INCOME-TAX REFERENCE

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

1956 March 7

INDIRA BALKRISHNA, MANAGER OF THE ESTATE OF BALKRISHNA PURSHOTTAM PURANI, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH AND SAURASHTRA, AHMEDABAD, RESPONDENT.*

Indian Income-Tax Act (XI of 1922), ss. 3, 9 (3)—Three widows inheriting jointly husband's properties movable and immovable and receiving income therefrom—Taxing Department assessing widows to tax as association of persons—Whether such assessment valid?—Whether it is proper for Income-tax Appellate Tribunal to express opinion on points not raised in appeal to them?

Three widows of a Hindu who died in 1947 made a return of income received by them from the properties inherited by them from their deceased husband for the assessment year 1950-51. The income showed in the return was derived from diverse sources such as immovable property, dividends, share in a registered firm, interest on deposit and ground-rent. The Income-Tax Officer assessed the widows separately so far as the income from immovable property was concerned under s. 9 (3) of the Indian Income-Tax Act 1922 but as regards the rest of the income the three widows were jointly assessed to tax as an association of persons. On appeal, the Appellate Assistant Commissioner confirmed the Income-Tax Officer's order. The Income-Tax Appellate Tribunal on appeal held that the entire estate of the deceased was inherited and possessed by the three widows as joint tenants and they were rightly assessed to tax as an association of persons. On reference,

Held, that before persons can be assessed to tax as an association of persons the question the Income-Tax Officer has to consider is whether such persons have earned income by reason of their association. It is only if persons who are associated together have done some act which produces or helps to produce the income that it can be said that the association of persons has earned income which is liable to tax. It could not be said of the widows that they had performed any operation as an association of persons which helped in producing income.

Held, therefore, that the widows could not be assessed as an association of persons with regard to the income which they earned as the wives of their deceased husband.

Commissioner of Income-tax v. *Laxmidas Devidas,*[1] and *Dwarkanath Harischandra Pitale, In re,*[2] referred to.

Though no appeal had been filed by the Department challenging the order of the Appellate Assistant Commissioner assessing the income from immovable property under s. 9 (3) of the Act, the Income-Tax Appellate Tribunal expressed an opinion that the order was wrong. In consequence the Income-Tax Officer issued an order against the assessee under s. 34 (1) (b) of the Act. On the question whether it is desirable for the Tribunal to express opinion on a point not raised in appeal before it,

Held, that the Income-Tax Appellate Tribunal must confine itself to the question that was raised in the appeal before it; it cannot travel outside the ambit of its jurisdiction and express opinions which are prejudicial to the assessee and which may help the Department to take proceedings against the assessee.

*Income-Tax Reference No. 52 of 1956.

1. [1937] 5 I. T. R. 584. 2. [1937] 5 I. T. R. 716.

Facts material to this report are sufficiently set out in the Judgment.

At the instance of the assessee the Income-Tax Appellate Tribunal referred the following questions to the High Court of Judicature at Bombay:—

(1) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the Income-Tax Department really assessed the three widows in the status of an association of persons and not the estate of Balkrishna Purshottam Purani, which was merely a misdescription?

(2) If so, whether the description of the assessee in the notices issued under ss. 22 (2) and 23 (2) and in the heading of the assessment order is sufficient to invalidate the proceedings against the assessee?

If the answer to the first two questions is in favour of the Department;

(3) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessment made on the three widows of Balkrishna Purshottam Purani in the status of an association of persons is legal and valid in law?

(4) Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the entire estate of the deceased was inherited and possessed by the three widows as joint tenants and its income was liable to be assessed in the status of an association of persons?

N. A. Palkhivala with *Sir Jamshedji B. Kanga* and *A. N. Patwa* for the Applicant.

M. P. Amin, Advocate General with *G. N. Joshi* for the Respondent.

Chagla C. J.—One Balkrishna died on November 11, 1947 and the assessees before us are his three widows. They made a return of the income from the property which they inherited as his heirs for the assessment year 1950-51 and the total income they showed in this assessment year was Rs. 69,346 of which Rs. 11.011 was derived from property. Rs. 4,071 from shares from a registered firm, Rs. 51,796 from dividend, Rs. 2,343 from interest on deposit, and Rs. 125 from ground rent. The Income Tax Officer assessed the assessees as an association of persons, but he held that as far as their income from property was concerned the case fell under s. 9 (3) and that income must be assessed separtely to each of the three widows. The Appellate Assistant Commissioner on appeal confirmed this view of the Income Tax Officer. The Income Tax Tribunal took the same view and dismissed the appeal of the assessees. In dismissing the appeal it gave expression to the opinion that the view taken by the Appellate Assistant Commissioner with regard to the income from property falling under s. 9 (3) was not the correct view.

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Now, a question of law has been raised with regard to this view taken by the Appellate Assistant Commissioner and that is covered by question (4) which is to the following effect:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the entire estate of the deceased was inherited and possessed by the three widows as joint tenants and its income was liable to be assessed in the status of an association of persons?"

But Mr. Palkhivala points out that it was not open to the Tribunal to take a view with regard to the assessment of the assessees which was prejudicial to them when that question did not arise in the appeal before it. The only question that arose was whether the view of the Appellate Assistant Commissioner that the assessees should be assessed as an association of persons or whether they should be assessed as separate individuals. The Department had not challenged the decision of the Appellate Assistant Commissioner that with regard to income from property the case fell under s. 9 (*3*) and even so the Tribunal went out of its way to express the opinion that the decision of the Appellate Assistant Commissioner was erroneous. Now, it is never desirable for any Judge to express an opinion which is not necessary for the decision of a case; even so Judges, and some of them very eminent Judges, have indulged from time to time in *obiters*. But the only result of their doing so is possibly to encumber law reports and the giving expression to these *obiters* has not resulted in any prejudice to any party. But in the case of the Tribunal the position is entirely different. Every expression of opinion by them is likely seriously to prejudice the assessee. In this very case because they took the view that the Appellate Commissioner was in error in considering that the income from property fell under s. 9 (3), the Income Tax Officer has, as pointed out by Mr. Palkhivala, issued a notice against the assessees under s. 34 (*1*) (*b*). The Tribunal being the highest authority under the Income Tax Act, the Income Tax Officer is bound to respect any opinion expressed by it and if it says that an assessee has been under-assessed or there has been a failure to assess properly, the Income Tax Officer is bound to take action under s. 34, and that is exactly what has happened in this case. Therefore, in our opinion, with respect to the Tribunal, it should be very careful in giving findings and in expressing opinions. It must try and confine itself to the question that really arises in the appeal before it and not travel outside the ambit of its jurisdiction and express opinions prejudicial to the assessee which may help the Department in taking proceedings against the assessee. It may be said that if the Income Tax Officer is in error in issuing the notice under s. 34 or that

the view expressed by the Tribunal was not correct, the assessee would always have his remedy. But that is not the point. The assessee is harassed by a notice issued against him under s. 34 and he has got to run the gamut of several income-tax authorities before ultimately he gets justice, and all this arises because the Tribunal overlooks its own responsible position and the serious consequences of expressing opinions which do not really arise for the decision of the appeal before it.

The only substantial question which arises on this reference is whether these three widows have been rightly assessed as an association of persons. Mr. Palkhivala also wanted to argue that the assessment was bad because the assessment order was against Indira Balkhishna, one of the widows, manager of the estate of Balkrishna Purushottam Purani, and Mr. Palkhivala wanted to contend that what the Income Tax Officer was purporting to do was to assess the income of a dead person. We agree with the Tribunal that this is merely a misdescription which does not invalidate the assessment. It is quite clear from the record that the assessment was made on the three widows as heirs of their husband in respect of property which they have inherited, and therefore brushing aside that question which really is a very minor one, we come to the really substantial question as to whether the assessment of these three widows as an association of persons is a valid assessment.

The Income Tax Act only refers to an association of persons as an assessable entity under s. 3, but it does not anywhere provide as to when an association of persons can be assessed to tax. The expression "association of persons" occurs along with other assessable entities, viz. individual, Hindu undivided family, company and local authority and firm, and in our opinion all these entities must stand on the same footing and the test of the liability must be whether they have earned income in the capacity in which they are sought to be assessed. That must be the test with regard to an individual or with regard to an Hindu undivided family or company and local authority, or firm or association of persons. Therefore, the question that we have to ask is whether these three widows earned income by reason of their association. Property which an association of persons may own jointly may produce income, but even so the question that will have to be considered is whether these persons who are associated together have done any act which has helped to produce the income, because it is only if they have done something in respect of the property which helps the production of income that it could be said that the association of persons has earned income which is liable to

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tax. In this case the position of these three Hindu widows as heirs under Hindu law is clear. They take the estate of their husband as joint tenants with rights of survivorship and equal beneficial enjoyment. Therefore, as far as the income is concerned, each widow is entitled to one-third share of the income of her husband. With regard to the ownership of the property, they are joint tenants and on the death of any one of the widows the remaining widows would take the property by survivorship. But as we are concerned with the income and not with the corpus, the question is with regard to the liability of these widows to pay tax on the income which they earn, and each widow is entitled to one-third income in her own right.

What is urged by the Advocate General—and that is the view which seems to have found favour with the Tribunal—is that when Balkrishna died these widows did not exercise their right to separate possession and enjoyment of the property which right they had under Hindu law, but they continued to manage the property jointly, and inasmuch as they managed the property jointly which produced income they became an association of persons liable to tax in that capacity. The only property which the widows could have managed which produced income is the immoveable property which fetched an income of Rs. 11,000 and undoubtedly it could have been said with regard to that property that the widows having enjoyed that property jointly and not having asked for separate possession and having managed that property which ultimately produced income, they would be liable to be assessed as an association of persons. But as far as property is concerned, the Legislature has made an exception in s. 9 (3) and the provision is in these terms.

"Where property is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with this section shall be included in his total income."

This is a case where property is owned by these three widows, their shares are definite and ascertainable, and therefore the income earned by these three widows, assuming that they are an association of persons for the purpose of the Income Tax Act, their income cannot be assessed as an association of persons but the share of each of them must be included in her own individual assessment. The Advocate General made a faint attempt to argue that the property was not owned by these widows because they are widows and in Hindu law they are merely life tenants and not full or absolute owners. But when it was pointed out to him that that argument might have severe repercussions in that if widows were not owners of the property they were not liable to pay tax at all under s. 9 because

it is only the owner of the property who pays tax under s. 9, he agreed that it was not possible to contend that the case of a Hindu widow will not fall under s. 9 (3).

Therefore, if we exclude property, as we must, by reason of the provisions of s. 9 (3), all that is left is dividend, interest on deposit, and share from registered firm, and the main item with regard to which argument was advanced is the dividend on shares. It is difficult to understand what act of management widows performed which resulted in these properties producing income or which helped these properties to produce income. The Advocate General rather ingeniously suggested that the widows kept the shares in the same joint names as they were, when the husband died, that they collected the dividends, and this according to him constituted acts of management. Surely, it is impossible to suggest that dividend income is earned by the widows by reason of their collecting the dividend warrants or keeping the shares in a particular name. It cannot be predicated with regard to dividend income that any act on the part of the receiver of the dividend helps to produce that income. It was then suggested by the Advocate General that in any case there was receipt of income by these widows and in that sense according to him interest was earned by an association of persons. In our opinion, what is required before an association of persons can be liable to tax is not that they should receive income but that they should earn or help to earn income by reason of their association, and if the case of the Department stops short of mere receipt of income then the Department must fail in bringing home the liability to tax of individuals as an association of persons.

Reliance was placed on two decisions of this High Court with regard to the liability to tax of an association of persons. Both of them are reported in the same volume. The first is *Commissioner of Income-tax* v. *Laxmidas Devidas.*[3] That was a case where two individuals actually joined together in purchasing certain immoveable properties, contributing the purchase moneys in equal shares, holding them jointly and managing them, and the management resulted in profits which were shared by the assessee equally and the assessees were sought to be taxed as an association of individuals,—as that was the assessable entity then and not an association of persons—, and the High Court upheld the action of the Department. Sir John Beaumont, C. J., after holding that an association of individuals should not be construed *ejusdem generis* with the other expression which precede that expression, points out:

3. [1937] 5 I. T. R. 584.

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"In my opinion, the only limit to be imposed on the words 'other association of individuals' is such as naturally follows from the fact that the words appear in an Act imposing a tax on income, profits and gains, so that the association must be one which produces income, profits or gains. It seems to me that an association of two or more persons for acquisition of property which is to be managed for the purpose of producing income, profits or gains falls within the words 'other association of individuals' in s. 3....."

Therefore, the ratio that the learned Chief Justice laid down was that the association must be one which produces income profits or gains. It is necessary to remember that when this judgment was given there was no provision in the Income Tax Act corresponding to s. 9 (*3*) and therefore even with regard to property an association of persons was liable to tax if that association helped to produce income from that property by managing it. But in view of the incorporation of sub-s. (*3*) in s. 9, this decision is no longer good law but it is good law to the extent that it lays down the ratio with regard to the liability of an association of persons to be taxed.

The second decision on which even stronger reliance is placed is *Dwarkanath Harischandra Pitale, In re.*[4] That was a case where two brothers inherited certain property as tenants-in-common and they elected to retain the property and manage it instead of dividing or partitioning it, and these two brothers were assessed to tax with regard to income from property as an association of individuals, and Sir John Beaumont, C. J. at p. 721, after referring to the earlier decision, points out:

"The only distinction between that case and the present one is that the original association in the present case was not a voluntary act on the part of the assessees. They did not purchase the property for the purpose of managing it; they received it under a will, and it may be said, that in the first instance they did not constitute an association of individuals. But as soon as they elected to retain the property and manage it as a joint venture producing income, it seems to me that they became an association of individuals within the meaning of the Income Tax Act....."

Therefore, these brothers managed a property which produced income as a joint venture. Therefore the learned Chief Justice was applying the same ratio to this case which he had propounded in the earlier decision, and this is the ratio which the Advocate General wants us to apply to the case before us. The Advocate General says that here also the widows did not choose to enjoy that property separately, they retained the property and managed it and the property produced income, and therefore the ratio of that case must apply to the facts before us. It is true that the Tribunal has given as a finding of fact that the property was managed by these three widows, but as we have

4. [1937] 5 I. T. R. 718.

already pointed out that expression can only be true and appropriate with regard to immoveable property. That expression in our opinion, has no meaning when it is applied to income from dividend or interest on deposit. Again, this second decision of Sir John Beaumont, C. J. was given when there was no provision corresponding to s. 9 (3). Therefore, if we omit "immoveable property" which could be managed for the purpose of producing income and which in fact was managed by these widows, but which is now exempted under s. 9 (3), then there is no other income shown in their assessment with regard to which it could be said that that income was earned by these three widows by reason of their association or that they performed any operation as an association which resulted in producing the income or which even helped in producing the income.

Therefore, in our opinion, the Tribunal was in error in coming to the conclusion that these three widows could be assessed in the status of an association of persons with regard to the income which they earned as heirs of their deceased husband.

We therefore answer question (1) in the affirmative, question (2) in the negative, question (3) in the negative and question (4) as unnecessary. The Commissioner to pay the costs.

Attorneys for Appellant:—Arvind B. Patwa.

Attorneys for Respondent:—N. K. Petigara.

Order accordingly.

P. M. P.

INCOME-TAX REFERENCE

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

SHREE CHANGDEO SUGAR MILLS, LTD., BOMBAY, APPLICANTS *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY CITY, BOMBAY, RESPONDENT.*

1956 March 8

Indian Income-Tax Act (XI of 1922), s. 23A (1), third proviso and Explanation thereto—Company "to which the provisions of this sub-section apply": meaning of.

The expression "company to which the provisions of this sub-section apply" in the explanation to sub-s. (1) of s. 23A of the Indian Income-Tax Act, 1922 merely refers to the nature of the Company which is defined in the third proviso to the section. In determining whether the Company is one contemplated by the Explanation the material question to

*Income-Tax Reference No. 4 of 1956.