

INCOME-TAX REFERENCE

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Sen, Mr. Justice Mosely, Mr. Justice Leach, Mr. Justice Dunkley, Mr. Justice Mackney, and Mr. Justice Braund.

1937

Jan. 20.

COMMISSIONER OF INCOME-TAX,
BURMA

v.

S. MANSOOKHLAL.*

Income-tax—Correct legal consequence of facts found—Question of law—“Succession” to business—Question of law or fact—Income-tax Act (XI of 1922), ss. 26 (2), 66 (2).

It is always open to an assessee who desires to argue the legal consequences of the facts to require a reference as to whether the Commissioner has attributed in law the correct legal consequences of the facts he has found.

Whenever the facts found by the Commissioner give rise to a consequential question whether there is or is not a “succession” within the meaning of s. 26 (2) of the Income-tax Act a question of law is involved. In many instances, however, the legal construction of the phrase “succeeded in such capacity” is not in issue because of the facts proved, and in such cases there is no question of law which the Commissioner of Income-tax can be required to refer under s. 66 (2).

In re Commissioner of Income-tax, Burma v. N.N. Firm, I.L.R. 11 Ran. 501, discussed and approved.

Bell v. National Provincial Bank, 5 T.C. 1; *H.M. Inspector of Taxes v. Madame Tussauds (1926) Ltd.*, 17 T.C. 127; *Thompson v. Le Page*, 8 T.C. 541, referred to.

Per MOSELY, J.—The facts set out by the Commissioner must raise the specific question of law which in the view of the assessee arises. Succession to a separate branch of a business constitutes succession within the meaning of s. 26 (2) of the Income-tax Act.

In re The Commissioner of Income-tax, Burma v. C.P.L.L. Firm, I.L.R. 12 Ran. 322; *Stockham v. Wallasey Urban District Council*, 95 L.T. 834, referred to.

Per LEACH, J.—A question under s. 26 (2) of the Income-tax Act is not ordinarily one of fact only. It may be so in a particular case where the facts are such as to present no difficulty, but the proper legal effect of a proved fact is essentially a question of law.

Dhanna Mal v. Moti Sagar, 54 I.A. 178; *N. C. Pal v. Shukur*, 45 I.A. 183; *New Zealand Shipping Co., Ltd. v. Stephens*, 5 T.C. 553, referred to.

TUN BYU (Assistant Government Advocate) for the Crown. S. 26 (2) of the Income-tax Act secures to

* Civil Reference No. 17 of 1936.

Government the income-tax for the full year in spite of a transfer of the business during the year. In a case like the present, the only question of law that could be referred is whether there was any evidence on which the Commissioner could come to the conclusion that he did. Only a question of law could be referred and not one of fact. *Commissioner of Income-tax v. E.M. Chettyar Firm* (1); *Commissioner of Income-tax v. A.K.R.P.L.A. Chettyar Firm* (2); *A.K.R.P.L.A. Chettyar Firm v. Commissioner of Income-tax* (3); *In re Abdul Bari Chowdhury v. Commissioner of Income-tax* (4).

All questions arising under s. 26 (2) of the Income-tax Act are questions of fact. The statement of the law in *In re Commissioner of Income-tax v. N.N. Firm* (5) is not correct. Succession to business is a question of fact in all cases.

In re Keshardeo Chamaria (6); *Bell v. National Provincial Bank* (7); *A. Ferguson & Co., Ltd. v. Aikin* (8); *Thompson v. Le Page* (9); *Michael Faraday v. Carter* (10); *Wilson & Barlow v. Chibbett* (11); *Ogston v. Reynolds, Sons & Co., Ltd.* (12); *Malayalam Plantations, Ltd. v. Clark* (13); *In re The Western India Turf Club, Ltd.* (14); *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax* (15).

[ROBERTS, C.J. There is no case where it is said that in each and every case it is a question of fact. In many instances on the facts established it may be so.]

(1) I.L.R. 7 Ran. 635, 638.

(2) I.L.R. 9 Ran. 21, 23.

(3) I.L.R. 9 Ran. 25.

(4) I.L.R. 9 Ran. 281, 292, 293.

(5) I.L.R. 11 Ran. 501.

(6) I.L.R. 63 Cal. 401, 412, 414.

(7) 5 T.C. 1.

(8) 4 T.C. 36.

(9) 8 T.C. 541.

(10) 11 T.C. 565, 574

(11) 14 T.C. 407.

(12) 15 T.C. 502.

(13) 19 T.C. 314.

(14) I.L.R. 50 Bom. 648.

(15) I.L.R. 12 Pat. 5, and on appeal

38 C.W.N. 1159.

1937

COMMISSIONER OF
INCOME-TAX,
BURMA
v.
MANSOOKH-
LAL.

Kalyanwala for the assessee. The old business was wound up. The assessee has started altogether a new business. The old firm has disappeared; only the place of business remains. The Commissioner has come to a conclusion not warranted by the facts. The major portion of the creditors have been paid off from the old stock, and now no stock is left. Succession means that the successor takes over the *whole* business. *Watson Brothers v. Lothian* (1).

ROBERTS, C.J.—The following question has been referred to this Court for determination in Civil Reference No. 17 of 1936

“whether there were materials on which the Income Tax Officer and the Assistant Commissioner could conclude that the assessee had succeeded to the business carried on by Mansookhlal Dolatchand and Company at 128 Mogul Street Rangoon.”

By section 66 (2) and (3) of the Income Tax Act XI of 1922 an assessee may, provided certain conditions laid down therein are satisfied, require the Commissioner to refer to the High Court any question of law arising out of an order either by the Assistant Commissioner or by the Commissioner himself or arising out of the decision of a Board of Referees and the Commissioner shall within a specified time draw up a statement of the case and refer it with his own opinion thereon to the High Court.

It is therefore always open to an assessee who desires to argue the legal consequences of the facts to require a reference as to whether the Commissioner has attributed in law the correct legal consequence of the facts he has found.

In the case under review the question was not happily framed, because it obscured the real question

of law namely what were the legal consequences of the facts. Whenever the facts found by the Commissioner give rise to a consequential question whether there is or is not a "succession" within the meaning of section 26 (2) of the Income Tax Act XI of 1922 a question of law is involved.

Section 26 (2) runs as follows :

"Where, at the time of making an assessment under section 23 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."

The words "in such capacity" are important and should not be overlooked. In such a case as the present the proper question, and one which does not obscure the legal consequences of the facts, is this

"On the facts as stated has the assessee succeeded in such capacity the person formerly carrying on the business within the meaning of section 26 (2) of the Income Tax Act?"

In many instances the legal construction of the phrase "succeeded in such capacity" is not in issue because of the facts proved, and in such cases there is no question of law which the Commissioner of Income Tax can be required to refer under section 66 (2). In my opinion this case is such a case. The major creditors had been paid off but the same business was being carried on, and in substance there was little or nothing more than the retirement of one of the partners from the business. But it was contended on behalf of the Commissioner of Income Tax that the question of succession must always be a pure question of fact and a number of cases were cited which were

1937
 COMMISSIONER OF
 INCOME-TAX,
 BURMA
 v.
 MANSOOKH-
 LAL.
 ROBERTS,
 C.J.

1937

COMMISSIONER OF
INCOME-TAX,
BURMA
v.
MANSOOKH-
LAL.
ROBERTS,
C.J.

supposed to support this proposition. It is really enough to say that they were all cases in which no question of legal construction happened to be involved. Once any legal difficulty as to the application of the phrase "succeeded in the same capacity" has been solved, then in the words of the Lord President of the Court of Session in *Thompson and Balfour v. Le Page* (1)

"the question whether there is in any particular case a succession or not is a question of fact."

Lord Skerrington in his judgment said

"Primarily I should say that it is a question of fact whether one trader has succeeded to the business of another but the question as put to us involves a question of law, namely, whether the Commissioners as reasonable men were entitled to draw the inference that the Appellants had succeeded to the business."

Then in *Bell v. National Provincial Bank* (2) Esher M.R. said

"The finding of the Commissioners upon that part of the case is this, 'the Commissioners were of opinion that there was no succession within the meaning of the said 4th Rule. That is, as my brother Mathew has pointed out, not a finding of fact that there was no succession, but that the particular kind of succession which took place in this case was not a succession within the meaning of the 4th rule.'"

He goes on to say that counsel relied on the authority of a Scotch case as showing that it is and it must be a question of fact whether there has in point of fact been a succession or not. "It may be in many cases, or in some cases, a question of fact. But it seems to me for the reasons I have already given that if it was a question of fact for the Commissioners in this case they have

(1) 8 Tax Cases 541, 550.

(2) 5 Tax Cases 1.

deliberately not decided it. They have presented to us a problem of law, and given us the benefit of their opinion on it, and if we do not agree with it we are entitled to say so. In my view if this is a finding (as I think it must be) of law that there is no succession within the meaning of the rule I find myself unable to agree with it."

I next pass on to consider *In re Commissioner of Income-tax, Burma v. N.N. Firm* (1) decided by a Full Bench. Page C.J. there after referring to the facts said

"Upon these facts the income tax authorities have held that there was a succession to the money lending business of the undivided joint family within section 26 (2) of the Income Tax Act. In my opinion it is manifest there was not a 'succession' within section 26 (2) of the Act. In order that a person should be held to have succeeded another person in carrying on a business profession or vocation it is necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. Where a business is split up and thereafter another person carries on part of the business I am of opinion that he does not 'succeed' his predecessor in carrying on the business within section 26 (2) of the Act."

This is only another way of saying that where a person has carried on a business no one can be said to succeed him in such capacity when only part of the business is taken over. The learned Chief Justice went on

"Further where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started it may be with the same assets and under the same conditions and in the same premises as the old business the persons carrying on the new business do not 'succeed' those who had carried on the old business within section 26 (2) of the Act."

We think that there can be no doubt that in application to the particular facts before the Court the element of

1937

COMMISSIONER OF
INCOME-TAX,
BURMA
v.
MANSOOKH-
LAL.
ROBERTS,
C.J.

1937

COMMISSIONER OF
INCOME-TAX,
BURMA
v.
MANSOORH-
LAL.
ROBERTS,
C.J.

non-continuity was a factor to be taken into consideration when the facts came to be ascertained and we have no doubt that the decision in *In re Commissioner of Income-tax, Burma v. N.N. Firm* (1) was correct. But this latter sentence should not be interpreted as a proposition of law of necessarily universal application. The Court apparently had not had cited before it the judgment of Finlay J. in *H.M. Inspector of Taxes v. Madame Tussauds (1926) Ltd.* (2). In that case the old and well known Madame Tussauds' exhibiton having been burnt down in March 1925, the Company sold the site in July 1926 and a new Company entered into possession, rebuilt the premises, and opened them to the public in April 1928. It was held that the Commissioners could rightly arrive at the conclusion that there was in fact a succession by the new Company to the business of the old one.

The case was, as the learned Judge who tried it pointed out, rather peculiar and special and depended perhaps even more than usual upon its own particular facts. The question really comes down in all such cases to this; whether there is a delay which as a matter of law the Commissioner is bound to regard as forcing him to infer that there was not a succession. This delay is a question of degree, and in some cases a delay may only mean a cesser of profit-making operations and never any real cessation of the business at all. The real test is the identity of the two businesses, and when this comes to be considered the reasons for any delay between closing down and opening up again may throw a light upon the correct solution.

The conclusion at which I have arrived upon this reference is that though the Commissioner of Income Tax may be required to refer any question of law there is nothing in the law applicable to this case which

(1) (1933) I.L.R. 11 Ran. 501.

(2) 17 Tax Cases 127.

stood in the way of the Commissioner coming to a decision in point of fact. The question as propounded must therefore be answered in the affirmative. The Commissioner of Income Tax is entitled to his costs of this reference advocates fee 20 gold mohurs.

1937
 COMMISSIONER OF
 INCOME-TAX,
 BURMA
 v.
 MANSOORH-
 LAL.
 ROBERTS,
 C.J.

SEN, J.—I agree.

DUNKLEY, J.—I agree.

MACKNEY, J.—I agree.

BRAUND, J.—I agree.

MOSELY, J.—I agree. As regards the form of the reference the Commissioner's proper course was pointed out in *N. N. Firm's* case (1). The facts set out by the Commissioner must raise the specific question of law which in the view of the assessee arises, *C.P.L.L. Firm's* case (2). The form of the reference made here is only suitable to cases where the sole question is whether there is a legal quantum of evidence to justify the finding on facts of the Income Tax Officer, [as in *E.M. Chettyar Firm's* case (3)].

As regards what was said in *N.N. Firm's* case at page 504 that a person who carries on part of a business only does not "succeed" his predecessor in carrying on the business within section 26, sub-section (2), this is perhaps stated too broadly. It has, I think rightly, been held in *Stockham v. Wallasey Urban District Council* (4) that succession to a separate branch of a business constitutes succession within the meaning of the Rule and the Indian Rule is for this purpose identical with the English.

(1) (1933) I.L.R. 11 Ran. 501.

(3) (1929) I.L.R. 7 Ran. 635.

(2) (1934) I.L.R. 12 Ran. 322, 332.

(4) 95 L.T. 834.

1937
 COMMISSIONER OF
 INCOME-TAX,
 BURMA
 v.
 MANSOOKH-
 LAL.

LEACH, J.—I agree that the answer to the question propounded should be in the affirmative; but I wish to state that in answering the question in this way I do not accept the argument advanced on behalf of the Commissioner of Income-tax that the question whether a person is to be deemed to be a successor within the meaning of section 26 (2) of the Indian Income-tax Act is only one of fact. In order to answer the question, it is, of course, necessary to ascertain the facts; but, having ascertained them, it is then necessary to consider whether they constitute succession within the meaning of the section. Primarily, the question is one of fact, and the facts may be such that the case presents no difficulty; but the proper legal effect of a proved fact is essentially a question of law, as their Lordships of the Privy Council pointed out in *Nafar Chandra Pal v. Shukur* (1) and *Dhanna Mal v. Moti Sagar* (2). In the words of Lord Buckmaster in the former case, questions of law and of fact are sometimes difficult to disentangle; and the Court has the right to say whether the Income-tax Officer has misdirected himself on the facts.

In *The New Zealand Shipping Company, Limited v. Stephens* (3), Farwell L.J. deprecated stating people out of Court, by stating, under the guise of fact, that which is really law. I do not say that there has been an attempt to do so in this case, but in view of the argument advanced by the learned Assistant Government Advocate it is necessary to emphasize that a question under section 26 (2) is not ordinarily one of fact only.

(1) (1918) 45 I.A. 183.

(2) (1927) 54 I.A. 178.

(3) 5 Tax Cases 553.