INCOME-TAX REFERENCE.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Cornish and Mr. Justice Bardswell.

A. C. T. NACHIAPPA CHETTIAR OF ALAGAPURI (ASSESSEE), PETITIONER,

1933, January 4.

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS, RESPONDENT.*

Indian Income-tax Act (XI of 1922), sec. 60—Notification issued under—If can deal with income-tax or super-tax alone—Government of India Notification, Finance Department (Central Revenues) No. 21, dated 12th October 1929—Necessity for and object of—If extends to super-tax.

Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929, does not extend to super-tax. Under section 60 of the Income-tax Act (XI of 1922) the Government of India can, by notification, deal with income-tax and super-tax ; but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India in issuing a notification under section 60 therefore have power to exclude super-tax.

Necessity for the above-mentioned notification and its object explained.

UNDER section 66 (3) of the Indian Income-tax Act (XI of 1922).

R. Kesava Ayyangar for assessee.—The construction put by the Commissioner on the notification is wrong and the assessee is entitled to succeed as regards super-tax also. The notification in question has been issued under section 60 of the Income-tax Act. That section uses the word "income-tax". The assessment in the present case is one made under section 34 read with section 23 of the Act, i.e., escaped assessment. In section 34 also the word used is income-tax. Section 55 refers to super-tax. Super-tax, under that section, is merely

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additional duty of income-tax. Income-tax in the Act includes super-tax also by virtue of the definition of super-tax in section 55 and of section 60 under which the notification has been issued and also section 34 under which action has been taken in the present case. The word income-tax in the notification must have the same meaning as it has in the Act; see section 20 of the General Clauses Act (X of 1897) as to the meaning of words in a notification issued under power given by a statute. The Government's power to issue a notification in regard to super-tax is derived from section 60 which uses only the word "income-tax". The Commissioner's view, in so far as it is based on the fact that in some other notifications the word "super-tax" has been used, would, if correct, lead to the conclusion that Government has no power to issue notifications in regard to super-tax. [Instruction issued pursuant to the notification referred to.] There is an inconsistency between the notification and the instruction. The instruction is really in consonance with the provisions of the Act. Section 25 of the Act makes a distinction between two classes of assessees:—(1) persons who carried on business under the Act of 1918 and discontinued it subsequently, and (2) persons who did not carry on business under the Act of 1918 but commenced business thereafter.

M. Patanjali Sastri for Commissioner of Income-tax.—The notification in question was issued in respect of income-tax alone. The reason for giving the exemption in respect of income-tax is as follows:—Under the Act of 1918 the basis of assessment was the amount of income in a particular year, i.e., income in the year of assessment itself. But, as it is impossible to ascertain the income of the assessment year in the course of the year itself, the income of the previous year was taken as a tentative basis for a provisional assessment. Then when the next year came the income of the previous year was ascertained and a final assessment was made by reference to the actual income and the necessary adjustments were made. Under the present Act the income of the previous year is made the basis of assessment for the ensuing year and the assessment so made is the final assessment. The old Act ceased to be in force in 1922 but this adjustment provision was kept alive for a year; see section 68 (repealed). Thus the actual income of 1921–22 suffered income-tax twice. The Legislature tried to remedy this injustice by providing that the income of the year

in which the business is discontinued shall not be payable; see section 25 (3) of the present Act. Under it the profits of the year in which the business is discontinued go free, i.e., profits in the hands of the firm. Under section 14 (2) (*b*) a partner is liable to be taxed in respect of his share of the profits of the firm if the firm itself has not been taxed. The result of that provision would be to make taxable what would not be taxable under section 25 (3). To obviate this inconsistency and consequent injustice the notification in question was issued in respect of income-tax alone. As regards super-tax it was always imposed on the basis of the previous year's income, i.e., even under the old Act. Hence there was no necessity for any such notification in case of super-tax, i.e., no necessity for any equitable adjustment as in the case of income-tax. Section 25 (3) was not intended to be applicable to super-tax though its language is wide enough to include it. Vide Sundaram's Law of Income-tax in India, third edition, pages 775–6, as regards the difference between income-tax and super-tax. The word income-tax in section 60 (1) no doubt includes super-tax but that is not because the word in that section by itself connotes super-tax. It does so by virtue of section 58 being read with the provisions of section 60. In the other sections also referred to by the other side income-tax includes super-tax but that again is only by virtue of the provisions of section 58 and not by reason of the word income-tax therein connoting super-tax. If income-tax in the Act would itself include super-tax, such a provision as section 58 would have been unnecessary.

R. Kesava Ayyangar in reply.—If the argument of the other side were sound there would have been no necessity for a notification in the circumstances of the present case. The income in question in the present case is not the income of the previous year but of the year previous to that. That income would not be taxable under section 3, the charging section. Section 25 (3) applies only to cases where the income of the firm is chargeable but has escaped taxation. Section 14 is inapplicable to the facts of the present case.

Cur. adv. vult.

JUDGMENT.

BEASLEY C.J.—The petitioner is the manager of a Hindu undivided family carrying on banking

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business at Alagapuri in the Ramnad district and at Minhla and Sitkwin in Burma. Up to December 1928 he had been a partner with P. L. S. M. Muthukaruppan Chettiar, Karaikudi, in a firm known as "C. T. A. M. Minhla," and in another firm known as "C. T. A. S. M. Sitkwin"; but in December 1928 these two partnerships were dissolved and the petitioner and his former partner started independent concerns of their own in both those places. A question arose as to whether the partners were successors in respect of these concerns to the businesses formerly carried on at these places by the before-mentioned partnerships. After an appeal the Commissioner of Income-tax, Burma, held that no succession had taken place. In the meantime the Income-tax Officer, Karaikudi, had made an additional assessment on the petitioner under section 34 including in his assessment his share of the profits of the firms on the footing that a succession had taken place and he levied both income-tax and super-tax. On appeal to the Assistant Commissioner, in view of the decision of the Commissioner of Income-tax, Burma, the petitioner's assessment to income-tax was cancelled but his assessment to super-tax was upheld. On an application under section 33 to the Commissioner of Income-tax, Madras, for cancellation of the assessment to super-tax the Commissioner of Income-tax declined to cancel the assessment.

The petitioner's claim that the assessment to super-tax must be cancelled is based upon Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929, which it is contended exempts the assessee not only from liability to pay income-tax in respect of the profits and gains, the subject of this reference, but also super-tax thereon.

The question for our consideration is:

"Whether upon the facts of this case the assessee is liable to be assessed to super-tax upon the income exempted by Government of India Notification, Finance Department (Central Revenues) No. 21, dated the 12th October 1929."

The Government of India Notification referred to reads as follows:—

"In exercise of the powers conferred by section 60 of the Indian Income-tax Act, 1922 (XI of 1922), the Governor-General in Council is pleased to direct that no income-tax shall be payable by an assessee in respect of such part of the profits or gains of a firm which has discontinued its business, profession or vocation as is proportionate to his share in the firm at the time of such discontinuance if tax has at any time been charged on such business, profession or vocation under the Indian Income-tax Act, 1918 (VII of 1918), or if an assessment has been made on the firm in respect of such profits or gains under sub-section (1) of section 25 of the Indian Income-tax Act, 1922 (XI of 1922);

Provided that such part of the profits or gains shall be included in computing the total income of the assessee."

It is contended on behalf of the assessee that the words "income-tax" in the notification comprise income-tax and super-tax, that section 60 refers to "income-tax" and that even if the Government of India intended to apply the notification only to income-tax to the exclusion of super-tax it would be *ultra vires* because section 58 of the Indian Income-tax Act, which excepts certain sections of the Act from application to the charge, assessment, collection and recovery of super-tax, does not except section 60. It is further contended that throughout the Act the words "income-tax" mean both income-tax and super-tax. With regard to the contention that by reason of section 58 of the Act the Government of India in issuing a notification under section 60 have no power to exclude super-tax, in my opinion, there is no real substance in that contention. It is quite true that under section 60 the

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Government of India can, by notification, deal with income-tax and super-tax but it does not necessarily follow that the Government of India cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. What has to be considered here is what really was intended by the notification. Taking the words "income-tax" by themselves without any consideration of the reasons which make such a notification necessary, I agree with the assessee's contention that ordinarily the words "income-tax" should be taken to include super-tax as well. But Mr. Patanjali Sastri on behalf of the Income-tax Commissioner argues that under the Indian Income-tax Act of 1918 the basis of assessment was the income of the year of assessment and that since of course it could not be really known until the end of the year what that income was a provisional assessment was made and adjustment was made later when the actual income was known and then a final assessment was made. In 1922 the basis was altered and assessment made on the income of the previous year but by section 68 of the Act which is now no longer in operation the old basis of assessment was kept alive for one year. This resulted in a double assessment. When the adjustment system was abandoned on the passing of the Act of 1922, it was agreed that one final adjustment should be made in the year 1922–23; and both a final assessment or adjustment under the old system (retained, as before-mentioned, for one year under section 68) and an assessment under the new system were made on the income of the year 1921–22. This resulted in the assessments which had been a year behind (so far as final assessments were concerned) being brought up abreast of the income again. Since that is the position, it is clear that provision had to be made as regards the assessment of

business, professions or vocations on which tax was at any time charged under the provisions of the Income-tax Act of 1918 and which were or might be discontinued. These are provided for in section 25 (3). Super-tax has always been in a different position because, ever since it was imposed in 1917–18, it has always been assessed on the previous year's income and so was always a year behindhand and not abreast of income. The effect therefore of section 25 (3) is that in the case of income-tax the business, profession or vocation which is discontinued has been assessed for the number of years of its existence. If it has been in existence for ten years, it has been assessed in respect of the income of those ten years. But with regard to super-tax, as it has always been a year behindhand, it has only been assessed on nine years' income. Hence it is that a distinction is drawn by the income-tax authorities between the two taxes and the argument addressed to us that the notification does not cover both. What then is the necessity for the notification? Section 25 (3) leaves in an unsatisfactory position an assessee who is a member of an undivided Hindu family in respect of the profits and gains which he receives as such member of any firm which have been assessed to income-tax as are proportionate to his share in the firm. It is pointed out that, notwithstanding section 25 (3), section 14 (2) (*b*) might still render such profits and gains liable to income-tax since section 14 (2) (*b*) deals with the profits and gains of a firm which have been assessed to income-tax and, since it might have been contended by the income-tax authorities that as the firm is free from assessment by reason of section 25 (3) and the assessee will on that account not be able to bring himself within the provisions of section 14 (2) (*b*), the notification was made necessary in order to protect

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such an assessee. This explanation in my opinion is the correct one and it is clear that it is intended by the notification to put the assessee in the same position as regards exemption as that occupied by the assessee in section 25 (3); and in my view neither an assessee in section 25 (3) nor the assessee here is entitled to claim that the notification extends to super-tax as well as income-tax. I am further confirmed in this opinion by the proviso to the notification which reads as follows:—

"Provided that such part of the profits or gains shall be included in computing the total income of the assessee."

It is conceded here by the assessee that the profits and gains are included for the purpose of arriving at the appropriate rate of income-tax. I cannot see why the proviso is limited merely to that purpose. I think it follows that it is also for the purpose of ascertaining whether the income is sufficient to make it chargeable to super-tax. I would, therefore, for the reasons I have given, answer the question referred to us in the affirmative. The assessee must pay Rs. 250, costs of the Commissioner of Income-tax.

CORNISH J.—I agree.

BARDSWELL J.—I agree.

A.S.V.