> becomes clothed with some of the infirmities mentioned in that rule. In substance, removal from membership and ceasing as a member have the same effect for an elected person. When the legislature in its wisdom has conferred the power of removal on the Registrar only, then it would be undesirable to hold that the said authority was not competent to take action under Rule 26. We are of the view that even when a declaration is sought to be given regarding a member under Rule 26, the matter must be decided by an authority invested with the powers of the Registrar."

Finding support from the above observations, I hold that the impugned orders in these writ petitions have been passed by the Assistant Registrar who was not competent to exercise the powers of the Registrar under section 27 of the Act. The impugned order in all these three writ petitions are, therefore, without jurisdiction and are quashed. There will, however, be no order as to costs.

MITAL, J.—I agree. ......

K. S. K. ...

INCOME TAX REFERENCE.

Before D. K. Mahajan and P. S. Pattar, JJ.

M/S. DASHMESH TRANSPORT COMPANY (P) LTD., LUDHIANA.—*Applicant.*

versus

THE COMMISSIONER OF INCOME TAX,—*Respondent.*

I.T.R. No. 35 of 1972.

October 23, 1973.

Income Tax Act (XLIII of 1961)—Section 40(a) (ii)—Assessee Company taking over assets and liabilities of another Company—Tax liability of the transferor Company paid by the assessee—Such payment—Whether not allowable deduction by reason of section 40(a) (ii).

Held, that it is a fundamental rule of interpretation of statutes that a part of the statutory provision cannot be read in isolation.

Section 40 of the Income Tax Act, 1961 does make a reference, though indirect, to sections 28 and 29 of the Act and, therefore, it has to be interpreted keeping in view the scheme of the Chapter IV, particularly Part 'D' thereof in which this section finds place. The provision contained in sub-clause (ii) of clause (a) of section 40 of the Act concerns itself with the business of an assessee and his income which is being assessed. It only prevents the deduction of a tax when it has been levied on the profits and gains of the assessee's business. Where a Company takes over the assets and liabilities of another Company and pays the tax liability of the transferor Company, such payment does not fall within the purview of section 40(a) (ii) of the Act. It is a payment of the tax liability of a person other than the assessee. Hence, where an assessee Company takes over the assets and liabilities of another Company and makes the payment of tax liability of the transferor Company, such a payment is an allowable deduction and does not fall within the category of section 40(a) (ii) of the Act.

Reference under section 256(1) *of the Indian Income Tax Act,* 1961 *made by the Income Tax Appellate Tribunal (Chandigarh Bench), Chandigarh,*—vide *its order dated* 30*th October,* 1972, *for opinion to this Hon'ble Court on the following question of law in R.A. No.* 99 *of* 1971-72 *arising out of I.T.A. No.* 37 *of* 1970-71 *regarding assessment year* 1966-67:—

(1) *Whether the sum of Rs.* 1,01,095 *represents the real income of the applicant chargeable to tax in its hands ?*

(2) *Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs.* 1,01,095 *was not allowable as deduction by reason of the provisions contained in Section* 40(*a*) (*ii*) *of the Act?"*

G. C. Sharma, Sr. Advocate with V. Vasudevan, Prem Singh and M. M. Punchhi Advocates, *for the applicant.*

D. N. Awasthy, Advocate and B. S. Gupta, Advocate, *for the respondent.*

JUDGMENT

Judgment of the Court was delivered by:—

MAHAJAN, J.—The Income-Tax Appellate Tribunal (Chandigarh Bench) has referred the following question of law for our opinion:—

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 1,01,095

was not allowable as deduction by reason of the provisions contained in section 40(a)(ii) of the Act?".

(2) The assessment year in question is 1966-67. The assessee is a Private Limited Company. It was incorporated on the third day of July, 1964. The Company in July, 1964 took over the transport business including all the assets and liabilities of Messrs Khalsa Nirbhai Transport Company Private Limited, Group 'A'. In the Articles of Association of the assessee-Company Article 18 provided:

> "The assets and liabilities of the Khalsa Nirbhai Transport Company Private Limited (Group 'A') Ludhiana will be taken over by the Company."

(3) The liabilities of the Messrs Khalsa Nirbhai Transport Company Private Limited included tax liability to the Income-tax Department to the tune of Rs. 1,01,095 which were in fact, advance-tax penalties including income-tax and these liabilities were prior to the taking over of the Company by the assessee. The assessee claimed the amount of tax paid by it on behalf of the transferor-Company as a permissible deduction under sections 28 and 37 of the Income-tax Act. The Income-tax Officer disallowed this claim on the basis that "Payment of liability in respect of the predecessor cannot be allowed as a deduction specially when the liability is that of income-tax". The assessee appealed to the Appellate Assistant Commissioner who took the following view:—

> "Whatever price was paid for taking over the Company, the Company was naturally fixed after taking into consideration the total value of assets and liabilities. The liabilities discharged in terms of the agreement of taking over the Company, can only be regarded as capital expenditure being part and parcel of the price paid for taking over of the assets together with the liabilities of the old concern. The Income-tax Officer was, therefore, justified in treating all these payments as capital expenditure and not allowable as a deduction in the case of the appellant Company."

Against the decision of the Appellate Assistant Commissioner, the matter was taken in appeal to the Income-tax Appellate Tribunal (Chandigarh Bench). The Tribunal affirmed the decision of the Appellate Assistant Commissioner regarding the amount of Rs. 1,01.095 (the tax liability of the transferor-Company) but on a different

ground altogether. The reasoning of the Tribunal may now be stated in its own words:—

"We have given our most anxious thought and consideration to this problem before us which appears to be simple from the point of view of both the parties but ultimately not so simple, as that. If we agree with the propositions of the learned counsel for the assessee that the taxes and penalties were paid in discharge of the contractual obligations of the assessee Company the assessee must have its claim. But then the bar contained in section 40(a)(ii) as emphatically urged by the Departmental Representative, stares us in the face too and particularly the words used therein viz., "any rate or tax levied on the profits or gains of any business" and that too "in the case of any assessee" as section 40(a) opens out.

To us it appears to be a case where the law is on the side of the revenue but justice perhaps, is on the side of the assessee, as the learned counsel put it. After all if the assessee had not paid the tax etc. levied on the transferor Company he would have failed to discharge his contractual obligation and perhaps would have been answerable in civil Court for breach of contract or even for specific performance of the contract under the Contract Act. At the same time the Revenue would have recovered all its demands from the assessee by pointing out to the assessee Article 18 of the Memorandum of Association. If he had not paid or failed to pay, apart from freezing the assets, the Revenue would have brought all his business activities to a stand-still by virtue of coercive powers vested in them by the law. The Revenue would have further levied penalties for non-payment of the taxes etc. When assessee has paid, as in the instant case, the claim is not allowed. If the assessee had not paid he would have been perhaps, sweeped out of business. The assessee's predicament is perhaps like the proverbial serpent with the lizard in his mouth. If he swallows he dies; if he throws out he becomes blind.

It was contended that if they were taxes, etc., paid pure and simple section 40(a)(ii) would have had constituted an

insurmountable bar for the assessee but the taxes etc. so paid are not taxes etc., paid as such but an obligation discharged undertaken in the process of the taking over as specified in Article 18 of the Memorandum of Association.

While we are much impressed by the very unusual but interesting arguments of the learned counsel for the assessee that section 40(a)(ii) is not applicable we cannot agree with him because section 40(a)(ii) does not mention whose taxes paid by whom. It only mentions in the case of any assessee..............any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis, of any such profits or gains." It is an unqualified bar with no exit, whatsoever, when the legislature places a bar, one cannot be allowed to cross it. The Tribunal is not to provide an exit where there is none.

The learned counsel for the assessee could argue that if other expenses incurred and liabilities discharged on behalf of the transferor-Company could be allowed why not the taxes etc. paid for the transferor-Company. He could urge that on the same parity of reasoning the claim was allowable. We would have allowed it on the same parity of reasoning, but we cannot help the assessee as section 40(a)(ii) stares us too in the face. We have to like what the law likes. The law likes this bar and we have to like it and so must the assessee much to his distaste and disadvantage. We, therefore, agree with the learned Departmental Representative that the assessee must fail on this claim for Rs. 1,01,095."

The assessee being dissatisfied with the decision of the Tribunal moved an application under section 256(1) of the Act asking the Tribunal to refer the following two questions of law for the opinion of this Court:—

"(1) Whether the sum of Rs. 1,01,095 represents the real income of the applicant chargeable to tax in its hands ?

(2) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of

Rs. 1,01,095 was not allowable as deduction by reason of the provisions contained in section 40(a)(ii) of the Act ?"

The Tribunal allowed the application and has referred the question of law set out in the opening part of our order.

(4) Before we deal with the respective contentions of the learned counsel for the parties, it will be proper to refer to the scheme of the Act in which section 40 figures. Section 40 is in Chapter IV which is headed "Computation of Total Income". There are various heads under this Chapter and the head 'D' deals with "Profits and gains of business or profession". Sections 28 to 44 are under this heading. Section 28, so far as it is relevant for our purpose, reads thus: —

"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

* * * * *".

* * *

Section 29 is in the following terms: —

"29. The income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43".

Section 40(a)(ii) which needs consideration is in the following terms: —

"40. *Amounts not deductible.*—Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",

(a) in the case of any assessee—

(i) * * *

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

(iii) * * * *

(iv) * * * *".

There is one other provision which need be mentioned at this stage and that is section 170 which is in the following terms:—

"170(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referrd to as the successor) who continues to carry on that business or profession,—

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly.

(3) When any sum payable under this section in respect of the income of such business or profession for the previous year in which the succession took place up to the date of succession or for the previous year preceding that year, assssed on the predecessor, cannot be recovered from him, the Income-tax Office shall record a finding to that

effect and the sum payable by the predecessor shall thereafter be payable by and recoverable from the successor, and the successor shall be entitled to recover from the predecessor any sum so paid.

(4) * * * *.

Explanation.—For the purposes of this section, "income" includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession."

(5) The contention of Mr. Sharma, learned counsel for the assessee, is this: The Income-tax Officer is concerned with an assessment of an assessee. It is his income that has to be assessed. It is he, who is entitled to the deductions. Therefore, keeping in view the scheme of the Act its provisions have to be applied to an assessee whose income from business or profession is being assessed to income-tax. The benefits and liabilities under the Act have referred to him and him alone unless there is a specific provision to the contrary. If this is done it will be clear that what was paid by the transferee-Company was not its tax liability. What was paid, was the liability incurred by it under Article 18 of the Articles of Association. The tax liability was of the transferor-Company and section 40 merely gives recognition to the English rule of law, namely, "Income-tax is not a deduction before you arrive at profits; it is a part of the profits." See in this connection *Allen (H.M. Inspector of Taxes)* v. *Farquharson Brothers and Company* (1). Section 40 also states that notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",

"in the case of any assessee—
any sum paid on account of any rate of tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains."

Mr. Awasthy, who represents the Department, on the other hand vehemently contends that section 40 does not warrant the taking

(1) 17 Tax cases 59.

into account of the scheme of the Act. The plain words of section 40 have to be given effect to and according to him so long as the liability is tax liability no matter how and in which circumstances it is paid and by whom, the person paying it cannot claim it as a permissible deduction. According to him tax liability is tax liability and can assume no other form. It is immaterial whether it is that of the assessee or someone else. Mr. Awasthy has put the following proposition in support of his contention "Income of an assessee is processed under various heads including income from business carried on by him during the accounting period relevant to the assessment year. While processing the income under the head "business" an assessee is entitled to certain deductions which have been enumerated in sections 30 to 39. In the present case, the assessee has made a payment of tax levied on the profits of the business now being carried on by him for the period during which it was being carried on by his predecessor. After making this payment of tax during the relevant accounting year, he is seeking deduction of tax paid from the assessment. Section 40(a) (ii) does not permit this and, in fact, is a complete bar to such a claim." If we were to read section 40 divorced from its context, there is no answer to Mr. Awasthy's contention. This cannot be done. It is a fundamental rule of interpretation of statutes that a part of the statutory provision cannot be read in isolation. Moreover section 40 makes an indirect reference to sections 28 and 29 of the Act. Therefore, one has to keep in view the scheme of Chapter IV and particular Part 'D' of Chapter IV and then interpret section 40. If the provisions of section 40 are clearly examined, a question straightaway arises, "whose income and whose business are the subject-matter of assessment with which this provision concerns itself?" The answer is clear. It is the business of the assessee and it is his income which are being assessed. Section 40 prevents tax as a deduction when it has been levied on the profits and gains of the assessee's business. The payment made by the assessee in this case does not fall within this category. It is payment of the liability to tax of another assessee. It is not, therefore, possible for us to accept the contention advanced by Mr. Awasthy. In fact, the Tribunal fall into that error in accepting such a contention. If the Tribunal had kept in view the scheme of the Act and the purpose for which section 40 was enacted, it would have come to a different conclusion. We put a simple illustration to Mr. Awasthy to judge the validity of his argument. If his contention is correct, it will also be so in the case of the said

illustration. "Amount of tax is due by A to the Income-tax Department. A goes to B, a money-lender and asks B to discharge that liability to the Department and executes a Pronote in favour of B. A is unable to pay the debt and B writes it off and claims it as a permissible deduction. Can it be said that what B paid was tax?" In common parlance, it would be that what B was paying was tax on A but what section 40 prohibits is the deduction of tax due from B and not deduction of tax paid by B on account of A. Mr. Awasthy hesitated to go that far and did not contend that the tax paid by B cannot be claimed a permissible deduction under section 40. This would fully illustrate that the view that we have taken is the only view possible so far as section 40 is concerned. This view finds some support from the provisions of section 170 of the Act. Section 170 provides that the tax liability when a business is transferred prior to the date of transfer rests with the transferor and after the date of transfer rests with the transferee. But, in certain circumstances, the transferee may be made liable for the liability of the transferor. What really matters is that the liability is that of the transferor and not of the transferee and the mere fact that in certain circumstances that liability can be put on the shoulders of the transferee will not in any manner detract from the fact that the liability to tax all the same is that of the transferor.

(6) Before parting with this judgment, we may refer to the decision of the Supreme Court in *Jaipuria Samla Amalgamated Collieries Limited* v. *Commissioner of Income-tax, West Bengal* (2). While dealing with section 10(4) of the 1922, Act which is equivalent to section 40 of the 1961 Act, their Lordships observed as follows:—

> "Now it is quite clear that the aforesaid cesses would be allowable deductions either under clause (ix) or clause (xv) of sub-section (2) of section unless they fell within section 10(4). We have already referred to the provisions of both Acts under which the cesses are levied which show that their assessment is not made at a proportion of the profits of the assessee's business. What has to be determined is whether the assessment of the cesses is made on the basis of any such profits. The words "profits and gains of any business, profession or vocation" which are employed in section 10(4) can, in the context, have reference only to profits or gains as determined under

(2) 82 I.T.R. 580.

section 10 and cannot cover the net profits or gains arrived at or determined in a manner other than that provided by section 10. The whole purpose of enacting sub-section (4) of section 10 appears to be to exclude from the permissible deductions under clauses (ix) and (xv) of sub-section (2) such cess, rate or tax which is levied on the profits or gains of any business, profession or vocation or is assessed at a proportion of or on the basis of such profits or gains. In other words, sub-section (4) was meant to exclude a tax or a cess or rate the assessment of which would follow the determination or assessment of profits or gains of any business, profession or vocation in accordance with the provisions of section 10 of the Act."

These observations do support the view that we have taken of the matter.

(7) For the reasons recorded above, we answer the question referred to above, in the negative, that is, in favour of the assessee and against the Department. In the circumstances of the case, however, we make no order as to costs.

B. S. G.

FULL BENCH

Before R. S. Narula, C.J., B. R. Tuli, and B. S. Dhillon, JJ.

MAHANT HARI KISHAN,—*Appellant.*

versus

THE SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR, ETC.,—*Respondents.*

F.A.O. No. 102 of 1965.

April 21, 1975.

Sikh Gurdwara Act (VIII of 1925)—*Sections* 2(4)(*i*), 2(4) (*iv*), 7, 8, 9 and 16—*Notification under section* 7—*Objection under section* 8 *filed by a person claiming to be "hereditary office-holder"—Gurdwara Tribunal—Whether has to decide first regarding the institution being a Sikh Gurdwara before adjudicating upon the locus* standi *of the claimant—Claim to an "hereditary office"—Determination of—Relevant considerations for—Stated—Person shown to be*