhi Branch 'B', has referred the following two questions of law to this Court for opinion at the instance of the Commissioner of Income-tax :—

"1. Whether on the facts and in the circumstances of the case the Tribunal was right in law in entertaining the new contention raised on behalf of the assessee that past intangible additions made in the assessee's case explained the discrepancy in the capital figures ?

"2. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that past intangible additions made in the case of an assessee should be taken into account in considering the unexplained investment made by it ?"

(2) The assessment year in question is 1964-65, the relevant previous year being the financial year ending March 31, 1964. The facts relevant for returning the answer to the questions referred to us, lie in a narrow compass. The assessee is a Hindu undivided family carrying on business in hardware, pipes, etc. It has its head office at Ladwa and a branch at Yamuna Nagar. A partial partition of the family was effected on March 31, 1964, whereby the capital of both the shops was pooled together and then divided equally amongst the various members of the family, after setting apart a sum of Rs. 12,235 for the marriages of the minor daughters in the family. A document evidencing the partition was executed on a stamp paper on that very day.

(3) During the course of assessment proceedings for the assessment year 1964-65, it was found on examination of the account books of the Yamuna Nagar branch that the capital of that branch on March 31, 1964, was only Rs. 31,459.10 paise whereas according to the partition document the amount pooled from this branch was Rs. 51,463.45 paise. There was, thus, a discrepancy of Rs. 20,004.35 paise for which explanation of the assessee was sought. The Income-tax Officer was not satisfied with the explanation tendered by the assessee and included that amount in the assessable income of the assessee as income from undisclosed sources.

(4) The assessee went up in appeal to the Appellate Assistant Commissioner before whom it was contended that the Income-tax Officer ought to have passed an order under section 171(2) of the Indian Income-tax Act, 1961, hereinafter called the Act, in regard to the assessee's claim of partial partition on March 31, 1964. Agreeing with this contention of the assessee, the Appellate Assistant Commissioner set aside the order of the Income-tax Officer and directed him to make a fresh assessment after making necessary enquiries under section 171(2) of the Act and after recording a finding regarding the partition of the family property and the date of partition.

(5) In pursuance of that direction the Income-tax Officer passed an order under section 171 of the Act recognising a partial partition of the family with effect from April 1, 1964. He also recorded the finding that a capital of Rs. 92,245 had been divided among the members of the family after setting apart a sum of Rs. 12,235, for the marriages of the minor daughters in the family. This amount of Rs. 92,245 included the sum of Rs. 51,463.45 paise contributed

by Yamuna Nagar branch as capital. As before, he treated the sum of Rs. 20,004 as the assessee's income from undisclosed sources and adding that amount to the disclosed income an order of assessment was made on December 31, 1966.

(6) The assessee filed an appeal before the Appellate Assistant Commissioner both against the assessment order as well as the order under section 171 of the Act, but both the appeals were rejected. Before the Appellate Assistant Commissioner it was stated by the assessee that the capital at the Yamuna Nagar branch transferred to the head office at the time of the partition was only Rs. 31,459.10 paise and not Rs. 51,463.45 as has been stated in the deed of partition by mistake. This contention of the assessee, however, was not accepted by the Appellate Assistant Commissioner.

(7) The assessee filed further appeals against both the orders to the Income-tax Appellate Tribunal, which were heard together. After considering the assessee's explanation already given, the Tribunal rejected the assessee's contention that the capital divided at the time of partition was only Rs. 72,241 and not Rs. 92,245. The Tribunal held that the assessee's explanation that there had been a mistake in stating the amount of capital contributed by the Yamuna Nagar branch as Rs. 51,463.45 paise instead of Rs. 31,459.10 paise was an after-thought and that the discrepancy of Rs. 20,004.35 paise between the two figures had to be explained.

(8) At that stage the assessee raised a new contention before the Tribunal, that is, the difference between the capital at the Yamuna Nagar branch as per its books and the capital transferred to the head office at the time of the partial partition represented the intangible additions made to the assessee's income not only in the present assessment year but also in the earlier assessment years. The Departmental Representative objected to the admissibility of this new contention at that stage. The Tribunal, however, held that the contention sought to be raised by the assessee was legal in nature and should be allowed to be raised. The Tribunal decided to allow the assessee to raise this contention because in several decisions it had been held that intangible additions made to the assessee's income represented his real income and such income had been taken into account while considering any unexplained investment of the assessee. The Tribunal, however, pointed out that in the absence of any information regarding the amount of intangible additions and in the

absence of an opportunity to the Department to verify the figures, it would not be possible for the Tribunal to decide the point straightaway. It, therefore, set aside the orders of the Appellate Assistant Commissioner and directed him to consider the assessee's case on the basis of the new contention raised before him.

(9) The Commissioner of Income-tax then applied under section 256(1) of the Act to the Tribunal for referring the two questions of law stated above for the opinion of this Court. Two contentions were raised on behalf of the Commissioner of Income-tax, namely, (i) that while the Tribunal has undoubtedly a discretion to admit an additional ground before it, it was not open to the Tribunal to permit the assessee to raise a fresh ground which would involve an investigation into fresh facts; and (ii) that the Tribunal erred in coming to the conclusion that the past intangible additions in the case of the assessee should be taken into account in considering any unexplained investment.

(10) The same two contentions have been raised before us by the learned counsel for the petitioner. Reliance in support of the first contention is placed on a judgment of a Division Bench of the Bombay High Court (Tambe and Desai JJ.) in *Commissioner of Income-tax, Bombay City* 1. v. *Hazarimal Nagji & Co.* (1). In that case during the assessment proceedings for the assessment year 1949-50, the Income-tax Officer found cash credits to the extent of Rs. 90,000 and, as the source of such credits was not explained, he added this amount to the assessee's income. The Appellate Assistant Commissioner reversed this order. The department appealed and when the Tribunal expressed the view that the burden of proof was on the assessee, the assessee raised for the first time a new point that as the credits arose in the financial year 1947-48, they could not be taxed in the assessment year 1949-50, but only in 1948-49. The Tribunal permitted the assessee to raise this new ground and further declined to give a direction under section 34(3) of the Act that the sum may be taxed in 1948-49. On a reference to the High Court it was held—

> "that on the facts as stated by the Tribunal, the contention raised in the present case was one purely, in law, on the facts as they existed all along before the Income-tax Officer as well as the Appellate Assistant Commissioner, though

(1) (1962) 46 I.T.R. 1168.

the legal argument available on those facts was not urged before either of the authorities.....It was within the jurisdiction of the appellate powers of the Tribunal to permit the assessee-respondent to raise the question, which it sought to raise for the first time before the Tribunal and the Tribunal, therefore, could not be said to have erred in permitting the assessee-respondent to do so."

(11) This judgment, instead of helping the department, helps the assessee and it is quite clear from the observations made therein that the income-tax Appellate Tribunal has the discretion to allow a new contention to be raised in the appeal before it. This power is also spelt out from rule 11, of the Income-tax (Appellate Tribunal) Rules, 1963, which reads as under :—

"11. Grounds which may be taken in appeal,—

The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

In the present case the Departmental Representative was given an opportunity of being heard on the new ground raised by the assessee and, thus, the requirement of that rule was satisfied. We are, therefore, of the opinion that the answer to the first question has to be returned in the affirmative.

(12) As regards the second question we are unable to understand, why the assessee cannot take advantage of the past intangible additions made in its income while explaining the sum of Rs. 20,004 which was treated by the Income-tax Officer and the Appellate Assistant Commissioner as income from undisclosed sources. It is true that before the Income-tax Officer and the Appellate Assistant Commissioner this plea was not taken. It may be that the assessee was

not aware of the legal position, that is, that it was entitled to take advantage of the intangible additions made in the previous years and it is quite evident from the facts of this case that this point was urged before the Tribunal by the learned counsel for the assessee. Since this was a point of law, the assessee was not supposed to know it and it will be wholly unfair not to allow him to raise that plea simply because he did not urge it before the Income-tax Officer or the Appellate Assistant Commissioner. On the intangible additions made in the previous years the assessee had paid the income-tax and possibly penalty for not disclosing it, and if the law permits the assessee to take advantage of those intangible additions for explaining the capital in the subsequent assessment years, the opportunity should be allowed to it in the interest of equity and fair play.

(13) Nothing has been said by the learned counsel for the petitioner as to why it was not open to the Tribunal to allow the assessee to raise the plea and substantiate it. There is no question of investigation on facts because the intangible additions made in that year or in the previous years were on the record of the Income-tax Office and only a reference had to be made to the previous assessment orders. No new fact had to be investigated or proved. The two judgments of their Lordships of The Supreme Court in *Kala Khan Mohammad Hanif* v. *Commissioner of Income-tax, Madhya Pradesh and Bhopal,* (2) and *Commissioner of Income-Tax, U.P* v. *Devi Prasad Vishwanath Prasad* (3) relied upon by the petitioner have no applicability to the facts of the present case. All that was held by their Lordships in those cases was that it was open to the Income-tax Officer to assess an amount as the income of the assessee from undisclosed sources when the assessee was unable to prove the source of that income and it was not necessary for the Income-tax Officer to prove that source. In none of those cases the matter of permitting the assessee to explain the source of the credits in his accounts as the intangible additions made in the previous year was in question.

(14) In our opinion if the Income-tax Authorities made additions to the assessable income of the assessee in the previous year as income from undisclosed sources, the assessee is entitled to take advantage of those added incomes to explain the source of what is

(2) (1963) 50 I.T.R. 1.
(3) (1969) 72 I.T.R. 194.

considered by the Income-tax Department as income from undisclosed sources because every other explanation tendered by the assessee was rejected. To say the least it is fair and equitable to allow him to do so because the assessee has already paid the necessary income-tax on that amount.

(15) In view of what has been said above, our answer to question No. 2 is also in the affirmative.

(16) The reference is answered accordingly but in the circumstances we make no order as to costs.

B. S. G.

WEALTH TAX REFERENCE

Before D. K. Mahajan and Bal Raj Tuli, JJ.

THE COMMISSIONER OF INCOME-TAX, DELHI,—
Applicant.

versus

VIJAY KUMAR BEHAL,—*Respondent.*

Wealth Tax Reference No. 2 of 1969

November 19, 1970.

Wealth Tax Act (XXVII of 1957)—Section 2(m)—Amount of Income-tax liability on concealed income—Whether a "debt owed"—Assessee—Whether entitled to the deduction of such amount in the computation of his net wealth.

Held, that on a true interpretation of section 2(m) of the Wealth Tax Act, 1957, the tax-liability is undoubtedly a debt. It has to be deducted from the Wealth of the assessee in order to arrive at the net wealth. The liability to pay tax arises on true income and true income will include both disclosed and undisclosed income. Consequently in the determination of the assessee's net wealth, he is entitled to the deduction of the income-tax payable by him on the concealed income included in his wealth.

(Paras 6 and 7)