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**(1954) 08 CAL CK 0029**  
**In the Calcutta High Court**  
**Case No : Income-tax Ref. No. 13 of 1953**

M.M. Isphani Ltd.

APPELLANT

Vs

Commr. of Excess Profits Tax, West Bengal

RESPONDENT

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**Date of Decision :** 06-08-1954

**Acts Referred:**

Income Tax Act, 1922 — Section 66(5)

**Citation :** AIR 1955 Cal 370 : 59 CWN 104 : (1955) 27 ITR 188

**Hon'ble Judges :** Chakravartti, C.J.; Lahiri, J

**Bench :** Division Bench

**Advocate :** E.R. Meyar and Balai Pal, for the Respondent

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## Judgement

Chakravartti, C.J.—In this case we find a situation which has arisen before, but with regard to which we did not take any decision. As the situation has become one of rather frequent occurrence, it is necessary to decide the question arising and to settle the practice of the Court.

2. We have before us a Reference made by the Calcutta Bench of the Income Tax Appellate Tribunal u/s 21, Excess Profits Tax Act, read with Section 66(1), Income Tax Act, of a certain question of law. The reference has been made at the instance of the assessee, M. M. Isphani Limited, Calcutta, and it was made u/s 66(1) of the Act. The Tribunal has, in accordance with the rules obtaining at the time when the Reference was made, caused the paper-book to be prepared and printed and has filed the same. The matter has now come up for hearing.

3. No hearing, however, can take place, as the assessee who caused the Reference to be made are not attending. As I have said, this has happened before, but in spite of the absence of the assessee who had caused the Reference, we decided the question of law in those cases, as we felt some doubt, in view of the language of Sub-section (5) of Section 66, as to whether it was open to the High Court to decline to answer a question for the reason that the party who had caused the Reference to be made, was not appearing. We have

now considered the matter further and it appears to us that when the party who has caused a Reference to be made, chooses not to appear at the hearing, this Court is not bound to answer the question and should not do so.

4. Apart from the language of Sub-section (5) of Section 66, the position appears to be perfectly plain. The assessment was concluded in a certain way by the order of the Appellate Tribunal and that order involved a decision on a particular question of law. The assesseees were not satisfied with the manner in which that question of law was disposed of by the Tribunal and wanted the matter to be referred to this Court for further consideration. Having caused the Reference to be made, they are not appearing at the hearing, which can only mean that they are not desirous of having the question considered further by this Court. If the party, who felt doubt about the correctness of the decision of the Tribunal and was not satisfied with it, fails to appear at the hearing of the Reference, it must be either for the reason that he no longer feels any doubt or that he is not willing to proceed further in the matter, whatever the cause may be. The position, therefore, is that there is no one at the present moment who wants the opinion of the Tribunal to be further considered or to put it in other words, no one who is seeking the advice of the Court and, therefore, there is no reason why the Court should tender any advice at all.

5. The doubt to which I referred a few moments earlier is caused by the language of Sub-section (5) of Section 66, Income Tax Act. That section reads as follows:

"The High Court upon the hearing of any such case shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment."

6. It will be noticed that the section is expressed in mandatory language and deploys the word "shall" throughout its many clauses. "Prima facie", therefore, it would seem that upon a Reference being received, it becomes an obligation of the High Court to answer the question referred and take the further steps mentioned in the section and it becomes equally the obligation of the Appellate Tribunal to adjust its order, if necessary, to the opinion which the High Court may express on the question concerned. It seems to me, however, in spite of the apparently mandatory language of the sub-section, that its true import cannot be to require the High Court to answer the questions referred to it in all circumstances irrespective of whether the parties appear before it or not. To take an extreme case, suppose instead of only the party who had caused the Reference to be made being absent, both the parties fail to appear : would the Court still be bound to deal with the Reference and answer the question referred? I cannot imagine that the section purports to impose upon the Court any such obligation. It seems to me that before the duty contemplated by the section to

decide the questions of law referred can arise, a hearing of the case must take place, because the section opens with the words: "The High Court upon the hearing of any such case" etc. Where the party, who has caused the Reference to be made and who is in the position of a plaintiff, fails to appear, no hearing of the case can take place and, in my view, since the preliminary condition of the subsection is not satisfied in such a case, the consequent obligation of deciding the questions of law and delivering a judgment does not also arise.

7. It appears to me, therefore, that it is not required of us that we should answer the question referred to us in this Reference at all, since the assessee is not appearing before us.

8. We therefore decline to answer the question. As the Commissioner of Excess Profits-tax, West Bengal, Calcutta is appearing and has incurred the usual expenses, he will have the costs of this Reference.

Lahiri, J.

9. I agree.