## INCOME TAX REFERENCE

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

1952 Oct. 9

THE COMMISSIONER OF EXCESS PROFITS TAX, BOMBAY CITY APPLICANT *v.* MOHONLAL MAGANLAL, RESPONDENT.*

*The Excess Profits Tax Act (XV of 1940), ss. 4, 5 and 10A—Excess profits derived from selling-agency business accruing or arising in Indian States—Selling agency business transferred to a private limited Company with a view to avoiding or reducing liability under the Act—Scope of s. 10A—Applicability of s. 10A to profits falling under 3rd proviso to s. 5 of the Act.*

The assessee was the selling agent of various mills, two of which were situate in Baroda State. The assessee then floated a private limited company on September 12, 1941, with himself and his wife as share-holders. On September 19, 1941, he resigned his office as selling agent of the two Baroda Mills and on that very day the private limited company was appointed the managing agents of the two Mills. On the question whether the Excess Profits Tax Officer could add to the assessee's profits the profits derived from the selling agency business of the Baroda State Mills for the calendar years 1942 onwards.

*Held*, that business started in or transferred to an Indian State by an assessee is not liable to pay Excess Profits Tax for it is a business to which the Act does not apply. There must be a liability upon a business before it is possible to postulate that the assessee has avoided or reduced the liability of that business to pay excess profits tax.

*Held*, therefore, that the Excess Profits Tax Officer cannot tax under s. 10A of the Excess Profits Tax Act a business to which the third proviso to s. 5 of the Act applied.

*Punjabhai Dipchand* v. *The Commissioner of Excess Profits Tax, Bombay Mofussil*,[1] followed.

*Harihar Kesholal* v. *The Commissioner of Income-Tax, U. P. and Ajmer-Merwara*,[2] dissented from.

Facts material to the report are fully set out in the judgment.

At the instance of the applicant the following question was referred to the High Court, viz. "whether in the circumstances of the case could the provisions of Section 10A of the Excess Profits Tax Act be invoked in view of the third proviso to Section 5 of the Act?"

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

*Sir J. B. Kanga* with *D. H. Dwarkadas*, appeared for the respondent.

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* Income Tax Reference No. 13 of 1952.

[1] (1949) 17 I. T. R. 482. [2] (1951) 19 I. T. R. 52.

CHAGLA C. J. The assessee was the selling agent of the Victoria Mills Ltd. and the Jubilee Mills Ltd. He was also the selling agent of the Gaekwar Mills Ltd. and the Navsari Cotton and Silk Mills Ltd. The last two mills were working in the Baroda State. The assessee then floated a private limited company in the name of M. M. Shah Ltd. in the Baroda State on September 12, 1941. Out of 1,000 shares in this private limited company he held 800 shares and his wife held the remaining 200 shares. On September 19, 1941, the assessee resigned his office of selling agent of the two mills situated in Baroda State and this resignation was to take effect from October 1, 1941, and on that very day these two mills appointed M. M. Shah Ltd. to be the selling agents of the mills. The Excess Profits Act Officer while making the excess profits assessment for the chargeable accounting periods, calendar years 1942, 1943, 1944, 1945 and January 1, 1946, to March 31, 1946, added to the assessee's profits the profits derived from the selling agency business of the Baroda State mills. The finding of the department and of the Tribunal was that the assessee transferred the selling agencies to M. M. Shah Ltd. with the main purpose of avoiding or reducing the liability of his business to pay in British India excess profits tax. But the Tribunal came to the conclusion that, in view of the decision of this Court in *Punjabhai Dipchand* v. *Commissioner of Excess Profits Tax*[1] the assessee was not liable to pay tax in respect of the profits made by his business in Baroda State, and the question that is now referred to us at the instance of the Commissioner is,

"Whether in the circumstances of the case, could the provisions of s. 10A of the Excess Profits Tax Act be invoked in view of the third proviso to s. 5 of the Act?"

Turning to the Excess Profits Tax Act it is well settled that the unit which is taxed under the Act is a business, and the charging section is s. 4 which speaks of charge of excess profits tax to any business to which the Act applies, and in order to find out to which business the Act applies, we have got to turn to s. 5 and the third proviso to section 5. Exemption from the operation of the Act is given to a business the whole of the profits of which accrue or arise in a Part B State. Therefore, it cannot be disputed and it is not disputed that looking to sections 4 and 5 only the business of the assessee in Baroda State was exempted from the tax under the Excess Profits Tax Act,

[1] (1949) 17 I. T. R. 482.

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or, in other words, the business was not a business to which the Act applies. What is contended by Sir Nusserwanji on behalf of the Commissioner is that s. 10A overrides the third proviso to s. 5, and it is urged that if an assessee transfers his business in taxable territories to a Part B State with the object and the intention of avoiding or reducing his liability to excess profits tax, then it is open to the Excess Profits Tax Act Officer to ignore that transaction and to consider the profits made by the business in a Part B State as if they were the profits in the taxable territories.

Now, turning to s. 10A, it provides that where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction or transactions was or were effected was the avoidance or reduction of liability to excess profits tax, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions. *Prima facie* it seems difficult to accept the contention that s. 10A can possibly have the effect of extending the applicability of the Act, or, to put it in a different language, to subject a business to tax which is not liable to tax under s. 4 of the Act. It is clear that any business either started by an assessee in a Part B State or transferred to a Part B State from taxable terrritories is not liable to pay excess profits tax because it is a business to which the Act does not apply and which is not subject to tax under s. 4 of the Act. Is any power given to the Excess Profits Tax Officer to make the Act applicable to such a business because in his opinion the main object of the assessee was to avoid or reduce liability to excess profits tax? In our opinion there must be a liability upon a business before it is possible to postulate that the assessee has avoided or reduced the liability of that business to excess profits tax. But if there is no liability at all, if the particular business is exempt from tax, it is not possible to tax that business under the powers given to the Excess Profits Tax Officer under s. 10A of the Act. It is not a business in the taxable territories that the Excess Profits Tax Officer is taxing under his powers under s. 10A. He is really in substance taxing a business the profits of which accrue or arise in a Part B State. Therefore, by the exercise of his powers under s. 10A he is bringing within his purview and

subjecting to taxation the very profits which the Legislature exempted from taxation. Now, the language of s. 10A also does not lend itself to the interpretation for which Sir Nusserwanji is contending. The power given to the officer is to make such adjustments as respects liability to excess profits tax as he considers appropriate. To make the Act applicable to a business when the Legislature has not made it applicable, to make a business liable to tax when the Legislature has exempted it is not to make an adjustment as respects liability to excess profits tax but is to impose a new liability when the Legislature did not thing it proper to impose such a liability. It is impossible to hold that by s. 10A the Legislature intended to confer upon the Excess Profits Tax Officer the power in effect to repeal the third proviso to s. 5, to re-write s. 4, and to make a business, the profits of which accrued or arose in a Part B State, liable to payment of excess profits tax. Sir Nusserwanji has strongly relied on sub-s. (*2*) (*a*) of s. 10A, and that provides that:

> "Without prejudice to the generality of the powers conferred by sub-s. (*1*), the powers conferred thereby extend (*a*) to the charging with excess profits tax of persons who but for the adjustments would not be chargeable with any tax or would not be chargeable to the same extent."

Sir Nusserwanji says that this sub-section gives a power to the Excess Profits Tax Officer to assess, to tax, a business which might not have been liable to pay tax under the provisions of the Act. It is significant that the language used by the Legislature is not to empower Excess Profits Tax Officer to charge a business with Excess Profits Tax Act which was not liable to be charged. It only empowers an officer to charge to excess profits a person who would not be chargeable with any tax or would not be chargeable to the same extent but for his power to make adjustments. Therefore, this can only apply to a person who is liable to pay tax in respect of a business to which the Act applies. It cannot possibly refer to a business which does not come within the scope and ambit of the Act at all.

Now, turning to our decision on which reliance was placed by the Tribunal, Sir Nusserwanji has attempted to distinguish that case from the facts we have to consider in the present reference. Sir Nusserwanji is perhaps right that there were one or two distinguishing features in that case. There was a firm carrying on business in Ahmedabad in piece-goods and that firm had two partners. Then a new firm was started

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at Jorawarnagar in the Wadhwan State, which was an Indian State, and that firm had three partners, and, therefore, in that sense the firm was a new firm which was started in an Indian State and that new firm was never liable to pay excess profits tax in the taxable territories. What Sir Nusserwanji says is that in the present case the assessee was liable to pay excess profits tax in respect of his selling agency business for the two Baroda Mills; in fact he has paid excess profits tax and it is by means of the device adopted by him in starting a limited company in the Baroda State and getting the selling agency business transferred to that State that he has avoided payment of excess profits tax. Therefore, Sir Nusserwanji says that we are not bound by the decision of this Court in *Punjabhai's case.*[1] Although the facts are different and distinguishable when we turn to that decision, the *ratio decidandi* is clear and that *ratio decidandi* applies equally strongly to the facts of the present case. In that case we considered the third proviso to s. 5, and we pointed out at page 485:

> "...There is no liability whatever to pay excess profits tax on profits which accrue in an Indian State. If that be the position, it is impossible to understand how the Excess Profits Tax Officer, by resorting to his powers under s. 10A, could defeat and override the provisions of the Act itself. What the Excess Profits Tax Officer has really done is to have made the profits accruing in an Indian State liable to excess profits tax, although the Legislature has thought fit to exempt those profits from tax."

This is exactly what the Excess Profits Tax Officer has done in this case. It may be that if s. 10A applied to the facts, this was a much stronger case than the case which we were considering in *Punjabhai's case.*[1] But if s. 10A cannot override the third proviso to s. 5, we are not concerned with the particular facts which led the Excess Profits Tax Officer to put s. 10A into operation. Therefore, as far as the principle of the judgment is concerned, it is clear that that principle applies to the facts of this case, and in view of that decision we must come to the same conclusion as we did in that case.

Reliance was placed by Sir Nusserwanji on a recent decision of the Allahabad High Court. That is reported in *Harihar Kesholal* v. *Commissioner of Income Tax.*[2] The reference was heard *ex parte* and the learned Judges of that High Court held that any transaction which is entered into with the specific purpose of avoiding liability to excess profits tax can be avoided by the Excess Profits Tax Officer under section 10A

[1] (1949) 17 I. T. R. 482. [2] (1951) 19 I. T. R. 52.

of the Excess Profits Tax Act irrespective of the circumstances whether the effect of that transaction is to make the Act altogether inapplicable to the business or part of the business or whether it merely reduces the liability to the tax or the rate of the tax. With very great respect to the learned Judges, when we turn to the judgment they assume that there is no doubt that a transaction can be avoided under s. 10A irrespective of the circumstance whether the effect of that transaction is to make the Act altogether inapplicable to the business or part of the business or whether it merely reduces the liability to the tax or the rate of the tax. Not only is there a doubt but there is a very serious doubt whether that is the true interpretation of s. 10A of the Excess Profits Tax Act, and we feel certain that if the matter had been fully argued before the learned Judges of the Allahabad High Court they would have taken a different view of the matter or at least they would have realized that the matter is certainly not so clear as they thought it was.

The result, therefore, is that we must answer the question submitted to us in the negative. The Commissioner to pay the costs.

Attorney for applicant: *N. K. Petigara.*

Attorneys for respondent: *Kanga and Co.*

*Answer accordingly.*

P. M. P.

## INCOME TAX REFERENCE

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

GOVINDRAM RAMNATH AND CO. APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

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*Indian Income-tax Act (XI of 1922), ss. 10 (2) (xv), 12A—Managing agency commission shared with third party—Claim under s. 12A—Declaration under s. 12A—Whether such declaration made and acted upon for a year endures for subsequent years—Whether commission shared with others can be claimed as permissible deduction under s. 10 (2) (xv)—If so when—Appellate Assistant Commissioner's power to refer the matter back to the Income-tax Officer in case of delay in filing such declaration in proper case.*

The assessment for each year is self-contained and a declaration once made and acted upon by the Income-Tax Officer does not endure for the benefit of the assessee in subsequent years. Therefore, an assessee who

* Income Tax Reference No. 10 of 1952.