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.*

1952 *Oct.* 10

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.

1952

GOVINDRAM RAMNATH v. COMMISSIONER OF INCOME-TAX BOMBAY

Chagla C. J.

wants to claim deduction under s. 12A of the Indian Income-tax Act, 1922 in respect of the amount of the managing agency commission shared by him with a third party or parties must file a declaration as required by that section every year for the purpose of every assessment.

In re *Govindram Seksaria*,[1] referred to.

Such a declaration however must be filed before the assessment is completed though in a proper case the Appellate Assistant Commissioner, when he is satisfied that a ground is made out for condonation of delay, has the power to refer the matter back to the Income-tax Officer for taking into consideration the declaration filed after the assessment is completed and then assessing the assessee.

If the assessee wants to claim that the amount of the managing agency commission shared by him with third parties should be allowed as permissible deduction under s. 10 (*2*) (*xv*) of the Act, he would have to prove that it was for the purpose of his business or in order to help or assist his business that he had to part with a portion of his commission and it is only then that he could possibly make a claim under s. 10 (*2*) (*xv*).

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

At the instance of the applicant, the following questions were referred to the High Court—

"(1) Whether the declaration required to be filed under s. 12A of the Indian Income-tax Act has to be filed at the time of each assessment or whether a declaration filed at the time of one assessment holds good for subsequent assessments?

(*ii*) Whether in respect of the assessment for the year 1944-45, the Appellate Assistant Commissioner on appeal could take into consideration the declaration filed before the Income-tax Officer after the assessment for that year was completed and give relief to the assessee firm"?

Sir J. B. Kanga with *M. M. Jhavery*, for the applicant.

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

CHAGLA C. J. The question that arises in this reference is as to the true construction of s. 12A of the Income-tax Act. The assessee is a firm and in the relevant years of account it acted as the managing agents of Seksaria Sugar Mills Ltd. The assessee firm entered into an agreement on March 22, 1934, with one Mirzamull Didwania and Mahadeo Didwania and agreed to give them 2 annas share in the managing agency commission earned by the assessee firm. On the same date the assessee firm entered into another agreement with Hiralal Rungta and Ramsarup Batwal agreeing to pay to these two persons also two annas share in the managing agency commission. Ramsarup was adjudged insolvent in 1939 and on

[1] (1943) 1 I. T. R. 104.

September 19, 1942, the assessee firm entered into another agreement with Hiralal agreeing to give him 1 anna instead of 2 annas share jointly to Hiralal and Ramsarup. The assessee firm was assessed in Bombay for the first time in 1942-43 and no claim was made by the assessee firm under s. 12A. The claim was made under s. 12A in the assessment year 1943-44 and a proper declaration as required by s. 12A was filed. A claim was also made for the assessment year 1944-45. The assessment of that year was completed on the July 29, 1948, and the declaration under s. 12A was filed on August 20, 1948. In the subsequent years no declaration was filed, and the question is whether the assessee firm having filed a declaration for the assessment year 1943-44 is entitled to claim exemption in respect of the share of the managing agency commission given by them to other parties without filing fresh declaration and on the strength of the original declaration filed for the year 1943-44.

Turning to s. 12A, it provides that "where a managing agent of a company is liable under an agreement made for adequate consideration to share managing agency commission with a third party or parties, the said agent and the said party or parties shall file a declaration showing the proportion in which such commission is shared between them, and on proof to the satisfaction of the Income-tax Officer of the facts contained in such declaration such agent and each such party shall be chargeable only on the share to which such agent or party is entitled under the agreement." In this case the Tribunal has found that the agreement was made for adequate consideration. The only question that arises is the question of filing a declaration required by this section. It is contended by Sir Jamshedji on behalf of the assessee firm that section does not lay down that the declaration has got to be filed every year by the assessee. Once a declaration is filed it would be open to the Income-tax Officer to ask for proof as to the statements made in the declaration at any time subsequent to the filing of the declaration, but here is no obligation whatever cast upon the assessee to file a declaration every year for the purpose of every assessment. It is clear on the language of the section that the declaration has to be filed before the assessment is completed because the Income-tax Officer has got to be satisfied of the facts contained in the declaration. But what is contended is that the declaration having been filed in time for the assessment year 1943-44, it was not necessary for the assessee to file it again with regard

1952

GOVINDRAM RAMNATH v. COMMISSIONER OF INCOME-TAX BOMBAY

Chagla C. J.

to the assessment year 1944-45 and the subsequent assessment years. If the proposition is accepted that an assessment for each year is self-contained, then it is with regard to each and every assessment that the assessee has to satisfy the Income-tax Officer that he is sharing the managing agency commission with a third party or parties. A declaration once made and acted upon by the Income-tax Officer cannot endure for the benefit of the assessee in subsequent years of assessment. Every assessment being self-contained, the declaration lapses with the completion of the assessment, and if the assessee again desires to have the benefit of s. 12A he must apply for it in the manner laid down in s. 12A. It was suggested by Sir Jamshedji that if there is an agreement under which there is a liability upon the assessee to share the commission for a certain number of years, it ought to be sufficient for the assessee to refer to such an agreement in the declaration and to file the agreement, and it would be unnecessary in subsequent years again to rely on the same agreement which would be in force. But we feel that to accept the interpretation suggested by Sir Jamshedji may lead to many serious practical difficulties. Many agreements to share commission do not lay down a clear or absolute obligation upon the managing agent to share his commission. The right to share may be conditional upon the sharer carrying out certain obligations, and every time a difficult question would arise whether an agreement filed with a declaration covered clearly an obligation on the part of the assessee to share the commission not only during the year of assessment but also in subsequent years. In this very case the agreement to share is conditional, conditional upon the parties who share the commission holding shares of a certain value in the company. Further, the language used by the Legislature also leads one to the conclusion that the intention was to file a declaration in respect of every assessment, because what the declaration has to show is the proportion in which the commission is shared between the assessee and the sharers, and then when the Income-tax Officer is satisfied on proof of the facts contained in the declaration the managing agent and each sharer shall be chargeable only on the share to which such agent or party is entitled under the agreement. Therefore, the assessee has got to satisfy the Income-tax Officer of the proportion in which the commission is shared between him and the sharer, and it seems that he must satisfy the Income-tax Officer with regard to this proportion each time he claims an

exemption and not generally with regard to future assessment years.

Support is lent to this argument also by the view taken by our Court on a construction of s. 43. In that case there is an obligation cast upon the Income-tax Officer to cause a notice to be served of his intention of treating a person as the agent of a non-resident person when he wants to hold the person liable as the agent of the non-resident for the purposes of the Act. Section 43 does not provide that the notice has got to be served periodically, and yet our Court in *Govindram Seksaria, In re.*,[1] held that the notice must be served in respect of every assessment and that the notice once served cannot hold good for subsequent years. In construing this section Mr. Justice Kania as he then was pointed out that the assessment for each year is self-contained and, therefore, the contention that once a notice is served on the party and he is held to be an agent such decision is good for all times unless the party himself moves and takes steps to get that decision set aside, is not correct. Section 43 dealt with the obligation of the Income-tax Officer when he sought to impose a liability upon a person. Section 12A deals with the right of the assessee to claim a certain exemption given to him under the provisions of that section. If every assessment is self-contained when we are considering the obligation of the Income-tax Officer, it must equally be self-contained when we are considering the rights of the assessee. The assessee must claim whatever right he is entitled to in respect of each assessment and the right given under s. 12A is that he is exempted from paying tax on that portion of the commission which he has earned which he has shared with a person under an agreement for adequate consideration.

Therefore, in our opinion, the Tribunal was right in the view that it took that the declaration filed by the assessee firm for the assessment year 1943-44 did not endure for subsequent years.

We should like to say a word about the declaration filed by the assessee firm for the year 1944-45. As already pointed out, that declaration was out of time by about 21 days. In our opinion the Appellate Assistant Commissioner on appeal could undoubtedly not have taken into consideration that declaration because it was out of time, but he could have sent the matter back to the Income-tax Officer and asked him to assess

[1] (1943) I. T. R. 104.

1952

GOVINDRAM RAMNATH v. COMMISSIONER OF INCOME-TAX BOMBAY

Chagla C. J.

the assessee after taking into consideration that declaration. It is difficult to understand why the Appellate Assistant Commissioner did not follow this procedure. All that s. 12A requires is that the declaration must be filed before the assessment is completed. Assuming the assessment is completed and the declaration is filed thereafter, there is nothing to prevent, in proper cases, the Appellate Assistant Commissioner from asking the Income-tax Officer to take the declaration into consideration and then assess the assessee. The Appellate Assistant Commissioner himself cannot consider the declaration because s. 12A requires the Income-tax Officer to be satisfied with regard to the proof of the facts contained in the declaration. We do not say that in every case where there is delay in filing the declaration the Appellate Assistant Commissioner should send the matter back to the Income-tax Officer. But if the Appellate Assistant Commissioner is satisfied that a ground is made out for condonation of the delay, he has certainly the power to refer the matter back to the Income-tax Officer. In this particular case, considering that the facts are not disputed and the agreement is held to be a genuine agreement for adequate consideration, we hope that the Income-tax Commissioner would take into consideration the declaration filed by the assessee and would consider the desirability of giving the necessity relief to the assessee firm.

A notice of motion has been taken out by the assessee firm to raise a further question which they say arises out of the order of the Tribunal, and the further question suggested is that the amount shared by the assessee firm with other parties of the commission received by it should be allowed as a permissible deduction under s. 10 (2) (*xv*). Sir Jamshedji says that in law even though the Legislature has enacted s. 12A which deals with the specific case of managing agency commission being shared by a managing agent, even so the assessee firm is not precluded from applying for the necessary relief under s. 10 (2) (*xv*), and that raised an interesting question. But in our opinion it is unnecessary to raise that question or to decide it, because on the facts the Tribunal has held that s. 10 (2) (*xv*) has no application. The Tribunal has pointed out that all that the agreement shows is that there was a certain consideration for the assessee sharing the managing agency commission and the consideration was that the sharer was to have bought shares of the value of Rs. 1,25,000 of the Seksaria Sugar Mills Ltd. and to have

retained, throughout the continuance of this agreement, shares of the value of Rs. 10,000. The right of the sharer to receive his share was conditional upon holding these shares of Rs. 10,000. But the Tribunal points out, and in our opinion rightly, that the mere fact that a managing agent agrees to share his commission for a consideration is not sufficient proof of the fact that the commission was shared wholly or exclusively for the purposes of the assessee's business. Something much more would have to be proved than that. The assessee would have to prove that it was for the purpose of his business or in order to help or assist his business that he had to part with a portion of his commission, and it is only then that he could possibly make a claim under s. 10 (2) (*xv*). The only evidence before the Tribunal in this case was the agreement on which the assessee firm relied and the agreement merely showed the consideration for which the commission was shared. But, as we said before, the mere fact that there is consideration for sharing the managing agency commission is not sufficient to lead to the inference that the commission was shared exclusively and wholly for the purposes of the assessee's business. The Tribunal has taken the view that on that decision no question of law arises and that the decision turns purely on appreciation of evidence and is nothing more than a decision on question of fact. We agree with the view taken by the Tribunal and, therefore, in our opinion no question of law arises out of the decision of the Tribunal.

The result is that the answer to the first question submitted to us is, "for each assessment". The answer to the second question is: "See Judgment". Assessee to pay the costs. Notice of motion dismissed with costs.

Attorneys for appellant: *Payne & Co.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.