

# **Kunjlal Nawal Bihari vs Commissioner Of Income-Tax, U.P., ... on 17 December, 1954**

**Equivalent citations: AIR1955ALL333, AIR 1955 ALLAHABAD 333**

**Author: V. Bhargava**

**Bench: V. Bhargava**

## **JUDGMENT**

Malik, C.J.

1. This is a reference under Section 66(1), Income-tax Act read with Section 21 of the Excess Profits Tax Act and relates to three assessment years, 1944-45, 1945-46 and 1946-47. The relevant chargeable accounting periods are from 9-11-1942 to 28-10-1943; 29-10-1943 to 16-10-1944; and 17-10-1944 to 4-11-1945. (2) The questions of law referred to us for decision are as follows:

"1. Whether in the circumstances stated in para 3 of the statement of the case, the Tribunal was justified in refusing to go into the question of the validity of Section 15, E. P. T. assessment proceedings and could legally deal with Section 10A, E. P. T. appeal relating to the chargeable accounting period ending 28-10-1943 independently of that consideration?

2. Whether on the facts stated in the statement of the case, the Tribunal could legally draw the inference that the main purpose with which the firm of Kunjlal Banwarilal was formed and the division of gold sovereign of the Sarrafa shop was made was the avoidance or reduction of the E.P.T. liability and was justified in holding that Section 10A, E. P. T. Act applied to such transaction?

3. Whether the formation of the firm Kunjlal Banwarilal and the division of the gold sovereign-assets of the Sarrafa shop were transactions within the meaning of Section 10A and attracted the applicability of that section?

4. Whether in the circumstances of the case, the profits earned by the partners from the sale of the gold and sovereign received at the division of the sarrafa shop could legally be included in the assessment of the applicant firm under Section 10A of the E. P. T. Act?

3. The case came up before a Bench of this Court on 28-9-1950, and was referred to a larger Bench on the ground that the first question was of some importance.

4. This is again, one of those cases where a great deal of the time of the Court has been wasted by reason of the fact that the Statement of the Case was very badly drafted, and counsel in consequence were not agreed as to what were the facts found by the Tribunal. We have had occasion to point out more than once that the desirable course is for the Tribunal to summarise the facts seriatim and then formulate the questions of law which are said to arise on those facts. Unless this is done, the hearing before this Court will almost certainly be unnecessarily prolonged. As we proceed with this judgment, it will be apparent how necessary it was that the facts should have been clearly stated and the difficulty which this Court had to face in finding out what were the findings which give rise to the questions of law which we are required to answer.

5. Kunjlal and Bankeylal were two brothers, who carried on business in silk yarn in the name of Munnalal Madanlal. There was a partition between Kunjlal and Bankeylal and after the partition Kunjlal died. In the statement of the case the year of his death is given as 1936 though counsel stated that this was a mistake for 1934. After the death of Kunjlal, the assessee firm known as Kunjlal Nawal Bihari came into existence under a deed dated 17-8-1940. Kunjlal's son Nawal Bihari and five minor brothers of Nawal Bihari owned a twelve anna share in the new firm while the remaining four anna share was owned by Krishna Das and Durga Prasad, maternal uncles of Nawal Bihari. The assessee firm was registered under Section 26A, Income-tax Act, in the year 1941 and carried on business in silk yarn, Banaras Silk goods and sarrafa business. The firm was reconstituted on 30-7-1942, and the shares of Nawal Bihari and his five brothers were slightly altered, Nawal Bihari and Bibhutibhusan being given  $-\frac{2}{3}$  share each, Pratap Chand and Hariharlal  $-\frac{2}{-}$  each, and Gauri Shanker and Banwarilal  $-\frac{1}{9}$  each -- total remaining

$-\frac{12}{-}$  while Krishna Das and Durga Prasad continued to own a share of  $-\frac{4}{-}$  half and half.

6. During the first chargeable accounting period

-- from 9-11-1942 to 28-10-1943 -- another new firm known as Kunjlal Banwarilal was started in which the partners were Nawal Bihari and his five brothers and their mother Savitri Devi, Krishna Das, Durga Prasad and Krishna Das' son Brijbhushan Das, the shares of the two families, remaining at  $-\frac{12}{-}$  and  $-\frac{4}{-}$  respectively. This firm was also registered under Section 26A of the Indian Income-tax Act and it took over from the assessee the business in Banaras silk goods. The sarrafa business was discontinued by the assessee and the gold and sovereigns were divided among the partners. According to the learned counsel for the assessee, this division was made only among those partners who had contributed the capital and no share was given to Krishna Das and Durga Prasad who had not contributed any capital. The gold and sovereigns partitioned among the members of the assessee firm were sold by the persons to whom they were allotted. It is not clear from the Statement of the Case

whether those persons sold the entire share of the gold and sovereigns that were allotted to them. Learned counsel for the assessee has stated that only some of them sold a part of what was allotted to them at the division.

7. The Income-tax Officer and the Excess Profits Tax Officer treated the firm Kunjlal Banwari-lal as a branch of the firm Kunjlal Nawal Bihari and held that the income made by Kunjlal Ban-warilal be added to the income of the assessee and made liable for Income-tax and Excess Profits tax. The assessment orders are dated the 28-3-1945.

8. The assessee filed two appeals before the Appellate Assistant Commissioner, one against the assessment order of the Income-tax Officer and the other against the assessment order of the Excess Profits Tax Officer. The Appellate Assistant Commissioner allowed the appeals on the 9-2-1946, holding that the firm Kunjlal Banwari lal was a genuine firm which was distinct and separate from the assessee firm Kunjlal Nawal Bihari and that there was no legal bar to this new firm being constituted and a part of the business of the assessee firm being handed over to it. The Appellate Assistant Commissioner, therefore, held that the income made by the firm Kunjlal Banwarilal could not be added to the income of the assessee for purposes of Income-tax or Excess Profits Tax. The Income-tax Officer and the Excess Profits Tax Officer were, therefore, directed to pass fresh orders of assessment after excluding the profits made by the firm Kunjlal Banwarilal.

In the Excess Profits Tax appeal, the Appellate Assistant Commissioner however, said:

"The profit of the business as computed for income-tax purposes before deduction of E. P. T. and adopted for E. p. T. assessment includes the profit earned by the firm Kunjlal Banwarilal. It should be deducted and the assessment be modified accordingly unless the Excess Profits Tax Officer applies the provisions of Section 10A which is open to him."

The Commissioner of Income-tax submitted to the Appellate Order and did not file a further appeal to the Tribunal. Neither in the assessment orders nor in the order of the Appellate Assistant Commissioner is any mention made of the profits made by the sale of gold and sovereigns.

9. On 6-3-1946, the Excess Profits Tax Officer issued a notice under Section 10A, Excess Profits Tax Act, the relevant portion of which is as follows:

"WHEREAS I am of the opinion- that the main purpose of converting the branch shop, viz: Kunjlal Banwarilal into a separate partnership concern was the reduction or evasion of Excess Profits Tax liability. You are required to show cause why the profits of the said new firm be not included in the profits of the firm Messrs. Kunjlal Nawal Bihari under Section 10A of the Excess Profits Tax Act."

10. Another notice was issued under Section 15, Excess Profits Tax Act on 26-4-1947, to the following effect:

"WHEREAS in consequence of definite information which has come into my possession, I have discovered that profits of the chargeable accounting period commencing 9-11-1942 and ending 28-10-1943 chargeable to Excess Profits Tax have: (b) been under-assessed, I therefore propose to reassess the said profits that have

(b) been under-assessed ....."

11. The assessee in answer to the notice under Section 10A filed objections in which he denied that the main purpose of starting the firm Kunjlal Banwarilal and transferring to it the silk goods business was the reduction or evasion of the Excess Profits Tax liability. On 26-4-1947, the Excess Profits Tax Officer considered the objections and came to the conclusion that the main purpose in constituting the new firm was to escape the Excess Profits Tax liability, and he also held that it was for the same reason that the sarraf business was discontinued and the stock of gold and sovereigns was divided among the partners.

12. On 24-5-1947, the Excess Profits Tax Offi-

cer made the re-assessment and the income of the firm Kunjlal Banwarilal was added to the income of the assessee. The income made by some of the partners by the sale of gold and sovereigns was also added as a result of the notice under Section 15 on the ground that that income had escaped assessment and the division of the gold and sovereigns had been made to escape the Excess Profits Tax liability.

13. Against the order of reassessment dated 24-5-1947, an appeal was filed before the Appellate Assistant Commissioner, while against the order dated 26-4-1947, passed under Section 10-A, an appeal was filed before the Tribunal. The appeal filed before the Appellate Assistant Commissioner was dismissed on 1-6-1948, on the ground, that it was incompetent inasmuch as the revised assessment was made under Section 10-A, Excess Profits Tax Act and the notice under Section 15, Excess Profits Tax Act, was "merely subsidiary to the application of Section 10-A". We have no information whether a further appeal was filed against the order of the Appellate Assistant Commissioner dated 1-6-1948. The Tribunal dismissed the appeal against the order dated 26-4-1947, on 25-9-1948. An application was made for a case to be stated to this Court under Section 66 (1), Income-tax Act, read with Section 21, Excess Profits Tax Act, and the four questions, quoted above, have been referred to us for decision.

14. Taking up the first question, Section 10-A (3), Excess Profits Tax Act provides that-

"Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal."

An appeal lies under Section 17 of the Act to the Appellate Assistant Commissioner when an assessee denies his liability to be assessed or objects to the amount assessed, and there is a further appeal against the order of the Appellate Assistant Commissioner to the Appellate Tribunal under Section 19(2), Excess Profits Tax Act.

15. The assessee, therefore, had the right to file an appeal direct to the Appellate Tribunal against an order under Section 10-A. An order under Section 10-A can be passed only in the course of assessment proceedings. If the assessment proceedings have been concluded, they can be re-started by a notice under Section 15 where income had escaped assessment and definite information had come into the possession of the Excess Profits Tax Officer of that fact. If the notice under Section 15 is bad, the re-assessment proceedings must fail on that ground and an order passed under Section 10-A would also become useless as no re-assessment can then be made. Where, therefore, the validity of an assessment under Section 14 or the validity of a notice under 9. 15 is being challenged, it may be more convenient for the Tribunal to postpone the consideration of the appeal against a section 10-A order till the question of the validity of the assessment has been finally determined, but if the Tribunal does not decide to follow that procedure, it cannot in our opinion be said that there was any illegality or irregularity in its order.

16. Though we do not agree with certain observations made in the Appellate Order of the Tribunal when dealing with this part of the case it does not seem to us to be necessary to go into them and the only way in which we can answer the first question is to hold that the Tribunal could refuse to go into the question of the validity of the notice under B. 15, Excess Profits Tax Act in the appeal filed against the order under Section 10-A of the Excess Profits Tax Act.

17. Coming now to the fourth question, It appears from the Statement of the Case that the sarrafa business was as a matter of fact discontinued by the assessee; the gold and sovereigns were distributed among the various partners; and the gold and sovereigns allotted to the partners were sold by them and they earned profits. On the finding that the assessee had discontinued the sarrafa business, even if the main purpose was reduction or evasion of Excess Profits Tax liability, the amount of profit made by individual partners cannot be added to the income of the assessee unless it can be held that it is the Income of the business carried on by the assessee.

18. It has been held by the Supreme Court in -- 'Sohan Pathak and Sons v. Commissioner of Income-tax, U. P.', 1953-24 ITR 395: (AIR 1953 SC 456) (A), that Section 10-A must be read subject to the other provisions of the Act, and that where the income is not the Income of the business carried on by the assessee it cannot be added to his income merely because he had ceased to carry on that business to escape Excess Profits Tax liability.

19. Our answer to the fourth question must, therefore, be in the negative.

20. As regards the third question, learned counsel for the assessee does not now dispute that the formation of the firm Kunjilal Banwari-lal and the division of the gold sovereign assets of the sarrafa shop were transactions within the meaning of Section 10-A. The third question must, therefore, be answered in the affirmative.

21. The Tribunal has, however, added at the end of the question the words "and attracted the applicability of that section". This portion is contested by learned counsel on the ground that even if these were 'transactions' the income of the firm Kunjilal Banwarilal and the profits made by certain individual partners by the sale of gold and sovereigns could not be added to the income of the assessee. We do not think that the words "and attracted the applicability of that section"

were intended to cover this point. All that the Tribunal probably meant to ask was whether these were transactions within the meaning of Section 10-A of the Act.

22. The main controversy has turned round the second question. There is a finding of fact recorded by the Tribunal that the main purpose of forming the new firm and the division of gold and sovereigns of the sarrafa shop was to reduce or evade the Excess Profits Tax liability. We must, therefore, hold that that was the main purpose.

23. Learned counsel has, however, strenuously urged that the last portion of this question "and was justified in holding that Section 10-A, Excess Profits Tax Act applied to such transactions" should be answered in his favour. He has relied on the decision of the Supreme Court in --'Sohan Pathak and Sons v. Commr. of I. T., U. P.', (A). Briefly the facts of that case were these: The assessee was a joint Hindu family which carried on business under the name of Sohan Pathak and Sons. The family carried on at Banaras money-lending business and business in Banaras brocade. On 16-7-1943, there was a partial partition in the family and the Banaras brocade business was divided in equal shares among the four branches. The day after the partition the adult members of the family formed two partnerships, admitting the minors to the benefit thereof, and the Banaras brocade business was thereafter carried on in the names of Sohan Pathak Girdhar Pathak and G. M. Pathak and Co. It was held by the Tribunal, and the finding was affirmed by the Supreme Court at p. 399, that the main purpose in effecting a partial partition and starting two partnership firms was the avoidance or reduction of Excess Profits Tax liability.

The Supreme Court, however, remarked that there was "no clear finding as to how the partition of the brocade business was actually effected--whether by a division in shares, each branch holding its share in severally and the business being carried on as before on a partnership basis, or whether by an actual distribution and allotment of specific assets and liabilities among the branches resulting in the disruption and closing down of that business."

The Tribunal was asked to record a clear finding on the point. The Tribunal thereafter held that there was an actual distribution and allotment of specific assets and liabilities among the various branches resulting in the disruption and closing down of the business carried on by the assessee. On the return of the finding the Supreme Court dealt with the case in this way. Their Lordships said:

"The real and substantial question in the appeals is whether in view of the finding of fact that the old family business was wound up, its assets and liabilities having been actually distributed among the coparceners, and was no longer carried on by the joint family as such during the relevant chargeable accounting periods, Section 10-A has any application to the case." Their Lordships pointed out that Section 10-A could

have no application as the Act itself had no application to a business which did not make any profits during the relevant chargeable accounting period, and went on to say: "In other words, if a business, having been discontinued, earned no profits during the chargeable accounting period in question, no excess profits tax can be charged in respect of such business, and that being the position here as respects the old joint family business in Banaras brocade, the appellants are not liable to be taxed as a Hindu undivided family in respect of that business."

24. The difficulty that we have had to face in this case has arisen out of the confused Statement of the Case and the confused finding given by the Tribunal in the Appellate Order. Mr. Pathak has urged that what the Tribunal has said in its Appellate Order and in the Statement of the Case does not mean that the firm Kunjilal Banwarilal was a bogus firm, but that it was not challenged that it was a genuine firm which was carrying on the Banaras silk goods business, which business the assessee had ceased to carry on. He has relied on the fact that the Commissioner had submitted to the order passed by the Appellate Assistant Commissioner on 11-9-2-1946, by which order it was finally held that the firm Kunjilal Banwarilal was a distinct and separate firm and the proceedings before the Excess Profits Tax Officer were not under Section 10, Excess Profits Tax Act, which deals with artificial transactions, but under Section 10-A, which deals with real transactions, the main purpose of which, however is avoidance or reduction of Excess Profits Tax liability.

25. In the Appellate Order, paragraph 6, the Tribunal characterised the formation of the firm Kunjilal Banwarilal as a device. It stated that the introduction as partners of Savitri Devi and Brijbhushan made no real difference, and that for all practical purposes the benefits which the two groups derived remained the same; but the finding given in paragraph 8 was that the main purpose of constituting the new firm was avoidance or reduction of Excess Profits Tax liability. The same line was followed in the Statement of the Case.

26. We have however after reading the various orders, after considering the fact, that reliance is not placed on Section 10 but on Section 10A of the Excess Profits Tax Act, and taking into account that the fact that the order of the Appellate Assistant Commissioner was allowed to become final, come to the conclusion that the Tribunal did not intend to hold that there was in fact no new firm Kunjilal Banwarilal and it was all a fictitious transaction, but that there was a genuine firm which had taken over from the assessee the business in Banaras silk goods, although the main purpose in starting this new firm Kunjilal Banwarilal was to avoid Excess Profits Tax liability.

27. Mr. Jagdish Swarup has urged that it must be inferred from the decision of the Supreme Court that even if a new firm is started and the assessee hands over the business to that firm, then if the main purpose is avoidance of Excess Profits Tax liability the assessee cannot be held to have discontinued to carry on that business unless it can be shown that there was a definite break in the business activities the assets and liabilities having been actually distributed among the partners and there has been more than a mere change in the ownership or in the personnel that carried on the business.

28. Mr. Pathak has urged that there was in fact an actual cessation of the business by the assessee and a distribution of the assets and liabilities between the members of the assessee firm and not a mere transference of the business as a going concern to the new firm Kunjilal Banwarilal. There is no such finding, however, recorded by the Tribunal, and from the Statement of the Case and the Appellate Order all that we get is that the business was transferred to the firm Kunjilal Banwarilal, a fact which might mean no more than that the firm Kunjilal Banwarilal took over the Banaras silk goods business as a going concern.

29. It is true that the Supreme Court in --'Sohan Pathak's case (A)' remitted an issue on the point as in that case it was suggested that business continued to be carried on by the joint family, and probably also because it was suggested In the judgment of this Court that it was all a fraudulent transaction. On the findings returned by the Tribunal after the remand it was apparent that the assessee, which in that case was the joint Hindu family, had in fact discontinued the business after the partial partition and the business was being carried on by a partnership. On those facts, their Lordships held that it was not necessary to consider the provisions of Section 8 and it having been found that the business had been discontinued and a new business started, the income made by the new business could not be added to the income of the assessee for the charge of tax under S, 4. Excess Profits Tax Act.

Section 4 provided that subject to the provisions of the Act the tax will be charged, levied and paid in respect of any business if the profits exceed a certain amount. They must, however, be the profits of that business if Section 4 is to apply. If the profits are not of that business, Section 4 would clearly not be applicable, and in -- 'Sohan Pathak's case (A)' their Lordships pointed out that if they were not the profits of that business then Section 4 would not apply and even if the assessee had ceased to carry on that business to escape Excess Profits Tax liability, the profits not made by it but by some one else cannot be treated as its profits by applying the provisions of Section 10-A of the Act.

30. In the case before us, all that we know is that the business in silk goods that was being carried on by the assessee was transferred to the firm Kunjilal Banwarilal, a distinct and separate firm, and that, during the chargeable accounting period profits were made by the firm Kunjilal Banwarilal. It is, therefore, urged that they were not the profits of the business carried on by the assessee and Section 4 would not apply. Section 8(1). Excess Profits Tax Act, provides that "As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced."

The words "subject to the provisions of the Act" in Section 4 and "for all purposes of this Act" in Section 8(1) are significant. Tax is to be charged, levied or paid in respect of any business under Section 4 subject to the other provisions of the Act which include the provisions of Section 8(1).

Under Section 8(1) for all purposes of the Act in-eluding Section 4, a business is to be deemed to have been discontinued and a new business to have been commenced as from the date of the change in the persons carrying on the business. Conse-quently, whenever there is a change in the per-sons



carrying on the business, even for purposes of Section 4 the old business must be deemed to have been discontinued and a new business to have been commenced, so that, by a fiction of law, even though that business may have been taken over as a going concern by a new firm, for purposes of the Excess Profits Tax Act the old business can no longer be held to continue in existence and the provisions of the Act must be applied on the basis that a new business was started on the date of the change in the persons carrying it on, If there had been, in fact, a cessation of the business and a new business had been started, then the rule laid down in -- 'Sohan Pathak's case (A)' would apply. It is therefore clear that, in one case, it is as a matter of law and in the other as a matter of fact that the old business will be held to have been discontinued and a new business will be deemed to have been started on the date on which the change in the persons, who had carried on the business, took place.

31. In our view the rule laid down by their Lordships in -- 'Sohan Pathak's case (A)' will also apply to this class of cases and the income made by the firm Kunjilal Banwarilal or the income made by some of the partners by sale of gold and sovereign of the sarrafa shop cannot be treated as the income of the assessee for purposes of Excess Profits Tax liability.

32. Learned counsel for the assessee has not urged that the finding recorded by the Tribunal about the main purpose can be challenged before us. The second question, as also the other questions, have been badly framed but we need not reframe the questions as the meaning is tolerably clear and it is possible to answer them.

33. Our answer to the second question, therefore, is that on the facts stated in the Statement of the Case the Tribunal could come to the conclusion that the main purpose underlying the formation of the firm Kunjilal Banwarilal and the division of gold and sovereign of the sarrafa shop was the avoidance and reduction of Excess Profits Tax liability, but in view of the fact that the profits made were not the profits of the assessee the Excess Profits Tax Officer could not include them under Section 4, Excess Profits Tax Act, for tax purposes.

34. The assessee is entitled to its costs which we assess at Rs. 500/- for each assessment year. The fee payable to counsel for the Department is also assessed at the same figure.