Privy Council Appeal No. 39 *of* 1944

The Commissioner of Income Tax, Bombay, Sind and Baluchistan - - - - - - - - - - *Appellant*

v.

P. E. Polson - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH MAY, 1945

Present at the Hearing:

THE LORD CHANCELLOR
LORD MACMILLAN
LORD SIMONDS
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* LORD SIMONDS]

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 s. 25 (3) of the Indian Income-tax Act, 1922 (hereinafter called " the 1922 Act "), as amended by the Indian 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* ((1943), 11 I.T. Rep. 247) the High Court at Madras has given it the narrower meaning.

The respondent P. E. Polson had from some date before 1922 until the 1st January, 1939, carried on business in coffee, butter, flour and casein under the style of Polson Manufacturing Company. He had made profits and been charged to tax under the Income-tax Act, 1918. On the 1st January, 1939, he assigned the business to Polson Ltd., which thereafter carried it on.

Part I of the amending Act which includes the amendments of ss. 25 and 26 of the 1922 Act, came into force on the 1st April, 1939, by virtue of Notification No. 7 of the Central Government dated the 18th March, 1939.

In May, 1939, the Income-tax Officer, Companies Circle, Bombay, issued a notice to the respondent under s. 22 (2) of the 1922 Act for the assessment year 1939-40, and on the 4th August, 1939, the respondent made a return which contained an item of Rs.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 s. 25 (3) of the 1922 Act as amended by the amending Act. This claim was rejected by the Income-tax Officer who on the 29th November, 1939, passed an order under s. 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 Commissioners who by an order passed on the 30th March, 1940, dismissed the appeal. The respondent thereupon applied to the Commissioners 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 s. 25 (3) of the Income-tax Act?
>
> 2. Whether in view of the provisions of the said s. 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 1935 liable to assessment in respect of the financial year 1939-40? "

The Commissioner, expressing his own opinion that the respondent was not entitled to any relief under the section, on the 20th June, 1941, duly referred the case to the High Court at Bombay. That Court on the 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 s. 3 of the 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 1922 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 1922 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.

S. 25 of the 1922 Act deals with assessment in the case of discontinued businesses. By subs. (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 subsection 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.

Subs. (2) of s. 25 is an administrative provision. It is upon subs. (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."

The purpose and effect of this subsection 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.

S. 26 of the 1922 Act deals by subs. (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 subs. (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.

Before the amending Act came into force the words " discontinued " and " discontinuance " in s. 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.* (1926) I.L.R. 50 Bombay 87, *Kalu Mal Shori Mal* v. *Commissioner of Income Tax, Punjab* (1929) 3 I.T. Cas. 341 and *Hanutram Bhuramal* v. *Commissioner of Income Tax, Bihar and Orissa* (1938) 6 I.T. Rep. 290 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.

It has however been contended that the amendments introduced by the amending Act impose a different interpretation upon s. 25 and it is this contention that has been accepted by the High Court at Bombay.

The amendments so introduced are as follows:—

S. 25 (1) and (2) are not touched. Into s. 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 subsection (4) have been rendered applicable." A new subsection (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 a 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."

A new subsection (5) is also introduced but it is not relevant to the present question. Consequential amendments are made in subsection (6).

S. 26 has also been substantially amended, but it is convenient to pause and examine the amendments to s. 25 before turning to s. 26.

It must first be noted that the new subsection (4) of s. 25 has no application to the respondent. On the 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 the 1st April, 1939. It is at any rate clear that they cannot mean any earlier date.

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 subsection (4). But such relief can be given once only in respect of a business. Therefore, when the owner, who transfers, has got relief under subs. (4), it would not be right for the transferee to get relief under subs. (3) if and when the business is discontinued. For this reason the words that have been cited are interpolated in subs. (3).

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 subs. (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 s. 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.

It is however to s. 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 s. 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 subs. (2) of s. 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 subsection 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 s. 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 s. 25. It is true that in the result the respondent may have suffered a disadvantage. When he transferred his business to the company on the 1st January, 1939, he presumably did so upon the footing of the existing law, including the unamended s. 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 s. 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 subs. (2) of s. 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.

In the result their Lordships agree with the reasoning and the decision of Leach C.J. and Patanjali Sastri J. in *Meyyappa Shettiar* v. *Commissioner of Income Tax, Madras,* 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.

Wt 8077—36 180 6/45 D.L. 338

In the Privy Council

THE COMMISSIONER OF INCOME-TAX
BOMBAY, SIND AND BALUCHISTAN

v.

P. E. POLSON

DELIVERED BY LORD SIMONDS

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1945