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Court : Mumbai

Decided On : Oct-01-1941

Reported in : [1942]10ITR52(Bom)

Appellant : P E Polson in Re.

Judgement :

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BEAUMONT, C. J.-This is a reference made by the Commissioner of Income tax under Section 66 (2) of the Income-tax Act, raising questions arising under section 25 of the Act as amended in 1939.

The material facts are that the assessee, Mr. Polson, was carrying on business under the name of Polson Manufacturing Co., which dealt in coffee, butter, flour and casein, which business had been in existence whilst the Income-tax Act of 1918 was in force. On the 1st of the January 1939, Mr. Polson had paid income-tax was assessed in respect of his business under the Act of 1918, and under that Act income-tax was assessed in respect of the year of assessment, and not in respect of the previous year. Under the Act of 1922 income-tax was assessed in respect of the previous years income, and, therefore, it following that for the income of the year 1921 income-tax was paid twice,-once under the Act of 1918 in respect of the year 1921, and once under the Act of 1922, in respect of the year 1922. So that, eventually it would happen. unless some relief was given, that tax would be payable for one year more than the life of the business. In order to

remove that hardship Section 25 (3) of the Act of 1922 provided that where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax act, 1918, was discontinued, relief was given. It will be noticed that sub-section seems to treat business, profession or vocation as if it was a sort of legal entity. It speaks of a business, profession or vocation on which tax was charged. Tax, of course, is not charged. on a business; tax is charged on the owner in respect of the business. It is not disputed in this case that Mr. Polson was charged in respect of his business under the Act of 1918, and that such business was the same business as the business assigned on the 1st January 1939, was not identical with the business as it existed in 1918.

Then under the Act of 1922, Section 26 (2) dealt with the case of assignment of a business, and provided that where, at the time of making an assessment under Section 23, it was found that the person carrying on any business, profession or vocation had been succeeded in such capacity by another person, the assessment should 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. So that there again the business is taxed as if it was an entity, and the tax is charged against the owner of the business at the time of the assessment, although he may not have been the owner of the business during the accounting year.

Under the old Act, reading those two sections together, it was held that the word 'discontinued' in Section 25 (3) referred to discontinuance by cessation, and not to discontinuance by disposal of the business to somebody else. That was so held in Commissioner of Income-tax, Bombay v, Sanjana & Co., Ltd. The Advocate-General has referred us also to an English case Sir H. H. Bartlett v. The Commissioners of Inland Revenue where Mr. Justice Scrutton, as he then was, said that a business, which was disposed of and carried on by the successor, is not discontinued. I am not sure that the matter is quite so simple as Mr. Justice Scrutton seemed to think, because there may be cases in which a business is disposed of in such a way that it would be difficult to suggest that the same business was carried on by the successor. For instance, a business on a small scale may be sold to the owner of a big concern, and amalgamated with the big

concern. In such a case the business assigned may not altogether cease to exist, but is difficult to identify under its new guise, and in my view, can fairly be said to have been discontinued. In point of fact, a business carried by one man is never quite the same as a business carried on by another man, for one thing, the credit of the owner is different, and that may affect methods of business.

Under the amended Act the scheme as to succession was altered and section 26 (2) provides that where there has been a succession to business, then the predecessor and the successor are each to be assessed in respect of his actual share of the income, profits and gains of the previous year. So that there you cease to treat the business as a single unit, and split up the tax between the owners for the time being of the business. That alteration in the law required a change to be made in Section 25, because relief had to be given to the predecessor of the business in respect of the double tax with which Section 25 deals. That was dealt with by the addition of a new sub-section (4), to Section 25, which provides that where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, then he is given relief.

Now, sub-section (4) of section 25 does not apply here, because at the time when the amended Act came into operation, namely the 1st of April 1939, Mr. Polson was not carrying on his business, the assignment having been made on the 1st of January. So he cannot get relief under Section 25 (4), and the question is whether he can get relief under subsection (3) of the amended section 25. That sub-section provides :

'Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, then unless there has been a succession by virtue of which the provision of sub-section (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the

income, profits and gains of the said period'

The sub-section seems to me to be very clumsily worded, and there is difficulty in this case, because in point of fact there is difficulty in this case, because in point of fact there is no period between the discontinuance of the old business and the end of the previous year. The previous year ended on the 31st of December 1938, and that is the date when the old business was sold to the company. so that taking the sub-section literally, and assuming its application to this case, it provides that no tax shall be payable for this non-existing period between the end of the previous year and the date of discontinuance, and the assessee may further claim that the income of the previous year, that is the whole year 1938, shall be deemed to be the income of the said period. I suppose that if the income of 1938 is to be deemed to be the income of a period which does not exist, and in respect of which no tax is to be charged, it is correct to say that the assessee is not liable for any tax, and that point has not been disputed by the Commissioner of Income-tax. and that point has not been disputed by the Commissioner of Income-tax. His contention is that under the new act, as under the old, 'discontinued' refers only to discontinuance by cessation, that the business of the assessee was not discontinuance by the assignment, and that consequently the assessee is not entitled to relief under Section 25 (3). as I have already indicated, I think, the word 'discontinued' by itself, and if not controlled by the context, as it was under the Act of 1922, would cover a discontinuance by disposal. Having regard particularly to the fact that Section 26 (2) as amended imposes tax, not in respect of a continuing business, but upon the owners of the business for the time being I think that the word 'discontinued' in the new Act covers discontinuance either by cessation or by cessation or by disposal. I was at first disposed to think that the words which following 'discontinued' in the amended Act, namely, 'unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable, ' showed conclusively that 'discontinued' in the amended Act was recognised as covering a succession to which sub-section (4) might apply But it is, I think, correct to say, as the learned Advocate-General does, that the exception might cover a case, very unlikely to occur but at the same time possible, in which there had been a succession to which sub-section (4) applied and subsequently there was cessation of business within the year of assessment. For

example, suppose the assignment of the business here had taken place on the 1st of May instead of the 1st of January, and the business had been brought to an end on, say, the 1st of August, in that case undoubtedly the exception would apply. At the same time it is unlikely that a business, acquired during a year, would be brought to an end during the same year and I think the reference to a succession under Section 25 (4) indicates that relief is to be given under sub-section (3) if the case does not fall under sub-section (4) and assists the extended meaning which I am disposed to give to the word 'discontinued' under the amended Act.

In my opinion, therefore, the questions raised by the Income-tax Commissioner : (1) whether on the facts of the case the assessee is entitled to the benefit of Section 25 (3) of the Income-tax Act; and (2) whether in view of the provisions of the said Section 25 (3) no tax is payable by the assessee in respect of his income from business of Polson Mfg. Co., for the calendar year 1938 liable to assessment in respect of the financial year 1939-40, must both be answered in the affirmative. Commissioner to pay costs. KANIA, J.-I agree that the question should be answered as suggested in the judgment just delivered.

The question for consideration rests on the construction of Section 25

(3) and Section 26

(2) as found in the Act before the amendment of 1939 and as those sub-sections exist now. It appears that before the amendment of 1939 the wording of Section 26

(2) made out a scheme where business was considered an entity existing throughout the year of assessment. It made no difference if the business was owned by different persons who was the owner of it at the moment of assessment, that is at the conclusion of the assessment year, When the act was amended in 1939, a vital change was made by the amendment made in Section 26 (2). By that amendment the aspect of the business being charged was abandoned, and it was provided that each persons should be assessed in respect of his actual share of the income, profits and gains of the previous year. Therefore, in making the

assessment the revenue authorities had not to ascertain what was the profit or income of the business as an entity, but immediately their attention was drawn to the fact that there was change in the ownership, the process was to ascertain what particular income the individual for the time being earned out of that business. This aspect of the section is very material, because the words used in Section 25

(3) are peculiar. They open with words which indicate that it was the business which was charged. Now, the discontinuance may be of a business, or the term may be applicable to an assessee discontinuing his business, or the term may be applicable to an assessee discontinuing his business. When a business is transferred. in certain aspects it may be conceived that although the ownership had changed hands, the business as such continues. In no event, however, when the word is taken as relating to the assessee, it can be properly stated that the business has continued. So far as the assessee is concerned, it has certainly come to an end, although the business as an entity may, as I have pointed out, out, in certain cases continue. If Section 26

(2) has to be read now as authorizing assessment of individuals in respects of a particular share of income or profits earned by the particular party in business, the aspect of assessing a business is gone and Section 25

(3) has now to be read in that light.

Section 25 (3), as has been pointed out, was inserted to grant relief to avoid a double taxation. If the construction now urged on behalf of the commissioner is adopted, it will mean that while the assessee cannot get the benefit of Section 25 (3), because, according to the Commissioner's contention, the business continues, the transferee also will not get the benefit of it. The learned Advocate-General Contended that the words 'has been a succession' in the exception inserted by the amendment indicate that there should be a succession before discontinuance. I do not suggest that that construction is wrong. But the further illustration which he gave, in my opinion, is not appropriate at all. It was suggested that if the business was transferred on the 1st of May 1939 and then discontinued in September 1939, under section 25 (4) the last owner would come under that sub-section and claim the relief provided by reason of the discontinuance of the business. That overlooks

the fact that he has not been assessed at all in respect of the business. This will be more clear by taking the date of transfer in December, 1939, and of discontinuance in July, 1940. The assessment will be under section 26 (2), and for the profits which he actually received during the period between 1st of December and 31st of March. He cannot contend that the business as an entity exists or has been discontinued, because he will be met by the wording of Section 26 (2), which does not deal with the business being charged as an entity at all. I, therefore, think that the illustration given by the learned Advocate-General is inappropriate. Having considered the matter from different aspects, it appears to me that if there is a case of doubt, and section 25 (3) having been clearly inserted in the Act to grant a relief, if the legislature wanted to prevent that relief, if the legislature wanted to prevent that relief being given in certain exceptional circumstances, it was their duty to provide so in clear words.

In my opinion, as the whole scheme of assessment or charging business as an entity has been changed and section 26 (2) has been brought in line with the general scheme of the Act that it is the individual who has to be charged and not an abstract thing like business or profession, the word 'discontinuance' is wide enough to include the contingency of a transfer under the amended Act as it exists now. The answers to both question should, therefore, be in the affirmative.

Reference answered in the affirmative.

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