(14) For the reasons recorded above, we answer the first question in the affirmative, that is, in favour of the department and against the accountable persons, second and fourth question in the negative, that is, second in favour of the department and against the accountable persons and fourth in favour of the accountable persons and against the department. The third question does not arise in view of our answer to second question. In view of the difficult nature of the case, we make no order as to costs.

K.S.K.

INCOME TAX REFERENCE.

Before D. K. Mahajan and Gopal Singh, JJ.

M/s. KISAN WORKERS TRANSPORT CO-OPERATIVE SOCIETY, LTD.,—*Applicant.*

versus

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

Income Tax Reference No. 39 of 1969

February 22, 1971

The Income-tax Act (XLIII of 1961)—Sections 251(1)(a) and 297(2)(a)—Income-tax Act (XI of 1922)—Assessment proceedings started by Income-tax officer under 1922 Act—Assessment made under 1961 Act—Appellate Assistant Commissioner while disposing appeal under 1961 Act not annuling the assessment but setting it aside and refering the case back to the Income-tax Officer to make fresh assessment under the 1922 Act—Such order of the Appellate Assistant Commissioner—Whether bad in law.

Held, that assessment proceedings started under the Income-tax Act, 1922, should have been completed under the Act as provided by section 297 (2)(a) of the Income-tax Act, 1961. However, while disposing appeal against assessment started under 1922 Act and completed under 1961 Act, the Appellate Assistant Commissioner, while disposing of appeal against the assessment and acting under section 251(1)(a) of the 1961 Act, instead of annuling the assessment, sets it aside and refers the case back to the Income-tax officer with the direction to make fresh assessment from return stage under the 1922 Act, the order of the Appellate Assistant Commissioner is valid and not bad in law. It is not incumbent on him to annul the assessment. Moreover, the Income-tax Officer was proceeding with the assessment under the 1922 Act, which he had jurisdiction to do. The mere fact that he applied a different provision of law would not render his order wholly without jurisdiction. (Paras 2 and 6)

Reference under Section 256(1) of the Income-Tax Act, 1961, made to this Court by the Income-tax Appellate Tribunal, Delhi Bench 'A' on 13th June, 1969, for opinion in R.A. No. 273/1968-69 on the following question of law arising out of in I.T.A. No. 2698 of 1967-68 regarding the assessment year 1961-62:—

> *"Whether on the facts and in the circumstances of the case the Tribunal was right in holding that it was within the competence of the Appellate Assistant Commissioner while disposing of the appeal under the Income-tax Act, 1961, to have set aside the assessment with a direction to the Income-tax Officer to make a fresh assessment from the return stage under the provisions of the Indian Income-tax Act, 1922?".*

BALRAJ KOHLI, ADVOCATE, for the applicant.

D. N. AWASTHY AND BALWANT SINGH GUPTA, ADVOCATES, for the respondent.

JUDGMENT

The judgment of this court was delivered by :—

MAHAJAN, J.—(1) The Income-tax Appellate Tribunal (Delhi Bench 'A'), has referred the following question of law for our opinion :—

> "Whether on the facts and in the circumstances of the case the Tribunal was right in holding that it was within the competence of the Appellate Assistant Commissioner while disposing of the appeal under the Income-tax Act, 1961, to have set aside the assessment with a direction to the Income-tax Officer to make a fresh assessment from the return stage under the provisions of the Indian Income-tax Act, 1922 ?"

(2) On facts there is not much dispute. The assessee is a Co-operative Society. It is engaged in transport business. It filed a return of income on 20th October, 1961, for the assessment year 1961-62. The total income shown in the return amounted to Rs. 35,815. On the 29th of January 1966, the assessee filed a revised return. In this return, a loss of Rs. 7,026, was shown. The Income-tax Officer made the assessment under section 143(3) of the Income-tax Act, 1961. He determined the taxable income at Rs. 40,770. An appeal was preferred by the assessee to the Appellate Assistant Commissioner of Income-tax against the order of the Income-tax Officer. The

main contention before the Appellate Assistant Commissioner was that the assessment was bad in law as the same had been completed under the 1961 Act contrary to the provisions of section 297(2) (a) of the 1961 Act. In fact, the assessment should have been made under the Income-tax Act of 1922. This contention was accepted by the Appellate Assistant Commissioner and he held that the Income-tax Officer erred in completing the assessment under the provisions of the Income-tax Act of 1961. The Appellate Assistant Commissioner while acting under section 251(1) (a) of the Income-tax Act of 1961 did not annual the assessment. He instead set aside the assessment and referred the case back to the Income-tax Officer to make a fresh assessment under the 1922 Act. The assessee was dissatisfied with this course inasmuch as he wanted the assessment to be annulled. He preferred an appeal to the Appellate Tribunal. The Tribunal by its order, dated December 12, 1968, affirmed the decision of the Appellate Assistant Commissioner. At the instance of the assessee, the Appellate Tribunal has referred the question of law, already set out above, for our opinion.

(3) After hearing the learned counsel for the assessee, we are clearly of the view that there is no merit in the contention of the assessee that the assessment should have been annulled. Section 251(1) (a) of the 1961 Act, which is in the following terms, gives ample power to the Appellate Assistant Commissioner to adopt the course that he adopted in the present case :—

> "251(1) In disposing of an appeal, the Appellate Assistant Commissioner shall have the following powers :—
>
> (a) In an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the Income-tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner and after making such further inquiry as may be necessary, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such assessment."

(4) It will also be of interest to note that the Income-tax Officer while making the assessment had started the proceedings under the 1922 Act. He was, however, misled by the fact that a revised return had been filed and, therefore, it had to be processed under the 1961 Act. In this connection, it will be worthwhile to quote *in extenso* that part of the order of the Tribunal wherein they have discussed how the Income-tax Officer proceeded with the assessment :—

"As to what transpired in the course of the—assessment proceedings subsequent to the filing of the — return by the assessee on 20th October, 1961, would be clear by the following statement :—

Notice under section 22(2)	.. 6-9-1961 served on .. 8-9-1961
Return filed	.. 20-10-1961
Notice under section 23(2)	... 16-1-1962
Notice under section 23(2)	... 12-7-1962
Notice under section 23(2)	... 24-7-1964
Notice under section	... 3-11-1965
Notice under section 23(2)	... 5-1-1966
Revised return on	... 29-1-1966
Notice under section 23(2)/143(2)	.. 29-1-1966

It will be noticed that in 1962, 1964 and also 1965 the concerned Income-Tax Officers were proceeding in accordance with law, keeping in view the provisions of section 297(2) (a) of the Income-Tax Act, 1961. It is only subsequent to the filing of revised return by the assessee on 29th January, 1966, that the Income-Tax Officer issued a notice purporting to be "under section 23(2)/143(2)." In the circumstances, it seems to us that only the order of assessment is defective, inasmuch as it was passed under the Income-Tax Act, 1961, instead of under the Indian Income Tax Act, 1922".

(5) It will be, therefore, apparent that though the proceedings were initiated under the 1922 Act, but by reason of the revised assessment the Income-Tax Officer was misled into passing the order under the 1961 Act.

(6) The matter can be looked at from another point of view also. The Income-tax Officer was proceeding with the assessment under the 1922 Act. He had the jurisdiction to do so and the mere fact that he applied a different provision of law would not render his order wholly without jurisdiction. It is like a case where a duly constituted Tribunal applies a wrong provision of law. In this situation, it cannot be said that the order of that Tribunal becomes wholly void. If any authority is needed for the proposition, reference may be made to the observations of Pathak, J., in *Laxmi Industries and Cold Storage Co: (Pvt.) Ltd.* v. *Income-Tax Officer, "A" Ward, Kanpur and others* (1) :—

> "The decision in this case is instructive even as it is opposite to the facts before us. Like the subordinate judge, the Income-tax Officer also enjoyed a double jurisdiction, jurisdiction in respect of proceedings under the Indian Income-tax Act, 1922, and jurisdiction in respect of proceedings under the Income-tax Act, 1961. Like the subordinate judge, who tried the suit under the Code of Civil Procedure in the exercise of his normal civil jurisdiction when he should have tried it as a judge of a small cause court, the Income-tax Officer completed the assessment under the Act of 1961, when properly he should have done so under the Act of 1922. Inasmuch as he did enjoy jurisdiction to proceed under the Act of 1922, he must be considered to have dealt with the case under that jurisdiction and "even if he was not quite alive to it at the time" the proceedings must be ascribed to the jurisdiction existing in him which would give them validity rather than to the jurisdiction under which they would be void."

(7) For the reasons recorded above, we answer the question referred to us in the affirmative, that is, in favour of the Department and against the assessee. The department will be entitled to costs which are assessed at Rs. 200.

K.S.K.

(1) (1971) 79 I.T.R. 248.