Privy Council Appeals Nos. 85 of 1935 and 1 of 1936.

The Commissioner of Income Tax, Bombay Presidency and Aden, and others - - - - - *Appellants*

v.

The Bombay Trust Corporation, Limited - - *Respondents*

The Commissioner of Income Tax, Bombay Presidency and Aden - *Appellant*

v.

Same - - - - - - - - *Respondent*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY, 1936.

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
SIR SHADI LAL.
SIR GEORGE RANKIN.
SIR GEORGE RICH.

[*Delivered by* SIR GEORGE RANKIN.]

In this case two appeals from the High Court at Bombay have been consolidated. Both appeals are brought by income-tax authorities and both arise out of proceedings to assess a company registered outside British India called the Hong Kong Trust Corporation, Limited (herein referred to as the Hong Kong company) to income-tax in respect of the year of assessment 1928-9. The income-tax authorities have claimed to be entitled to assess the Hong Kong company in the name of the Bombay Trust Corporation, Limited (herein called the Bombay company) as its agent under the provisions of section 42 (1) and section 43 of the Indian Income-tax Act, 1922, that is, upon the footing that in the year 1927 profits and gains accrued or arose to the Hong Kong company through its business connection with the Bombay company. The Income-tax Officer having on 29th March, 1930, made an assessment upon this footing the matter came on appeal from him before the Assistant Commissioner. The Assistant Commissioner,

on the 12th July, 1930, confirmed the assessment. The Bombay company having requested the Commissioner to make a reference to the High Court under section 66 of the Act, the Commissioner, on 2nd March, 1931, exercised his powers of review under section 33, and remanded the appeal for a fresh decision by the Assistant Commissioner after taking certain further evidence. In the end the Assistant Commissioner on the 9th October, 1931, assessed the Bombay company as agent of the Hong Kong company upon a sum of Rs.20,50,000 which involved a liability to tax, including super-tax, of Rs.3,17,187-8-0. On the 8th December, 1931, the Bombay company again applied to the Commissioner for a reference of certain questions of law to the High Court. This the Commissioner refused to do, but upon application made to the High Court for an order under section 66 sub-section 3 the High Court by order dated 6th October, 1932, required the Commissioner to refer the following question of law :—

> " Whether there was any evidence to justify the finding of the Assistant Commissioner that for the year of assessment, profits and gains accrued or arose to the Hong Kong Trust Corporation through its business connection with the Bombay Trust Corporation."

The Bombay company had in the meantime, on the 6th April, 1932, paid under protest Rs.3,17,187-8-0 the amount of the tax assessed. The Commissioner having stated a case for the opinion of the High Court upon the question propounded, and having further stated his opinion that the question should be answered in the affirmative, the High Court on the 29th August, 1933, gave judgment answering the question in the negative, and directing the costs of the reference to be paid to the Bombay company. It is from this decision that appeal No. 1 of 1936 has been brought, and their Lordships will first deal with this appeal.

The main evidence upon the question whether in the year 1927 sums of money were paid by the Bombay company to the Hong Kong company by way of interest upon money lent consists of entries in the books of the Bombay company. Exhibited to the case stated by the Commissioner are extracts from the ledger of the Bombay company taken from the accounts of the Hong Kong Trust Corporation, Limited, " Fixed Deposit account " and " Call Loan account " and of E. D. Sassoon and Company, Limited, " Shanghai Loan Account " and " Shanghai Current Account." These books show clearly enough that until November of the year 1926 the Bombay company was borrowing money in large sums from the Hong Kong company at $5\frac{1}{4}$ per cent. interest upon fixed deposit, that is, in every case or almost every case, upon deposit for one year certain. In 1924, 1925 and for almost the whole of 1926 different sums are shown as being lent for one year upon different dates, and interest thereon is shown as remitted to the Hong Kong company by debits

to the account of the Bombay company in the books of E. D. Sassoon and Company, Limited, at Shanghai, who were bankers to both parties.

It is not open to dispute that in October, 1926, the income-tax authorities served a notice upon the Bombay company to show cause why it should not be treated as an agent of the Hong Kong company under section 43. From documents which are in evidence it is further clear that on the 27th October, 1926, the Bombay company telegraphed to the Hong Kong company to enquire whether they were agreeable to all their deposits with the Bombay company being on call as from the dates of the deposits. On the 28th October a reply was received from the Hong Kong company agreeing to this proposal. On the 13th November the Hong Kong company telegraphed requiring repayment of their deposits amounting to Rs.11,04,85,918 through Messrs. E. D. Sassoon and Company, Limited, of Shanghai. On the 16th and 17th November the Income-tax Officer came to a finding that the Bombay company should be held to be agent of the Hong Kong company and called for a return upon that footing. On the 19th November the Bombay company wrote to Messrs. E. D. Sassoon and Company, Limited, of Bombay asking them to remit to Messrs. E. D. Sassoon and Company, Limited, Shanghai (whom their Lordships will refer to as the Shanghai branch), the sum of Rs.11,42,29,931-10-9. They also wrote to the Shanghai branch advising that they had remitted this amount through Messrs. E. D. Sassoon and Company, Limited, Bombay, the amount being made up as follows :—

	Rs.	a.	p.
Amount of Call Loans repaid by you on our behalf ...	11,04,85,918	0	10
Interest on above ending 16th November, 1926	37,44,013	9	11
	11,42,29,931	10	9

On the same day also the Bombay company wrote to the Hong Kong company saying that they had advised Messrs. E. D. Sassoon and Company, Limited, Shanghai to credit their account with these sums.

In complete accordance with this correspondence entries are made by the Bombay company in their ledger. Thus an account called the " Hong Kong Trust Corporation, Limited, Call Loan Account " is opened with a credit entry of 13th November, 1926, showing sums amounting for interest and principal to the figure already mentioned on the footing that the principal loans were taken originally as fixed deposits for one year and are now converted into call loans. On the debit side of this account there is an entry dated 17th November " to E. D. Sassoon and Company, Limited, for amount

being repayment of loans with interest ending 16th November, 1926." The " E. D. Sassoon and Company, Limited, Shanghai, Loan Account " shows at the same time a credit to the Shanghai branch " for amounts borrowed by E. D. S. & Co., Shanghai, on our account being equivalent of Taels 6,50,00,000 at Exchange 170 bearing interest at 5¼ per cent. per annum " together with a credit of interest to the end of the year upon this loan. Within a short time, namely, on the 6th December, 1926, an entry states that three out of the six and a half crores of taels borrowed were repaid to the Shanghai branch. Throughout 1927 entries are made upon the footing that there are no longer any sums received on loan from the Hong Kong company in respect of fixed deposits, call loans or otherwise, but that the Bombay company has received from the Shanghai branch a loan in taels on which interest at 5¼ per cent. is being paid. When the present matter was first before the Assistant Commissioner he requested the Bombay company to obtain a declaration from the Hong Kong company and from Messrs. E. D. Sassoon and Company, Limited, Shanghai, on certain specific questions which he formulated. These declarations were duly made, the Chief Accountant of the Shanghai branch declaring that his company made a payment on 17th November, 1926, to the Hong Kong company of the eleven crores of rupees and that the Shanghai branch made a tael loan of six and a half crores to the Bombay company but did not borrow any portion of that loan from the Hong Kong company, and that the Shanghai branch had not since the 17th November, 1926, borrowed any taels from the Hong Kong company or paid to that company any interest which they themselves had received from India. There was a further declaration from a Mr. Priestley, Director of the Hong Kong company stating that the Bombay company on the 17th November, 1926, paid off the loans and that the Hong Kong company had made no new loan of six and a half crores of taels to the Bombay company or to Messrs. E. D. Sassoon and Company, Limited, and that there were no transactions between the Bombay company and the Hong Kong company in 1927. This declaration was accompanied by the certificate of a firm of chartered accountants, auditors to the Hong Kong company. At a later stage, namely, in June, 1931, a letter from Sir Victor Sassoon was put in to the effect that in 1926 when he was in China he set to work to make arrangements on behalf of the Bombay company so that after his return to India that company was in a position to send the telegram of 27th October, 1926.

When the Commissioner, in compliance with the High Court's order came to state in his letter of reference the evidence which existed in support of the conclusion that in 1927 the Hong Kong company had been in receipt of interest from the Bombay company he set forth the correspondence

already referred to as taking place in October and November, 1926, and the facts as to the notifications made by the Income-tax Officer in October and November showing that he proposed to charge the Bombay company with tax as agents for the Hong Kong company. He set forth also that the amount of the original loan was very large, over eleven crores of rupees, and that the Hong Kong company, the Bombay company and the Sassoon company at Bombay and Shanghai were all closely associated concerns, their share capitals being held almost exclusively by members of the same family. Also that the Hong Kong company was " practically formed to finance the Bombay company ", the former having a paid up capital of 8 crores and the latter of 1 crore; while both had large resources in addition thereto from their banking or financing businesses.

Their Lordships are well satisfied that all these companies were closely associated, that in the words of sections 42 and 43 there was a business connection between them and that they were working in this matter in concert as though under one control. Indeed it is now clear that so long as the Hong Kong company was lending money at interest to the Bombay company the former company was in receipt of profits or gains taxable under sections 42 (1) and 43. This matter was thrashed out by litigation in respect of the transactions which took place in 1924-1925 and the liability under these sections was confirmed by a judgment of this Board in *Commissioner of Income-tax, Bombay Presidency* v. *Bombay Trust Corporation, Limited*, (1929) 57 I.A. 49. Tax was paid without contest in respect of the transactions of 1926. The question is whether there was any evidence upon which the income-tax authorities could in law find that in 1927 the Hong Kong company was receiving from the Bombay company any sums as interest on money lent.

In their Lordships' opinion the High Court at Bombay have rightly answered in the negative the question referred to them. However sceptical the attitude which the income-tax authorities may think fit to adopt towards the declarations offered and the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that in 1927 the loan from the Hong Kong company continued and that interest " accrued or arose " to that company thereon. If the entries in the books show no payment to the Hong Kong company and nothing due to the Hong Kong company, the income-tax authorities cannot without evidence insist upon a right to treat entries showing a tael loan of six and a half crores made by a Shanghai company, and interest calculated in taels paid thereon, as evidence that a somewhat similar amount was due from and was being paid by the Bombay company to the Hong Kong company. The only rule of evidence to be discovered in the Indian Evidence

Act having any bearing upon this question would appear to be illustration (*d*) to section 114 of the Indian Evidence Act :—

> "The Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence."

This rule cannot in the present case supply the want of evidence. Their Lordships are not considering a case in which by reason of the entries in an assessee's books of account being inconsistent, or by reason of positive evidence showing that certain entries in his books are erroneous or fraudulent, the value of the books as evidence can be considered as overthrown. On the contrary, though the income-tax authorities have been somewhat slow to appreciate it, the circumstance that in October or November, 1926, it was disclosed that the transactions between the Hong Kong and Bombay companies were to be charged with Indian income-tax means that the persons interested and in control of these closely associated companies had the strongest reasons for desiring to change their course of business (not merely for pretending to change it) so as not in the future to attract the tax. The Hong Kong company from a taxpayer's point of view had two plain disqualifications as a lender; it had a business connection in India and it had a large capital of its own upon which it did not need to pay interest. It is altogether credible therefore that the persons in ultimate control of all the associated companies, should desire to pay off the Hong Kong company and to obtain another financier for the Bombay company. By entries regularly made in its books, and by other evidence the Bombay company says that this is what it did. What is the evidence to the contrary—evidence, that is to say, to show that throughout 1927 payments were being made to the Hong Kong company, that what purported to be the making of a tael loan was a fiction, and that entries of payments of interest upon a tael loan were in reality references to payments of interest to the Hong Kong company? Their Lordships agree with the Bombay High Court in thinking that such evidence is altogether lacking. The income-tax authorities in arriving at the contrary opinion have insufficiently considered that the question at issue has to be decided according to the legal rights resulting to the parties from what they in fact did and agreed to. If the Hong Kong company really accepted a credit in the books of the Sassoon company at Shanghai in discharge of their loans to the Bombay company, and if the latter really intended to become liable to Sassoons at Shanghai for a debt in taels then the Bombay company succeeded in changing its financier. The only evidence in the case is evidence to that effect, and a mere refusal to believe in the evidence to that effect is not, in the absence of any positive evidence, sufficient to entitle the income-tax authorities to hold that in 1927 the

Hong Kong company was in receipt of profits and gains from the Bombay company.

Comment has been made by different income-tax officials that the Bombay company has not produced the books of the Hong Kong Trust Corporation which are at Hong Kong. Also, and less unreasonably, that the Bombay company was at first unwilling to disclose the name of the firm from which the Sassoon company at Shanghai obtained the finance which enabled them to make the tael loan to the Bombay company. At a later stage of the proceedings the Bombay company, the assessees, stated that Sassoons of Shanghai obtained this finance from a company called Arnold and Company in China. It is said also that Arnold and Company is closely associated with the Sassoon companies. If on these lines it could be shown—not that Arnold and Company lent the money and became entitled as upon a real transaction with Sassoons of Shanghai to the rights of a lender—but that the tael loan made by Sassoons was in fact and in law made by the Hong Kong company, no doubt there would be something upon which the assessment order could be supported. But the case stated discloses no evidence to show the falsity of any of the entries in the books or the unreality of the correspondence of October and November, 1926 supported as these are by the declarations for which the Assistant Commissioner had asked. The comments above noted do not supply the place of such evidence. The Bombay company made the repayment in the same manner as it had received payment, namely, by the agency of the common banker. On no view is it possible to suppose that the transactions of 1927 were the same in character as the transactions of the previous years. If it is to be held that very different transactions are in substance the same in character, the basis of such a finding must be evidence. The appeal from the judgment of the High Court dated 29th August, 1933, fails.

It remains to consider the events that followed upon the decision of the High Court. By the terms of section 66 applicable to the present case, upon receipt of a copy of the judgment it became the duty of the Commissioner to " dispose of the case accordingly ". The assessee company contended that the High Court's decision was final in the sense that it put an end to any right on the part of the income-tax authorities to continue the proceedings to assess them as agent for the Hong Kong company for that year of assessment, namely, 1928-9. On this view the duty of the Commissioner would be to set aside the assessment order, to refund the tax which had been paid and to discontinue all further proceedings. The Commissioner took another view. He does not seem to have been furnished with a copy of the High Court's judgment until 14th October, 1933. On the 16th January, 1934, he directed the Assistant Com-

missioner to take back the appeal on his file, to set aside the assessment and to direct the Income-tax Officer to make a fresh assessment after making such further enquiry as he might think fit. He also directed that the tax paid should be refunded with interest provided that Messrs. E. D. Sassoon and Company, Limited, undertook to be responsible for paying back the amount in case an assessment was levied again or the matter was taken on appeal to the Privy Council. On the 30th January, 1934, the Income-tax Officer acting under section 22 of the Act required the Bombay company as agent of the Hong Kong company to produce or cause to be produced on the 15th February, 1934, the books of account of the Hong Kong company for the year ended 31st December, 1927. He also required the Bombay company as such agent to produce at the same time any evidence on which it might rely in support of its original return. On the 5th February the solicitors for the assessees wrote to the Commissioner claiming that this procedure was unwarranted and asking whether it was proposed to proceed upon the notices issued by the Income-tax Officer pending application for leave to appeal to the Privy Council. On the 15th February the assessees appeared under protest before the Income-tax Officer. On the 20th February the Income-tax Officer purported to make an assessment under sub-section 4 of section 23 of the Act because of the failure of the Bombay company to produce the books of the Hong Kong company upon that date. He invited the assessees, however, to make an application under section 27 to set aside this assessment. At the same time he purported to act under section 49 (A) of the Act and to set off the amount due upon this fresh assessment against the refund due to the assessees under the order of 16th January, 1934. The application under section 27 having been made (together with an appeal preferred before the Assistant Commissioner notwithstanding the proviso to sub-section (1) of section 30), the assessees were informed on 5th July, 1934, that proceedings in respect of the appeal were postponed until the hearing of the appeal by the Commissioner to His Majesty in Council against the decision of the High Court on the reference. The application under section 27 was likewise kept in abeyance until the decision of the appeal now before the Board. Thereupon on the 23rd August, 1934, the Bombay company applied by motion to the High Court of Bombay under section 45 of the Specific Relief Act, 1877, for an order in the following terms:—

> (*a*) That the Commissioner of Income-tax, Bombay Presidency, be ordered to refund and pay back to the Petitioners the sum of Rs.3,17,187-8-0 being the assessment levied on the Petitioners and being the subject matter of Civil Reference No. 8 of 1933 under the Indian Income-tax Act referred to in the Affidavit of Mr. A. E. J. Brander and disposed of by this Honourable Court in its appellate side by judgment delivered on the 29th day of August, 1933, with interest on the said sum.

(*b*) That the Assistant Commissioner of Income-tax, Bombay, may be ordered to proceed with and dispose of the appeal filed by the Petitioners on the 14th day of March, 1934, against the summary assessment levied by the Income-tax Officer, Companies Circle, Bombay, by his notices dated the 20th day of February, 1934, referred to in the affidavit aforesaid.

(*c*) That the Income-tax Officer, Companies Circle, Bombay, be ordered to proceed with and dispose of the application made by the Petitioners under section 27 of the Income-tax Act on the 14th day of March, 1934, against the summary assessment levied by the Income-tax Officer by his notices of assessment dated the 20th day of February, 1934, and referred to in the affidavit aforesaid.

This application was dealt with by the High Court, Beaumont C.J. and Rangnekar J. on the 19th September, 1934. The High Court made an order whereby the Commissioner was directed to set aside the original assessment and to repay to the petitioners the sum of Rs.3,17,187-8-0 with certain interest and costs. The learned judges made no order under paragraphs (*b*) and (*c*) of the notice of motion saying that they thought they were unnecessary. It is from this order that appeal No. 85 of 1935 has been brought.

From the judgment of the learned Chief Justice it appears that the Court considered that, as a result of the previous order of the High Court, the proceedings should have been terminated forthwith. They were of opinion that the Commissioner had no jurisdiction to direct the Assistant Commissioner to take back the appeal to him. They also considered that there was no justification for directing the Income-tax Officer to make further enquiry, because the whole assessment was covered by the judgment of the Court, and the Income-tax Officer had already obtained production of all the documents for which he asked. The learned Chief Justice commented with some severity upon that part of the order of the Commissioner which imposed as a condition of refund that a guarantee should be given by E. D. Sassoon and Company : saying that the Commissioner must have known perfectly well that he was not justified in imposing as a condition of the refund that a guarantee should be given by some third party for the amount of any fresh assessment. He further observed with reference to the order under section 23 (4) made by the Income-tax Officer on the 20th February, 1934, that it was perfectly obvious, and the Income-tax Officer must have known, that it would not be possible for the assessees to produce within fifteen days books of account of the corporation in Hong Kong, a corporation which according to the finding of the Court had no business connection with the assessees. He described the procedure adopted by the income-tax authorities as a flagrant attempt to flout the judgment of the Court and to assess the assessees in a large sum in respect of which the Court had held that there is no evidence to justify the assessment. It being objected that by clause (*g*) of section 45 of the Specific Relief Act nothing in that section " shall be deemed to authorise

any High Court to make any order on any other servant of the Crown as such merely to enforce the satisfaction of a claim upon the Crown ", the learned Chief Justice answered that in the circumstances of this case the order was not being made merely for that purpose, but was being made for the purpose of ensuring that the orders of the Court were not ignored.

The intention of the learned judges was to make an order requiring that the Commissioner " do forthwith proceed to deal with the case under sub-section 5 of section 66 by setting aside the assessment and by repaying to the assessees the amount specified in the application." The formal order was made in the terms " that the 1st respondent do re-pay to the petitioners the sum of Rs.3,17,187-8-0 with interest ", etc. This part of the order is inartistically expressed : though it is true that in section 49 (A) the phrase occurs " in lieu of payment of the refund," the duty of the income-tax officials under the Act, and the duty of the Commissioner in the present case under section 66 sub-section 5, was to record or cause to be recorded, an order allowing the refund to the assessees and to issue to them a refund order upon which they could obtain payment from a branch of the Treasury or of the Imperial Bank of India. While their Lordships do not say that the distinction between doing these acts and " repaying " is as important for the present purpose as it would have been in an English case (cf. *The Commissioner for Special Purposes of the Income-Tax* v. *Pemsel*, [1891] A.C. 531, 569) it is very necessary that orders made under the Specific Relief Act should specify with exactitude and clarity the specific act which the person holding a public office is being commanded to do. Moreover, their Lordships cannot agree with the view taken by the High Court that the Commissioner was obliged to discontinue proceedings against the Bombay company as agent of the Hong Kong company in respect of the year of assessment 1928-9. It was within the jurisdiction of the Commissioner to direct further enquiry if he thought such enquiry to be reasonable and to be profitable in the public interest. Under section 33 (2) he has a general power to make enquiry or to cause an enquiry to be made. It was certainly unfortunate that his order for further enquiry took the form of quoting the power given to Assistant Commissioners by clause (*b*) of sub-section 3 of section 31. That is one of several powers mentioned in the sub-section each of which is to be used in a proper case. As the whole question at issue was whether or not the Hong Kong company, or the Bombay company as its agent, were liable to be assessed at all, to direct the Income-tax Officer to make a fresh assessment after making such further enquiry as he thought fit was an inappropriate form of order. But in substance the Commissioner was within his rights in directing further enquiry, and however disappointing this course may have been to the assessees it is a matter which

a court of law must leave in the discretion of the Commissioner. The learned judges of the High Court were not justified in thinking that this part of the order of the Commissioner was open to the criticism that the Commissioner was flouting or ignoring the High Court's decision.

Their Lordships cannot but agree, however, with the comments made by the learned Chief Justice upon the Commissioner's order of 16th January, 1934, imposing as a condition of refund that Messrs. E. D. Sassoon and Company, Limited, should undertake to be responsible for paying back the amount in case an assessment were levied again or the matter was taken on appeal to the Privy Council. So, too, in the case of the order of the Income-tax Officer dated the 20th February, 1934, making an assessment in default under section 23 (4) for failure to comply with the order of 30th January, requiring the Bombay company to produce the Hong Kong company's books of account on the 15th February, the strictures of the High Court are plainly justified. To this their Lordships will add that the action of the Income-tax Officer in refusing to deal with the application under section 27 until the disposal of the appeal to His Majesty in Council was equally open to criticism. Whether it adds to or subtracts from the discredit of such proceedings, if it be supposed that the income-tax authorities considered themselves entitled to do what was necessary to retain the assessees' money until the decision of this Board could be obtained, is a question upon which no opinion need here be ventured. It should suffice now to observe that since August, 1934, the Income-tax authorities have been withholding from the Bombay company over three lacs of rupees extracted from them by an illegal assessment order, and that there is no pretence of justice or law in the notion that the money can be withheld in case on some future date a valid assessment may come into existence.

The action taken by the High Court under the Specific Relief Act was, however, incorrect. In the first place the decision of the Court upon the particular question referred to it in this case was given in its special jurisdiction under section 66 of the Act and was " advisory " (*Tata Iron and Steel Co.* v. *Chief Revenue Authority* (1923), 50 I.A. 212): the complaint that the orders of the Court were being ignored does not appear to their Lordships to be a correct statement of the assessees' grievance. But in any case clause (*g*) in section 45 of the Specific Relief Act does not mean that orders can be made to enforce the satisfaction of a claim upon the Crown provided that the Court acts with some additional motive or has some further intention. The words of the clause have been taken *verbatim* from a well-known judgment on mandamus, the judgment of Coleridge J. in *Baron de Bode's* case in 1838 (6 Dowling's Reports 776 at 792). " But, against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the

Crown, it is an established rule that a mandamus will not lie. I call this an established rule. I believe it has never been broken in upon." The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in *Regina* v. *Lords Commissioners of the Treasury* in 1872 (L.R. 7 Q.B. 387). The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown his principal. Whether the Commissioner of Income-tax, either generally or under section 66, sub-section 5 of the Income-tax Act, is in this position as regards the refund of tax paid under an invalid assessment is the question raised by clause (*g*) of section 45 of the Specific Relief Act. This their Lordships do not find it necessary in the present case to decide; nor do they discuss the question whether in view of what Lord Phillimore said in *Alcock Ashdown and Co., Ltd.* v. *Chief Revenue Authority*, (1923) 50 I.A. 237, the assessees were in any difficulty by reason of section 106 (2) of the Government of India Act, or had any other specific and adequate legal remedy (*cf.* clause (*d*) of section 45 of the Specific Relief Act, section 67 of the Income-tax Act, section 32 of the Government of India Act). Before the assessees had brought their application on the 23rd August, 1934, there was in existence the order under section 49 (A) based upon the fresh assessment of the 20th February. To get rid of that order it was necessary that proceedings should be taken under section 27, and it was not open to the assessees to apply to the court direct for an order setting aside that assessment or the set off made thereunder. The assessees' application had contained clauses (*b*) and (*c*) whereby an order was asked directing the Assistant Commissioner to dispose of the appeal and the Income-tax Officer to dispose of the application under section 27. No order was made by the learned judges of the High Court in respect of clause (*c*) of the application, and their Lordships do not consider that it was open to the learned judges of the High Court to direct a refund to be made, or the necessary steps to be taken in that regard, so long as the fresh assessment stood. Their Lordships are, therefore, of opinion that the order of the High Court dated 19th September, 1934, should be set aside and that the parties should pay their own costs of that application. They will humbly advise His Majesty to that effect and that subject thereto this consolidated appeal should be dismissed.

The Commissioner of Income-tax Bombay Presidency and Aden must pay to the Bombay Trust Corporation, Limited, two-thirds of their costs in the consolidated appeal.

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In the Privy Council.

THE COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY AND ADEN, AND OTHERS

v.

THE BOMBAY TRUST CORPORATION, LIMITED

THE COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY AND ADEN

v.

SAME

Consolidated Appeals

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