

## PRIVY COUNCIL

Commissioner of Income-tax, Bombay, Sind and Baluchistan

Vs.

P.E. Polson

Privy Council Appeal No. 39 of 1944

(Lord Chancellor, CJ. Lords Macmillan, Simonds, Goddard, and Sir Madhavan Nair JJ.)

29.05.1945

### JUDGMENT

#### LORD SIMONDS J.

1. This appeal, which is brought from a judgment of the High Court of Judicature at Bombay, raises a difficult question of Indian income-tax law upon which different views have been expressed by the High Courts of Bombay and Madras. The question can be briefly stated. It is whether the word "discontinued" in Section 25(3), Income-tax Act, 1922 (hereinafter called "the 1922 Act"), as amended by the Income-tax (Amendment) Act, 1939 (hereinafter called "the amending Act"), means only a complete cessation of the business or whether it also includes the case of discontinuance of the business by the person formerly, carrying it on as the result of the transfer or assignment of that business to another person who thereafter carries it on. In the case under appeal the High Court at Bombay (Beaumont C. J. and Kania J.) has given the wider meaning to the word. In *Meyyappa Chettiar v. Commissioner of Income-tax, Madras* <sup>1</sup>. the High Court at Madras has given it the narrower meaning.

2. The respondent P. E. Polson had from some date before 1922 until 1st January 1939, carried on business in coffee, butter, flour and casein under the style of Poison Manufacturing Company, He had made profits and been charged to tax under the Income-tax Act, 1918. On 1st January 1939, he assigned the business to Poison Ltd., which thereafter carried it on. Part 1 of the amending Act which includes the amendments of Sections 25 and 26 of the 1922 Act, came into force on 1st April 1939, by virtue of Notification No. 7 of the Central Government dated 18th March 1939. In May 1939, the Income-tax Officer, Companies Circle, Bombay, issued a notice to the

respondent under a. 22 (2) of the 1832 Act for the assessment year 1989-40, and, on 4th August 1939 the respondent made a return which contained an item of Rupees 1,64,726 in respect of income from his business for the previous year, i. e., the year 1938. Before any assessment was made he submitted a revised return showing "Nil" under all items. As his covering letter showed he based this return upon a claim to be entitled to the benefit of the provisions of Section 25(3) of the 1922 Act as amended by the amending Act. This claim was rejected by the Income-tax Officer who on 29th November 1939 passed an order under Section 23(3) of the 1922 Act assessing the respondent to tax on a total income which included the item of Rs, 1,64,726 in respect of the business. The respondent appealed to the Appellate Assistant Commissioner who by an order passed on 30th March 1940, dismissed the appeal. The respondent thereupon applied to the Commissioner of Income-tax, Bombay, Sind and Baluchistan, to review the assessment or to refer to the High Court for its decision the following questions of law :

- "1. Whether on the facts of the case your petitioner [the respondent] is entitled to the benefit of Section 25(3), Income-tax Act ?
2. Whether in view of the provisions of the said Section 25(3) no tax is payable by your petitioner [the respondent] in respect of his income from business of Polson Manufacturing Company for the calendar year 1988 liable to assessment in respect of the financial year 1939-40 ?"
3. The Commissioner, expressing his own opinion that the respondent was not entitled to any relief under the section, on 20th June 1941, duly referred the case to the High Court at Bombay. That Court on 1st October 1941 delivered judgment answering both questions in the reference in the affirmative. It is from this judgment that the Commissioner of Income-tax appeals, contending that the respondent is not entitled to the relief claimed and that the referred questions should be answered in the negative. It is now necessary to refer to certain provisions of the Indian Income-tax Acts upon the interpretation of which this case depends. It must in the first place be borne in mind that under section 3, Income-tax Act, 1922 (which in this respect differs from the English Income tax Acts), the subject of charge is not the income of the year of assessment but the income of the previous year. This was a change introduced by the 1923 Act. Previously, under the 1918 Act, the subject of charge was the actual income of the year of assessment. The result of this change was that, if a business was in existence and earning profits in the year 1921 when the 1918 Act was in force and continued in existence in the year 1922 when the 1922 Act was in force, the owner would pay income-tax twice over on his 1921 profits. It was accordingly necessary in

the 1932 Act to differentiate for the purpose of discontinued businesses between those which had, and those which had not, been charged to tax under the 1918 Act. Section 25 of the 1922 Act deals with assessment in the case of discontinued businesses. By sub section (1) it provides that, where any business on which income-tax was not at any time charged under the provisions of the 1918 Act is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year. This sub-section does not apply to the present case, but reference may be made to it as illustrating the purpose of the Act to make the number of assessments agree with the number of years during which the business has been carried on. Sub-section (2) of Section 25 is an administrative provision. It is upon sub section (3) that this appeal turns. Before the amending Act of 1939 came into force it was in the following terms:

"(3) Where any business, profession or vocation .... on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

4. The purpose and effect of this sub-section is clearly to give relief to a tax-payer who but for it would in the aggregate be charged with tax once in respect of every year's income and twice in respect of one year's income. Section 26 of the 1922 Act deals by sub section (1) with assessments where at the time of making the assessment it is found that a change has occurred in the constitution of a firm and by sub section (2) with assessments where at the time of making the assessment it is found that there has been a succession. It is a section which distributes a tax already charged as between old and new members of a firm or between the predecessor and the successor in a business. In its original form it provides that in the case of a succession the assessment shall be made on the successor as if he had been carrying on the business throughout the previous year and had received the whole profits for that year.

5. Before the amending Act came into force, the words "discontinued" and "discontinuance" in Section 25 of the 1922 Act had been the subject of numerous decisions in the Courts of India, amongst them, *Commissioner of Income-tax, Bombay v. Sanjana and Co. Ltd.*<sup>2</sup> ; *Kalu Mal Shori Mal v. Commissioner of Income-tax, Punjab*<sup>3</sup> and *Hunutram Bhuramal v. Commissioner of Income-tax, B. and O.*<sup>4</sup> and it had been uniformly decided that these words did not cover mere change of ownership but referred only to a complete cessation of the business. Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain meaning of the section and to be in line with similar decisions upon the English Income-tax Acts. Nor has their correctness been challenged in the judgment under appeal or in the argument before their Lordships.

6. It has however been contended that the amendments introduced by the amending Act impose a different interpretation upon Section 25 and it is this contention that has been accepted by the High Court at Bombay. The amendments so introduced are as follows: Section 25 (1) and (2) are not touched. Into Section 25(3) after the word "discontinued" there are interpolated the words "then, unless there has been a succession by virtue of which the provisions of sub section (4) have been rendered applicable." A new sub section (4) is introduced which is in the following terms:

"(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of and partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

7. A new sub section (5) is also introduced but it is not relevant to the present question. Consequential amendments are made in sub section (6). Section 26 has also been substantially amended, but it is convenient to pause and examine the

amendments to Section 25 before turning to Section 26. It must first be noted that the new sub section (4) of Section 25 has no application to the respondent. On 1st January 1939, he ceased to be the owner of the business. Therefore he was not carrying it on "at the commencement of" the amending Act. Prima facie, these words mean the date when the Act comes into force, i. e., on 1st April 1939. It is at any rate clear that they cannot mean any earlier date.

8. The scheme of the amendment may then be observed. It is clear-enough. Under the unamended Act, relief was given in respect of a business, which had been taxed under the 1918 Act, only when it was discontinued. It was thought desirable to extend this relief to the case where there was not a discontinuance but there was a succession. Thus, upon a transfer the transferor or predecessor would get the same relief as he would have got if the business had been discontinued. This provision is made by the new sub section (4). But such relief can be given once only in respect of a business. Therefore, when the owner, who transfers, has got relief under sub section (4), it would not be right for the transferee to get relief under sub section (3) if and when the business is discontinued. For this reason the words that have been cited are interpolated in sub-section (3).

9. This being the clear purpose and effect of the amendments, their Lordships see no reason for thinking that they impose upon the word "discontinued" in sub section (3) any other than its natural meaning which had indeed received unanimous judicial sanction in the Courts of India, and they would further observe that it would only be a compelling context which could by virtue of an amendment require a different interpretation of words so construed. But in fact the amending provisions so far from raising any doubt as to the meaning ascribed to "discontinued" appear to enforce that meaning. Under the unamended Act, Section 25(3) gave relief in the event of discontinuance : the amendment; introduced a qualification, not enlarging or altering the meaning of discontinuance but providing that, if there was a succession in respect of which relief was given, there should not be relief upon discontinuance. To construe this provision as meaning that "discontinuance" includes succession appears to do violence to plain language.

10. It is however to Section 26 and its amendments that much argument was directed. Sections 25 and 26 no doubt form part of a single scheme and their interaction must not be ignored. But Section 26 is primarily directed not to the circumstances in which relief from taxation is given but to the apportionment of tax where relief is not given. Its application to the case under appeal is not in doubt. It is sub section (2) of Section

26 as amended by the amending Act which applies, and, inasmuch as at the time of making the assessment, i. e., in November 1939, the respondent had been succeeded in carrying on the business by the company, each of them became assessable in respect of his actual share, if any, of the income, profits and gains of the previous year. If the sub-section had not been amended, the company as the successor would have been assessable as if it had been carrying on the business throughout the previous year and had received the whole of the profits of that year. The language of Section 26 both in its original and in its amended form appears to be unambiguous and there is nothing in it that can throw any doubt upon the interpretation which must be given to Section 25. It is true that in the result the respondent may have suffered a disadvantage. When he transferred his business to the company on 1st January 1939, he presumably did so upon the footing of the existing law, including the unamended Section 26, so that he could count on the company as successor being assessed to the profits of the business of the previous year. It probably did not matter to him therefore that he would get no relief under Section 25(3). But by the time the assessment was made in November 1939, the law had been changed and as the result of the amended sub section (3) of Section 26 he became liable to an assessment not contemplated by him or his transferee. The relief that is given upon discontinuance might ultimately accrue to the company but that, he justly says, is not his relief. It is possible that there is here a flaw in the legislative scheme which requires remedy. It would, appear prima facie at least that in such a case the burden of so-called double taxation falls upon the tax-payer notwithstanding the plain intention of the section to avert it. But this is a consideration which cannot be allowed to influence the clear interpretation of the section, though it may well afford grounds for amending legislation.

11. In the result their Lordships agree with the reasoning and the decision of Leach CJ and Patanjali Sastri, J. in (*Meyyappa Chettiar v. Commissioner of Income-tax, Madras* <sup>5</sup>) rather than with that of the High Court of Bombay. The appeal must be allowed and the two questions referred to the High Court by the Commissioner of Income-tax must be answered in the negative. The respondent must pay the appellant's costs of this appeal and of the reference. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Cases Referred.

1. 30 AIR 1943 Madras 504 : ILR (1944) Mad. 166 : 212 IC 612 : (1943) 11 ITR 247,

2. AIR 1926 Bombay 129: 50 Bom 87: 92 IC 517,
3. AIR 1929 Lahore 461: 117 IC 228 : (1929) 3 ITC 341
4. 6 ITR 290 (Pat),
5. 30 AIR 1943 Madras 504 : ILR (1944) Mad. 166 : 212 IC 612 : (1943) 11 ITR 247,