INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Tendolkar.

1952 Oct. 3

COMMISSIONER OF INCOME TAX, BOMBAY CITY, APPLICANT, *v.* DWARKADAS VASANJI BY HIS HEIR AND REPRESENTATIVE VASANTSEN DWARKADAS, RESPONDENT.*

Indian Income Tax Act (XI of 1922), s. 23 (5) (a)—Total income of registered firm assessed—Partners' shares ascertained—Assessee partner in the firm—Assessee's share of such income included in his assessment—Further profits earned by the firm not included in firm's assessment—Firm's' assessment not modified to include such further profits—Assessee's share of such further profits added to his assessment—Whether assessee liable to be assessed on such further profits.

The assessee was a partner in the registered firm P. L. and his share was 12 annas. The said firm was assessed, its total income ascertained and assessee's share of total income of the firm was included in his assessment. Subsequently, the business carried on in the name V. D. was found to be a branch of the firm P. L. and the Income Tax Department assessed the profits of the said business V. D. at a certain figure and wanted to include the twelve annas share of the assessee therein in the assessment of the assessee. On the question whether it was competent for the Department to do so without modifying the assessment of the firm P. L.

Held, that it was not open to the Department to assess the assessee as a partner of the firm on his partnership income which did not form part of the total income of the firm as ascertained by the Department under s. 23 (5).

Seth Badridas Daga v. *Commissioner of Income-Tax, Central and United Provinces*,[1] *Rati Ram and Sons, Kanpur* v. *Commissioner of Income-Tax, United Provinces*,[2] referred to.

Neemchand Daga v. *Commissioner of Income-Tax, Bengal*,[3] distinguished.

This reference relates to the assessment made on Dwarkadas Vasanji represented by his heir Vasant Dwarkadas for the assessment year (1942-1943) in respect of assessee's income in S. Y. 1997. Total income of Dwarkadas was assessed at Rs. 1,23,299. A registered firm Purshotam Laxmidas carrying on business in piece goods in which Dwarkadas was a partner with a twelve-anna share was also assessed for that year and Dwarkadas' share of profits in the said firm amounting to Rs. 38,788 was included in his assessment.

* Income-Tax Ref. No. 8 of 1952.

[1] (1949) 17 I. T. R. 209. [2] (1951) 19 I. T. R. 233.
[3] (1931) 5 I. T. C. 206.

On January 28, 1941 business in piece goods was commenced by a firm of the name of Vasantsen Dwarkadas. This firm filed a voluntary return of income and applied for the registration of the firm showing three different partners. The Income Tax Department refused to register the firm. The Income Tax Officer held that this was the business of Dwarkadas and fixed its income at Rs. 62,752.

On appeal before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner held that the said business carried on in the name of Vasantsen Dwarkadas was a branch of the firm Purshottam Laxmidas and consequently ordered that only his twelve-anna share in the said sum of Rs. 62,752 should be included in the assessment of Dwarkadas.

The Income Tax Appellate Tribunal before whom an appeal against the order of the Appellate Assistant Commissioner was preferred reduced the profits ascertained by the Department of Vasantsen Dwarkadas from Rs. 62,752 to Rs. 32,752. But the Tribunal however held that as the Department had not modified the assessment of Purshottam Laxmidas by adding thereto the said ascertained profits of the business carried on in the name of Vasantsen Dwarkadas, it was not entitled to add to the assessment of Dwarkadas his share of the said ascertained profits and, therefore, ordered the deletion of the addition made by the Department.

On the application of the Commissioner of Income Tax, Bombay City, the Income Tax Appellate Tribunal made a reference to the High Court on the following question of law, viz., whether in the assessment of Dwarkadas it is competent to the Department to include his twelve-anna share in the sum of Rs. 32,752.

The reference was heard.

Sir N. P. Engineer, with *G. N. Joshi,* for the applicant.

Sir J. B. Kanga, with *R. J. Kolah,* for the respondent.

CHAGLA C. J. The assessee before us is one Dwarkadas Vasanji. He was a partner in the firm of Purshottam Laxmidas and his share was 12 annas. In 1941 business was commenced by a firm of the name of Vasantsen Dwarkadas and this firm filed a return of its income. The profits of the firm were assessed at Rs. 62,752 by the Income Tax Officer. He however came to the conclusion that the business which was carried on in the name of Vasantsen Dwarkadas belonged to Dwarkadas Vasanji and he refused an application for the registration of

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the firm of Vasantsen Dwarkadas. Vasantsen Dwarkadas preferred an appeal to the Appellate Assistant Commissioner and the Appellate Assistant Commissioner came to the conclusion that the business carried on in the name of Vasantsen Dwarkadas was really the business of Purshottam Laxmidas and that Dwarkadas had a 12 annas share in that business. From the decision of the Appellate Assistant Commissioner an appeal was preferred to the Tribunal. The Tribunal confirmed the opinion and the decision of the Appellate Assistant Commissioner that the business of Vasantsen Dwarkadas was the business of Purshottam Laxmidas, but it reduced the profits ascertained by the Income Tax Officer and confirmed by the Appellate Assistant Commisoner of Vasantsen Dwarkadas from Rs. 62,752 to Rs. 32,752; and the question that has been submitted to us is whether in the assessment of Dwarkadas it is competent to the Income Tax Department to include his 12 annas share in the sum of Rs. 32,752.

Now, in the return of Dwarkadas he had shown an income of Rs. 1,23,299 and in this income was included the sum of Rs. 38,788 as being the profit coming to his share in the firm of Purshottam Laxmidas, and the question is whether Dwarkadas is liable to pay tax over and above the income of Rs. 1,23,299 on the 12 annas share in the profits of Rs. 32,752, which is Rs. 24,564. The contention of the assessee before the Tribunal which was accepted by the Tribunal was that the only partnership income of the firm of Purshottam Laxmidas on which he was liable to pay tax was the income which had been ascertained as a result of the assessment of Purshottam Laxmidas and which had been allocated to his share, but there was no liability upon him to pay any tax on any additional partnership income ascertained by the Department. In order to understand this contention it is necessary to look at s. 23 (5). That sub-section deals with the assessment of a firm and sub-cl. (*a*) deals with the case of a registered firm and that sub-clause provides that when the assessment is of a registered firm the sum payable by the firm itself shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined. Therefore, under s. 23 (5) (*a*), although the income of a registered firm has to be assessed, the liability to pay tax is not upon the registered firm but is upon each partner to the extent of the profits of

that firm which come to his share. The contention of the assessee is that when you are ascertaining the profits earned by a partner of a registered firm the profits can only be ascertained in the manner laid down in s. 23 (5) (*a*) and the liability to tax upon a partner in a registered firm can only arise provided the procedure laid down in s. 23 (5) (*a*) is followed. It is urged that in this particular case Purshottam Laxmidas, which is a registered firm, was assessed, its total income was ascertained, the shares of the partners were ascertained, and the partners were made liable to pay tax on their respective shares in the profits of the firm of Purshottam Laxmidas. That having been done, it was not competent to the Department to add to the income of the assessee an additional amount which represented according to the Department further profits earned by the firm of Purshottam Laxmidas. The contention is that the total income of the firm of Purshottam Laxmidas having been ascertained, the Income Tax Department cannot depart from the ascertainment arrived at of that total income and by adding to the income of the assessee in effect increase the total income of Purshottam Laxmidas.

Now, two views are possible with regard to the interpretation of this section. One view is that sub-s. (5) of s. 23 only deals with the assessment of a firm and when a firm is being assessed the procedure laid down in that sub-section must be followed. There is nothing in sub-s. (5) which prevents the Department from assessing an individual and in the assessment of that individual including partnership profits which did not form part of the total income of the firm when the firm was assessed under s. 23 (5) (*a*). It is also contended that it is open to the Department, without assessing the firm at all, to assess the individual partners, ascertain the profits of the firm, and to tax each individual partner in respect of his share. It is urged that s. 23 (5) is only a machinery laid down by the Income Tax Act for the assessment of registered firms under sub-cl. (*a*) and unregistered firms under sub-cl. (*b*). If the Income Tax Department avails itself of that machinery it must follow the provisions contained in those sub-clauses. But there is no compulsion upon the Department to adopt that machinery. It may ignore it completely, may not assess a firm at all, and may proceed to assess individual partners. It is further urged that even assuming the Department has availed itself of that machinery and has assessed the firm as

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laid down in sub-s. (5), it is still open to the Department to assess individual partners and in assessing individual partners the Department is not bound by the total income of the firm determined by the Department under sub-s. (5). It is pointed out that under s. 3, after it was amended in 1939, a partner of a firm can be charged to tax, and the reason for the amendment was that independently of the firm a partner of the firm can be assessed. On the other hand, it is contended that both under s. 3, which is the charging section, and s. 4, which deals with the total income of an assessee, the charge to tax and the determination of total income is subject to the provisions of the Act, and one of the provisions of the Act is s. 23 (5), and it is said that a person can be charged to tax and his total income can be determined only as laid down, among other provisions of the Act, under s. 23 (5). It is, therefore, urged that as far as partnership profits are concerned, they can only be assessed under s. 23 (5). The only obligation upon an assessee to pay tax on partnership profit arises provided the firm of which he was a partner is assessed under sub-s. (5) and his share is determined.

The contention put forward by the assessee receives considerable support from a decision of the Privy Council in *Seth Badridas Daga and another* v. *Commissioner of Income Tax*[1]. That was a case of a resident and registered firm which had been assessed to tax. Considerable part of the firm's income arose or accrued outside British India and was not brought into or received in British India, and two of the partners contended that they were not bound to include in the total income the whole of their share of the firm's income because they were not 'ordinarily resident' or 'not resident'; and the question that arose for the determination of the Privy Council was whether the contention of the partners was justified, which contention was put forward under the provisions of s. 4 of the Income Tax Act. The veiw taken by the Privy Council was that once the firm was assessed under s. 23 (5) and the income of the partners ascertained, if the firm was a registered firm, the partners were liable to pay tax on their share and it was not open to them to claim any exemption under s. 4 on the ground that they were not 'ordinarily resident' or 'not resident'. Their Lordships rejected the argument put forward on behalf of the assessees that the provisions of s. 4 limiting the liability of persons 'not resident' or 'not ordinarily

[1] (1949) I. T. R. 209.

resident' in British India must be applied universally so as to qualify or even override any subsequent provision in the Act dealing with a particular kind of income which is so framed as to exclude this limitation, and in rejecting this argument their Lordships pointed out that that argument neglected the opening words of s. 4, viz. "subject to the provisions of this Act", and contradicted the principle that the Act must be read as a whole. Then their Lordships go on to say (p. 212):

> "...In their Lordships' view the question in this case is whether the provisions of the Act which deal with partnership income can be reconciled with an intention to exclude from the total income of partners not resident or not ordinarily resident in British India a part of their share of the firm's income, in respect of income accruing to the firm from outside British India."

Therefore, what their Lordships in effect held was that s. 23 (5) dealt with partnership income and the liability to pay on that partnership income could not be limited by any provision contained in s. 4. In that particular case the Privy Council was dealing with the right that the assessees put forward to claim exemption and that right was denied to the assessees by the Privy Council for the reason that their liability to pay tax arose under s. 23 (5) and any right to exemption which may arise under s. 4 could not apply to partnership income which was dealt with under s. 23 (5). This passage is relied upon strongly by Mr. Kolah for the contention that in the present case also the contention of the Department is that the obligation to pay tax on partnership profits is wider and larger than what is provided in s. 23 (5), and according to Mr. Kolah if the Privy Council rejected the right of the assessee to claim exemption under s. 4, equally so must the claim of the Department be rejected to increase the liability and the obligation of the assessee. There is considerable force in this argument, but one or two aspects of the matter must not be overlooked. The Privy Council was considering a case where the registered firm had been assessed and the procedure laid down in s. 23 (5) had been followed and the aliquot share of the partners had been included in their respective assessments, and the partners having been assessed as laid down in s. 23 (5) a claim was put forward for exemption under s. 4. It was on those facts that the Privy Council expressed the opinion to which attention has just been drawn. The Privy Council was not considering the position which is now relied upon by Mr. Kolah. The Privy Council was not considering what the effect in law would be if an assessment was not

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made on the firm and an assesment was made on individual partners, and their Lordships were not called upon to decide the question as to whether the Department was precluded from assessing individual partners otherwise than by the procedure laid down under s. 23 (5).

Therefore, in our opinion, interesting and important as the question is, we do not propose to decide the larger question whether, if a firm is not assessed under s. 23 (5) at all, it is open to the Department to assess individual partners by ascertaining the profits of the firm otherwise than by the machinery laid down by s. 23 (5). We would prefer to limit and restrict our decision to the facts of this present case. The salient feature of the reference before us is that the firm of Purshottam Laxmidas has been assessed, profits have been ascertined, and the shares of the partners have also been ascertained and entered in their individual assessments, and the short and narrow question that arises for our determination is whether it is open to the Income Tax Department, having ascertained the total income of a firm, which in this case happens to be a registered firm, under s. 23 (5), to in effect vary the total income by assessing a partner of that firm on a larger profit of the firm than was ascertained when assessing the firm under s. 23 (5), because undoubtedly if the assessee is to be assessed on the income of Rs. 24,564 as representing the profits of the Purshottam Laxmidas he would be assessed on partnership profits which did not form part of the total income of Purshottam Laxmidas ascertained by the Department under s. 23 (5). It is difficult for us to understand how it is possible for the Department to take up the attitude that having resorted to the machinery provided in law under s. 23 (5), having assessed the registered firm, having determined its total income, it could in the case of the assessment of one of the partners of that registered firm take up the position that the total income of the firm was different from the income which it had itself ascertained and determined. We are conscious of the fact that the principle of estoppel does not apply to decisions of Taxing Authorities, but in coming to this conclusion we are not relying upon the principle of estoppel. We have not here a case where the Taxing Authorities in one assessment have come to one conclusion and come to a different conclusion in a subsequent assessment or assessments. We are dealing with a case of the same assessment, the assessment of the firm for the same accounting year, with regard to the same

income, and with regard to the ascertainment of the same profits. In our opinion it would be totally contrary to the scheme of s. 23 (5) to permit the Department when it assesses the firm to hold that the total income of the firm was "X" and subsequently when assessing the individual partner of the firm to hold that the total income of the firm was "X" plus "Y". That is exactly what the Department has done in this case.

Sir Nusserwanji has relied on a decision of the Calcutta High Court reported in *Neemchand Daga* v. *Commissioner of Income Tax, Bengal*[1]. In that case a Full Bench of the Calcutta High Court laid down that a partner of a registered firm whose profits escaped assessment in part can be assessed under s. 34 of the Income Tax Act in respect of his share of that part, when proceedings under that section against the firm itself have failed for want of jurisdiction and fresh proceeding are time barred, and Sir Nusserwanji says that this is a clear decision showing that even though the firm could not be proceeded against under s. 34, the individual partners were proceeded against in respect of the profits of the firm which had escaped assessment. It is important to note that this decision was given in 1931 before the amendment of the Income Tax Act in 1939 and the position of a registered firm under the law then was very different from the position of a registered firm under the law at present. Under the law then a registered firm was liable to pay tax like any other assessee. The liability to pay tax in respect of the profits of a registered firm was both upon the registered firm and the individual partner. The relief to the individual partner was given by means of a rebate provided for under s. 14 of the old Act. There were no provisions similar to s. 23 (5) and it is in the light of the law as it then was that the observations of the learned Chief Justice of the Calcutta High Court should be read and appreciated. The learned Chief Justice at p. 210 says:

"...I can find nothing in the Act to say that the firm is to be assessed first, still less that the assessment on the firm is to operate as a sort of an estoppel in favour of individual partners."

This would be perfectly true, with respect, in reference to the law with regard to firms and partners under the old Income Tax Act. The liability was conjoint both upon the firm and the assessee. But when we turn to the scheme of the present Act, there is no liability to pay upon the firm at

[1] (1931) 5 I. T. C. 206.

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all and the liability is only upon the partners and that liability is fixed by s. 23 (5). Further, with respect, the question as to what effect should be given to the language of ss. 3 and 4, viz. subject to the provisions of this Act, was also not considered in this decision, and it could not be considered because there were no provisions similar to s. 23 (5) which the Court was called upon to consider. This decision has been followed by the Allahabad High Court in a recent decision reported in *Ratee Ram & Sons, Kanpur* v. *Commissioner of Income-tax*[1]. In that case the firm was not assessed. One of the partners was assessed in one place on his individual share and the other partner was assessed at another place, the two assessments being by two different Income Tax Officers, and the question was whether the fact that one partner had been assessed by one Income Tax Officer debarred the other Income Tax Officer from assessing the other partner at a different place. Sir Nusserwanji relies on this decision for the purpose of pointing out that partners were in fact assessed in this case although the firm had not been assessed and the procedure under s. 23 (5) was not followed. In that particular case the firm was an unregistered firm, and although the learned Judges of the Allahabad High Court have followed the Calcutta decision in *Neemchand Daga* v. *Commissioner of Income-tax, Bengal,*[2] the question which they have considered and which they have decided is not so much the question as to whether a partner was liable to pay tax on partnership profits without the firm being assessed, but the question whether a partnership was liable to pay tax on partnership profits because his other partner had already been assessed on his share of the profits. Therefore, we do not look upon this decision, with respect, as throwing any light on the difficult and debatable question which we have to decide in this reference.

The tenacity of the Income Tax Department to realise tax is proverbial and Sir Nusserwanji has represented in a certain sense that tenacity when he tried to argue that in this particular case s. 23(5) was satisfied and on the facts of this case we should hold that the assessee was assessed to profits of a firm in accordance with the ascertainment of the total income of that firm under s. 23 (5), and Sir Nusseerwanji's argument is that when the firm of Vasantsen Dwarkadas submitted its return its total income was determined at Rs. 62,752 and subsequently reduced to Rs. 32,752, and the share of the assessee

[1] (1931) 5 I. T. C. 206. [2] (1951) 19 I. T. R. 233.

in that firm was Rs. 24,564. Therefore, the total income of Vasantsen Dwarkadas being determined, the procedure under s. 23 (5) was followed and Dwarkadas has no answer to the claim for tax made by the Department. In advancing this argument Sir Nusserwanji unfortunately overlooks what the findings of facts are as recorded in the statement of the case submitted to us. It is perfectly true that the case of the assessee was that Vasantsen Dwarkadas was a firm separate from the firm of Purshottam Laxmidas, and that whereas Purshottam Laxmidas had two partners the firm of Vasantsen Dwarkadas had three partners and he actually applied to have that firm registered. The Income Tax Officer refused to register the firm, and held that Dwarkadas was the sole proprietor of Vasantsen Dwarkadas and Vasantsen Dwarkadas was not a partnership firm. When the matter went to the Appellate Assistant Commissioner, what he held was, as already stated, that the business of Vasantsen Dwarakadas belonged to the firm of Purshottam Laxmidas and Dwarkadas as a partner of Purshottam Laxmidas had a 12 annas share in the firm, and that finding was confirmed by the Tribunal. Therefore, far from there being any finding that any firm of the name of Vasantsen Dwarkadas is in existence, there is a clear finding that the business of Vasantsen Dwarkadas is the business of Purshottam Laxmidas and that there is no separate entity like Vasantsen Dwarkadas and no firm of the name of Vasantsen Dwarkadas which could be assessed under s. 23(5) or whose total income can be ascertained under that section. Therefore, this particular argument is not open to Sir Nusserwanji.

Therefore, we hold that in this particular case, as the firm of Purshottam Laxmidas has already been assessed and its total income ascertained, is was not open to the Department to separately assess the assessee as a partner of the firm of Purshottam Laxmidas on his partnership income which did not form part of the total income of Purshottam Laxmidas as ascertined by the Department under s. 23 (5).

Therefore, the answer we give to the question submitted to us is in the affirmative. Commissioner to pay the costs.

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Answer accordingly.

P. M. P.