INCOME-TAX REFERENCE

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

1953 March 13

MANEKLAL CHUNILAL & SONS LTD., APPLICANTS *v.* THE COMMISSIONER OF INCOME TAX (CENTRAL) BOMBAY, RESPONDENT.*

Indian Income-tax Act, (XI of 1922), s. 26 (2): ss. 23, 34—Assessee company succeeding to another not in year of account but subsequently—Liability of successor for income of predecessor in year of account which has escaped assessment—Applicability of s. 26 (2) as it stood before amendment of March 1939—Amendment of s. 26 (2) after issue of notice under s. 34 but before assessment order—Whether amended section applies—Making of assessment—meaning of.

M. C. was carrying on business as an individual and was assessed on June 14, 1937 for the year 1937-38, the previous year being Samvat year 1992 which ended on November 14, 1936. On September 16, 1937 M. C. transferred his business to M. C. Sons & Ltd., a private limited company. After the original assessment for the year 1937-38, the Income-tax Officer in consequence of certain information that the income of M. C. had escaped assessment issued a notice under s. 34 of the Indian Income-tax Act, 1922, against the company as successor to M. C. on March 14, 1939. A further notice under s. 22 (4) of the Act was also issued against the company to produce certain books of account. On the failure of the assessee company to produce the accounts, the Income-tax Officer made a best judgment assessment under s. 23 (4) of the Act, on March 5, 1942.

Section 26 (2) of the Act was amended on March 31, 1939. The contention of the assessee company was that as at the date of the passing of the order of assessment s. 26 (2) as amended was in force, its case was governed by the amended section and therefore the assessee company was not liable.

Held, that the time of making an assessment is not that specific point of time when the order of assessment is made but the whole period during which the assessment is being made. Making an assessment in this context does not merely mean passing an order of assessment but it means initiating proceedings necessary for making an assessment and it covers the whole period during which the assessment is being made.

Held, therefore, that as in this case process of assessment had begun on March 14, 1939, by issue of notice under s. 34 of the Act, s. 26 (2) as it stood before the amendment applied.

Maharajadhiraj of Darbhanga v. *The Commissioner of Income-tax, Bihar and Orissa,*[1] followed.

Chattman v. *Commissioner of Income-tax, Bihar*[2], *Seth Badridas Daga* v. *Commissioner of Income-tax, Central and United Provinces,*[3] and *Krishna Hydraulic Press Ltd.* v. *Commissioner of Income-tax,*[4] referred to.

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* Income-tax Reference No. 39 of 1952.

(1) [1934] 2 I. T. R. 345 (P.C.). (2) [1947] 15 I. T. R. 302.
(3) [1949] 17 I. T. R. 209. (4) (1937) 5 I. T. R. 277.

On the contention that the assessee company was not liable as it had not succeeded to M. C. in the year of account viz. S. Y. 1992 but subsequently,

Held, as the interpretation of s. 26 (2) as it stood before the amendment of March 31, 1939 was not *res integra* and following the decision of the special Bench of the Madras High Court in '*Commissioner of Income-tax, Madras* v. *Nachel Achi.*[1]

That the assessee company was liable to be assessed for the Samvat year 1992 though it did not succeed to M. C. in that year but subsequently.

Commissioner of Income-tax, Madras v. *Nachel Achi*,[1] followed.

Facts material to this report appear in the judgment.

At the instance of the applicants the following question was referred to the High Court:—

"Whether on the facts and circumstances of the case there was material to hold that the assessee company was prevented by sufficient cause from complying with the terms of the notices issued under s. 22 (4) of the Act?†

N. A Palkhivala with *R. J. Kolah*, for the applicants.

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

Chagla C. J. The assessee is a private limited company and has succeeded to the business of one Maneklal Chunilal. The assessment on the income of Maneklal Chunilal was made on June 14, 1937, and the assessment was for the accounting Samvat year 1992. That accounting year closed on November 14, 1936. On March 14, 1939, the Income-tax Officer served a notice under s. 34 upon the assessee company and a further notice was served under s. 22 (4) to produce certain books of account. The assessee company failed to produce the accounts and thereupon the Income-tax Officer made a best judgment assessment under s. 23 (4). An appeal was preferred to the Appellate Assistant Commissioner and finally to the Tribunal who confirmed the assessment, and the question that arises before us is whether the assessee company was liable to be assessed in respect of the income of Maneklal Chunilal which escaped assessment.

The point which has been urged before us by Mr. Palkhiwala is that the assessee company succeeded to Maneklal Chunilal on September 16, 1937, and proceedings under s. 34

† The High Court reframed the question by inserting the word "not" before the word "prevented."

(1) [1933] 1 I. T. R. 277.

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have been taken in respect of the assessment for the Samvat year 1992 and inasmuch as the assessee company had not succeeded to Maneklal Chunilal in the Samvat year 1992 but succeeded to him subsequently, the income-tax anthorities are not entitled to proceed against the successor in respect of the income of Maneklal Chunilal which escaped assessment.

The answer to this question depends upon first whether s. 26 (*2*) before it was amended applies or the amended section applies. Section 26 (*2*) was amended on March 31, 1939, and it is common ground that if the amended section applies then the assessee company's contention must be upheld and the company is not liable to pay assessment. If, on the other hand, the old section applies, then we have to consider whether on a true construction of that section the assessee company is liable.

Turning to the point which was first urged by Mr. Palkhiwala that even if the old section applies, the assessee company is not liable, it seems to us that there is considerable force in the contention put forward by Mr. Palkhiwala. Sub-section (*2*) of s. 26 before its amendment ran as follows:

> "Where, at the time of making an assessment under s. 28, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

Two interpretations of this sub-section which are possible, and which have been urged before us, attach importance and lay emphasis upon two points of time mentioned in this sub-section. The interpretation put forward by the Commissioner attaches importance to the point of time specified in the opening words of the sub-section, viz., "Where, at the time of making an assessment under s. 23" and the interpretation put forward by Mr. Palkhiwala attaches importance to the point of time suggested at the end of the sub-section, viz.,

> "throughout the previous year and as if he had received the whole of the profits for that year."

If we were construing this section as *res integra* we would have found great difficulty in accepting the Commissioner's contention and rejecting what has been put forward before us by Mr. Palkhiwala. It seems to us that the expression "as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the

whole of the profits for that year" are the key words of that sub-section. These words clearly, in our opinion, indicate that in order to make a successor, liable, he must have succeeded in the accounting year for which the assessment is being made. It is precisely because of this that the Legislature has used the expression "as if he had been carrying on the business, profession or vocation throughout the previous year" which means that even if he has not been carrying on the business throughout the year but only for a part of the year, he is liable to assessment, and again the words "as if he had received the whole of the profits for that year" are used which mean that even though he has not received the whole of the profits for that year but if he has received only a part of the profits for that year, he is liable to be assessed as a successor. If the Commissioner's interpretation were to be given effect to, it will lead to some very startling results. A businessman may not have his assessment completed for many years, and if the assessment is not completed his successor may become liable on this interpretation to pay tax for years together when he had nothing whatever to do with the business and when he had succeeded to the business long after his predecessor became liable to pay the tax; and as Mr. Palkhiwala rightly points out, no discretion is left under sub-s. (*2*) of section 23 upon the taxing authorities. The assessment has to be made on the successor. It would be difficult to understand why the Legislature should have intended to penalise a *bona fide* successor for the delay on the part either of his predecessor assessee or of the taxing authorities in completing the assessment. But unfortunately the interpretation of sub-s. (*2*) is not *res integra.*

A special Bench of the Madras High Court has taken the view favourable to the Commissioner and contrary to the view suggested by Mr. Palkhiwala and in conformity with the uniform policy which we have laid down in income-tax matters, whatever our own view may be, we must accept the view taken by another High Court on the interpretation of the section of a Statute which is an all India Statue. The decision to which we refer is *Commissioner of Income-tax* v. *Nachal Achi*[1]. The point directly arose for the consideration of Beasley, C. J. and Cornish and Bardswell, JJ. and at page 283 the judgment states:

[1] (1933) I. T. R. 277.

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"The Act provides for an assessment on the date on which the person carrying on business has been succeeded by another person in which case that other person is to be assessed as if he or she had been carrying on the business during the year of account and as if he or she had received the whole of the profits of that year of account. In this section the only important times are the date of the assessment and the year of account."

and in this particular case the assessee was assessed because in the course of assessment the Income-tax Officer found that she was carrying on the business of the husband although the assessment was for the period when the widow had not succeeded to the business of her husband.

Therefore, if s. 26 (2) applies, then it is clear that the assessee company would be liable to be assessed although it had not succeeded to Maneklal Chunilal in the year of account. But the argument is still open to Mr. Palkhiwala that it is not the old s. 26 (2) that applies but the amended section. Now, on this point, there is a decision of the Calcutta High Court reported in *Krishna Hydraulic Press Ltd.* v. *Commissioner of Income-tax*[1] and the Calcutta High Court held that the assessment was to be made as if it were one which was effected in the year in which escapement had been effected, viz., 1938-39, and as at that time the provisions of the Amendment Act were not in force, the income-tax authorities were right in making the assessment on the basis of s. 26 (2) as it stood before it was amended by the Act of 1939. Therefore, if this view of the Calcutta High Court was correct, and inasmuch as in this case the income had escaped for the Samvat year 1992, the question that we have to consider would be what law was in force during that year, and as admittedly in the Samvat year 1922 the law which was in force was the old s. 26 (2) and not the amended s. 26 (2), the assessee's rights and obligations would be governed by the old section and not the amended section. With respect, we find it very difficult to accept this view expressed by the Calcutta High Court. We have looked at the judgment and we find that the Calcutta High Court has only considered the provisions of s. 34 and has not considered s. 26 (2) in order to decide which law was applicable, because if at the time of making an assessment under s. 23, s. 26 (2) was not in force at all, it is difficult to understand how that section can be applied in order to impose a liability upon the assessee company, because if at the time of making the assessment the amended section was in force, and if that

[1] (1943) 11 I. T. R. 504.

amended section did not cast any liability upon the assessee company, then the taxing authorities would have no power to fix the assessee company with this vicarious liability of his predecessor. But fortunately it is not necessary for us expressly to dissent from the decision of the Calcutta High Court because in this case, as we will presently point out, we have come to the conclusion that at the time of making the assessment the old section was in force and, therefore, the assessee company could be made liable under the provisions of s. 26 (*2*) before its amendment.

As I have already pointed out, the notice which initiated the assessment proceedings was given on the March 14, 1939, and s. 26 (*2*) was only amended on March 31, 1939, and the contention that has been put forward by Mr. Palkhiwala is that the relevant date which we have to consider for the purpose of sub-s. (*2*) is not the date of giving the notice but the date of making the assessment; and Mr. Palkhiwala says that the date of making the assessment is when the order of assessment was made which in this case was March 5, 1942. If on that date s. 26 (*2*) was amended, then the taxing authorities had no power to impose this liability upon the assessee company. At first impression there seems to be considerable force in Mr. Palkhiwala's argument. If making an assessment means actually making an order of assessment, then undoubtedly at that date s. 26 (*2*) had been amended. But, in our opinion, the time of making an assessment is not that specific point of time when the order of assessment is made. Making an assessment in this context does not merely mean passing an order of assessment but it means initiating proceedings necessary for making an assessment and it covers the whole period during which assessment is being made. Therefore in this particular case the relevant point of time is when the notice under s. 34 was given on March 14, 1939, which was the time of making the assessment upon the assessee company. It was at that point of time that it had to be determined whether the assessee company was liable, whether it was the successor to Maneklal Chunilal. It would make the machinery of the Income Tax Act unworkable if effect was to be given to the construction of this Sub-section suggested by Mr. Palkhiwala. If the taxing authorities had to determine who was liable under s. 26 (*2*) only at the precise moment when the Income Tax Officer makes the order of assessment, then it is difficult to understand how a notice under s. 34 could be served at all be-

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cause the notice under s. 34 has got to be served upon a person liable to pay tax and the liability can only be determined from the point of view of s. 26 (2). Again, it may be that one person may be liable at the date when the notice was given under s. 34 and another person may become liable at the date when final order of assessment was made. It would be impossible to expect the taxing authorities to know at the precise moment when the assessment order was made as to who was the successor of the assessee whose income they were assessing.

Mr. Palkhiwala has referred us to a decision of the Privy Council in *Badridas Daga* v. *Commissioner of Income Tax*[1]. The Privy Council makes it clear at page 211 that the word "assessment" and the word "assessee" are used in different places in the Income Tax Act with different meanings, and again in another Privy Council case *Chatturam* v. *Commissioner of Income Tax, Bihar*[3] the Privy Council says at page 307 that the income tax assessment proceedings commence with the issue of a notice and to set all doubts at rest Mr. Palkhiwala has with his usual fairness drawn our attention to another Privy Council case which directly concludes the matter as far as this question of construction is concerned. That case is *Maharajadhiraj of Darbhanga* v. *Commissioner of Income -tax, Bihar.*[3] In that case before the death of the Maharaja of Darbhanga on July 3, 1929, served upon him under s. 22 (2) of the Income Tax Act to furnish a return of his income for the year 1927-28. The Commissioner held that the Maharaja's son was taxable in respect of this income under s. 26 (2) as he had succeeded to the business of his father. The Privy Council held that the son was rightly assessed as he had succeeded to the business that was being carried on by his father and had carried it on himself after his father's death. Their Lordships were called upon to construe the very words of s. 26 (2) which we are now called upon to interpret and their Lordships observed (p. 349):

"On that view of "assessment" it seems to their Lordships that where a notice has been given under s. 22 (2) to a person to furnish within the time specified a return in the prescribed form the process of assessment has begun and continues until some order of assessment is made. If that be so, the words "at the time of making the assessment" mean in the course of the process of assessment and inasmuch as in the present case a notice was duly served on the late Maharajadhiraj the process of assessment had begun and it would be impossible to say that the event had not occurred which enabled the tax officer to find, if the facts justified the finding, that the person on whom this notice had been served had

(1) (1949) 17 I. T. R. 209. (2) (1947) 15 I. T. R. 302.
(3) (1934) 2 I. T. R. 245.

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carried on a business and had been succeeded in such capacity by another person."

In our opinion, therefore, the assessee company was liable to be assessed in respect of the escaped income of Maneklal Chunilal.

The contention raised by the assessee company was that it was prevented by sufficient cause from complying with the notice issued under s. 22 (*4*) and that therefore the best judgment assessment passed by the Income Tax Officer was not a proper assessment. The sufficient cause urged by the assessee company was that it was not liable as the successor of Maneklal Chunilal to pay the tax on the escaped income of Maneklal Chunilal. It is because of this that the Tribunal has raised the question in the form in which it has done.

The question framed by the Tribunal is obviously not appropriate because the question as framed by the Tribunal suggests as if any authority had held that the assessee company was prevented by sufficient cause from complying with the terms of the notice issued under s. 22 (*4*). In fact what was held was that he was not so prevented. Therefore, we will insert the word "not" before the word "prevented", and after re-framing the question answer it in the affirmative. The assessee to pay the costs.

Notice of motion dismissed. No order as to costs.

Attorneys for applicants: *Ardeshir, Hormusji Dinshaw & Co.*

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

Answer accordingly.

P. M. P.

APPEAL FROM ORIGINAL CIVIL

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

KALURAM SITARAM, A FIRM, APPELLANTS (ORIGINAL PLAINTIFFS) v. THE DOMINION OF INDIA RESPONDENTS (ORIGINAL DEFENDANTS).*

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Indian Railways Act (IX of 1890), ss. 72 (1), s. 75 (1)—Second Schedule—Risk-note in form 'x'—Consignment of bare silver bars not contained in packet or parcel—Such risk-note signed by consignors—Silver bars being articles specified in Second Schedule of value exceeding Rs. 300—Percentage on value as required by s. 75 (1) not paid—Whether s. 75 (1) applied—Whether risk-note in form 'x' applied only to cases falling within s. 75 (1).

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* Appeal No. 77 of 1952: Suit No. 1671 of 1948.