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and rule 4.7 and consequently the letter of 19th October, 1959 could not have been treated as an application. Regarding the objection of the learned counsel for the respondents whether the appellants were persons aggrieved or not, we are of the opinion that they were. They were bound to be prejudicially affected in case the Delhi Transport Undertaking was permitted to operate services parallel to the existing services of the appellants.

In view of the opinion that we have expressed on these two questions it is not necessary to deal with the other contentions raised by the learned counsel for the appellants. In the result the appeal succeeds and the permits granted to Delhi Transport Undertaking to run their buses on Delhi-Bawana; Delhi-Narela *via* Bawana; Delhi-Anchandi *via* Bawana and Delhi-Kharkhoda *via* Bawana routes quashed, There will, however, be no order as to costs.

Mahajan J. D. K. MAHAJAN, J.—I agree.

B.R.T.

INCOME TAX REFERENCE

Before Daya Krishan Mahajan and S. K. Kapur, JJ.

DELHI REGISTERED STOCKHOLDERS (IRON AND STEEL) ASSOCIATION LTD.,—Appellant.

versus

THE COMMISSIONER OF INCOME TAX, DELHI AND RAJASTHAN, NEW DELHI.,—*Respondent.*

Income Tax Reference No. 1—D of 1962

1965

March, 2nd.

Income-tax Act (XI of 1922)—Proviso to S. 2(11)(1)(a)—Order passed by Income-tax Officer refusing change in the previous year—Whether appealable.

Held, that no appeal would lie against and order of the Income tax Officer refusing change in the previous year under the proviso to sub-clause (a) of clause (1) of section 2 (11) of the Income-tax Act, 1922. Under section 3 the tax is to be charged in respect of the total income of the previous year. The previous year is defined in sub-section (11) of section 2 and under the proviso thereto once an assessee has been assessed in respect of a particular source of income or where in respect of business, profession or vocation newly set up, an assessee has exercised the option under sub-clause (c), the assessee cannot in respect of that source, business, profession or vocation

change his previous year except with the consent of the Income-tax Officer and upon such conditions as he may impose. Consequently whether or not permission to change the previous year should be given has to be decided by the Income-tax Officer and may be by the Commissioner in revision but it cannot be said that the assessee, who challanges that decision is either objecting to the amount of income assessed under section 23 or the amount of tax determined under section 23, or denying his liability to be assessed under the Act. All that he is complaining about is that for the purpose of section 3 a different period should be taken for the computation of his income.

Reference under Section 66(2) *of the Indian Income Tax Act,* 1922 (*XI of* 1922) *referring the following question of law for the opinion of their Lordships:—*

> *"Whether an appeal lay against an order of the Income-tax Officer refusing change in the 'previous year' under the proviso to sub-clause (a) of clause (i) of section* 2(11), *and whether the appellate authorities are competent to judge in appeal whether the discretion so vested in the Income-tax Officer has been judiciously and correctly exercised."*

S. N. ANDLEY, ADVOCATE, for the Petitioner.

H. HARDY AND DALIP KAPUR, ADVOCATES, for the Respondent.

ORDER

KAPUR, J.—The following question of law has been referred to this Court under section 66(2) of the Indian Income-tax Act, 1922 :— Kapur, J.

> "Whether an appeal lay against an order of the Income-tax Officer refusing change in the 'previous year' under the proviso to sub-clause (a) of clause (i) of section 2(11) and whether the appellate authorities are competent to judge in appeal whether the discretion so vested in the Income-tax Officer has been judicially and correctly exercised?"

The relevant assessment year is 1952-53 (the previous year ending 30th April, 1951). The Delhi Registered Stockholders (Iron & Steel) Association Ltd., Delhi (hereinafter referred to as the assessee company) is a limited liability company incorporated in the year 1944. It commenced its business on 1st September, 1944. The accounts

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were closed for the first time on April 30, 1945 and the assessment for the assessment year 1946-47 was made for the period 1st September, 1944 to 30th April, 1945. Thereafter the assessments were made for the previous years ending on 30th April. The profits of the company were exempt from income-tax, under the orders of the Central Board of Revenue and each shareholder was charged to tax direct on his share profits. The system of directly taxing the the shareholders was discontinued in the year 1951, when the Central Board of Revenue discontinued the exemption in favour of the company. On November 26, 1951 the assessee company passed a resolution whereby the date of annual closing of accounts was changed from 30th April to 31st March. In the year 1952 the balance-sheet and the profit and loss account were drawn up for the period ended 31st March, 1952. The assessee company made an application under the proviso to sub-clause (a) of clause (i) of section 2(11) for change of the accounting period with respect to the assessment year 1951-52. This application was refused. The request was repeated for the assessment year 1952-53 but the Income-tax officer again declined the request. In this reference we are concerned with the latter application. It may also be pertinent to point out that the assessee company even filed their return of income for the period ended March 31, 1952. The Income-tax Officer considered the balance-sheet and profit and loss account for the period ended 30th April, 1951 as the relevant balance-sheet and profit and loss account for assessment for the assessment year 1952-53. The order making the assessment and declining the request for change in the accounting period was a composite one. Aggrieved by the order the assessee company filed an appeal before the Appellate Assistant Commissioner. In the said appeal it was *inter alia* contended that the Income-tax Officer was wrong in not allowing the assessee company the change of the accounting period claimed by it. The Appellate Assistant Commissioner, however, came to the conclusion that this matter could not be agitated in appeal since discretion of the Income-tax officer was final. The appeal by the assessee company before the Tribunal also failed. It has been contended by Mr. Andley, learned counsel for assessee company that the Tribunal was in error in holding that this question could not be agitate in appeal. His submission is that if the petition for change of the year had been accepted, then the profits arising up to the 31st of March, 1951, would have

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been exempt and consequently an appeal lay before the Appellate Assistant Commissioner under section 30. According to the learned counsel any assessee objecting to the amount of income assessed under section 23, or the amount of tax determined under section 23, or denying his liability to be assessed under the Act, could file an appeal under section 30 before the Appellate Assistant-Commissioner and in agitating against the order of the Income-tax Officer in declining permission to change the previous year, the assessee company was in substance objecting to the amount of income assessed under section 23 and the amount of tax determined thereunder. He was also denying his liability to be assessed under the Act. In the alternative the learned counsel submits that the order being a composite order the assessee company could agitate the matter before the Appellate Assistant Commissioner and consequently before the Tribunal inasmuch as the acceptance of the contention of the assessee company would have automatically resulted in the reduction and/or extinction of the assessee company's tax liability. The learned counsel relies in support of this proposition on the decision of the Bombay High Court in *Commissioner of Income-tax, Bombay City* v. *Jaglish Prasad Ramnath* (1). In that case the Bombay High Court was concerned with penal interest imposed under sub-section (6) of section 15-A and the question was whether in an appeal against the regular assessment the assessee could urge before the appellate authority that the income upon which the quantum of interest was charged should be reduced and as a consequence of such reduction the penal interest should also be reduced. It was held—

> "Therefore the scheme of the Act is that penal interest must follow upon the regular assessment; the appeal should be against the regular assessment and in the regular assessment it should be open to the assessee to take all points which may legitimately not only reduce the taxable income or the tax to be paid or with regard to the proper head under which the income should fall but also reduce "the quantum of penal interest and the legislature having provided for this in the regular appeal itself did not think it

(1) (1955) 27 I.T.R. 192.

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necessary that a separate right of appeal should be given to the assessee to appeal against the quantum of penal interest."

It is to be remembered that there is no inherent right of appeal and that the right has to be deduced from the provisions of section 30 alone and the said section gives right of appeal only in certain circumstances and to certain persons against certain orders of the Income-tax officer which are expressly specified in the section. In the Bombay case the position was slightly different. Their Lordships were concerned with penal interest payable under sub-section (6) of section 18-A. The payment of penal interest is completely linked with the tax payable as a result of regular assessment and as a matter of fact by virtue of sub-section (8) it has to be added to the tax as determined on the basis of the regular assessment if it has not been paid. It was in these circumstances that the Bombay High Court held that since there was an automatic re-adjustment of penal interest imposed under sub-section (6) as well as sub-section (8) of section 18-A, in an appeal against regular assessment it was open to an assessee to take a point in appeal which may reduce the penal interest. As a matter of fact, the High Court also held that the legislature had not provided any right of appeal merely against an order of the Income-tax officer imposing penal interest under section 18-A for failure to pay advance Income-tax. Reliance is again placed on a decision of the Supreme Court in *Commissioner of Income-tax, U.P.* v. *Kanpur Coal Syndicate* (2), where the question was whether the option exercised by the Income-tax officer under section 3 in assessing either the association of persons as such or the members thereof individually could be made subject-matter of appeal. Their Lordships came to the conclusion that it could be. It was observed—

> "The expression 'denial of liability' is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In one case the asessee says that he is not liable to be assessed to tax

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under the Act, and in the other case the assessee denies his liability to tax under the provisions of the Act if the option given to the appropriate officer under the provisions of the Act is judicially exercised."

That decision also would be distinguishable because only one of the two, namely, either the association of persons or the individual members could be assessed and if one of them came up in appeal on the ground that they are not liable to be assessed, such an appeal would fall within section 30. If appellate jurisdiction has to be derived from the statutory provisions by which it is created and it can be acquired and exercised only in the manner prescribed, then we are of the opinion that no appeal would lie against an order of the Income-tax officer refusing change in the previous year under the proviso to sub-clause (a) of clause (1) of section 2(11). Under section 3 the tax is to be charged in respect of the total income of the previous year. The previous year is defined in sub-section (11) of section 2 and under the proviso thereto once an assessee has been assessed in respect of a particular source of income or where in respect of business, profession or vocation newly set up an assessee has exercised the option under sub-clause (c) the assessee cannot in respect of that source, business, profession or vocation change his previous year except with the consent of the Income-tax Officer and upon such conditions as he may impose. Consequently whether or not permission to change the previous year should be given has to be decided by the Income-tax officer and may be by the Commissioner in revision but it cannot be said that the assessee who challanges that decision is either objecting to the amount of income assessed under section 23 or the amount of tax determined under section 23, or denying his liability to be assessed under the Act. All that he is complaining about is that for the purpose of section 3 a different period should be taken for the computation of his income. In our view, therefore, the Tribunal was right in holding that this matter could not be agitated in appeal. The fact that the order is a composite one does not, in our opinion, make any difference. The question of testing in appeal whether Income-tax officer has exercised his discretion judicially and correctly does not, in the circumstances arise. The answer to this question would, therefore, be in the negative and it is

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answered accordingly. There will in the circumstances of the case be no order as to costs.

D. K. MAHAJAN, J.—I agree.

B.R.T.

INCOME TAX REFERENCE

Before Daya Krishan Mahajan and S. K. Kapur, J.

M/S REGAL THEATRE, NEW DELHI,—*Applicants*

versus

THE COMMISSIONER OF INCOME TAX, NEW DELHI,—

Respondent.

Income Tax Reference No. 3-D of 1961

1965

March, 8th.

Income-tax Act (XI of 1922)—S. 10—Lessee of cinema panelling the walls to hide ugly spots—Expenses incurred—Whether revenue or capital expenditure.

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some places and there were also some ugly spots thereon. The assessee, in order to cover up these cracks and ugly spots, panelled the lounge, the stair-case and the restaurant. In the lounge, the booking offices, the visitors' stand and a place for refreshment are housed. The cost of panelling came to Rs. 18,640. Out of this amount Rs. 7,340 was on account of replacement and Rs. 11,300 was on account of decoration expenses. The assessee claimed deduction of these amounts under section 10(2)(xv) on the ground that this expenditure had been incurred for the purposes of the business and was in the nature of 'revenue expenditure'. The Income-tax Officer disallowed both these items for the following reasons :—

"(a) Penalling of walls amounted to nothing else but putting on fixture and any expenditure incurred on fixture was a capital expenditure.

(b) The cinema building was on lease. If the assessee failed to get the renewal of lease then he had the option to remove the fixture and sell it in