ALLAHABAD HIGH COURT

Commissioner of Income-tax

Vs.

Neekalal Jainarain

Misc. Case No. 339 of 1953
(M.C. Desai, C.J. and S.C. Manchanda, J.)

21.09.1965

JUDGMENT

Desai, C.J.

1. This is a statement of a case submitted, at the instance of the Commissioner of Income-tax, U.P. by the Income-tax Appellate Tribunal, Allahabad Bench, to this Court inviting to answer the following question : Whether the business of an Hindu undivided family on which notices under Section 13 of the E. P. T. Act had been served before the disruption of the Hindu undivided family could be subjected to E. P. T. after the disruption of the Hindu undivided family ?

The assessee is a Hindu undivided family which once carried on business in hemp and oilseeds in the name of Neeka Lal Jai Narain and the question is of being assessed to excess profits tax for two chargeable accounting periods, (1) 1-9-1939 to 14-11-1939 and (2) 15-11-1939 to 24-10-1940. Notices as required by Section 13 of the Excess Profits Tax Act were served upon the Karta of the Hindu undivided family on 8-6-1942. On 27-2-1943 it was assessed to the excess profits tax for the first chargeable accounting period but the assessment order was set aside because the assessment on the firm under the Indian Income-tax Act itself was reopened and another assessment order was passed on 31-5-1944. For the other chargeable accounting period an assessment order under the Excess Profits Tax Act was passed against the assessee on 31-5-1944. On 24-10 1944 an application was made to the Income-tax Officer on behalf of the Hindu undivided family to the effect that it had been disrupted with effect from 10-11-1942 and an order was sought for under Section 25-A(1) of the Indian Income-tax Act. On 17-3-1947 the Income-tax Officer passed an order under Section 25-A(1) recognizing disruption of the Hindu undivided family with effect from 6-9-1943. Assessment orders under the Excess Profits Tax Act passed in respect

of the two chargeable accounting periods on 31-5-1944 were quashed by the Appellate Assistant Commissioner on 17-3-1947 and 9-10-1947 respectively and on 31-7-1950 the Income-tax Officer passed fresh assessment orders in respect of both the chargeable accounting periods. The assessee appealed against the two assessment orders and one of the grounds taken in the memoranda of appeals was that it was not served with any notice issued under Section 13 of the Excess Profits Tax Act and that consequently the assessment was invalid. No argument was advanced in support of this ground in the course of the hearing of the appeals, the only point urged on behalf of the assessee being that relief as a result of reduction in the amount assessed for the purpose of income tax in the corresponding income-tax appeal should be granted. The Appellate Assistant Commissioner maintained the assessment orders. Against his orders appeals were filed before the Tribunal and again the ground was taken in the memoranda of appeals that the assessment was invalid because no notice had been served upon the appellant as required by Section 13. The appellant merely repeated the ground in the same words as used in the memoranda of appeals before the Appellate Assistant Commissioner and did not challenge the statement in the judgments of the Appellate Assistant Commissioner that the argument had not been pressed before him. The Tribunal allowed both the appeals. But on the sole ground that after the disruption of the Hindu undivided family the notices under Section 13 could not be served upon the erstwhile members of it and it could not be assessed to excess profits tax. It relied upon *Commr. of Excess Profits Tax, Madras v. Jivaraj Topun and Sons Madras,* [1]

2. The Commissioner, Income-tax, made application under Section 66(1) of the Income-tax Act for referring the question of law arising out of the Tribunal's orders to this Court. The applications were opposed by the assessee. In its reply to the application it ascertained that there was no finding (in the Tribunal's judgments) that any notices under Section 13 was served on the Hindu undivided family on 8-6-1942 and that in its grounds of appeals to the Appellate Assistant Commissioner and the Tribunal it had specifically denied that any notice under Section 13 had been served. In the statement of facts attached to the reply the assessee referred to the ground taken in the memoranda of appeals to the Appellate Assistant Commissioner and the Tribunal and stated that no finding was given by the Tribunal that the notices were served upon the assessee. The Tribunal allowed the application and stated the case. When the draft statement was shown to the assessee it objected to the statement contained in it about the service of notices under Section 13 upon the assessee on 8-6-

1942 and to the question which assumes that notices under Section 13 were served upon the Hindu undivided family before its disruption The Tribunal overruled the assessee's objection, saying that the question whether the notices were served upon the assessee or not had never in fact been agitated before it when it heard the appeals.

3. The learned Advocate-General objected to the question framed by the Tribunal on the ground that it mentions the fact of service of e notices under Section 13 upon the Hindu undivided family without its appearing in the judgments of the Tribunal. What he meant to say is that a question to be referred under Section 66 to the High Court must arise out of the order of the Tribunal and that the statement of case must mention only those facts which have been admitted by the parties or found to exist by the Tribunal in its order. As pointed out, whatever might have been urged by the assessee in its grounds of appeals it did not urge orally before the Tribunal that the notices were not served upon it or were not served on 8-6-1942. The question whether they were served at all or not or whether they were served on 8-6-1942 was not raised before the Tribunal and naturally it did not give any finding on it. That explains why in its orders there is no reference to the fact that they were served on 8-6-1942. The question was to be raised by the assessee; it was for it to show that assessment orders were invalid because it was not served with notices as required by Section 13. Every objection against its being assessed had to be taken by it and if it could not be assessed unless it was served with a notice under Section 13 and if it was not really so assessed it was for it to plead so in the assessment proceedings. There was no question of the Commissioner's raising any question about the service of the notices. An assessment proceeding is not like criminal proceeding in which all the necessary facts have to be proved by the prosecution or even a civil proceeding in which a plaintiff has to state all the necessary facts in his plaint and has to prove such of them as are not admitted by the defendant. The assessee quite clearly understood that it had to raise the question of non-service of the notices and that is why it raised it in the grounds of appeals to the Appellate Assistant Commissioner and the Tribunal. What actually happened was that though it raised it in writing it did not press it orally before either of the two appellate authorities and, therefore, there was no finding given on it by either of them But the Tribunal was not prevented by the fact that it did not give an express finding on the question from mentioning in the statement of the case that the notices were served on 8-6-1942 as claimed by the Commissioner. If the Commissioner's claim was that they were served on 8-6-1942 and it was not disputed and the Tribunal was not invited to decide it, it could take it as undisputed and

mention it as a fact in the statement. If it could treat the service of the notices on 8-6-1942 as a fact it could frame the question incorporating the fact. In *Industrial Development and Investments Co. Ltd. v. Commr. of Excess Profits Tax, Bombay,* [2] the Supreme Court (Sic) observed :

> "It is true that very often the Tribunal may not refer to all the evidence and all the facts in its appellate order . . ... in many cases the decision may seem obvious to the Tribunal and it might dispose of an appeal by a very short order. If a statement of the case is subsequently called for, naturally the Tribunal would want to elaborate its decision by pointing out various materials and pieces of evidence to which it had not referred in the appellate order. But all that can be referred to in the statement of the case are materials and evidence which were before the Tribunal when it heard the appeal".

Service of the notices was an essential condition and any question relating to the liability to be assessed to excess profits tax must state either its existence or its absence. No question regarding the liability to the tax can be answered without information regarding service of the notice. If the notice was not served the question regarding the liability must be answered in the negative regardless of all other circumstances and it can never be answered in the affirmative without its being found that the notice was served. The learned Advocate-General referred to *Petlad Turkey Red Dye Works Co Ltd. v. Commissioner of Income Tax,* [3] and Industrial Development and Investments Co. Ltd. (1957) 31 ITR 688 (Bom) (Supra) and pressed us to refuse to answer the question on the ground that does not arise out of the Tribunals order but our finding is that it does arise out of them. We have no jurisdiction to decide any question of fact, our Jurisdiction being confined to answering questions of law. In order to answer the questions of law with reference to a particular case we are bound to take the facts from the statement of the case submitted by the Tribunal. As pointed out by the Supreme Court in *Kshetra Mohan Sannyasi Charan Sadhukhan v. Commr. of Excess Profits Tax, West Bengal.* [4] and *Commissioner of Income Tax v. Calcutta Agency Ltd.,* [5] the statement is binding upon us with regard to all matters of fact. We are, therefore, bound to take notice of the fact mentioned in the statement that the notices were served on 8-6-1942. If there was any misstatement of fact in the statement the assessee's remedy was to have it corrected by the Tribunal.

4. Section 4 of the Excess Profits Tax Act provided that there shall, in respect of any business in which this Act applies, be charged, levied and paid on the amount . . .a tax

(in this Act referred to as 'excess profits tax'). The Act applied to every business of which any part to the profits made during the chargeable accounting period was chargeable to income-tax, vide Section 5. It is not in dispute that the Act applied to the business carried on by the asses-see; therefore, excess profits tax was to be charged, levied and paid on it during the chargeable accounting periods. Since it was a Business that was to be charged there had to be a provision for determining when one business came to an end and another commenced and consequently there was the provision in Section 8 to the effect that if there was a change in the persons carrying on the business the business was to be deemed to have been discontinued and a new one to have been commenced. By Section 12 the amount of the excess profits tax for any chargeable accounting period was to be deducted as an expense when computing the profits or gains pf the business for the purposes of income-tax. Section 13 was as follows :

> "(1) The Excess Profits tax Officer may ..... require any person..... to furnish.... a return in the prescribed form..... setting forth with respect to any chargeable accounting period..... the profits of the business....." Section 14 provided that the Excess Profits Tax Officer should "assess..... the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment .... .and ..... furnish a copy of such order to the person on whom the assessment has been made", that excess profits tax payable in respect of any chargeable accounting period "shall be payable by the person carrying on the business in that period" and that where an assessment could, but for his death, have been made on any person it could be made on his legal representatives.
> 'Person' was defined in the Act to include a Hindu undivided family. Section 21 made the provisions of certain sections of the Income-tax Act applicable as if they were contained in the Excess Profits Tax Act and referred to excess profits tax instead of to income-tax; those provisions included Sections 10, 13, 24-B, 29 and 45 to 48, but not Sections 4, 21, 22, 23, 25, 25A, 26 and 26A. It will be noticed that the unit of assessment under the Excess Profits Tax Act was a business and not any person and that what was to be assessed was the excess profits of the business for each chargeable accounting period. Though it was the business that was to be charged with the tax the assessment had to be done in the presence of, and the tax had to be paid by, a human being. The Act did not lay down in whose presence the assessment was to be done and the provision contained in Section 14(1) that a copy of the assessment order was to be

furnished to the person on whom the assessment had been made was incomplete. It contained no provision about the person on whom the assessment in respect of the business was to be done. It may be presumed, and it was not contested before us, that the assessment had to be made on the person who carried on the business. This presumption is justified by the fact that there could not be any other person on whom the assessment could made and Section 14 itself required that the tax was payable by the person carrying on the business. It would have been anomalous if the tax had to be paid by a person other than the person on whom the assessment had been made and who was furnished with a copy of the assessment order. Though the person who carried on the business was the person on whom the assessment was to be made the subject of the assessment was not the person but the business. To this extent the Excess Profits Tax Act departed from the Income-tax Act under which even person is to be charged with income-tax in respect of his total income of the previous year, see Section 3 of the Income-tax Act. "Person" here includes every individual, Hindu Undivided family, company, local authority and every firm or other association of persons, or the partners of the firm or the members of the association individually. Under the Income-tax Act the assessing authority takes every person, assesses his income of every previous year and assesses him to income-tax on it; under the Excess Profits Tax Act the assessing authority took every business, determined the excess profits of every chargeable accounting period and assessed the person carrying on the business to excess profits tax on its basis. This distinction between the two Acts accounts for certain provisions of the Income-tax Act being made applicable and others not being made applicable to excess profits tax. Section 24B of the Income-tax Act deals with the death of a person and provide that if he dies before being served with a notice under Section 22 his legal representative on being served with the notice must comply with it and the income of the deceased may be assessed as if the legal representative were the assessee, that if a person dies after furnishing a return the assessing authority may assess his income and determine the tax payable by him and that when a person dies his legal representative is liable to pay out of his estate (to the extent of its capacity to meet the charge) the tax assessed on him. All these provisions were necessary to be applied to assessment under the Excess Profits Tax Act because Section 14(4) did not cover the same ground as any of them. Section 25 of the Income-tax Act deals with assessment in case of discontinued business; as the subject-matter of

taxation under the Excess Profits Tax Act was (the excess profits of) a business, if a business was discontinued the subject-matter of taxation disappeared and there was occasion for providing for the discontinuance. If a business was continued but under changed proprietorship Section 8 dealt with the matter. So there was no need for there being in the Excess Profits Tax Act any provision analogous to that contained in Section 25 of the Income-tax Act. A Hindu undivided family is assessed to income-tax on income from its property, e.g. the joint family property and the coparceners are not assessed at all on their shares or interest in the income from the joint family property though each is liable as an individual to be assessed separately on income of his own self-acquired property. Where an Income-tax Officer records an order contemplated by Section 25A the income received by or on behalf of the Hindu undivided family will be assessed (as if no partition had taken place) and each member will be liable to pay income-tax on the income from his self-acquired property and also for his share in the income-tax on the income of the portion of the joint family property allotted to him. Section 25A applies when at the time of making an assessment it is claimed that a partition has taken place among the members of the Hindu undivided family and the joint family property has been allotted in definite porticos to its members. Sections 45 to 47 of the Income-tax Act relate to recovery of income-tax. Under Section 23 the Income-tax Officer to required to assess the income of the assessee and determine the income-tax payable by him on the assessed income. "When any tax.....is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax . . .a notice of demand in the prescribed form specifying the sum so payable"; see Section 29. Section 45 is to the effect that any sum specified as payable in a notice of demand shall he paid within the time mentioned in the notice and an assessee failing to pay is to be deemed to be in default. When an assessee is in default the Income-tax Officer is authorised to impose a penalty. Under Section 3 income-tax is charged for a particular year when the Finance Act enacts that it shall be charged for that year at a certain rate. The effect of the passing of the Finance Act is simply to make the income chargeable with income-tax. Then the income is to be assessed and the income-tax payable is to be determined. When a notice demanding the income-tax so determined is issued it becomes payable. There is no liability to pay a certain amount as income-tax before a notice of demand under Section 29 is issued. Obviously, a certain sum can

become payable only when it is determined. The chargeability to tax arises, however, on the passing of the Finance Act. Thus an individual becomes chargeable to income-tax on the Finance Act being passed and becomes liable to pay a certain amount as tax on the issue of a notice of demand following an assessment order. As Sections 29 and 45 of the Income-tax Act were deemed to be included in the Excess Profits Tax Act a person became liable to pay a certain amount as Excess Profits Tax on the issue of a notice of demand following an assessment order. Section 3 of the Income-tax Act dealing with chargeability of a person to tax was not deemed to be included in the Excess Profits Tax Act because what was to be charged under it was not a person but a business. Nobody was made chargeable to excess profits tax. Therefore, while in respect of income-tax if can be argued that a person becomes chargeable with income-tax on the passing of the Finance Act long before he is assessed and that only the liability to pay a certain sum as tax arises when a notice of demand is issued to him, in respect of excess profits tax such a distinction could not be made it could not be argued that a person was chargeable with excess profits tax on the expiry of the chargeable accounting period and that only the liability to pay a certain sum as excess profits tax accrued to him on the issue of a notice of demand. Under the Excess Profits Tax Act a person was not chargeable at all and, therefore, could not be said to be liable to pay excess profits tax; the only liability that was upon him was to pay a certain sum as excess profits tax and it accrued only on the issue of a notice of demand. Prior to the issue of a notice of demand he was under no liability of any kind at all.

5. Under the Hindu Law when disruption of a Hindu undivided family takes place the property available for partition among its members is the joint family property left after providing for joint family debts payable out of it and personal debts of the father not tainted with immorality; see para 304 of Mulla's Hindu Law. If no provision is made a partition takes place and each member remains liable for payment of the debts to the extent of the share in the joint family property allotted to him. A son also is liable on account of the pious obligation to discharge a debt not tainted with immorality incurred by his father whether for a legal necessity or not. Thus after the disruption of a Hindu undivided family a member of it becomes liable for payment of a debt incurred by the manager in three cases, (1) when the debt was incurred for legal necessity, (2) when it was incurred for any purpose other than an immoral purpose by the father-manager and (3) when under the scheme of the partition of the joint family

property liability was transferred to him. In *Bankey Lal v. Durga Prasad,* [6] a Full Bench of this Court laid down that where a simple money debt binding on the entire family remains unpaid and the members entered into a partition without providing for its payment, the creditor may enforce payment by proceeding against the properties received on partition by the several members.
The Supreme Court approved of this law in *Pannalal and another v. Mst. Naraini.* [7] Mukherjee, J. speaking for the Supreme Court said at p. 553 (of SCR); (At p. 174 of AIR) that the pious obligation of a son to pay his father's debt not incurred for an immoral purpose is limited to the assets received by him in his share of the joint family property and at p. 559 (of SCR) : (At p. 176 of AIR) that a son is liable after the partition for the repartition debts of his father not tainted with immorality or illegality and for the payment of which no arrangement was made at the time of the partition.

In *Esthuri Aswathaiah v. Income-tax Officer (No. 2),*[8] Somnath Iyer and Kalagute, JJ. observed at p. 982 :

> "..... .that if a debt is payable by a family and after the family has incurred the liability to pay that debt a partition takes place between its members in which, however, no provision is made for the payment of the debt due by it, the creditor can proceed to recover it from every one of the members of the erstwhile Hindu joint family to the extent of the family property in the hands of those individual members. The individual members of a Hindu joint family cannot escape from that liability by making a partition as between themselves of the family property"

and relied upon 1952 SCR 544 (supra).

6. In order that the above rule of Hindu Law applies in the instant case we must be able to say that there was a debt clue by the Hindu undivided family before its disruption. 'Debt' is defined by Stroud to mean "a sum payable in respect of a liquidated demand recoverable by action". In *Webb v. Stenton,* [9] a judgment-debtor was entitled for his life to [he income arising from a fund vested in trustees payable half-yearly in February and August, in November 1882 nothing was due to him because the payment for August, 1882, had been made and the Court of Appeal held that there was no debt owing or accruing to him in November, 1882. The trustees were

not indebted to him in November. Brett, M.R. observed at page 552, "If there is not a debt payable in praesenti, but there is a debt in existence, debitum in praesenti, but payable in futuro, it seems to me that such an order could be made with regard to that debt, although it be the only debt and there is no debt payable in praesenti, because such third person is indebted to the judgment debtor, and that would satisfy the words of the rule and held that there was no debt at all whether payable in praesenti or in future. There was only a probability of a debt accruing in February 1883 but the probability was not "something which the law recognizes as a debt". He relied upon *Jones v. Thompson,* [10] in which "accruing debt" was interpreted to mean "an existing debt though it only may be accruing" or "there must be a debt though it need not be yet due" (in the words of Crompton, J.) and "debtium in praesenti, solvendum in futuro" (in the words of Wightman, J.). It is clear from his decision that there is either a debt or there is no debt, that there is a debt though it may not be due or payable at present and that the mere probability of a debt coming into existence does not mean that there is a debt. The facts an *O'Driscoli v. Manchester Insurance Committee,* [11] were that the Insurance Committee entered into an agreement with doctors by which the whole amounts received by it from the National Insurance Commissioners were to be pooled and distributed among the doctors in accordance with a scale of fees. One Dr. Sweeny was one of the doctors who worked under the agreement with the Committee, the Committee received funds from the National Insurance Commissioners and it was held that there was a debt owing to Dr. Sweeny or accruing from the Insurance Committee even though the exact amount payable to him had not been ascertained. Under the contract Dr. Sweeny became entitled to his share in the funds received by the Committee from the Insurance Commissioners in accordance with the scale of fees as soon as he performed his part of the contract by doing the work for the Committee and the Committee received the funds from the Insurance Commissioners. The liability on the part of the Committee to pay money to him accrued and the fact that the sum to which he was entitled out of the funds was not determined did not mean that there was no liability in praesenti to pay to him. The liability arose under the contract and not m determination of the amount pertaining to his share, Swinfen Eady, L.J. said at p. 511 :

> "There was. .....no contigency which could happen to deprive him of his right to payment on the figures being finally adjusted and on p. 512 :
> "It was not presently payable, the amount not being ascertained but it was a debt to which the doctors were absolutely and not contingently entitled. The

only question was as to the amount of the debt, the debt not being payable until the amount had been ascertained. He distinguished the debt in question from unliquidated damages by pointing out that on the latter case there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given whereas in the former case there is a debt, uncertain in amount, which will become certain and payable when the accounts are finally dealt with and not "a mere probability of a debt, as for instance, where a person has to serve for a fixed period before being entitled to any salary."

In *Banchharam Mujamdar v. Adyanath Bhattacharjee,* [12] Full Bench of the Calcutta High Court held that when a person advances a loan which is repayable on a certain date and dies before that date there is a debt due to him within the meaning of the Succession Certificate Act prohibiting a Court from passing a decree against the debtor of a deceased person except on the production of a succession certificate, Jenkins, C.J. took it to be well established "that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation" (p. 938). The Full Bench relied upon (1883) 11 QBD 518 (supra) and also *People v. Arguello,*[13] in which the Supreme Court of California had divided debts into two classes (1) solvendum in praesenti and (2) solveudum in futuro and held that "a sum payable upon a contingency. . .is not a debt, or does not become a debt until the contingency has happened. Duff, J. in The *Secretary of State v. Neitzke* [14] giving a broader construction to the word "debts'" occurring in a statutory provision regarding settlement of pecuniary obligations said that "it includes moneys held under a legal or equitable obligation to pay at any time on demand"; in the same case Mignault, J. at p. 284 said that "debts" lato sensu would include any species of claim whether for money or other property to which one person is entitled as against any other". *Hall v. Pritchett,*[15] and *Booth v. Trail,* [16] decided that a salary or pension is not a debt due, owing or accruing so lone is it does not fall due and that future salary or pension cannot be attached. In the latter case Lord Coleridge, C.J. said at p. 10 :

"Sums which may or may not become due in the future are not debts owing or occurring . . . . . A sum in the hands of the garnishees, which they in some way or other can presently be compelled to pay to the judgment debtor, seems to me to be a debt within the rule, and therefore, attachable". (The question before the Court was whether the Court was whether pension which has already fallen due to the judgment-debtor can be attached or not).

In *Whitney v. Inland Revenue Commrs.,* [17] Lord Duned said at p. 52 :

> ". . . . .there are three stages in the imposition of a tax; there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery."

Their Lordships were not considering the meaning of "debt' and 'liability' and 'debt' are not synonyms. Further, they considered the liability imposed by a statute upon a person which is distinct from the chargeability imposed by Section 4 of the Excess Profits Tax Act upon a business. In *Neptune Assurance Co. Ltd. v. Life Insurance Corporation.*[18] the Supreme Court said at p. 149 (of ITR) : (At p. 903 of AIR) :

> "It is well established that under the income-lax law the liability to be charged to tax. . . exists all along . . . from the 1st April. . . . the amounts of tax payable by the appellant became determinable for the income was then capable of computation and the rate was also known. . . The assessment only particularized the amounts, it did not create the right, for the right came into existence us soon as according to the relative Finance Act it became ascertainable that the tax deducted at source or treated as paid on its behalf and exceeded the tax payable. That right, therefore, was an asset contemplated in Section 7 of the Act of 1956."

The question before the Supreme Court was not what is the meaning of "debt" but whether the right to refund of income-tax deducted at source is tin asset within the meaning of a particular statute. Therefore, the above observations are of no assistance in determining the meaning of "debt". Jagannadhadas, J. said in *Chatturam Horilram Ltd. v. Commissioner of Income Tax,* [19]

> "The income of an assessee attracts the quality of taxability with reference to the standing provisions of the Act but the payability and the qualification of the tax depend on the glassing and the application of the Annual Finance Act."

This observation was made in quite a different context. The question before the Supreme Court being whether certain income had escaped assessment for the assessment year 1939-40 it was not assessed because the annual Finance Act was not in force in the area during the assessment year) when the Finance Act was enforced in the Area retrospectively from 30-3-1939. It was when answering the question in the affirmative that the observation was made. It does not at all support the view that a debt comes into existence even before the income-tax is assessed and a notice of demand is issued. There is a distinction between being taxed and being under a liability to be taxed and the Supreme Court did not decide that being under a liability to be taxed amounts to being indebted. My learned brother said in *Prem Ballabh Khulbe v. Income-tax Officer,* [20] that an assessment having been made and a demand created, a debt undoubtedly comes into existence and becomes due to the Government". The question whether a debt came into existence earlier on the expiry of the accounting year did not arise before him and, therefore, it might be said that this case is no authority for the view that it did not come into existence earlier.
In *Chatturam v. Commissioner of Income Tax,* [21] Kania, J. speaking for the Federal Court observed at p. 308 (of ITR) :

> "The liability to pay the tax is founded on Sections 3 and 4 of the Income-tax Act which are the charging sections. Section 22 etc., are the machinery sections to determine the amount of tax."

and referred to the observations of Lord Dunedin in the case of Whitney, 1926 AC 37 (supra). Again the learned Judge made the observation in connection with the question whether the liability to be assessed to income-tax and to pay tax is conditional on the validity of a notice issued under Section 22 of the Income-tax Act and not with the question when a debt to pay the tax comes into existence. The general nature of charging Section 3 of the Income-tax Act was explained by Lord Uthwatt in *Wallace Brothers and Co. Ltd. v. Commissioner of Income Tax,* [22] stating :

> "..... the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed."

Their Lordships were considering quite a different question and not the question when

indebtedness arises in respect of income-tax and should not be understood to lay down that liability amounts to indebtedness.

7. Now in this case there was disruption of the Hindu undivided family on 6-9-1943, after the chargeable accounting periods had expired, the profits of the business carried un by the Hindu undivided family had become liable to be assessed .and notices under Section 43 of the Excess Profits Tax Act had been served upon its Karta, but before an enforceable assessment order was passed and a notice of demand was issued. An assessment order had been passed in respect of one chargeable accounting period before the date of disruption but it had been set aside and therefore, is to be ignored. The question whether there was a debt due from the Hindu undivided family to the State on that date must be answered in the negative. Admittedly nothing was payable by it on that day but it was not even indebted to the Government on that day. There was no debitum in praesenti at all. It was not chargeable at all to the tax because as I explained earlier what was chargeable to Excess Profits Tax was not a person but a business. In the case of income-tax it may be possible to contend that on the first day of the assessment year a person is chargeable to income-tax and that consequently he is indebted even though the amount of the tax has not been determined but it is not possible to contend that a person was chargeable to excess profits tax on the first day of the assessment year. A person carrying on a business came into the picture only when an assessment order was passed; before the passing of the assessment order there was no debt due from him, not even a debt payable in future. The Excess Profits Tax Act did not impose upon him any liability which could be treated as a debt as is done by the Income-tax Act. Even under the Income-tax Act a debt due to the State comes into existence when a demand for the tax is made under Section 29 and Section 45 of the Income-tax Act, as held in *Durga Prasad v. Secy. of State,* [23] Sir John Beaumont said at p. 289 (of ITR) :

> ". . . . .although income-tax may be popularly described as due for a certain year, it is not in law so due. It is calculated and assessed by reference to the income of the assessee for a given year, but it is due when demand is made under Section 29 and Section 45. It then becomes a debt due to the Crown."
> "Net wealth" is defined in Wealth Tax Act No. 27 of 1957 to mean the aggregate value of the assets of a person which is in excess of the aggregate value of "all the debts owed by" him barring certain debts. A question has often arisen as lo when income-tax payable by au assessee can be said to be a debt

owed by him within the meaning of this provision.

In *Kesoram Cotton Mills Ltd. v. Commr. of Wealth Tax,* [24] the Calcutta High Court held that there was no debt towards income-tax due by the assessee even though it had made provision for it in its balance-sheet, because the Finance Act itself had not been passed and the assessee's income had not been assessed by the Income-tax Authorities. The learned Judges held that all liabilities are not debts within the meaning of Section 2(m) of the Wealth Tax Act and that only debt solvendum in praesenti can be deducted. We are not concerned with the interpretation of Section 2(m) of the Wealth Tax Act and admittedly there was no debt solvendum in praesenti because the assessment itself had not been done. The case, is, therefore, of no assistance to us. In *Commissioner of Wealth Tax, Madras v. Pierce Leslie and Co. Ltd.,* [25] the Madras High Court held that earmarking a sum of money for payment of income-tax not yet assessed was not a debt within the meaning of Section 2(m). Jagdisan, J. said at page 1015 : "(Debt) is an ascertained, liquidated, quantified obligation enforceable in praesenti or in future. A debt must be a 'debitum' that is due. The fact that the time for payment will arise in future does not make it any the less a debt ..... a future contingent liability is not a debt due and owing". A contrary view was taken by the Assam High Court in *Commr. of Wealth Tax, Assam v. Ahmed Tea Co. (Pvt.) Ltd.,* [26] what was said by Mehrotra, C.J. and Dutta, J. was this :

> "A debt may be defined to be a certain sum due from one person to another either by record, under a specialty or deed or under simple contract by writing or oral It cannot be said that the tax amount becomes a debt only if it is quantified by an order of the assessing authority. The amount has been ascertained by the assessee himself. As the liability was there, the assessee sets apart certain amount which he thinks will be necessary for discharging the tax liability and thus the amount of the liability has been ascertained and it cannot be said that the amount is not a debt which can be deducted to find out the net wealth of the assessee." (p. 947).

The teamed Judges dissented from 1963-48 ITR 31 : AIR 1963 Calcutta 392 (supra) and distinguished 1945-13 ITR 285 (supra) because the question before the Privy Council was different. They relied upon 1926 AC 37 (supra) and held that the liability to pay income-tax is not mere a contingent liability before the passing of an assessment order because it arises under Section 3 of the Income-tax Act on the

income being earned. It is not necessary for us to decide here whether the liability imposed by Section 3 of the Income-tax act is a contingent liability depending upon the passing of an assessment order or not because it is, as pointed out earlier, essentially different from the, liability imposed by Section 4 of the Excess Profits Tax Act.

The view taken by the Bombay High Court is as follows :

> "It cannot, as an invariable rule, be said that for an existing obligation to pay money to be a debt', it must necessarily be for an ascertained sum..... The word 'debt' in Section 2(m)....is capable of being understood to include.... an existing obligation to pay money, though the amount may not have been yet ascertained, (p. 284).
> ..... .'Debt' in its wider import means an existing obligation to pay a sum of money either ascertained or unascertained whether payable in praesenti or in futuro, but not a contingent obligation." (p. 285).

See *Commr. of Wealth Tax v. Standard Mills Co. Ltd.,* [27] In *Commr. of Wealth Tax v. D.C. Basappa.* [28] the Mysore High Court laid down that "debts owed in Section 2(m) of the Wealth Tax Act "must beheld to include both debts payable at once as well as those payable in future" and that it also includes debts which are ascertained as well as those that are not ascertained." There can be no quarrel with this statement provided that an unascertained debt is a debitum in praesenti and not a contingent debt. The question before the learned Judges was whether agricultural income-tax to be paid for the assessment year 1959-60 was a debt on 31-3-1959 even though no assessment order had been passed. Under the Mysore Agricultural Income-tax Act, agricultural income-tax was payable for She year 1959-60 on the agricultural income for the year ended on 31-3-1959. Because the year, the income of which was the basis of the tax, had expired the learned Judges held that the tax payable on it was a debt. They have not referred to the relevant provisions of the Mysore Agricultural Income-tax Act, such as the sections dealing with the changeability the liability to lie assessed and to pay the tax, the date on which the tax becomes payable, etc. Further the valuation date was March 31, 1959, earlier than April 1, 1959, on which date the liability to pay the tax accrued for the first time. There was no liability to pay that particular tax (e.g. for the assessment year 1959-60) on March 31, 1959, which preceded the assessment year. With great respect to the learned Judges I find it difficult to agree with them that

the mere probability on March 31, 1959, that the assessee might be alive on April 1, 1959, and be liable to be assessed amounted to a debt. If under the charging section the assessee was to be charged with the tax, he was alive on 31-3-1959 but might not be alive on 1-4-1959 and it he died before 1-4-1959 there was no question of his being assessed and no debt was to come into existence at all. On 31-3-1959 the assessee was under no obligation to pay the tax; he could only be said to be under the threat of, or the liability to the obligation and liability to be obliged is not the same thing as being obliged. The learned Judges took the same view in *Commissioner of Income Tax/Wealth Tax v. Amco Batteries Ltd.,* [29]

8. I am of the view that on 6-9-1943 there was no debt due from the Hindu undivided family to the Government on account of any liability under the Excess Profits Tax Act. Admittedly no provision was made for payment of excess profits tax at the time of partition of the joint family property; but as there was no debt the principle of the Hindu law referred to above has no application and the excess profits tax cannot be realized from the members of the disrupted family.

9. The business was carried on by a Hindu undivided family. The family existed on the date of issue of the notices under Section 13, but not when the assessment orders came to be passed. The assessment orders could be passed only against the person who had carried on the business, the excess profits of which were to be charged. That person (the Hindu undivided family) existed no more and, therefore, no assessment orders could be passed. The business existed during the two assessment years (1940-41 and 1941-42) and was earned on by the Hindu undivided family which became liable to be assessed to the excess profits tax. The Excess Profits Tax Act, however, contained no provision for assessment of the excess profits tax in respect of a business carried on by a Hindu undivided family upon the expiry of the assessment year, if there was disruption of the family after the expiry and before the making of an assessment order. The business was there and the excess profits were there during the whole of the assessment years, but the person against whom the assessment orders could be passed ceased to exist, with the consequence that there was no person against whom assessment orders could be passed and from whom the assessed tax could be realized. The tax could be realized only from the Hindu undivided family. Under the Hindu law a debt due from a Hindu undivided family can be realized from its members after disruption, but, as I have shown, there was no debt due from the Hindu undivided family before its disruption.

10. The position under the Income-tax Act is that when a Hindu undivided family earns income in an accounting year and continues to exist at the time of the assessment it will be assessed and not its members; see Section 3 and 14(1). If it is disrupted after the expiry of the accounting year but before the assessment proceedings it does not exist and cannot be assessed under Section 3. Section 25-A, however, allows it to be assessed in a certain circumstance, viz, if no order contemplated by it has been passed by the Income-tax Officer. If such an order has been passed, the tax payable will be determined as if there had been no disruption and will then be distributed among, and realized from, its members in accordance with their shares. There was no such provision in the Excess Profits Tax Act, and therefore, a Hindu undivided family could not be assessed to the excess profits tax after disruption. Section 25-A was not made applicable to assessment and recovery of excess profits tax.

11. Suppose a Hindu undivided family consisting of two members A and B earned income from a business in an accounting year; there are two possibilities at the time of assessment of income-tax on it, one that it continues to exist and the other that it was disrupted after the expiry of the accounting year but before the assessment proceedings. If it continues to exist, there are again two possibilities, one that A and B had withdrawn money from the earned income during the accounting year and the other that they had not. In the former case they had received income and would be liable to be assessed on it (under Section 3) but for the provision of Section 14(1) of the Income-tax Act, in the latter case there was no question of their being assessed for the simple reason that they had derived no income, it having been derived by the Hindu undivided family and they had received no part of it. If the Hindu undivided family was disrupted before assessment there were again two possibilities. (1) that A and B withdrew money from the income earned by it and (2) that they did not. The withdrawal of money could be either before the disruption or after it. If they withdrew money before the disruption, they could not be assessed on the money withdrawn by them, as Section 14(1) protected them. If they withdrew money From the disruption, they could be assessable because Section 14(1) is not applicable, they having received the income not as members of a Hindu undivided family but after its disruption. If they did not withdraw money they could be assessed on the income only if Section 25-A(2) applies; the income was not earned by them and only under Section 25-A(2) they could be assessed on it even though it was earned by the Hindu undivided family. In

respect of any money withdrawn by a member of a Hindu undivided family as such, i.e. before disruption of it, he is protected from assessment by Section 14(1), even if disruption takes place before the assessment. Section 14(1) had to be enacted if the legislature decided not to tax money withdrawn by a member of a Hindu undivided family as such, because otherwise he would be liable under Section 3. Since the protection granted by Section 14(1) was irrespective of any question of disruption (taking place subsequently but before assessment proceedings) Section 25-A(2) had to be enacted if the member had not to be protected after disruption if it took place before assessment.

12. The Excess Profits Tax Act contained a provision for the death of the person who had carried on the business during a chargeable accounting period prior to the assessment but contained no provision in respect of disruption before assessment of a Hindu undivided family that had carried on a business during a chargeable accounting period. The consequence is that nobody could be assessed to the tax; the Hindu undivided family could not be assessed because it did not exist and the members could not be assessed because they had not carried on the business and the family's liability had not been transferred to them by any provision in the Act or under the Hindu Law.

13. In *John Smith and Son, v. Moore,* [30] the House of Lords speaking through Viscount Finlay repelled the contention that as the excess profits tax is a tax upon the business itself as distinguish so from the person who carried if on, it is continuous and that when a person who carried on the business is succeeded by another person the other can be assessed. His Lordship observed at p. 286 that "though the business is treated as continuous, the essential incidence of the tax is upon the person by whom it is conducted at the time in question" and that "the profits are not earned by the business, they are earned by the person who carries it on". In (1951) 20 ITR 143 : AIR 1951 Madras 952 (supra) the Madras High Court held that when the business was carried on by a Hindu undivided family upto the moment of its disruption no notice under Section 13 could be issued to any of the members of the disrupted family to file a return in respect of a chargeable accounting period ending before the disruption and no excess profits tax could be assessed. Satyanarayana Rao and Vishwanatha Sastri, JJ. relied upon the above quoted observations of Viscount Finlay and pointed out that the Excess Profits Tax Act contained no provision for assessing members of an erstwhile Hindu undivided family that had carried on the business.

The facts in *A.G. Pandu Rao v. Collector, of Madras,* [31] are that a registered

partnership carried on business till September 1946 and was dissolved in February 1947 by a Court, a notice under Section 13 of the Excess Profits Tax Act was issued to the Receiver (appointed by the Court during the pendency of the suit for dissolution) and the assessment order was passed in 1949 and a demand notice was served upon the Receiver, who also was the managing partner and processes were issued for realising the tax from the erstwhile partners, Satyanarayana Rao and Rajagopalan, JJ. distinguished the case of Jivraj Topun and Sons, (1951) 20 1TR 143 : AIR 1951 Madras 952 (supra) and held that the notices were valid. The notices and the assessment orders were held to be valid because of Section 44 of the Income-tax Act made applicable to assessment and collection of excess profits Tax.

14. The facts in *Muthappa Chettiur v. Income-tax Officer,* [32] were as follows. Muthappa and Thyagrajan were partners of a firm which carried on business, the latter being the managing partner. Thyagrajan claimed dissolution of the partnership on 4-3-1943 and Muthappa instituted a suit challenging the claim The High Court held in 1953 that the partner ship was dissolved with effect from 1949. In 1951 the Income-tax Officer served upon Thyagrajaii a notice under Section 13 of the Excess Profits Tax Act. assessed the excess profits for the chargeable accounting period ending on 4-3-1943 and proceeded to realise the excess profits tax from Muthappa. The Supreme Court held that Muthappa, who had been asserting all along that the partnership had not been dissolved, could not contend during the pendency of his suit that there was dissolution, that even if there was disruption prior to the assessment, the assessment remained valid because it was the business that was the unit of assessment and Section 44 of the Income-tax Act was made applicable. These two cases, which dealt with partnership, are distinguishable from the instant case. A partnership is nothing but the partners taken collectively; there is no distinction between a partnership and the partners taken collectively. A Hindu undivided family on the other hand is not synonymous with the members constituting it and is an entity different from the members even if taken together. Consequently, every law relating to partnership is not applicable to a Hindu undivided family.

15. Nothing turns upon the fact that the notices under Section 13 of the Excess Profits Tax Act were served before the disruption. The members of the erstwhile Hindu undivided family do not become liable to be assessed to the excess profits tax merely because of this fact. There was no provision in the Act laying down that whoever was the person upon whom a notice under Section 13 was served was liable to be assessed

and to pay the assessed tax regardless of all subsequent events.

16. My answer to the question is in the negative.

17. A copy of this order should be sent under the seal of the Court and the signature of the Registrar to the Income-tax Appellate Tribunal as required by Section 66(5) of the Income-tax Act.

18. The assessee should get its costs of the reference, which are assessed at Sections 400, from the Commissioner of Income-tax. Counsels fee may be assessed at Rs. 400.

Manchanda, J.: I agree.

Question answered in the negative.

Cases Referrred.
1. (1951) 20 ITR 143: AIR 1951 Mad 952
2. (1957) 31 ITR 688 at p. 695 (Bom)
3. (1963) 48 ITR (SC) 92 (AIR 1963 SC 1484)
4. (1953) 24 ITR 488
5. (1951) 19 ITR 191
6. AIR 1931 All 512
7. 1952 SCR 544
8. 1963) 49 ITR 977 (Mys)
9. (1883) 11 QBD 518
10. (1858) 27 LJ QB 234
11. (1915) 3 KB 499
12. (1909) ILR 36 Cal. 936
13. (1869) 37 Clif, 524
14. (1922) 62 Can SCR 262 at p. 267
15. (1878) 3 QBD 215
16. (1883) 12 QBD 8
17. (1926) AC 37
18. (48 ITR SC 144)
19. (1955) 27 ITR 709, at p. 716: AIR 1955 SC 619 at p. 623
20. (1964) 54 ITR 637 at p. 639 (All)

21. (1947) 15 ITR 302
22. (1948) 16 ITR 240 at p. 244: (AIR 1948 PC 118 at p. 119)
23. (1945) 13 ITR 285
24. (1963) 48 ITR 31: AIR 1963 Cal 392
25. (1963) 48 ITR 1005: AIR 1963 Mad 356
26. (1963) 46 ITR 948 (Ass)
27. (1963) 50 ITR 267 (Born)
28. (1964) 51 ITR 790: AIR 1964 Mys 206
29. (1964) 52 ITR 370 (Mys)
30. (1928) 12 Tax Cas 266
31. (1954) 26 ITR 99: AIR 1954 Mad 1049
32. (1961) 41 ITR 1