BOMBAY HIGH COURT

Mathuradas B. Mohta

Vs

Commissioner of Income-Tax

(N Abhyankar, C.J. Y Tambe, J.)

27.07.1964

JUDGMENT

Tambe, J.

1. This is reference under section 66(1) of the Indian Income-tax Act and four questions have been referred to us. The first two questions relate to the assessment year 1947-48, and the third and the fourth questions relate to the assessment year 1950-51. The first question now has remained only academic and the answer to the second question is concluded by the decision of the Supreme Court. We will deal with each question separately and consider the facts relevant to that question while dealing with these questions.

2. The assessee before us is Seth Mathuradas Bulakhidas Mohta, Hinganghat. He had been assessed in the status of Hindu undivided family in the assessment year 1947-48 and has been assessed in the status of individual in the assessment year 1950-51. The first question that has been referred is in the following terms :

> "Whether, in the facts and circumstances of this case, the proceedings under section 34 were valid ?"

3. The facts relevant to this question in brief are : In the assessment year 1944-45 Seth Mathuradas Mohta filed his return in the status of an individual, and since then he had been filing his return every year in the status of individual all through. His claim was that there was a partition among the members of the Hindu undivided family on October 16, 1944, and therefore from the year 1944-45 he was liable to be assessed as an individual. The Income-tax Officer did not accept this contention of Seth family. In the assessment year 1947-48 also Seth Mathuradas had been assessed in the status of Hindu undivided family. There had been an appeal by Seth Mathuradas against the decision of the Income-tax Officer. The Income-tax Officer, therefore, though it proper to take precautionary measure by having the precautionary assessment made

against Seth Mathuradas in his capacity as individual also. The Income-tax Officer, therefore, issued a notice under section 34 for that purpose, and ultimately an assessment against him in his capacity as an individual also has been made for the same income for which there had been an order of assessment in his capacity of a Hindu undivided family. The matter has ultimately been decided by the Supreme Court, and it appears that as result of a Supreme Court decision Seth Mathuradas is liable to be assessed in the status of Hindu undivided family till the assessment year 1947-48. We are here concerned with the assessment year 1947-48. This being the final result flowing form the decision of their Lordships of the Supreme Court, the Income-tax Officer has now canceled the assessment of Seth Mathuradas in his individual capacity. Mr. Joshi for the department has stated these facts before us in the course of proceedings of this reference. That being the position, and there being now no outstanding assessment against Seth Mathuradas in his capacity as an individual, the question whether the notice issued under section 34 was valid or otherwise has become only academic. In the circumstances it is no more necessary to answer question No. 1.

4. The second question is in the following terms :

"Whether the Appellate Assistant Commissioner, while dealing with the assessee's appeal for the assessment year 1947-48, was competent to give any direction in relation to assessment of capital gains and profits arising out of the sale of the textile mills for the year 1948-49 ?"

5. The facts relevant for the purpose of answering this question, in brief, are : The textile mill belonging to Seth Mathuradas had been said on October 25, 1946. The sale resulted in capital gain. The Income-tax Officer included the capital gains in the total income of the assessee for the assessment year 1947-48. Feeling aggrieved, the assessee had taken an appeal to the Appellate Assistant Commissioner, and the Appellate Assistant Commissioner, in dealing with the assessee's appeal for the assessment year 1947-48, held that the amount of capital gain was not assessable in the assessment year 1947-48. After recording his finding the Appellate Assistant Commissioner further gave a direction that the said capital gains profits arising out of the sale of the textile mills were taxable in the assessment year 1948-49. The second question has arisen out of this direction. The question that arises to be considered is whether, in dealing with the case for the assessment year 1947-48, the Appellate Assistant Commissioner was competent to give direction in respect of this capital gain to assess it in the assessment year 1948-49. The matter stands concluded by the decision of their Lordships of the Supreme Court in Income-tax Officer, Sitapur v. Murlidhar Bhagwan Das. Their Lordships have held that the jurisdiction of the Appellate Assistant Commissioner under section 31 of the Act was strictly confined to the assessment order of that particular year under appeal. The Appellate Assistant Commissioner no doubt was competent to hold whether a particular item or a particular amount was income of that

assessment year, but he has no jurisdiction further to decide in that appeal the appropriate year in which the said income would fall. That being the position, the answer to the second question will have to be in favour of the assessee. We, accordingly, answer the second question in the negative.

6. The third question is in the following terms :

> "Whether, in the facts and circumstances of this case, the amount of Rs. 42,361 (Rs. 25,451 from Rajnandagaon and Rs. 16,910 from Bikaner) could be assessed as remittance of profits ?"

7. Before we state the facts it may be stated that in the question which has been referred to, the respective figures given are Rs. 97,954, Rs. 51,035 and Rs. 46,910. At the time the statement of the case was prepared, the assessee had made a suggestion that these figures be corrected, but the suggestion does not appear to have been accepted by the Tribunal. Before commencing the argument on the third question, Mr. Joshi, learned counsel for the department, stated that the correct figures are Rs. 42,361 instead of Rs. 97,945, Rs. 25,451 instead of Rs. 51,035, and Rs. 16,910 instead of Rs. 46,910. In view of the statement of Mr. Joshi, we have reframed the question as stated above by giving the correct figures.

8. Facts relevant for the purpose of this case are : In dealing with the assessment for the assessment year 1950-51, the Income-tax Officer has included the amount of Rs. 25,451 as income brought by the assessee from Rajnandgaon (as territory outside the taxable territory) into the taxable territory, and Rs. 16,910 from Bikaner (another territory outside the taxable territory) into the taxable territory and had included these two amounts in the total income of the assessee in the assessment year 1950-51. An appeal was taken by the assessee, challenging the validity of the order of the Income-tax Officer including these two amounts in the total income of the assessment year 1950-51.

9. Now, the contentions raised by Mr. Mulla who appeared for the assessee before the Appellate Assistant Commissioner were two-fold. In the first instance he contended that there was no material no record showing that any amount was remitted from the non-taxable territories to Hinganghat, the head office of the assessee. His second contention was that the remittances, even if any form the non-taxable territories to Hinganghat, were not remittances of his income. In short, the remittances were on moneys which he had received as his share in the partition of the joint family. The Appellate Assistant Commissioner did not accept Mr. Mulla's first contention that there were no remittances. The other contention, however, the Appellate Assistant Commissioner accepted. He has agreed with Mr. Mulla that what could be taxed in the hands of the assessee who was an individual, was only the amounts of this income brought from non-

taxable territories to Hinganghat. He then went into the question as to the extent of the profits available to the assessee in respect of his business form October 16, 1944, i.e., the date on which the partition had taken place, up to the 1949-50. The amount found by him was Rs. 49,287. He further found that up to the assessment year 1949-50 about a lakh of rupees were brought by the assessee from non-taxable territories to Hinganghat. On these findings he held that in the assessment year 1950-51 the amounts brought by him were not liable to be included in the total income of the assessee. The department took an appeal against this decision of the Appellate Assistant Commissioner to the Tribunal. The Tribunal did not disagree with the finding of the Appellate business concerns as result of partition, the profits thereof are capitalized, turning them into assets. The Tribunal, however, following the decision in the Commissioner of Income-tax v. Annamalai Chettiar, came to the conclusion that even in such a case the amounts when brought from nontaxable territories to taxable territories would be taxable and are liable to be included in the total income of the assessee. The Tribunal has observed that in the absence of any other decision it was following the decision in Commissioner of Income-tax v. Annamalai Chettiar. On this finding of the Tribunal, at the instance of the assessee, the aforesaid third question has been referred.

10. The question that arises is whether the amount which the assessee gets in a general partition between different members of a Hindu undivided family is income and profits accruing or arising to him in his capacity as a separated member. It is not in dispute that the aforesaid amounts have been included by the Tribunal under the provisions of sub-clause(iii) of the clause (b) of sub-section (1) of the section 4 of the Act. The material part of the section is in the following terms :

4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which - .....

(b) if such person is resident in the taxable territories during such year, - .....

(iii) having accrued or arisen to him without the taxable territories before the beginning of such year after the 1st day of April, 1933, are brought into or received in the taxable territories by him during such year....."

11. On the language of this section, when the department claims that a particular sum brought from non-taxable territories to the taxable territories is taxable, it must establish that the sum was in the nature of income or profits of the assessee accrued to him or arisen to him in non-taxable territories. The question to be considered is whether the amounts, though originally formed part of the profits of the Hindu undivided family, when o a general partition it is received by a member, still retains its original character of profit or income. In our opinion, the original

character undergoes change. What happens in a partition is, all the family properties, in whomsoever hands they may be are thrown in a hotchpot; capital assets, ready assets, profits, all together are thrown in a hotchpot, and it is the totality of these things which is then divided among the members of the joint Hindu family in accordance with their share. The character of the property in the hands of members of the family on being received on partition is his share of assets of the family property, whatever its original character may be. It is not now in dispute that there was general partition and in the general partition the assessee had received certain amounts, and the aforesaid amounts brought in the assessment year from Bikaner and Rajnandgaon to Hinganghat are out of those amounts. On the view taken by us, what was brought by the assessee to Hinganghat was a part of the his assets that had fallen to his share on partition him in non-taxable territories. The view taken by us finds support in a decision of the Madras High Court, Veerappa Chettiar v. Commissioner of Income-tax. In that case the facts were, two brothers who were members of Hindu undivided family, carried on a money-lending business in Colombo. They partitioned their property at some time. Under the partition deed, the elder brother took over the entire assets of the Colombo business consisting of its properties outstanding and profits that had been earned by the business till then and agreed to pay to his younger brother, the assessee, a certain sum as for his half share of the family properties including the money-lending business. During the relevant accounting year the assessee brought one lakh of rupees from Colombo to British India. The income-tax authorities held that out of the sum of rupees one lakh at the time of the partition, Rs. 36,000 and odd was the share which the assessee had obtained in the profits of the Colombo money-lending business. They therefore, held that amount to be taxable. The High Court held that the amount was taxable. The reasons given by the learned judges for this view are in the following terms at page 401 of the report :

12. On a partition all that a member can claim is an allotment of his proper share of the family estate with reference to the existing assets and the number of coparceners and this allotment may be made in meal or in malt. One sharerer may get the landed properties of the family of his share, another may get the outstandings and third member may get the cash and movables. What is divided at a partition is the entire family estate consisting of the original family estate with all subsequent accretions to that estate in the shape of income or profits, the whole thing constituting one composite property without allocation to capital or profits. On a partition the sole right of a member of the family is to get an allotment of his share in the assets available after discharging the family debts. For the purpose of ascertaining the assets existing at the date of the partition it is quite immaterial whether the family possessed them by way of capital or by way of subsequent accretions in the shape of profits. The sums earned by the family as profits might be applied in discharge of capital liabilities and capital assets of the family might be applied in discharge of current liabilities of the family. What is distributed amongst the sharerers at the partition is the

net residue of the estate after payment of family debts and no artificial dissection of the allotments into capital and profits is necessary and in many cases would be impossible."

13. Such exactly is the position here. There is no finding here that there was at the partition separate division of capital assets and profits. The division of properties appears to be general one. That being the position, in our opinion, the Tribunal was, with respect, in error in holding that the said two amounts were taxable. It is true that the decision on which the Tribunal has placed reliance appears to be supporting the contention of the concluding portion of the judgment in Veerappa Chettiar v. Commissioner of Income-tax, at page 402, that the view is not adhered to. With respect, we are in agreement with the view expressed in Veerappa Chettiar v. Commissioner of Income-tax.

14. From the observations of the Tribunal in paragraph 12 of its order, it appears that the Tribunal has followed the decision in Commissioner of Income-tax v. Annamalai Chettiar because the decision in Veerappa Chettiar v. Commissioner of Income-tax or any other decision was not brought to its notice. For the reasons stated above, in our opinion, the answer to the third question will have to be in favour of the assessee. We accordingly answer the third question in the negative.

15. This brings us to the fourth and the last question as follows :

> "Whether, in the facts and circumstances of this case, an appeal to the Appellate Assistant Commissioner against the charge of penal interest was competent ?"

16. Facts giving rise to the question, in brief are : We have already said that in the assessment year 1947-48 the assessee was claiming that he should be assessed in that year in his status as an individual. Advance tax however was not paid by him in his capacity as an individual, but as the department was insisting on taxing him in his status of Hindu undivided family advance tax has been paid by him in that capacity. The Income-tax Officer took the view that the assessee in his status as an individual was a distinct independent entity. He was in this year claiming the status as an individual and, therefore, under sub-section (3) of section 18A of the Act there was an obligation on him to submit an estimate of his income and pay an advance tax. He not having done so, he was liable to pay interest as provided in sub-section (8) of section 18A. The Income-tax Officer accordingly calculated the amount of interest at Rs. 24,214-11-0 and added it to the demand of the amount due from the assessee. The assessee had taken an appeal against the assessment order and one of the grounds taken was that the Income-tax Officer was in error in holding that in the circumstances of the case penal interest was chargeable. It was argued on behalf of the assessee that the full payment of advance tax was made under section 18A, as at

that time the authorities had held that there was no partition and the department had been assessing the assessee as a Hindu undivided family. The Appellate Assistant Commissioner accepted this contention and held that the penal interest was not chargeable. In an appeal taken by the department before the Tribunal, this finding of the Appellate Assistant Commissioner was challenged, and the contention raised was that the Appellate question of charge of penal interest. The Tribunal upheld this contention of the department and held that the Appellate Assistant Commissioner was not justified in entertaining that contention. In this view of the matter, the Tribunal set aside the order of the Appellate Assistant Commissioner in this respect. What the Tribunal observed in paragraph 13 of its order is as follows :

> "We would therefore set aside the Appellate Assistant Commissioner's order on that point on the ground that he was incompetent to go into the contention of the assessee in regard to charge of interest of Rs. 24,215."

17. On this finding arises the fourth question. The question to be considered is whether in the circumstances the Appellate Assistant Commissioner had jurisdiction to entertain an appeal as regards the validity or otherwise of the imposition of penal interest under section 18A of the Act. It is a well settled principle of law that right of the appeal is a creature of statute and no person can claim by way of right a right to appeal. An appeal therefore from a certain order would not lie unless a right to file an appeal against it has been conferred by law. Section 30 is the relevant section in the Act relating to appeals to the Appellate Assistant Commissioner against the Assessment order. The material section is sub-section (1) of section 30, and it is in the following terms :

> "30. (1) Any assessee objecting to the amount of the income assessed under section 23 or section 27, or the amount of loss computed under section 24 or the amount of tax determined under section 23 or section 27, or denying his liability to be assessed under this Act, or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of the section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26A or to make a fresh assessment under section 27, or objecting to any order under sub-section (2) of the section 25 or section 25A, or sub-section (2) of section 26 or section 28, made by an Income-tax Officer, or objecting to any penalty imposed by an Income-tax Officer under sub-section (6) of section 44E or sub-section (5) of section 44F or sub-section (1) of section 46, or objecting to a refusal of an Income-tax Officer to allow a claim to refund under section 48, 49 or 49F, or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee, being company, objecting to an order made by an Income-tax Officer under sub-section (1) of section 23A, may appeal to the Appellate Assistant Commissioner

against the assessment or against such refusal or order Provided that no appeal shall lie against an order under sub-section (1) of section 46 unless the tax has been paid :Provided further that whether the partners of a firm are individually assessable on their shares in the total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of an Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income :

Provided further that a shareholder in a company in respect of which an order under section 23A has been passed by an Income-tax Officer, may not in respect of matters determined by such order appeal against the assessment of his won total income."

18. It is the contention of Mr. Thakkar that this section in express terms confers a right to an assesses when the assessee has been "denying his liability to be assessed under the Act." The argument of Mr. Thakkar is that the penalty provided under section 18A of the Act is a tax within the meaning of the Act. The Income-tax Officer had assessed the assessee to this tax and has imposed this tax on him. The assessee had been denying his liability to be assessed to this tax. The contention of the assessee had not been accepted by the Income-tax Officer. In these circumstances the assessee had a right of appeal to challenge before the Appellate Assistant Commissioner this part of the order of the Income-tax Officer. Mr. Thakkar further argues that apart from it and even assuming that the assessee had no right to file an appeal only in respect of imposition of penal interest, it is open to the assessee to challenge the Income-tax Officer's finding in this respect when he has filed an appeal against the assessment order as a whole. He has placed reliance on certain observations in Commissioner of Income-tax v. Jagdish Prasad, the decision on which the Tribunal itself has relied. Mr. Joshi on the other hand contends that charge of interest under sub-section (8) of section 18A is not imposition of any tax. Sub-section (8) deals only with arithmetical calculations to be made in accordance with the provisions of the Act when it is found that the assessee who was liable to pay an advance tax has failed to pay the advance tax. If the assessment stands, the amount added by way of the interest must stand. If the assessment fails or is modified, the amount of interest would accordingly be either deleted or modified. The assessee, therefore, has no right appeal against the levy of interest under the clause "denying his liability to be assessed under this Act" occurring in section 30 of the Act even when the assessee had filed an appeal against the order of assessment made under section 23 of the Act. The first question that arises is whether the levy of interest under section 18A is levy of tax under the Act. Now "tax" has not been defined in the Act. In considering this question the decision of their Lordships of the Supreme Court in C. A. Abraham v. Income-tax Officer,

Kottayam, affords guidance. Their Lordships in that case were considering the question partner of dissolved firm under section 44 of the Act. Section 44 enabled the Income-tax Officer to assessee a partner of a dissolved firm in respect of an income of the firm that has been dissolved or discontinued. The assessee was assessed in respect of the income of the dissolved partnership and a penalty under section 28 also had been levied against him under section 28(1)(c). The contention raised on behalf of Abraham before their Lordships was that through section 44 may enable the Income-tax Officer to levy tax on him in respect of income of the dissolved partnership, there was no provision in the Act enabling the income-tax authority to levy penalty under section 28 on him. The question that was being considered by their Lordships was whether the penalty is tax within the meaning of the Act.

19. Now, section 28 provided that an assessee who fell under that section was liable to pay penalty and that the amount of penalty imposed was to be added to the amount of Income-tax assessed. Considering the question their Lordships at page 430 of the report observed :

> "By section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessee. It is true that this liability arises only if the Income-tax Officer is satisfied about the existence of the conditions which give him jurisdiction and the quantum thereof depends upon the circumstances of the case. The penalty is not uniform and its imposition depends upon the exercise of discretion by the taxing authorities; but it is imposed as a part of the machinery for assessment of tax liability."

20. Another decision of their Lordships in Commissioner of Income-tax v. Bhikaji Dadabhai & Co. also affords guidance. In that case the question considered was whether in spite of repeal of the Hyderabad Income-tax Officer to levy penalty on an assessee. The Finance Act of 1950, which repealed the Hyderabad Income-tax Act, saved the provisions of the repealed Act relating to "levy, assessment and collection of income-tax". The question was whether the provisions relating to imposition of penalty fell within the expression "levy, assessment and collection of income-tax". Their Lordships upheld the contention of the department that the provisions relating to imposition of penalty were saved. Their Lordships, referring to their earlier decision in Abraham's case, observed at page 128 of the report as follows :

> "This court regarded penalty as an additional tax imposed upon a person in view of his dishonest or contumacious conduct. It is true that under the Hyderabad Income-tax Act, distinct provisions are made for recovery of tax due and penalty, but that in our judgment does no alter the true character of penalty imposed under the two Acts."

21. In our opinion, the ratio that emerges from these two decisions of their Lordships of the Supreme Court is that whatever addition is made in the amount of tax by reason of the provisions of the Act which formed part of the machinery of assessment of tax liability, is a tax. Chapter IV of the Income-tax Act relates to deduction and assessment and contains the various provisions relating to the machinery for assessment to tax liability. Section 18A as well as section 28 fall under this very Chapter. In Abraham's case, when examining the provisions of various section relating to the machinery of assessment of tax liability, their Lordships have referred to section 18A also. Sub-section (8) of section 18A provides that the amount of interest determined in accordance with the provisions of sub-section (6) "shall be added to tax as determined on the basis of the regular assessment." It is thus clear that the amount interest determined under sub-section (8) of section 18A is an addition to the tax. This addition to the tax has been made by reason of the provisions of the section which form part of the general machinery for assessment of tax liability created by the Income-tax Act. That being the position, in our opinion, the amount of penalty is a tax within the meaning of the Act. The assessee had been disputing his liability to pay interest under section 18A. In other words, the assessee was denying his liability to be assessed to tax which is designated as interest under section 18A of the Act. In our opinion, therefore, the assessee would have a right to file an appeal under clause (1) "denying his liability to be assessed under this Act" occurring in section 30 of the Act.

22. Mr. Joshi, however, argues that having regard to the terms of sub-section (1) of the section 30, such a construction would not be permissible inasmuch as a right of appeal on an assessee, whether it be in respect of the imposition of tax, amount of tax or the imposition of penalty or this amount. Sums added to the amount to tax under the provisions of the Income-tax Act on account of some acts of omission or commission on the part of the assessee are contained in section 28, 44F, sub-section (1) of section 46 and section 18A. Sub-section (1) of section 30 in express terms mentions section 28, sub-section (6) of section 44E, sub-section (5) of section 44F and sub-section (1) of section 46, but has made no mention of section 18A. That being the language used in sub-section (1) of section 30, the clause "denying his liability to be assessed under this Act" cannot be given a meaning of wider aptitude as contended for by the assessee. It is no doubt true that sub-section (1) of section 30 confers a right of appeal in respect of orders under section 28 and other section which empower the Income-tax Officer to add certain amounts to tax and does not in express terms make reference to section 18A. That by itself, in our opinion, would not a sufficient ground for giving a limited meaning to the clause as contended for by Mr. Joshi has also made reference to the two decisions on which the Tribunal has placed reliance in this respect and has contended that no appeal lies against the order made under section 18A. These decisions no doubt to a certain extent support the contention of Mr. Joshi, but the view taken by this court in Commissioner of Income-tax v. Jagdish Prasad was that

there was a clear distinction between a tax and a penalty or penal interest, and therefore, an assessee who merely denies his liability to pay penalty or penal interest cannot be said to deny his liability to be assessed under the Income-tax Act. It is to be noticed that the decision in Abraham's case and Bhikaji Dadabhai's case were then not available. In view of the decision of their Lordships it can hardly be said that any material distinction between "tax" and "penalty" has remained. However, it is not necessary for us to go into the question further. All that has been held by this court is that the assessee is not entitled to a right of appeal merely against an order of the Income-tax Officer imposing penal interest under section 18A of the Income-tax Act for failure to pay advance tax. In the instant case the appeal has not been filed by the assessee merely against an order made by the income-tax Officer under section 18A of the Act, but the appeal is filed against the order of assessment as a whole and one of the grounds therein is that the addition of interest is bad in law. In Jagdish Prasad's case the learned Chief Justice in delivering the judgment of the court observed at page 199 :

> "Therefore, the scheme of the Act is that penal interest must follow upon the regular assessment. The appeal should be against the regular assessment and in the regular assessment it should not be open to the assessee to take all points which may legitimately not only reduce the taxable income or the tax to be paid, or with regard to the proper head under which the income should fall, but also reduce the quantum of penal interest, and the legislature having provided for this in the regular appeal itself, did not think it necessary that a separate right of appeal should be given to the assessee to appeal against the quantum of penal interest."

23. Having regard to these observations, all that can be said on the basis of this decision is that an appeal merely against the order under section 18A would not lie but in an appeal against an order of assessment it should be open to the assessee to challenge the order of the Income-tax Officer under section 18A of the Act. This decision therefore does not come in the way of the assessee. The other decision to which Mr. Joshi made a reference is also a decision earlier than Abraham's case; a distinction has been drawn between a tax and a penal interest and it has been held that merely because the interest is added to the tax it cannot be said that the provision relating to the addition of interest is a process of assessment of the income. In view of the decision of their Lordships of the Supreme Court, in our opinion, similar line of reasoning cannot any more be pursued.

24. Mr. Joshi also referred us to rule 20 of the Rules and on the basis of that rule he argued that the amount of interest is added only after the net amount as tax has been determined by the Income-tax Officer, and this shows that the amount of interest is not tax. It is difficult to accept the suggestion made by Mr. Joshi that the provisions of the Act should be construed with the aid

of rules framed under the Act.

25. For the reasons stated above, in our opinion, the answer to the fourth question will also have to be in favour of the assessee. We accordingly answer the fourth question in the affirmative.

26. In the result, the first question is now academic and it is not necessary to answer that question, the second question is answered in the negative and in favour of the assessee, the third question is answered in the negative and in favour of the assessee, and the fourth question is answered in the affirmative and in favour of the assessee. In the circumstances, the department shall bear half the costs of the assessee.