

EXECUTORS OF THE ESTATE OF J. K. DUBASH
 v.
 COMMISSIONER OF INCOME TAX, BOMBAY
 CITY.

[SHRI HARILAL KANIA C.J., PATANJALI SASTRI
 and DAS J.J.]

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 Dec. 21.

Indian Income-tax Act (XI of 1922), s. 25 (4)—Succession—Death of person carrying on business—Executors carrying on business as going concern for selling it under terms of will—Whether “succeed in such capacity” to testator—Date of succession.

A person who carried on a business on which tax had been levied under the Income-tax Act of 1918 died on the 9th of April, 1942, leaving a will by which he authorised his executors to carry on his business as a going concern, as if they were absolute owners but without being responsible for loss, for a period not exceeding 12 months during which if any of his nephews wanted to purchase the business, they might sell it to him or them. The business was sold to one of the nephews on the 1st January, 1943. The question being whether for the purposes of s. 25 (4) of the Income-tax Act of 1922 as amended in 1939 the succession to the business took place on the 9th April, 1942, when the testator died or on the 1st January, 1943, when the business was sold :

Held, affirming the decision of the Bombay High Court, that inasmuch as the business got vested in the executors on the death of the testator and the executors carried on the business within the meaning of ss. 3 and 10 of the Act, and as such became personally liable as assesseees and there was thus a change in the assessee, a succession to the testator “in such capacity” took place on the date of the death of the assessee, even though the executors carried on the business as a going concern under the terms of the will and the business was also being carried on not for the benefit of the executors but for the benefit of the estate of the testator.

Per PATANJALI SASTRI J.—The expression “succeeded by another person” in s. 26 (2) and s. 25 (4) of the Act includes not only cases of succession *inter vivos* but also cases of succession on death.

While it is true that a transfer of ownership is ordinarily involved in cases of succession falling within s. 26 (2) and s. 25 (4), it is not an essential element of succession within the meaning of those provisions.

The words “in such capacity” in s. 26 (2) and s. 25 (4) mean nothing more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is, with a liability to be taxed on its profits and gains.

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Commissioner of Income-tax, Bombay v. P. E. Polson (L.R. 72 I.A. 196) referred to.

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Jupuli Kesava Rao v. Commissioner of Income-tax, Madras (59 Mad. 377) explained.

Commissioner of Income-tax, Bombay City. APPEAL (Civil Appeal No. CV of 1949) from a Judgment of the Bombay High Court (Chagla C.J. and Tendolkar J.) dated March 19, 1948, in a reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (Income-tax Reference No. 26 of 1947).

Sir N. P. Engineer (R. J. Kolah, with him) for the appellant.

M. C. Setalvad, Attorney-General for India, (G. N. Joshi, with him) for the respondent.

1950. December 21. The Court delivered Judgment as follows :

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KANIA C.J. -- This is an appeal from a judgment of the High Court at Bombay delivered on a reference by the Income-tax Appellate Tribunal under the Indian Income-tax Act. The material facts are these. The assessee (appellant) is the executor of the will of Mr. J. K. Dubash who died on the 9th of April, 1942, having made his last will on the 8th of April, 1942. Probate of the will was issued to the executors on the 10th of August, 1942. During his life-time, the testator carried on the business of shipping agents. Clause 13 of the will contains directions about carrying on this business of the testator till its disposal. It directs the executors to carry on the business as a going concern after his death with power to make fresh contracts and discharge the existing and future liabilities and all other usual and necessary powers, unless special circumstances arose which, in the opinion of the executors, made it expedient to sell the business earlier. This business was to be carried on for a period not exceeding twelve months during which time the executors were to ascertain whether or not any of his nephews was willing to purchase the said undertaking. For this purpose and generally for sale purposes, he directed that the executors shall, as soon as possible,

after his death, have a valuation made of the said undertaking. The undertaking was to be sold so as to include all his interest in the premises, the goodwill, the stock-in-trade, plant, furniture etc. but excluding securities for money and cash in the bank to the credit of the account of that undertaking. If the executors were satisfied before the expiration of one year from the testator's death that the said undertaking would not be sold to his nephews because none was willing or able to purchase it or if it remained unsold, at the end of a year, to any of the nephews then (whichever event first happened) the executors were directed to sell the undertaking to such third person on such terms and at such price as they thought proper. The clause ended with the following words:— "I expressly declare that in carrying on the said undertaking my trustees shall, in addition to all powers, discretion and authorities vested in them by law, have power to carry on or discontinue any part of the said undertaking or to augment or diminish the capital employed and generally to act as absolute owners without being responsible for any loss." The business was sold to one of the nephews on the 1st of January, 1943. The appellants contended that within the meaning of section 25 (4) of the Indian Income-tax Act the succession to the business took place on the 1st of January, 1943, while the taxing authorities contended that the succession was on the 9th of April, 1942, when the testator died. The first question submitted for the High Court's opinion related to this dispute.

The second question referred to the High Court for its opinion was in respect of an amount paid by the executors to the widow of the testator. That question was answered against the appellants by the High Court. Learned counsel appearing for the appellants intimated that he did not want to contest the High Court's decision on the point. The appeal therefore is limited to the first question only.

Section 25 of the Indian Income-tax Act, 1939, gives certain concessions in respect of a business where tax had been paid by the person carrying the business

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under the provisions of the Indian Income-tax Act, 1918. The material part of sub-clause 4 of section 25 is in these terms :—

“ Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 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..... ”

The scheme of section 25 read with the provisions of section 26 (2) appears to be to give relief, *inter alia*, to persons who were carrying on business in 1921 and had been taxed on their income under the Income-tax Act of 1918. By a change effected by the Income-tax Amendment Act of 1922 they were subjected to taxation twice on the income of 1921-22. The relief is intended against this levy of tax twice over.

The rival contentions urged on behalf of the parties are these. The assessee contends that on the death of the testator under clause 13 of the will of the deceased, the executors were carrying on the business of the deceased only for the purpose of winding it up, and there was no succession to the business on the death of the deceased within the meaning of section 25 (4) of the Income-tax Act. It is argued that the clause provides for nothing else than a direction to carry on the business with a view either (a) to sell it within a year to one of the nephews, or (b) to sell it to someone else at the end of the year as a going concern. It was pointed out that all directions in the clause permitting contracts to be made etc. were for the purpose of keeping the business alive and not allowing it to die so that the business which was a valuable asset of the deceased could be sold as a going concern with its goodwill. It was therefore argued that the succession to the business took place only on the 1st of January, 1943, when the business was sold by the executors to one of the nephews in terms of clause 13 of the will. In actual money, the contest is whether the executors

are entitled to get the benefit of the exemption from income-tax in respect of the profits earned only for the nine days between the 1st of April and the 9th of April, 1942, or between the 1st of April, 1942, and 1st of January, 1943, under section 25 (4) of the Indian Income-tax Act. The High Court has answered the question against the assessee.

In our opinion, the conclusion of the High Court is correct. It cannot be disputed that in the event of a sale or gift of the business by the original owner the succession within the meaning of section 25 (4) will take place only on the date of such sale or gift and the exemption from liability to tax will be for a period terminating on that day. It cannot again be seriously disputed that if the testator settled his business on trust under a deed of settlement there will be a succession to the business by another person on the day of the settlement. Similarly in the event of his death intestate his heir-at-law will succeed to the business on the date of his death. The argument advanced on behalf of the appellants that in the present case having regard to the terms of clause 13 of the will there has been "no succession in such capacity to another person" because the executors were carrying on the business only with a view to sell it as a going concern, cannot be accepted because on the day of the death of the deceased the estate including the business got vested in the executors and the executors carried on the business within the meaning of section 3 read with section 10 of the Act and as such became personally liable as assessee. Thus there came about a change in the assessee and therefore "a succession in such capacity" took place within the meaning of section 25 (4) of the Income-tax Act. It seems clear that if the testator had transferred the business to a trustee, although the trustees will not be the beneficial owners, in law there will be a succession of the business to another person within the meaning of section 25 (4) of the Indian Income-tax Act. If in such a case that result follows there appears no reason why when the legal estate is transferred by operation of law to an executor

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there should not be considered a succession to the estate by another person within the meaning of the same section 25 (4). The words "in such capacity" in that clause further make the position clear. It makes the distinction of legal and beneficial ownership irrelevant. The contention that the business was to be carried on by the executors as such, as a going concern or that it was being carried on for the benefit or loss of the testator's estate is not relevant for the present discussion. The only relevant question under section 25 (4) of the Indian Income-tax Act is whether in respect of the business there is a succession to another person. This is a provision to give relief and the scope of the relief must be governed by the words used in the Act. In our opinion the answer to this question, on the facts of the present case, must be in the affirmative and the date of such succession must be considered to be the death of the testator, which was on the 9th of April, 1942. The result is that the appeal fails and is dismissed with costs.

*Patanjali
 Sastri J.*

PATANJALI SASTRI J.—I agree that this appeal should be rejected.

The material facts have been set out in the judgment which has just been delivered. The only question now remaining for decision is : on what date was the testator, who was carrying on the business of shipping agent and land contractor "succeeded in such capacity by another person" within the meaning of section 25 (4) of the Act—on the 9th April, 1942, when the testator died and the appellants as the executors took over the business and carried it on or on the 1st January, 1943, when the business was sold by them as a going concern?

The business being admittedly one which was charged to tax under the Income-tax Act, 1918, if there was no succession within the meaning of section 25 (4) until the sale took place, as the appellants contend, the profits and gains of the period from 1st April, 1942, to 1st January, 1943, would not be liable to tax, whereas, if the testator could be said to have been "succeeded"

by the appellants, the profits of the much shorter period between 1st April, 1942, and 8th April, 1942, alone would be exempt from taxation. The reason for this relief is to be found in the change of the basis of taxation when the Act of 1922 was passed which resulted in the profits of the year 1921-22 being assessed twice over, once in that year as the income thereof "on adjustment" under the Act of 1918 and once in the next year as the income of the "previous year" under the Act of 1922 [see *Commissioner of Income-tax, Bombay v. P. E. Polson*(¹)]. The relief was, however, confined to discontinued businesses, as, in cases of succession till 1938 the successor alone was assessed to tax on the whole of the profits of the previous year including those earned by his predecessor before the succession occurred. But the Indian Income-tax (Amendment) Act, 1939, (hereinafter referred to as the amending Act), having amended section 26 (2) so as to provide, in the case of a succession in business, profession or vocation, for the assessment of the predecessor and the successor, each in respect of his actual share of the profits of the previous year, the relief was extended, by enacting section 25 (4), to cases of succession occurring after the commencement of that Act, with the same object as in the case of discontinuance, namely, to redress the hardship of the business having been charged twice over on the income of 1921-22. In other words, the predecessor is given the same relief as if he had discontinued the business on the date of succession. It will thus be seen that the enactment of section 25 (4) is consequential on the amendment of section 26 (2), and the scope and meaning of the expression "succeeded in such capacity by another person" in section 26 (2) must determine also its scope and meaning in section 25 (4).

The first question which arises on the language of the amended section 26 (2), which speaks of "the person succeeded" being "assessed" and of his not being "found", is whether the sub-section should be construed as applicable only to cases of succession

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inter vivos. Whatever force there may have been in the suggestion that the sub-section could not have contemplated cases of testamentary or intestate succession if there was no provision for the assessment of profits earned by a deceased person in the hands of his representatives, there seems to be no sufficient reason for excluding from the scope of the sub-section cases of succession on death in view of the provision in section 24B. On the other hand, proviso (c) to section 24(2), which refers to a person "succeeded in such capacity by another person otherwise than by inheritance", would seem to imply that "succession", as that term is used in the Act, includes devolution on death.

The next question is what is the meaning to be attributed to the phrase "in such capacity"? A Full Bench of the Madras High Court in *Jupudi Kesava Rao v. Commissioner of Income tax, Madras*⁽¹⁾, held that the expression meant "in the capacity as owner", so that "the person who succeeds another must, by such succession, become the owner of the business which his predecessor was carrying on and which he, after the succession, carries on in such capacity, that is. the capacity as owner". Applying that test they held that the sole surviving member of a Hindu undivided family did not succeed to the business of the family within the meaning of section 26(2), as he was previously a part-owner of the business and there was no transfer of *ownership*. While it is undoubtedly true that a transfer of ownership is ordinarily involved in cases of succession falling within section 26(2) or section 25(4), it cannot, in my opinion, be regarded as an essential element of succession within the meaning of those provisions. The Income-tax Act directs its attention primarily to the person who receives the income, profits or gains rather than to the ownership or enjoyment thereof. The assessee is defined in section 2 (2) as the person by whom the income-tax is payable and by section 10 the tax is payable by an assessee who carries on the business, profession or

(1) I.L.R. 59 Mad. 377.

vocation. The statute thus fastens on the person who carries on the business, etc., the liability to pay the tax on the profits earned by him regardless of their destination or enjoyment. It is also worthy of note that in several instances persons who have no proprietary or other right in the income charged to tax are made liable to pay the tax for no other reason than the convenience of assessment and collection. Such instances are to be found in section 26(2) proviso, section 18 (7), section 23-A (3), section 25-A and section 42(1). As observed by Lord Cave in *Williams v. Singer & Others*⁽¹⁾ "the fact is that, if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income, which it is sought to reach".

There seems to be no warrant, therefore, to insist on a transfer of ownership as the decisive test of 'succession' within the meaning of section 26(2) or section 25(4) any more than for insisting on the ownership of the business by the person carrying on a business, for the purposes of section 10. I do not of course wish to be understood to say that a clerk or an agent in management of a business would be an assessee liable to be taxed in respect of its profits and gains. Some kind of title there must be, though not of a beneficial character. Nor need it be of the same quality in the predecessor and the successor. The question in each case must be: Is the person who has come in carrying on the business as a principal? If so, the Revenue looks to him and makes him liable for payment of the tax. The words "in such capacity" in sections 25 (4) and 26 (2) mean nothing more than the capacity of a person who carries on the business as the predecessor was carrying it on, that is, with a liability to be taxed on its profits and gains.

Applying these principles to the present case, I am clearly of opinion that the testator who was carrying on the business in question was succeeded in such

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capacity by the appellants when the former died on 9th April, 1942, and his estate vested in them. As already stated, the testator expressly authorised the appellants to carry on the business as a going concern for one year after his death and gave them power to enter into fresh contracts and to discharge liabilities past and future. They are thus an "association of persons" carrying on business, and, being assessable as such in respect of the profits and gains of the business carried on by them under section 10 read with section 3 of the Act, they are liable to be taxed on the profits earned after the 9th April, 1942.

It was objected that the appellants being assessable as the representatives of the testator under section 24-B in respect of the profits earned by him in the accounting year, they could not be treated as successors assessable under section 26 (2) in respect of the profits earned during the rest of that year, as such apportionment would be meaningless, the same interest, namely, the testator's estate, having to bear the incidence of the tax in either case. It was accordingly suggested that unless there was a break in the continuity of the interest represented by the executors, there could be no real apportionment such as is contemplated by section 26 (2) and, therefore, no succession within the meaning of that section or of section 25 (4) where the same expression is used. The argument is, in my opinion, fallacious. It overlooks the distinction between the position of the executors *vis a vis* the Revenue and their position *vis a vis* the testator's estate. As already pointed out, their liability to pay the tax on the profits earned after the testator's death arises under section 10 (1) and, being that of assessee carrying on the business, is personal to them, although as between them and the estate they would be entitled to be indemnified in respect of the tax paid; while their liability to pay tax on the profits earned during the testator's life-time arises under section 24-B and, being that of legal representatives of the testator, is limited "to the extent to which the testator's estate is capable of meeting the charge". It is therefore not correct to

say that an apportionment under section 26 (2) would be meaningless, though, if the testator's estate was sufficiently solvent, it would have no practical significance.

DAS J.—I agree with the Chief Justice.

Appeal dismissed.

Agent for the appellant: *R. S. Narula.*

Agent for the respondent: *P. A. Mehta.*

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