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**(1980) 02 MP CK 0032**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Civil Case No. 577 of 1974**

Commissioner of Income Tax

APPELLANT

Vs

Nirbheram Daluram

RESPONDENT

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**Date of Decision : 28-02-1980**

**Acts Referred:**

Income Tax Act, 1961 — Section 251(2)

**Citation :** (1980) 17 CTR 281 : (1981) 127 ITR 491 : (1980) JLJ 643

**Hon'ble Judges :** G.P. Singh, C.J.; Faizanuddin, J

**Bench :** Division Bench

**Advocate :** P.S. Khirwadkar, for the Appellant; D.C. Bhamore and O.P. Namdeo, for the Respondent

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## **Judgement**

This Judgment has been overruled by : Commissioner of Income Tax, M.P., Bhopal Vs. M/s. Nirbheram Deluram, AIR 1997 SC 1971 : (1997) 224 ITR 610 : (1997) 3 JT 688 : (1997) 2 SCALE 717 : (1997) 10 SCC 373 : (1997) 91 TAXMAN 181 : (1997) AIRSCW 1744

G.P. Singh, C.J.—This is a reference made by the Income Tax Appellate Tribunal on the direction of the High Court in Misc. Civil Case No. 302 of 1971, decided on 2nd November, 1972, referring for our answer the following questions of law :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the sum of Rs. 2,30,000 freshly added by the Appellate Assistant Commissioner ?

(2) Whether the sum of Rs. 2,30,000 was added by the Appellate Assistant Commissioner on new sources of income or items not considered by the Income Tax Officer from the point of view of assessability ?

(3) Whether the Appellate Assistant Commissioner had no jurisdiction or power to enhance the sum of Rs. 2,30,000 under the facts and circumstances in which he has added the same ? "

2. The reference relates to the assessment year 1956-57. The ITO completed the assessment by his order dated 11th March, 1957. During the assessment proceedings for the succeeding year, the ITO noticed certain entries relating to hundi loans which were not genuine and which could be considered as income from undisclosed sources for the assessment year 1956-57. Reassessment proceedings were then started. In these proceedings, the ITO considered twelve bogus entries ostensibly relating to hundi loans and he assessed the amount of undisclosed income at Rs. 2,45,000 by working out the " peak credit ". In the appeal preferred by the assessee, the AAC, on a scrutiny of the cash book, discovered ten more bogus entries totalling Rs. 2,30,000 and added the same as income from undisclosed sources. These entries were not at all considered by the ITO and were neither mentioned in the return nor in the order of assessment. In the second appeal preferred by the assessee, the Tribunal held that the AAC had no jurisdiction to add Rs. 2,30,000 as income from undisclosed sources when these sources were not considered at all by the ITO.

3. The powers of the AAC in disposing of an appeal filed by the assessee are contained in Section 251 of the I.T. Act, 1961. This section corresponds to Section 31(3) of the 1922 Act which was construed by the Supreme Court in *The Commissioner of Income Tax Vs. Shapoorji Pallonji Mistry*, and *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, . In *Mistry's* case, the AAC, in the appeal filed by the assessee, considered an item of Rs. 40,000 which had not been considered by the ITO and added the same as income from undisclosed sources. The Supreme Court held that the AAC exceeded his jurisdiction u/s 31(3) as he had no power to enhance the assessment by discovering new sources of income not mentioned in the record, that is to say, the return filed by the assessee and the assessment order passed by the ITO. In *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, , the AAC considered an entry of Rs. 5,85,000 which had not been considered from the point of view of its taxability by the ITO and added the amount as income from undisclosed sources. The Supreme Court held that the power of enhancement u/s 31(3) was restricted to the subject-matter of the assessment or the source of income which had been considered expressly or by clear implication by the ITO from the point of view of taxability and that the AAC had no power to assess a source of income which had not been processed by the ITO and which was not disclosed either in the return filed by the assessee or in the assessment order. In holding so, the Supreme Court observed (p. 451) :

" .....it is not open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income Tax Officer with a view to find out new sources of income and the power of enhancement u/s 31(3) of the Act is restricted to the sources of income which have been the subject-matter of consideration by the Income Tax Officer from the point of view of taxability." It was further observed (p. 451) :  
" ...consideration does not mean " incidental " or " collateral " examination of any matter by the Income Tax Officer in the process of assessment. There must

be something in the assessment order to show that the Income Tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection."

4. Although the entry of Rs. 5,85,000 was noticed by the Income Tax Officer collaterally, as it was not considered by him from the point of view of its taxability, it was held that the AAC had no jurisdiction in taxing the same. Both these cases were relied upon and applied in *The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd.*, which related to Section 251 of the 1961 Act. In this case, an item was brought to tax by the ITO and no exemption in respect of it was claimed u/s 84 by the assessee before him. The AAC allowed the exemption. It was held by the Supreme Court that the AAC had no power to do so as the ITO had not considered the item from the point of view of its non-taxability. This decision proceeds on the basis that Section 251 of the 1961 Act being similar to Section 31(3) of the 1922 Act must bear the same interpretation.

5. On the principles laid down in the aforesaid cases, it is clear to us that the AAC had no jurisdiction to consider the new entries which were not considered at all by the ITO and to add the amount of Rs. 2,30,000 to the total income of the assessee. The items totalling that amount constituted new sources of income which were not the subject-matter of assessment before the ITO and, therefore, it was not open in appeal to consider these sources and to assess them. The learned standing counsel does not dispute the position that this would be the result if the interpretation put upon Section 31(3) of the 1922 Act is followed in interpreting Section 251 of the 1961 Act. He, however, submits that Section 251 contains an Explanation which was not present in Section 31(3) of the 1922 Act and that this Explanation gives a wider power to the AAC in disposing of an appeal. The Explanation reads as follows :

" Explanation.--In disposing of an appeal, the Appellate Assistant Commissioner may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Appellate Assistant Commissioner by the appellant."

6. The Explanation empowers the AAC to " consider and decide any matter arising out of the proceedings in which the order appealed against was passed ". In our opinion, the words " any matter arising out of the proceedings " are not wide enough to include a matter which could have been raised before or considered by the ITO but was not raised before him or considered by him. These words, in our opinion, mean any matter which was processed by the ITO or was raised before him for being processed. The proceedings before the ITO are limited to the matters expressly or impliedly raised by the assessee and the ITO and the processing done by him of these matters. The Explanation does not authorise consideration of any matter by the AAC which was not raised or processed before the ITO and the Explanation, therefore, on its true

construction, does not help the department.

7. For the reasons given above, we answer all the questions in the affirmative, in favour of the assessee and against the department. There shall be no order as to costs.