1958 *Present :* Basnayake, C. J., K. D. de Silva, J., and Sinnetamby, J.

W. S. FERNANDO, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 318—Income Tax Case BRA/235

Profits tax—Method of computation—Point of law—Power of Supreme Court to consider it though it had not been raised in the tribunal below—Income Tax Ordinance, s. 11, sub-sections 1 and 2—Profits Tax Act, No. 5 of 1948, ss. 3, 6 (1) (a).

The assessee-appellant derived his income from three main sources, but in respect of two of them the annual accounts were made up to different dates, viz., up to 30th September and 31st December. The Commissioner rejected the assessee's returns and assessed the income on an estimated computation based on capital improvement for periods commencing on 1st April and ending on 31st March of the following year.

Held, that under section 6 (1) (*a*) of the Profits Tax Act the profits tax for the years 1947 and 1948 should be determined by reference to the assessable income for the years of assessment 1947-48 and 1948-49 respectively.

Held further, that where all the relevant facts are before the Court, the Court is entitled to consider a question of law although it was not specifically raised before the Commissioner of Income Tax or before the Board of Review.

CASE stated for the opinion of the Supreme Court.

H. V. Perera, Q.C., with *K. Sivagurunathan* and *L. Mututantri*, for the assessee-appellant.

V. Tennekoon, Senior Crown Counsel, with *B. C. F. Jayaratne*, Crown Counsel, for the respondent.

Cur. adv. vult.

February 25, 1958. SINNETAMBY, J.—

The facts involved in this reference are set out adequately in the case stated for the opinion of this Court and it is not necessary for us to mention them in detail here. In regard to the determination of the question involved in paragraphs 11 (*f*) (1) and 11 (*f*) (2) it was agreed between the Crown and the taxpayer that it should abide the result of the appeal to the Privy Council from a decision of this Court in S. C. Case No. 175/ Income Tax Case Stated No. 53/2260/BRA-236. This agreement, which was reached at an earlier hearing, applies to this case as well as to the connected income tax Case No. 319. The learned Counsel who appeared for both sides assured us that effect would be given administratively to the decision of the Privy Council when it is delivered. I shall, therefore, confine myself to the other question that arises on these proceedings to which learned Counsel limited themselves and which is set out in paragraph 11 (*c*) of the case stated. It is to the following effect :

> " The aggregate of Appellant's Profits liable to Profits Tax for the years 1947 and 1948 has been determined by reference to the assessable income of the Income Tax Years 48/49 and 49/50 respectively, whereas under sections 6 and 7 of the Profits Tax Act the aggregate of Profits for the said years 1947 and 1948 should be determined by reference to the assessable income of the Income Tax years 47/48 and 48/49 respectively. "

The assessee who is a mill owner, an arrack renter and a landed proprietor derived his income from three main sources, but in respect of two of them the annual accounts were made up to different dates, viz., up to September 30th and December 31st. The Commissioner acting under section 11 (2) of the Income Tax Ordinance had accepted these terminal dates for the purpose of computing the statutory income for these businesses. The assessee made his returns accordingly and when assessed for the periods in question appealed to the Commissioner. The taxing authority, we are told, decided eventually to reject the assessee's returns and tax him on an estimated income computed on the capital improvement of his various ventures during the period 1/4/42 to 31/3/50. The amount of the capital improvement and therefore the income during this period was finally determined by the Commissioner of Income Tax to be Rs. 700,000 and was apportioned as follows :—

Year of Assessment	1943/44	..	Rs.	12,000/-
,, ,,	1944/45	..	,,	45,000/-
,, ,,	1945/46	..	,,	45,000/-
,, ,,	1946/47	..	,,	40,000/-
,, ,,	1947/48	..	,,	30,000/-
,, ,,	1948/49	..	,,	214,000/-
,, ,,	1949/50	..	,,	164,000/-
,, ,,	1950/51	..	,,	150,000/-

Two important matters must be noted and emphasised at this stage : first, the assessor having computed the income from 1/4/42 to 31/3/50

apportioned Rs. 12,000 as the income which accrued to the assessee for the first year 1942/43, and secondly, this was to be the basis of taxation of the income tax year of assessment 1943/44. It is thus abundantly clear that to ascertain the income for the year of assessment 1943/44 the taxing authority adopted the income derived during the previous year 1942/43, i.e., from 1/4/42 to 31/3/43. The taxable income for the succeeding years was computed in the same way and for the year of assessment 1950/51 the year of accrual—to adopt a convenient phrase used by learned Counsel for the assessee—was the year 1949/50.

The assessee's complaint is that in computing for the purpose of the Profits Tax his income for the years 1947 and 1948 the Commissioner took into account the taxable profits for the years of assessment 1948/49 and 1949/50 instead of 1947/48 and 1948/49 respectively.

It was stated from the Bar by learned Crown Counsel that the profits tax was computed in this case under section 6 (i) (*a*) of the Profits Tax Act, No. 5 of 1948, and it is with the interpretation of that sub-section that we are in this case concerned. Section 3 of the Act imposed on the taxpayer the liability to pay profits tax in respect of the year commencing 1/1/47 and for each subsequent year. The Act enacts that the first profits tax year must end on some date in 1947. Section 6 (i) (*a*) provides that for the first profits tax year the taxable profits shall be for a period

> " ending on that day in the year 1947 up to which the accounts of the business are usually made up and which has been adopted for the purpose of ascertaining the statutory income from that business for either of the years of assessment commencing from 1/4/1947 and 1/4/1948 as the case may be under section 11 (1) or 11 (2) of the Income Tax Ordinance. "

In the present case—to repeat what I have stated earlier—the assessor having rejected the accounts submitted by the assessee adopted the income which accrued to the assessee from 1/4/46 to 31/3/47 in accordance with the provisions of section 11 (1) of the Income Tax Ordinance for the purpose of ascertaining the statutory income for the year of assessment which commenced on 1/4/47 and ended on 31/3/48. The statutory income for the following years was computed on the same basis. It follows that the statutory income computed in respect of any one income tax year of assessment corresponds with the actual income derived during the previous year, or to put it in another way, the actual income derived by the assessee in any one year is the same as the taxable income computed for the following year of assessment. It will be seen that in making an estimate of the assessee's taxable income the Commissioner proceeded on the footing that the accounts of the assessee were made up to 31st March in each year though in point of fact this was not so in respect at least of two of his enterprises.

To take the case of a business that had its accounts made up to a date after 31/3/47—say 30/9/47—in order to ascertain the statutory income for the year of assessment 1947/48 one has to take the actual income derived from 1st October 1945 to 30th September 1946, i.e., for the year 1945/46. This accords with the provisions of section 11 (2)

of the Income Tax Ordinance. In such a case the profits actually accruing during the twelve months which ended in 1947 for the purpose of profits tax is the same as the taxable income for the year of assessment 1948/49. It was contended by learned Crown Counsel that in his return the assessee had revealed businesses in respect of which accounts had been made up for a year which ended not on the 31st March but on the 30th September and 31st December. While it is true that if the assessments had been made on the returns furnished by the assessee in respect of the arrack rents and the oil mills the income derived for 1945/46 would be the taxable income for the year of assessment 1947/48, that certainly was not the basis on which the taxing authority dealt with the assessee's liability. The Commissioner rejected those returns and assessed the income from March to April on an estimated computation. It is manifest, therefore, that for an assessment on the Profits Tax Act the year of assessment which corresponds to the year of accrual which ends in 1947 is the period 1947/48 and not the period 1948/49 as adopted by the Commissioner. The Commissioner in his order does not give the reasons why he adopted for the profits tax year the assessable income for the year 1948/49. Presumably he took into account the fact that two at least of the assessee's businesses had their annual accounts terminating not in March but on subsequent dates. This he is not, on his own assessment of the assessee's income, entitled to do.

The other point raised by learned Crown Counsel was that this particular question was not raised before the Board of Review and that this court should not, therefore, consider it. In support he cited two cases—*Bray v. Justices of Lancashire* [1] and *Timbrell v. Lord Aldenham's Executors* [2]. In the first of these cases an appellant taxpayer was declared not entitled to raise before the Court of Appeal a point of law which had not been raised by him in the case before the Special Commissioners and which had not been determined by the Special Commissioners. It did not also arise in the case that was stated by the Special Commissioners for the determination of the Court. The point raised was a highly technical point which the Master of the Rolls described as "a miserable, contemptible point". The Court took the view that the point was raised only for the purpose of avoiding costs and refused to entertain it; and Lord Justice Bowen in refusing to consider it stated:

> "It makes no difference to any human being which way we decide, . . . In this case Mr. Bruce (Counsel for the assessee) who is wrong on the main point would get the costs if he happens to be right upon a technical point raised . . . . That is why he took the point with his usual ingenuity and that is the reason why we will not decide it."

In the other case the Crown sought to raise a question which had not been raised before the Special Commissioners and which had not been included in the case stated by the Special Commissioners for the decision of the Court and in respect of which "had it been taken quite obviously further evidence might have been called." The Court of Appeal refused to entertain argument on this point. Lord Justice Somervell in dealing

[1] *2 Tax Cases 426.* [2] *28 Tax Cases 293.*

with this question suggested that if all the relevant documents and evidence were before the Court they would have considered it. The present case differs from both these decisions in two respects : first, the question we are called upon to decide is included in the case stated to the Court ; secondly, all the relevant evidence in regard to it is before this Court, both in the order of the Commissioner of Income Tax and in paragraphs 2 and 3 of the case stated by the Board of Review. Furthermore objection was taken to the computation of profits tax before the Board of Review though not for the same reasons that were advanced before this Court. I take the view that where all the relevant facts are before the Court as in this case, the Court is entitled to consider a question of law which has not been specifically taken by a taxpayer before the Commissioner of Income Tax or before the Board of Review.

In the result I am of opinion that the profits tax for the years 1947 and 1948 should be determined by reference to the assessable income for the income tax years 1947/48 and 1948/49 respectively. The assessee will be entitled to the costs of this reference.

K. D. DE SILVA, J.—I agree.

BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Sinnetamby and I agree that the profits tax for the years 1947 and 1948 should be determined by reference to the assessable income for the years of assessment 1947-48 and 1948-49 respectively and that the assessee should receive the costs of the hearing before us.

I wish also to add that there is no substance in the contention of learned counsel for the Commissioner of Income Tax that the question of law to which learned counsel for the assessee restricted his argument does not arise on the case stated.

In his notice of appeal under section 71 (3) of the Income Tax Ordinance the assessee has stated as a ground of appeal the precise point which learned counsel was content to argue. It is also specifically set out in the Case Stated for our opinion.

I think we would be acting properly and we would be within our province in deciding a question of pure law which arises on the facts found by the Board even though it had not been raised in the tribunal below. I derive support for my view from the English cases on the point in particular the case of *Attorney-General v. Aramayo and others*[1] and *Wolfson v. Commissioners of Inland Revenue*[2] where Lord Justice Cohen cited with approval the *Aramayo* case. The observations of Lord Justice Atkin in the former case are helpful particularly in ascertaining the true scope of

[1] *9 T. C. 445 at 497.*

[2] *31 T. C. 141 at 166.*

section 74 (5) of the Income Tax Ordinance as he was there construing a statute *in pari materia*. I shall quote them *in extenso* as they bear repetition :—

" As I read the statutory procedure, which at that time depended on Section 59 of the Taxes Management Act, 1880, the Court is not limited to particular questions raised by the Commissioners in the form of questions on the Case. All that the Section provides is that if the appellant is dissatisfied with the determination as being erroneous in point of law he may require the Commissioners to state and sign a Case, and the Case shall set forth the facts and the determination, and upon that being done the Court has to decide whether or not the determination was or was not erroneous in point of law, and any point of law that can be raised properly upon the facts as found by the Commissioners the Court can decide upon. No doubt there may be a point of law in respect of which the facts have not been sufficiently found, and if that point of law was not raised below at all so as to require further facts on either side the Court may very well refuse to give effect to it, and either party may have precluded themselves by their conduct from raising in the Court of Appeal the point of law which they deliberately refrained from raising down below. Those questions, of course, have to be considered. But apart from that, if the point of law or the erroneous nature of the determination on the point of law is apparent upon the Case as stated and there are no further facts to be found, it appears to me that the Court can give effect to the law. "

Appeal allowed.