

(1933) 11 AHC CK 0064
In the Allahabad High Court

Biradhmal Lodha

APPELLANT

Vs

Income Tax Commissioner

RESPONDENT

Date of Decision : 03-11-1933

Acts Referred:

Citation : (1933) 11 AHC CK 0064

Final Decision : Disposed Of

Judgement

Bennet, J.—This is a miscellaneous Income Tax case in which an assessee made an application to this Court u/s 66 (3), Income tax Act, and this Court framed five questions provisionally on the facts as stated by the assessee and required the Income Tax Commissioner to state a case. The Income Tax Commissioner has stated a case and the case has now been argued before this Court by learned Counsel on each side. The first two questions which were framed by this Court provisionally were as follows:

(1) Whether in the case of a partial division of a joint family property Section 25-A has any application? (2) Whether any failure on the part of the assessee to substantiate their claim on this point, in an earlier year of assessment, precludes him from raising the point in a subsequent year of assessment? In regard of the second question the Income Tax Commissioner states that the assessee is not precluded from advancing a claim and therefore there is no contest on this point, and we accept that view. On the first question the facts as stated are as follows:

2. The assessee is a joint Hindu family carrying on business in the name of Kan-wal-nen Hamir Singh. The business is managed by Rai Bahadur Seth Birdh Mai Lodha, the karta of the joint family. Their head-quarters are in Ajmere, but money-lending and other transactions are carried on in other parts of British India and in Indian States. The joint family submitted a return for the income for the year 1927, to November 1928, on 10th September 1929, for the year 1929-30. The return was not accepted as correct by the Income Tax officer because the extracts from accounts showed that losses incurred outside British

India had been deducted and income derived from dividends on shares of the Edward Mills, Beawar, had not been included. The assessee's returns were therefore directed by notices under Sections 22(4) and 23(2), Income Tax Act, to produce account books or any other evidence on which they relied to substantiate their return. The assessee did appear before the Income Tax officer and proceedings before the Income Tax officer went on for over a year, and on 31st October 1930, the Income Tax officer assessed the income of the assessee including the dividends on shares in the Edward Mills, Beawar. It is in regard to these shares that the first question is framed. The facts stated by the Commissioner are as follows: In 1906 there were 392 shares purchased by the joint family with joint family funds and they were shown in the names of certain members of the joint family and of the munim as follows:

Shares Seth Gnan Mai	121	Rai Bahadur Seth Biradh Mal (the present Karta)	113	Diwan Bahadur Umed Mal	21	Seth Gaah Mal	21	Seth Chand Mal	21	Seth Abhai Mal	85	Seth Choga Lal	10	Total ..	392
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3. On 20th October 1922, 315 shares were transferred to the names of various members of the joint family as follows:

Diwan Jisanaaur setn Umea Iviyai no was then Karta)	105	Seth Biradh Mai (the present Karta) ..	53	Seth Gadh Mai	52	Seth Kan Mai	53	Seth Jeth Mai	52	Total ..	315
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and 76 shares were sold, and one share was given to charity. Up to 1926 the income from these shares was taken as part of the joint family income for the purposes of Income Tax assessment, and no objection was made. In the year 1927 the manager of the joint family made an objection to the inclusion of the income derived from these shares in the joint family income and notices were issued to the various members of the family to appear before the Income Tax officer in order that an enquiry might be made. A letter dated 28th November 1927, was received from the manager asking for a postponement and saying that he would later appear and explain in regard to the shares and that the members need not attend. He failed however to give any explanation or evidence, and on 16th January 1928, the Income Tax officer informed him that as the evidence required had not been given the income from dividends of the Edward Mills will be treated as joint income. This was done in that year and for the two subsequent years and no objection was made by the assessee. As we have seen, in the year of which the assessment is in question, the return omitted this income, and the Income Tax officer issued notices to the assessee to substantiate his return by the production of account books and other evidence. The order of the Income Tax officer dated 31st October 1930; making the assessment mentions: "Income shown less and detected on examination Rs. 35,918-10-8." This income apparently includes Rs. 24,906-9-1. But there does not appear to have been any claim advanced before the Income Tax officer in regard to the dividends from the Edward Mills on this occasion, and there is no

mention in his order that any such claim was made. The order is long and detailed one and deals in detail with various items claimed by the assesseees. There is no allegation in any affidavit of the assesseees that the point was raised before the income tax officer. The point was raised before the Assistant Commissioner of Income Tax on the appeal of the assesseees, and he deals with the point and considers an affidavit which was produced by the assesseees. He states that he was not satisfied with the evidence produced before him by the assesseees, and he then states that as the law of the Income Tax stands he believes that he is not competent to make a decision. He refers to Section 25-A, Income Tax Act. and says:

Under that section the claim that a partition has taken place must be made before the Income Tax Officer while he is making his assessment, u/s 23 of the Act. It was improper for the assesseees to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question lined by them now.

4. Now it is contended for the assesseees that Section 25-A will not cover the present case because Section 25-A refers to a partition among the members of the family and the Income Tax officer has to be satisfied that the separation has taken place and that the joint family property has been partitioned among the various members or groups of members in definite proportions. I consider that that objection is correct and that Section 25-A does not refer to a case like the present where there is an allegation that there was no partition in the joint family but there was merely a division of a particular portion of the joint family property among the various members, Therefore the answer to the first question is in the negative, and is that in the case of a partial division of a joint family property Section 25-A has no application. But I find it impossible to dispose of this portion of the case without framing a further question as follows:

(1. A) Should the plea that certain shares have been divided between the members of a joint Hindu family be raised at the time of making an assessment u/s 23 or can it be raised for the first time on an appeal against that assessment? When the first question was framed by the Bench of which I was a member, we stated quite definitely, as shown on p. 35 of the printed book, that:

It appears therefore that on this part of the case two questions of law might arise. We say "might arise" because we shall have to find ultimately, on the facts to be found by the Commissioner for our benefit, what are the actual points of law that do arise in the case.

5. Section 66(5) lays down : "The High Court upon the hearing of any such case shall decide the questions of law raised thereby." This shows that it is open to this Court when hearing the case on the statement of the Commissioner to decide what are the questions of law which arise, and in fact that has been held in the ruling reported in Shiva Prasad Gupta Vs. Commissioner of Income Tax, . In the present case when the first question was framed there was nothing to"

show that the objection had not been taken by the assessee before the Income Tax officer, and therefore no question was framed on that point. The additional question which I have noted as arising was read out by me to learned Counsel for the assessee at the time of his argument, and he had an opportunity of meeting that question. No further statement of the case appears necessary on this point as the facts appear to be clear. Much argument was made by learned Counsel that the Assistant Commissioner had based his rejection of the objection solely on the ground of Section 25-A. But Section 25-A is not the only point to which his order refers, and he has definitely stated : "it was improper for the assessee to raise this question for the first time in appeal." All that Section 25-A provides is that a claim which comes under that section should be made at the time of making an assessment. Although the present claim does not come u/s 25-A it appears to me that it is also a claim which must be made at the time of making an assessment. Under the CPC it is not open to a party on appeal to advance a claim for relief on a ground which he has not taken in his plaint, and even as regards the production of new evidence it is laid down by Order 41 Rule 27 that additional evidence can only be admitted in appeal where such evidence is required by the appellate Court itself in order to enable it to pronounce judgment or where such evidence has been refused by the Court of first instance. If the civil Courts are so stringent in regard to the rule that new matters should not be raised for the first time in appeal, why should it be laid down that appeals under the Income Tax Act should be conducted with greater laxity. In the present case, as already stated, the assessee sent a return which did not include the income from the shares in the Edward Mills, Beawar. u/s 23(2) the Income Tax officer considered that the return was incomplete on this ground, and this was one of his reasons for issuing a notice to the assessee u/s 23(2) to produce account books or any other evidence on which they relied to substantiate their return." That a notice u/s 23(2) was issued is shown by the statement of the case, para. 2, and is admitted by the assessee in the petition to this Court, p. 25, para. 5. I consider that in reply to this notice the assessee should have raised the plea that the shares had been divided between the members of the family, and they should have produced evidence to support that plea. The return was submitted on 10th September 1929 and the assessment order of the Income Tax officer was made on 31st October 1930 more than a year later so there was ample time to make the plea and produce the evidence. The necessity for evidence on this point had been brought to the notice of the assessee by the order of the Income Tax officer dated 16th January 1928, on p. 38 of the paper book. This was in connection with a plea on the point raised on the assessment for the year previous to the year now under consideration.

6. An allegation like the claim in regard to the Edward Mills is an allegation of fact which requires evidence to prove it, and it is an allegation which should obviously be made before the Income Tax officer at assessment, when he has issued a notice u/s 23(2) calling on the assessee to prove the correctness of their return which has omitted the dividends from these shares. The allegation

should be followed up with evidence to prove it. But the order of the Assistant Commissioner on p. 17 states that the question was raised by the assessee for the first time on appeal. I consider that this question (I-A) arises because when this Court has decided that the Assistant Commissioner was not correct in holding that Section 25-A barred the question being raised before him in the appeal, the question remains whether the question should or should not be raised before him in the appeal. I do not consider that the Assistant Commissioner should be left to decide this for himself without guidance on the point of law by this Court. It is the questions of law raised by the case which this Court decides u/s 66(5) and not the questions of law raised by the statement of the case. This is especially so in cases like the present where the statement was supplied on the direction of this Court which tentatively framed certain questions. In other words the questions did not arise on the statement, but the statement arose on the questions. The fundamental question of law on this part of the case is whether the plea raised by the assessee for the first time on appeal can or should be entertained on appeal and the question cannot be fully decided by the mere finding that the particular reason given by the Assistant Commissioner was not correct. It is true that Section 31(3)(b) does give the Assistant Commissioner hearing an appeal power to order further enquiry. But this is in case he sets aside the assessment and directs the Income Tax officer to make a fresh assessment,

after making such further inquiry as the Income Tax Officer thinks fit or the Assistant Commissioner may direct.

7. I consider that the section means that the assessment should be set aside on the ground that it is defective on record as it stands, and not that it should be set aside on the ground that new evidence if heard and accepted would prove that the assessment was defective. It is only after the assessment is set aside that further enquiry would be made, for the purpose of making a fresh assessment. But apart from this view of the wording of Section 31(3)(b), I consider that on general principles of the law of procedure the question is one which in the circumstances of the present case should not be entertained by the Assistant Commissioner in appeal. The assessee had ample opportunity to raise the matter before the Income Tax officer; the order of the income tax officer in the previous year had given them ample notice that the Income Tax officer expected evidence to be supplied on such a matter; and the Income Tax officer had issued a notice to them under 8. 23 (2) putting them to the proof of the correctness of their return which omitted the income from these shares. When in the face of all this the assessee neglects to produce any evidence on the point before the Income Tax officer, I consider that they should not be allowed to raise the matter for the first time on appeal and expect that a further opportunity will be afforded of them to produce evidence. It will of course be open to the assessee to raise the matter before the Income Tax officer at the time of assessment in any other year, and it is somewhat remarkable that they do not state that they have done so. But I consider that there must be some finality to

"the enquiries into the facts for a particular year, and I consider that the stage for [(inquiry was passed when the question was (raised. My answer to question (1-A) is (that under the circumstances of this case (the claim could not be raised for the first "time in appeal.

8. The third and fourth questions are as follows: (3) Whether there was any evidence before the Income Tax department fit the conclusion that the sum, of Rs. 36,000 and odd represents profits derived by the assesseees from transactions in British India? (4) If the profits men-ihinod in question No. (3) be regard, as profits received from transactions that took place in British India, whether the losses incurred in respect of the business at Tonk, Saronj, Jodhpurand Khithpura shops should not also be regarded, as a matter of law, as losses incurred in transactions that took place in British India?

9. In regard to these questions the statement of the case is that the firm of the joint family has numerous branches in various Indian States. In four of these branches, Jaipur, Alwar, Nimbhera and Kotha, the Income Tax officer assessed an income of Rupees 36,055-12-9. The state, proceeds that the Jaipur and Kotha branches alone had from transactions in British India received more than this iotal sum. The question No. (3) was "Whether there was any evidence before the Income Tax department for this conclusion?" The statement of the Commissioner refers to the account books of the Jaipur branch and those of the assesseees" Calcutta, Bombay and Ajmere branches. He states that some years ago certain amounts were transferred from the headquarters branch at Ajmere to Kotha and Jaipur branches. Afterwards it was found that this capital could be more profitably utilised in financing transactions in Calcutta and Bombay, and it was therefore transferred from the Kotha and Jaipur branches to the Calcutta and Bombay branches. The Calcutta and Bombay branches pay the interest which is earned on this capital to the Kotha and Jaipur branches. The evidence for this is the books of the Calcutta, Bombay and Jaipur branches where these sums are clearly shown. Now some confusion arose from a consideration of how this income has been treated under the Aot. This income comes uuder Section 4(1) which lays down that the Act applies to all income, profits or gains, accruing, or arising, or received in British India. The interest on this capital accrues and arises in British India, that is, in Calcutta and Bombay, and there, fore the Act applies to this income.

10. The answer to this question (3) therefore is in the affirmative. The question No. (4) asked whether as a rule of law if the profits in question No. (3) be regarded as profits which took place in transactions in British India therefore the losses incurred in respect of the business at Tonk, Saronj, Jodhpur and Shahpura shops should not be regarded as losses in transactions which took place in British India? Learned Counsel for the assesseees did not attempt to maintain this proposition, and it is obvious that the answer must be in the negative. The losses in the shops in these Indian States are not shown to have any connection with British India, and no income from these shops had been brought into British

India and assessed u/s 4(2).

11. The last question No. (5) is as follows : Whether, in the circumstances of the case, the Assistant Commissioner was right in law in refusing to invest, gate the claim as to payment of interest on deposits alleged to have been made in the business Hamir Singh Samir Mai by members of the family and relations not members of the family?

12. The question raised here is very similar to the question which I have raised in 1-A. There is a branch of the main family business, carrying on business at Ajmere styled Hatnir Singh Samir Mal. The assessee made a claim to the Assistant Commissioner on appeal that certain members of the joint family acting in their individual capacity and also some relatives had deposited their private money with this firm, and that the amount of interest paid on these deposits should be allowed as a deduction from the income derived by the joint family from this branch of their business. The return filed by the assesseees for this shop Hamir Singh Samir Mai showed rupees 84,709-2-0 on the credit side and on the debit side Rs. 4,656-1-0. This latter figure included six items of interest paid to various ladies. These particular deductions were allowed by the Income Tax officer. u/s 22(3), Income Tax Act, a person who has furnished a return and subsequently discovers any omission in it can furnish a revised return at any time before the assessment is made. The assesseees had sent their return on 10th September 1929, and the assessment was not made till more than a year later, on 31st October 1931, but the assesseees did not apply at any time before the Income Tax officer to correct their return. It was not until the case came on appeal before the Assistant Commissioner that the assesseees put forward this claim to the large amount of Rs. 84,216-15-6 as interest paid by the firm which should be allowed as a deduction. Now u/s 31(2) the Assistant Commissioner may before the disposal of any appeal make such further enquiry as he thinks fit or cause further enquiry to be made by the Income Tax officer. It is claimed by learned Counsel for the assesseees that the Income Tax Commissioner did not entertain this claim. If such a claim could be entertained on appeal then it was a matter for the discretion of the Income Tax Commissioner whether he should entertain this claim or not and make any further enquiry, but as I have stated in regard to question 1-A, I consider that such claims cannot be legally made on appeal. The Assistant Commissioner was of the same opinion and he stated : "The claim cannot now be entertained by me." He also referred to Section 25-A and said that the claim should have been made before the Income Tax officer. I think he was correct in refusing to entertain the claim. At the most it can be said that it was a matter for the discretion of the Income Tax officer, that he exercised his discretion against the assesseees and that he refused to make further enquiry on appeal. My answer therefore to the last question is in the affirmative. As regards the question of costs I consider that the applicants have only succeeded on a technical point in regard to the first question, and that the real point of substance in the matter is the question 1-A on which the assesseees fail. The second question was not contested by the Commissioner. In my view therefore

the applicants have failed in this reference, and I hold that they are not entitled to any relief arising from the decision which I give on these questions. It therefore consider that in view of the applicant's success only on the question of Section 25-A, the assessee shall pay three-fourths of the costs of the opposite party who will pay one-fourth of the costs of the assessee. I would assess the fees of the learned Counsel instructed by the Commissioner at Rs. 250.

Niamatullah, J.

13. I have had the advantage of persuing the order which my learned brother proposes to pass, and find myself in agreement with him unreservedly in answering question No. 3 in the affirmative and No. 4 in the negative. Questions Nos. 1 and 2 relate to the same matter and should be disposed of together. The facts bearing on those questions are as follows:

14. The assessee forms a joint Hindu family with its principal place of business at Ajmere. Among other properties it owned 392 shares in the Edward Mills, Beawar, standing in the names of the various members of the family and its muni. It is not disputed by the assessee that the shares formed part of the joint family property till 20th October 1922, when, it is alleged by them, they were transferred by the joint family to some individual members, each of whom was to hold a number of shares as his separate property. In spite of this alleged arrangement, the income derived from these shares was included as part of the income of joint family property for the purpose of assessment of income-tax. No objection was raised by the assessee or any individual member thereof till 1926, when the "karta" of the family objected to the inclusion of the dividend as part of the income derived from the family property. Notices were issued to certain members of the family demanding their presence before the income tax officer for the purpose of an enquiry into the correctness or otherwise of the objection preferred by the "karta." No appearance was however entered by any of them, but the "karta" undertook to satisfy the income-tax officer on the point. He however took no further steps. The income derived from the shares was treated for assessment purposes as the income derived from joint family property. In two subsequent years the dividend was similarly treated in the assessment of tax payable by the joint family. It does not appear whether in these two years the return, furnished by the assessee, included the income derived from the shares or whether the Income Tax officer himself added it to the income of the family shown in the return or ascertained by him.

15. This case relates to the assessment for the year 1929-30. It is not disputed that for this year the assessee did not show the dividends as part of the income derived from the family property. Income Tax officer however obtained correct figures from the Edward Mill and included the same for the purpose of assessment of super-tax. No question as regards Income Tax payable in respect of the income derived from the shares could arise, because it had been paid at the source. The account books of the joint family were produced before the Income Tax officer probably after notice u/s 32(2), Income Tax Act, was served

on the assesseees requiring them to produce evidence in support of their return. The Income Tax officer included the dividend as part of the family property.

16. In appeal to the Assistant Commissioner from the assessment made by the Income Tax officer they objected and alleged that the shares did not belong to the joint family but to certain individual members as their separate property. The Assistant Commissioner refused to entertain these pleas on the ground that Section 25-A, Income Tax Act, was a bar to the question being raised in appeal. In this connection he referred to what had been done in previous years. His order was upheld by the Commissioner, who refused to state a case for adjudication by this Court. On an application by the assesseees, this Court framed, among others, questions Nos. 1 and 2, which run as follows:

(1) Whether in the case of a partial division of a joint family property Section 25-A has any application? and (2) whether any failure on the part of the assesseees to substantiate their claim on this point, in an earlier year of assessment, precludes them from raising the point in a subsequent year of assessment?

17. The Commissioner has conceded, in the statement of the case, that question No. 2 should be answered in the negative. He is rightly of opinion that the assesseees are not precluded from raising a question which has so far not been decided on the merits. It is not necessary, in these circumstances, to take any further notice of question No. 2. The first question appears to be based on the assumption that the assesseees' objection amounted to an averment that a "partial partition" had taken place in the family of the assesseees. To avoid possible confusion arising from the use of that expression, it should be mentioned that what the assesseees alleged in substance was that the shares originally belonging to the joint family had been transferred to individual members thereof, each of whom was to hold the shares allotted to him as his separate or self-acquired property without introducing any change in the constitution of the family, which continues to be a coparcenary body. In one sense, it may be considered to be a partial partition in so far that part of the family property has been divided among the members of the joint family, apparently not in equal shares—a point which is quite immaterial. In another sense, the transaction, if in fact it took place, amounted to no more than a transfer by the joint Hindu family of the shares to certain persons, who were to hold the same in their individual capacity, and not as members of the joint family. The essence of the matter is that the shares ceased to belong to the joint family as such. Whether the transaction be styled as one of partial partition of the family property or as transfer of part of the family property, Section 25-A, Income Tax Act, does not, in my opinion, apply. That section contemplates a case in which a disruption of the family occurs, so that a joint family, as such, ceases to exist and no property previously belonging to it retains the character of joint family property. It is immaterial whether it is divided by metes and bounds or is held in defined shares. This is perfectly clear from the language employed in Section 25-A(1), which provides that:

Whether at the time of making an assessment u/s 23 it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among members of such family, the Income tax Officer shall make such inquiry therein as he may think fit, and if he is satisfied that separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions, he shall record an order to that effect.

18. What the section contemplates is "a separation of the members of the family," which implies that the status of certain members undergoes a change. In other words, they cease to be members of the joint family. It is an elementary rule of Hindu Law that a mere declaration of an intention to separate brings about a disruption of the family at any rate, so far as the member making the declaration is concerned. Partition of the joint family property by metes and bounds is not a necessary requirement of the disruption of the family. If the properties remain intact, but the separating member's share in them is defined, they, are nevertheless considered to have been "partitioned." Partition contemplated by Section 25- A is not necessarily a partition by metes and bounds. This view finds further support from the proviso to sub-Section 2 which runs as follows:

Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

19. In cases in which members of a joint Hindu family agree to divide among themselves a particular family property, leaving their status and the rest of the family property as before, they cannot be considered to be "separated members." In spite of a partial partition of the kind assumed, they continue to remain members of the same joint family possessed of joint family property left after the disposition of a part. For these reasons I am of opinion that Section 25- A was not applicable to the circumstances disclosed by the assessee's objection taken before the Assistant Commissioner, and I answer the first question in the negative. My learned brother who has answered question No. 1 in the manner I have done, proposes to frame an additional question, which he has called 1-A, and which runs as follows:

Should the plea that certain shares have been divided between the members of a joint Hindu family be raised at the time of making an assessment u/s 23 or can be raised for the first time on an appeal against that assessment,

20. I do not dispute the proposition that the High Court should decide questions of law raised by the statement of the case though any particular point may not have been put in the form of a definite question, provided the statement of the case shows that such a question arises on the face of it and calls for decision. I do not think such is the case before us. The Assistant Commissioner based his decision solely on his view of Section 25-A. I am unable to say what view he

would have taken if he had read Section 25-A as we have done. The Assistant Commissioner, who heard the appeal and before whom the assessee categorically stated their objection, declined to entertain it on the ground that Section 25-A debarred him from giving effect to the objection. His view was-and it is based on Section 25-A-that, as separation had not been alleged before the Income Tax officer, the assessee was not entitled to raise it at a subsequent stage, and that the Assistant Commissioner, sitting in appeal, was not "competent" to entertain it. If Section 25-A had been applicable, the Assistant Commissioner's refusal to entertain the objection would have been probably right, because Section 25-A directs the Income Tax officer to make an enquiry into the alleged separation after giving notice to the other members concerned. In other cases Section 31(2) clearly empowers the Assistant Commissioner,

to make such further inquiry as he thinks fit, or cause further inquiry to be made by the Income Tax Officer, before disposing of any appeal before him.

21. It is impossible for us to say that, if the Assistant Commissioner had not considered himself to be debarred from entertaining the assessee's objection, he would not have decided the question, if necessary, by making further enquiries into the truth or otherwise of the allegations made by the assessee. It should be borne in mind that the Income Tax Act contains no rules of pleadings of the nature prescribed by the Code of Civil Procedure. All that it requires an assessee to do is to make a return of his total income during the previous year" (see Section 22). On receipt of this return, the Income Tax officer may accept it or call for proof (Section 23). In the present case, it is not disputed that the assessee had not shown the income derived from the shares as part of the income of the joint family property. I think they question. In any case, their return clearly indicated that they did not regard the income derived from the shares as part of the joint family property. The Income Tax officer understood as much. u/s 23(2), Income Tax Act, it was the duty of the Income Tax officer, if he thought, as he apparently did, that the return was incorrect in that respect, to call for proof of the fact that the shares had ceased to be part of the joint family property. He issued a notice u/s 23(2), but it does not appear that he called for proof on the specific question whether the shares had ceased to be part of the family property. He however ascertained from the Company the amount of dividend paid and added it to the income shown in the return. The Company's register showed that the shares belonged to certain individuals and not to a joint family. The assessee does not appear to have produced any evidence other than their own account books and what appeared from the Company's register showing that the shares did not stand in the name of the joint family.

22. The Income Tax officer should be deemed to have found that the shares still belonged to the joint family, as he included the dividend as part of the income of the family. The question was pointedly raised before the Assistant Commissioner, who refused to adjudicate on it on the materials before him or to make any enquiry, in the view he took of Section 25-A. We shall not be justified if we

assume that the Assistant Commissioner would have found against the assessee or would have refused to exercise his powers u/s 31(2), even if he held, like ourselves, that Section 25-A had no application. On the contrary, I am inclined to think that a responsible officer like the Assistant Commissioner who is to look not only to the interests of public finance but is also to administer justice as between the Crown and its subjects, would have adjudicated on the question and, if necessary considered the question whether further enquiry was necessary. The question raised by the assessee is of some importance and shall have to be decided sooner or later. The assessee alleged that these shares were not part of the family property and stood in the names of individuals in their own rights. It may be that this arrangement was legitimately arrived at by the members of the family, or it may be that it was a fraud on Income Tax law and that the family is still the owner of the shares in question, deriving income therefrom, and the alleged transfer to individual members is sham and fictitious. As to whether the dividends were credited in the account books as income of the joint family is a piece of evidence of some value. The Assistant Commissioner did not apply his mind at all to this aspect of the case as he thought, erroneously to our minds, that Section 25-A debarred him from doing so. My view on this part of the case proceeds on the assumption that the Assistant Commissioner based his order exclusively on Section 25-A. The Assistant Commissioner's judgment relevant to this point is as follows:

It is admitted by the appellants that the Edward Mills shares were originally held by the undivided family as such. When part of the property of the undivided family was transferred to certain members of that family in their individual capacity, the undivided family became divided in respect of part of its property, though in respect of the remainder of its property the joint status was retained. Now the procedure to be followed when a Hindu undivided family becomes divided (whether in respect of part of its property or all its property is immaterial) is laid down in Section 25-A, Income Tax Act. Under that section the claim that a partition has taken place must be made before the Income-tax Officer while he is making his assessment under Section 23 of the Act, and any order of the Income Tax Officer u/s 25-A is appealable to the Assistant Commissioner of Income Tax u/s 50. In the present case no application u/s 25-A was made to the Income Tax Officer by the assessee and no order u/s 26-A was passed by the Income Tax Officer. It was improper for the assessee to raise this question for the first time in appeal, and as an appellate Court I am not competent to decide the question raised by them now. I may however observe that in my opinion the Income Tax Officer was correct, in the absence of any application u/s 25-A, regarding the dividends of the Edward Mills shares as part of the income of the joint family. He would only be justified in regarding the dividends of the Edward Mills shares as a part of the income of members of the family in their individual capacity if he had satisfied himself, after inquiry into a claim u/s 25-A, that the alleged partition had, in fact, taken place.

23. I have quoted, practically the whole of the order of the Assistant

Commissioner on this point to show conclusively that he based it solely on Section 25-A. The sentence "it was improper for the assessee to raise this question for the first time in appeal" should not be divorced from its context. What precedes and what follows it leaves no room for doubt that the impropriety attributed to the assessee consisted of their omission to raise the question which according to the Assistant Commissioner, they should have raised u/s 25-A before the Income Tax officer.

24. In the circumstances explained above, I do not think that question No. 1-A, formulated by my learned brother, arises. I would have merely answered the questions referred to us and disposed of the reference without expressing any opinion on the question which properly falls within the jurisdiction of the Assistant Commissioner, who should decide for himself whether assuming Section 25-A does not; apply the assessee should have done more than what they did before the Income Tax officer; whether on the materials before him any finding, and if so what finding can be arrived at on the question, namely, whether the shares are part of the family property; and whether the Assistant Commissioner should, in the exercise of his discretion, make such further enquiry as he thinks fit u/s 31(2). But as my learned brother has recorded his views on the question raised by him, I answer it as follows: The plea that the shares have been divided should have been taken by the assessee, in the first instance, by not including the income derived from them in the total income of the joint family shown in the return. This was done. They should have produced evidence in support of the return when they were served with notice u/s 23(2). Their own accounts were before the Income Tax officer, who had also access to the register of the Company showing that the shares did not stand in the name of the joint family as such. An enquiry by the Assistant Commissioner could not be claimed as of right; but the Assistant Commissioner (sought for further evidence and enquire in the exercise of his power u/s 31(1). In this case the Assistant Commissioner has not considered the question on the merits nor did he refuse to enquire into it u/s 31(2), He should have recorded a finding on the evidence already produced and could have called for more.

25. I may note that no analogy can be drawn from Order 41, Rule 27, Civil P.C., to determine the powers of the Assistant Commissioner hearing an appeal under the Income Tax Act, Section 31(2), as the latter lives unrestricted discretion to the Assistant Commissioner to make further enquiry, that is, to obtain more evidence throwing light on the question which is called upon to decide; while Order 41, Rule 27 confers very limited powers upon a Court of appeal in the matter of admitting fresh evidence. The only question that remains to be considered is question No. 5. The facts are that the assessee had shown in their return a sum of Rs. 4,000 odd as interest paid by the joint family. The Income Tax officer made an allowance to that extent. In appeal before the Assistant Commissioner a deduction of Income Tax, was claimed on no less than Rs. 80,000 odd alleged to have been paid to individual members of the joint family as interest on sums deposited by them. In other words the correctness of

their return was repudiated. The Assistant Commissioner refused, in these circumstances, to investigate this belated and inconsistent claim. He had a discretion to do so; and no error of law can be imputed to him. In this view I answer the 5th question in the affirmative. I agree with my learned brother as regards costs.