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his successor is authorised even under O. XVIII, r. 15, of the Civil Procedure Code. However, it is not necessary to pursue this point any further since Mr. K. T. Desai did not seriously contend that this Bye-law was *ultra vires*. Besides, the decision on this point would be a matter of academic importance in view of our conclusion that the dispute as to the existence of the contract itself is not covered by the arbitration agreement in the present case and the award made by the arbitrators is invalid for that reason.

In the result, the appeal must be allowed, the order passed by the learned City Civil Court Judge reversed, and the award made against the appellant set aside with costs throughout.

Appeal allowed,

G. N. V.

INCOME-TAX REFERENCE

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

1955 *Sep. 22*

M. K. KIRTIKAR, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 25 (4)—Finance Department Notification No. 878F dated March 21, 1922 as amended by Notification No. 8 dated March 24, 1923—Assessee employee of registered firm receiving certain amount as commission—Two-thirds of such amount disallowed as not permissible deduction by Taxing Department in assessment of such firm—Concern of such firm taken over by private limited company—Claim for exemption in respect of Income-tax and Super-tax under s. 25 (4) allowed to such firm—Assessee's claim for exemption from tax under Notification in respect of such two-third commission—Whether assessee entitled to relief?

In its very nature an exemption from tax can only be claimed provided there is a liability to pay tax. It is only when an income is charged to tax under the provisions of the Indian Income-tax Act, 1922 that the question arises whether under any other provisions of the Act the income is liable to be exempted from payment of tax. The mere fact, therefore, that an exemption was granted to the assessee does not mean that the income in respect of which exemption was granted was not assessed or charged to tax.

The very basis of s. 25 (4) of the Act is that the assessee paid tax twice when the new Income-Tax Act was introduced in 1919, and the exemption to which an assessee is entitled under Notification No. 878F, dated March 21, 1922, as amended, is on the basis that he is deemed to have paid tax for the year in question in the past. Therefore, in the eye of the law, although he gets exemption, he having paid tax on the whole of this income the law does not levy double tax on such income.

Assessment under the Act involves four stages, viz. (i) 'assessment', in its narrower sense, which is the mode of computation (ii) 'charge', which is the liability to pay tax under the Act (iii) 'levy' which is the proce-

*Income-tax Reference No. 13 of 1955

dure laid down for the realisation of the tax, and (iv) 'payment' of the tax. There is thus a clear distinction between 'charge' and 'levy' of tax.

M. K. K., assessee, was an employee of D. D. & Co., a registered firm, and received from the firm commission at the rate of 1 per cent on the turnover of the firm in its colour department. Apart from assessee two other employees received similar commission and the total commission paid to all the employees in s. y. 2000 came to Rs. 84.450. In the assessment of the firm for the assessment year 1945-46 a sum of Rs. 56,360 out of Rs. 84,540 was disallowed as not being permissible deduction and thus the firm was charged to tax *inter alia*, in respect of Rs. 56,360.

The firm was taken over as a going concern by a private limited company in the beginning of s. y. 2001 and as the assessment for s. y. 2000 was the last assessment of the firm, on the application of the firm for exemption from Income-tax and Super-tax under s. 25 (4) of the Act, the whole of the income of the firm for that year including the said sum of Rs. 56,360 was exempted from Income-tax and Super-tax.

The assessee in his income-tax return for the assessment year 1945-46, the year of account being s. y. 2000, included in his income the whole commission received by him from the firm in that year but claimed exemption from Income-tax and Super-tax on the basis of the Finance Department Notification No. 878F dated March 21, 1922 as amended by Notification No. 8 dated March 24, 1923 in respect of Rs. 18,787 (being 1/3 of Rs. 56,360) on the ground that the same was charged to tax in the assessment of the firm. The asessee's claim was disallowed by the Department and the Income-Tax Appellate Tribunal. On reference,

Held, that as the order of assessment of the firm stood, the firm was assessed and charged to tax in respect of its total income for s. y. 2000 which included the sum of Rs. 56,360.

Held, therefore, that the assessee was entitled to relief in respect of Income-tax and Super-tax on Rs. 18,787 by reason of the provisions of the said Notification.

Facts appear in the Judgment.

At the instance of the assessee the following qustion was referred to the High Court of Judicature at Bombay:—

"Whether the assessee was entitled to the relief granted by the Notification referred to above?"

R. J. Kolah, for the Applicant.

M. P. Amin, Advocate General for the Respondent.

Chagla C. J.—The assessee was an employee of Dadajee Dhakjee & Co. in the assessment year 1945-46, the previous year being Samvat Year 2000, from October 30, 1943 to October 17, 1944, and in this year of account he received from his employers commission at the rate of 1 per cent on the turnover of the the Company in its colour department. Apart from the assessee, two other employees also received similar commission and the total commission came to Rs. 84,540. Dadajee Dhakjee & Co. were assessed to tax in the assessment year 1945-46 and in the assessment order out of Rs. 84,540 paid as commission to its employees by the company Rs. 56,360 was disallowed. The total income of the company was assessed at Rs. 4,11,084. In other words, as the assessment order stood, Dadajee Dhackjee & Co. was charged to tax in respect of Rs. 56,360 although it had paid

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that amount as commission, because that was not considered as a permissible deduction. The assessee therefore in his own assessment claimed exemption from tax on Rs. 18,787, which represented his one-third share of Rs. 56,360, and he made this claim on the basis of the notification issued by the Finance Department on March 21, 1922. That notification exempts from tax sums received by an assessee on account of salary, bonus, commission or other remuneration for services rendered or in lieu of interest on money advanced to a person for the purposes of business, provided two conditions are satisfied, and the two conditions are that the sums are paid out of the profits of such business and the profits of the business have been assessed and charged to income-tax.

Dadajee Dhackjee & Co. was taken over as a going concern with its assets and liabilities by Messrs. Dadajee Dhackjee & Co. Ltd. in the beginning of Samvat Year 2001 and the company made an application for exemption from tax under s. 25 (4) and the exemption was granted by the Income Tax Officer. The result was that the company did not pay any tax on its total income which was assessed at Rs. 4,11,084. It was, therefore, contended by the department that inasmuch as no tax was paid on the sum of Rs. 56,360, the assessee was liable to pay tax on his one-third share of Rs. 18,787, he was not entitled to exemption and he did not come within the ambit of the Finance Department notification. What was alleged was that the principle underlying the notification was that if the employer paid tax on commission paid to the employee then the employee should not be taxed. In other words, tax should not be paid twice on the same commission, but as in this case the employer did not pay any tax on the commission received by the employee, viz., Rs. 18,787, the employee was liable to tax. This contention was accepted by the Tribunal and the assessee has come on this reference.

The Advocate General has argued that both the conditions laid down in the Finance Department notification are not satisfied. He points out that the commission was paid on the turnover of the employer company and not out of profits. That is clearly an untenable contention. The mode of computation of the commission of the assessee was undoubtedly 1 per cent of the turnover. What the Finance Department notification requires is that the source out of which this commission is paid is the profit of the employer and there is no finding before us that in fact this commission was not paid out of the profits. One has only to look at the assessment order to be satisfied that this commission in fact was paid out of the profits. As we pointed out the total income under the business head by the Company is Rs. 4,11,084. The second contention urged by the Advocate

General is that although the income tax may have been assessed it was not charged and therefore the Company is not entitled to the exemption. Now, what is the meaning of the expression "charged"? Section 3 of the Income Tax Act is the charging section, and a charging section in a fiscal statute means that by that section the subject becomes liable to pay tax referred to in that section. The liability to pay tax can only arise if the income or profits of the subject are charged to tax under the relevant provisions of the law. But the contention of the Advocate General is that "charged" means levying tax, and as in this case there was no levy of tax, the Advocate General says that the condition of the notification is not satisfied.

Really there are four processes recognised by the Income Tax Act. First, there is assessment which, as the Privy Council pointed out, is an equivocal expression, but for the purposes of this argument it can be looked upon as the mode of computation. Then we have the charge which is the liability to pay tax under s. 3. Then comes the levy which is the procedure laid down for the realisation of the tax, and finally comes the actual payment of the tax. These distinctions are clearly brought out in the section on which the Advocate General himself relies, which is s. 55. That is a section dealing with super-tax, which lays down that in addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year super-tax as mentioned in that section. Therefore, in this section a clear distinction is drawn between charging, levying and paying. If that be the true position, when we turn to the assessment order, there is no doubt that there has been an assessment of the total income at Rs. 4,11,084, and in this assessment Rs. 56,360 is included as income which should bear tax. Once the assessment is made, the income becomes liable to pay income-tax under s. 3, according to the provisions of the Income Tax Act. As to what the actual amount of tax is is, a mere matter of arithmetical computation. The rate is laid down in the Finance Act and the rate is to be applied to the total income. It is difficult to understand how this position is altered by the fact that the assessee got exemption under s. 25 (4). In its very nature an exemption can only be claimed provided there is a liability to pay tax. It is only when an income is charged to tax under the provisions of the Act that the question arises whether under any other provisions of the Act the income is liable to be exempted from payment of the tax, and therefore the mere fact that exemption was granted to the assessee does not mean that the income in respect of which exemption was granted was not assessed or charged to tax.

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There is another aspect of the matter which may be considered. The very basis of s. 25 (4) is that the assessee paid tax twice when the new Income Tax Act was introduced in 1919 and the exemption he gets is on the basis that he is deemed to have paid tax for this year in the past. Therefore, in the eye of the law although he gets exemption he has paid tax on the whole of his income and therefore the law does not levy double tax upon his income. But it is difficult to understand why the assessee is not entitled to the relief under the notification because his employer by reason of certain circumstances gets exemption from payment of tax which has been assessed and which has been charged to tax. The only ground that the Tribunal has in its Judgment given for accepting the contention of the department is that the assessee was not assessable to tax by reason of s. 25 (4). That, with respect, is a clearly erroneous view of the matter. The assessee was not bound to make an application under s. 25 (4). He might not have made an application in which case the position would have remained the same except that the department would have proceeded to the next stage, that of levying the tax, but because he did apply under s. 25 (4) and the application was granted the department stopped at the second stage of charging and did not proceed to levy the tax or compel the assessee to pay the tax. In our opinion the case of the asseessee falls within the ambit of the notification.

The result is that the answer to the question submitted to us must be in the affirmative. The Commissioner to pay costs.

Attorneys for Applicant: *Payne & Co.*

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

Answers accordingly.

P. M. P.

INCOME-TAX REFERENCE

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

1955 *Sept. 27*

THE NORTH DECCAN TRANSPORT, LTD., NASIK, APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH AND SAURASHTRA, AHMEDABAD, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 18A (2), (3) & (9) (a), 28 (1) (c); 30 & 33—Assessee furnishing false estimate of income for purpose of advance payment—Order imposing penalty—Whether appeal lies from such order?

When the Income-tax Officer is satisfied that the assessee has furnished under sub-s. (2) or (3) of s. 18A of the Indian Income-Tax Act, 1922 estimates of the tax payable by him which he knew or had reason to believe to be untrue and therefore holds the assessee liable under s. 18A

*Income-tax Reference No. 25 of 1955.