argument that if the Magistrate were not a Court, the position of the applicant would become weaker and not in any sense stronger, so far as the point relating to the want of sanction is concerned.

Thus it seems to me that though the sanction of the First Class Magistrate of Nadiad, who recorded the statement under section 164, Criminal Procedure Code, was necessary, we cannot interfere in revision on that ground under the circumstances of this case.

Rule discharged.

R. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

IN THE MATTER OF THE EXCESS PROFITS DUTY ACT, 1919, AND IN THE MATTER OF THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED.

1920, *October* 21.

Excess Profits Duty Act (X of 1919), section 6 (1) (a) and (b) and Schedule II, clause 1, proviso—*Cash and investments—Accumulated profits not to be considered as capital unless employed in business—"Employed in the business", meaning of—Income Tax Act (VII of 1918), section 51—High Court's power of interference—Specific Relief Act (I of 1877), section 45.*

Under the proviso to clause (1) to Schedule II of the Excess Profits Duty Act, 1919, accumulated profits of a company cannot be treated as capital unless they are employed in the business. Whether or not they are employed in the business is a question of fact which the Chief Revenue-Authority is entitled to decide on the materials before it.

The words "employed in the business" in the proviso, *prima facie*, bear their natural meaning of "*actually* employed in the business" and cannot be construed as if the words were "employed or *intended to be employed* in the business."

PER MACLEOD, C. J.:—It would be open to the Court to consider the grounds on which the Chief Revenue-Authority (acting under section 51 of the

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Indian Income Tax Act, 1918) was satisfied that a reference was unnecessary. For instance, if a question arose with regard to the interpretation of a section which was so complex, so intricate, that it was clearly advisable that the question should be finally determined by a judicial authority rather than by the Chief Revenue-Authority, I doubt whether that Authority would be justified in saying that it was satisfied that a reference was unnecessary.

PETITION :—

The petitioners were a company carrying on business as ship-owners in Bombay and having their registered office at 40, Church Gate Street, within the Fort of Bombay. The company was incorporated under the Indian Companies Act of 1882.

The petitioners were called upon by the Collector of Income Tax to make a return of income under the Excess Profits Duty Act X of 1919.

On the 6th August 1919, the petitioners made a return and expressed their desire to have their "standard profits" ascertained under section 6 (1) (iii) of the said Act and chose as the years to be taken under the said sub-section years 1913, 1914, 1915 and 1917 and sent to the Collector a statement showing that their average profits for the said four years amounted to Rs. 9,52,607, on an average capital of Rs. 22,34,775. According to the petitioners the capital employed by the company in the business on 31st December 1918 amounted to Rs. 1,16,47,896 and the profits for the year ending 31st December 1918 which was the accounting period amounted to Rs. 23,29,114. The standard profits on the said capital being Rs. 49,65,000, and the actual profits as assessed by the Collector being Rs. 23,29,114, the petitioners submitted that they were exempted from the Excess Profits Duty. On the 30th October 1919, the Collector of Income Tax issued a notice of demand in which he assessed the petitioners with the Excess Profits Duty in the sum of Rs. 6,48,379-4-0.

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On the 6th November 1919, the petitioners preferred an appeal to the Chief Revenue-Authority against the said assessment on the ground that the Collector had refused to take into account cash and investments which amounted to Rs. 1,08,11,684, as forming part of capital on 31st December 1918 except to the extent of Rs. 40 lakhs, and further that on the 31st December 1917, (i.e., the preceding year) such cash and investments had amounted to Rs. 89,82,434.

The petitioners alleged that the said sum of Rs. 1,08,11,684 had been retained by the company in the business for the purpose of discharging liabilities and (except such sum as it was necessary to keep in a liquid form for the purposes of the said business) for purchasing steamships so soon as conditions made it possible so to do. The petitioners further alleged that since the 31st December 1918 the said cash and investments had been considerably reduced and that at the date of the petition they amounted to Rs. 83,45,224. At the hearing of the appeal before the Chief Revenue-Authority, the petitioners requested him to refer to the High Court the question, whether the said cash and investments on the 31st December 1918 should be taken into consideration, under section 15 of the Excess Profits Duty Act of 1919 and section 51 of the Income Tax Act of 1918.

Thereafter, the petitioners wrote to the Chief Revenue-Authority the following letter, Exhibit D, dated 5th August 1920 :—

"Referring to the hearing before you on the 3rd instant, our objection to the assessment upon us of the Excess Profits Duty and to the request then made by our counsel that you should, under section 15 of the Act and section 51 of the Income Tax Act, 1918, state a case for the opinion of the High Court we have the honour to formulate the questions upon which we desire a case to be stated.

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Such questions are :—

(*a*) Whether monies *bona fide* set apart before the end of the accounting period as capital for the purposes of the business and temporarily placed upon deposit with Banks or temporarily invested in securities is capital employed in the business within the meaning of the proviso to section (6) (1) (*b*) (*iii*) of the Excess Profits Duty Act, 1919.

(*i*) When such monies represent the proceeds of property other than securities held by the assessees before the accounting period ?

(*ii*) When such monies are profits accumulated before the accounting period ?

(*iii*) When such monies are profits accumulated during the accounting period ?

(*b*) Whether the income arising from such deposits and investments having been included in the assessable profits it does not follow that the assessees are entitled to have such deposits and investments included in the capital employed in the business ?

(*c*) Whether if the deposits and investments referred to in question (*a*) are excluded from the capital the Revenue-Authority is entitled to include the income derived therefrom in the assessment ?

We shall be glad to know at your early convenience and before you give a final decision upon our objection whether you propose to accede to our request to state a case. If you do not propose to do so we shall have no alternative but to apply " to the High Court for a mandamus."

On 5th August 1920, the Chief Revenue-Authority passed orders confirming the assessment made by the Collector and refusing to refer the said question to the High Court on the ground that the law on the point was quite clear and it was therefore unnecessary to make such a reference. The following was the decision of the Chief Revenue-Authority :—

This Company made very large profits during the war, and invested a large amount of them in securities. They did not distribute these investments as dividends nor employ them in the business. They now claim that the securities are assets of the business and capital employed in the business, saying that they have entered into large contracts for laying out the money, and were prevented by the war from doing so, also that those are assets employed in the business because if the Company were liquidated these sums would be used to meet the liabilities, and if the business were sold, the securities would be assets.

Under the Act, it is not the Company which is liable but the *business* of the Company. The first proviso in section 6 states the basis for determining the average profits of the standard years, and states clearly that it is the average capital "employed in the business" which is the basis. The words "capital so employed" make this still clearer. Again Schedule II (1), (*c*), proviso shows that accumulated profits must be employed in the business if they are to be taken as capital.

It is quite clear to me that a great part of the profits which were invested are in the present case under appeal in no sense capital employed in the business, but merely immense profits obtained in exceptional circumstances which the firm did not and could not employ in the business. To allow such profits to be counted as capital would defeat the whole letter and spirit of the Act, and the result would be that those concerns which made the heaviest profits would escape all excess profits duty by investing them in securities. No other firm has raised such a contention before me.

The only other point to consider is whether the Collector has estimated the working capital correctly. Here he has allowed forty lacs invested which I consider very liberal.

It has been represented that under Rule 51 a case should be stated by me for the High Court as to the interpretation of the words "capital employed in the business". The firm wants this interpreted as the total capital of the Company. I am satisfied, however, that such a reference is quite unnecessary. The Act, section 6, and Schedule II (1), (*c*) proviso are absolutely clear on the point and show that only capital actually employed in the business is to be considered capital.

The fact that a large sum is involved is no reason why a reference to the High Court should be necessary.

I reject the appeal and confirm the gross duty at Rs. 6,91,604-8-0.

On the 11th August 1920, the Chief Revenue-Authority wrote to the petitioners stating that in calculating the income liable to duty, income arising from investments excluded from business capital had not been taken into consideration.

Para. 12 of the petition which set forth the main ground on which the petitioners' case rested, ran as follows :—

12. Your petitioners say that by reason of the proviso to section 6 (1) (iii) and Schedule 2 of the said Excess Profits Duty Act of 1919 the said

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cash and investments as on the 31st December 1918 or in the alternative as on the 31st December 1917 as far as they represented assets which had not been replaced and as far as they consisted of accumulated profits should have been taken into consideration for the purposes of the said assessment. It was never suggested that the capital represented by such cash and investments had not been *bona fide* retained in your petitioner's business for the purpose of carrying on the same. Your petitioners say that the question whether such cash and investments should be taken into consideration is a substantial question of law and that the reasons given by the Chief Revenue-Authority refusing to refer the said question to this Honourable Court show that he failed to exercise his discretion under section 51 of the Income Tax Act judicially and refused arbitrarily to refer the said question.

Your petitioners pray :—(*a*) That this Honourable Court will be pleased under section 45 of the Specific Relief Act to order the Chief Revenue-Authority to refer the said question together with his opinion thereon for the decision of this Honourable Court. (*b*) In the alternative, this Honourable Court will be pleased under section 45 of the Specific Relief Act to order the Chief Revenue-Authority to hear and determine according to law your petitioners' application to refer the said question to this Honourable Court.

On 20th August 1920, a rule *nisi* was granted by Setalvad J. calling upon the Chief Revenue-Authority to show cause why an order as prayed for by the petitioners should not be made. The matter came on for hearing before their Lordships, Macleod C. J. and Fawcett J.

Coltman, for the petitioners, in support of the rule.

Sir Thomas Strangman, Advocate-General, for the respondent, to show cause.

MACLEOD, C. J. :—The petitioners were assessed on the 30th October 1919 under the Excess Profits Duty Act X of 1919 in the amount of Rs. 6,48,379-4-0 and received due notice thereof from the Collector of Income Tax (Exhibit B). Thereupon the petitioners presented an appeal against the said assessment to the Chief Revenue-Authority claiming that they were entitled to be held exempt from assessment. The appeal was heard on the 3rd August 1920 when the

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assessment of the Collector of Income Tax was confirmed. The petitioners requested the Chief Revenue-Authority to state a case for the opinion of the High Court but on the 11th August the Chief Revenue-Authority wrote that a reference to the High Court had been deemed unnecessary.

On the 20th August, the petitioners obtained a rule calling upon the Chief Revenue-Authority to show cause why he should not be ordered to refer to this Honourable Court for its decision the questions set out in Exhibit D to the petition, and the question whether the cash and investments referred to in para. 8 of the petition should be taken into consideration for purposes of excess profits duty, together with his opinion upon those questions, or, in the alternative, why the Chief Revenue-Authority should not be ordered to hear and determine according to law the petitioners' application to refer the above questions to this Honourable Court. The alternative prayer seems unnecessary. An affidavit in reply has been put in annexing the decision of the Chief Revenue-Authority to the effect that the reference asked for was quite unnecessary as the provisions of section 6 of the Act and Schedule II thereto were absolutely clear on the point.

Section 45 of the Specific Relief Act provides that—

"[The High Court] may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office...Provided—

(*a*) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing...of the said specific act;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person...in his...public character,...

(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

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(*d*) that the applicant has no other specific and adequate legal remedy ; and

(*e*) that the remedy given by the order applied for will be complete."

Act X of 1919 is an Act to impose a duty on excess profits arising out of certain businesses, and it is admitted that the Act applies to the business carried on by the petitioners. Sections 5 and 6 provide for the methods in which the excess profits are to be ascertained for the purposes of assessment.

Section 7 gives the Collector power to make allowances for special circumstances.

Section 8 provides for an appeal to the Chief Revenue-Authority against the decision of the Collector or an application under section 7. The decision of the Chief Revenue-Authority is final.

Section 15 provides that certain sections of the Indian Income Tax Act (VII of 1918) including sections 49 to 52 shall apply as if they referred to excess profits duty instead of to income tax.

Section 51 of the Indian Income Tax Act (VII of 1918) provides that if in the course of any assessment under the Act a question has arisen with reference to the interpretation of any provision of the Act or of any rule thereunder, the Chief Revenue-Authority shall refer any such question on the application of the assessee with its own opinion thereon to the High Court, unless it is satisfied that the application is frivolous or that a reference is unnecessary.

The wording of the section is not very satisfactory. On a strict construction the Chief Revenue-Authority could always avoid referring a question on the application of the assessee by saying it was satisfied the reference was unnecessary, and then it would be

difficult for the Court to hold that it was incumbent under the Act for the Chief Revenue-Authority to refer the question. I think, however, it would be open to the Court to consider the grounds on which the Chief Revenue-Authority was satisfied that a reference was unnecessary. For instance, if a question arose with regard to the interpretation of a section which was so complex, so intricate, that it was clearly advisable that the question should be finally determined by a judicial authority rather than by the Chief Revenue-Authority, I doubt whether that Authority would be justified in saying that it was satisfied that a reference was unnecessary. In order, therefore, to decide whether in this case the Chief Revenue-Authority had reasonable grounds for being satisfied that a reference with regard to the questions which had arisen was unnecessary, we must consider the sections of the Act which provide for the assessment of excess profits duty.

Section 2 defines the accounting period as the twelve months ending the 31st March 1919, or, if the accounts of the business have been made up within the twelve months for the purpose of the Indian Income Tax Act, 1918, in respect of a year ending on any date other than 31st March, then the year ending on that date.

Section 4 imposes a duty of 50 per cent. on the amount by which the profits in the accounting period exceed the standard profits.

Section 6 (1) (*a*) and (*b*) prescribe various methods for calculating standard profits. If they are calculated under (*b*) there is a proviso that if the average capital employed in the business in the years adopted for the purpose of determining the standard profits is less or more than the capital so employed at the end of the accounting period, there shall be made to or from the

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standard profits an addition or deduction as the case may be, which shall bear to the standard profits the same proportion as such decrease or increase of capital bears to the average capital so employed in the year so adopted. For the purpose of ascertaining the average capital, the capital employed in the business in any year shall be deemed the capital so employed at the end of that year.

By sub-section (4) no increase of capital made after the 31st December 1918 shall be taken into account in any case and no such increase before that date shall be taken into account, when it appears or to the extent to which it appears, that the increase was made with intent to evade or has the effect of evading the payment of the excess profits duty. To take, therefore, a concrete instance, if the standard profits are one lac on an average capital of ten lacs, and the capital at the end of the accounting period is twenty lacs then the standard profits will be increased to two lacs. It is obvious then that the more the capital at the end of the accounting period can be increased, the greater the addition to the standard profits, with a corresponding decrease in the amount on which the excess profits duty can be levied.

Schedule II to the Act prescribes how capital is to be ascertained.

1. The amount of the capital of a business shall, so far as it does not consist of money, be taken to be—

(*a*) so far as it consists of assets acquired by purchase, the price at which these assets were acquired, subject to any proper deduction for depreciation or for unpaid purchase money,

(*b*) so far as it consists of assets being debts due to the business, the nominal amount of those debts subject to any reduction which has been allowed or is allowable in respect of these debts under the Indian Income Tax Act, 1918, and

(c) so far as it consists of any other assets which have not been acquired by purchase, the value of the assets at the time when they became assets of the business, subject to any proper deduction for depreciation:

2. Any borrowed money or trade debts shall be deducted in computing the amount of capital for the purposes of this Act.

Then there is the proviso which has given rise to the matter in dispute in this case.

Accumulated profits other than those made in the accounting period would, in the ordinary course, remain to the credit of the profit and loss account and would not be capital, but nothing in the provisions regarding the ascertainment of the capital of a business is to prevent accumulated profits being treated as capital if they are employed in the business.

Now the petitioners' balance sheet for the year ending the 31st December 1918 shows a total of 119 lacs odd for cash and investments. No doubt a portion of this amount was required to meet recognised liabilities appearing on the other side of the balance sheet, but it is equally clear, and I do not think the petitioners dispute it, that some portion of this amount represented accumulated profits for the years prior to the accounting period. Those profits which are not employed in the business cannot be treated as capital for the purposes of the Act. There is nothing, therefore, with regard to the interpretation of Schedule II which can give rise to any difficulty. Assuming that the questions were referred to us, what is the proper interpretation of the proviso to clause (1) of the Second Schedule, we could only say that accumulated profits cannot be treated as capital unless they are employed in the business. Whether or not they are employed in the business is a question of fact which the Chief Revenue-Authority is entitled to decide on the materials before it.

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The petitioners claimed that the whole of their cash and investments were employed in the business. They made no attempt to assist the Collector or Chief Revenue-Authority in deciding how much was employed in the business, with the result that a haphazard guess was made at the amount, instead of employing proper accounting methods. The questions which the petitioners formulated in their letter of the 5th August to the Chief Revenue-Authority, were really questions for a Chartered Accountant and not questions with regard to the interpretation of the Act. Supposing those questions were before the Court they could only be answered with the assistance of experts. But it may be permissible to make a few remarks on the facts as presented to us. Ordinarily speaking the excess in a balance sheet of assets over liabilities is profit. On the balance sheet produced before us that excess is over sixty lacs, if the reserve fund is not considered as a liability since it represents past profits which have not been distributed. But if the ships are valued as the petitioners wish them to be valued for the purpose of increasing the capital as at the end of the accounting period, the profits would be over rupees eighty-six lacs including of course the profits earned during the accounting period. This amount is actually represented by cash and investments; and could be distributed among the shareholders by way of dividend. If, however, it was represented by ships, even though they were purchased at the end of the accounting period, it would be profit employed in the business.

As on the 31st December 1918 it had not been so employed, it cannot be argued that it makes no difference so long as it was intended to be employed. The Act does not say that profits intended to be

employed in the business can be treated as capital. We have not got the calculations before us on which the Collector came to the conclusion that the capital at the end of the accounting period was twenty-four lacs, but the best advice I can give the petitioners is that they should ask the Collector or the Chief Revenue-Authority to reconsider its decision, and instead of adopting an absolutely impossible attitude in calculating the capital, to satisfy him by proper accounting methods what amount of the accumulated profits now represented by investments are actually employed in the business.

In my opinion the Chief Revenue-Authority had reasonable grounds for being satisfied that it was unnecessary to refer to the High Court the questions which had arisen with regard to the interpretation of the Act and the rule should be discharged with costs.

FAWCETT, J.:—I agree that it has not been shown to be "clearly incumbent on" the Chief Revenue-Authority to refer the questions mentioned in this petition under section 51 of the Indian Income Tax Act, 1918, and that the rule should be discharged with costs.

The words "employed in the business" in the proviso to Rule 1 of Schedule II to the Excess Profits Duty Act, 1919, *prima facie* bear their natural meaning of "*actually* employed in the business", and cannot properly be construed as if the words were "employed *or intended to be employed* in the business". If the latter had been intended, they would presumably have been used, just as they are used in Schedule D, Cases I and II, Rule 3 (*f*) of the English Income Tax Act, 1918, which specifies "any sum employed *or intended to be employed* as capital in such trade, profession, employment or vocation."

In my opinion, the interpretation put on the proviso by the Chief Revenue-Authority is correct, and he had

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reasonable grounds for being satisfied that it was unnecessary to make the reference to the High Court, which the petitioners asked for.

Solicitors for the plaintiff: Messrs. *Crawford, Bayley & Co.*

Solicitor for the defendant: Mr. *J. C. G. Bowen.*

Rule discharged.

G. G. N.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

[1920. September 13.

BHAVAN MORAR, BY HIMSELF AND AS SURVIVING CO-PARCENER OF THE DECEASED VALLABH PEMA (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT*.

Resumption—Pasaita Inam land—Patelki service—Exemption from payment of land revenue in return for service as Patel—Service ceasing claim for exemption from paying land revenue ceases—Government not entitled to resume possession of land—Land Revenue Code (Bom. Act V of 1879), section 202.

The land in suit was held as a *Pasaita Inam* land by one Vallabh Pema. It was entered as *Chakariat* at the time of the settlement in 1868 and in consideration of rendering services as a Patel, Vallabh Pema was excused from paying revenue to Government. In 1916 Vallabh Pema was removed from the Patelship and a stranger to the family was selected to officiate in his place. The Collector then purporting to act under section 202 of the Land Revenue Code made an order that Vallabh Pema should vacate the land and hand over possession to the new Patel. The plaintiff, grandson of Vallabh Pema, thereupon sued for a declaration that the plaintiff had a right to hold and occupy the suit land so long as he paid the full assessment to the Government and that the Government had no right to evict the plaintiff,

Held, that the plaintiff was entitled to succeed as his right to possession of land was not lost though his family ceased to hold the Patelkiship and their claim for exemption from paying the land revenue came to an end.

FIRST appeal against the decision of W. Baker, District Judge of Surat, in Suit No. 7 of 1917.

* First Appeal No. 226 of 1918.