

(1939) 10 BOM CK 0016

In the Bombay High Court

Case No : Income Tax Reference No. 1 of 1939

A. R. HATTIANGADI, IN RE.

Date of Decision : 05-10-1939

Acts Referred:

Income Tax Act, 1961 — Section 66(1)

Citation : (1940) 8 ITR 85

Hon'ble Judges : Beaumont, C.J

Bench : Division Bench

Judgement

Beaumont, C.J. - This is a reference made by the Commissioner of Income Tax on his own motion u/s 66 (1) of the Income Tax Act in which he raises the following question :

"Whether in the circumstances of the case, the Income Tax Officer has rightly held the assessee liable to tax on the amounts of Rs. 5,296 and Rs. 8,013 received by him from the Trustees of the Native Staff provident and Savings Fund on account of the employers contribution to the Fund and the accumulated interests on the total contributions thereto respectively."

The assessee was an employee of the South British Insurance Co. Ltd., which company had instituted a Provident Fund for its native staff. The fund is regulated by a deed of trust which is Exhibit A to the Reference.

Under clause 4 of the Deed all native employees have to become subscribers to the Fund. Under clause 5 every subscriber to the Fund has to contribute annually a sum equal to five per cent. upon his actual salary and by sub-clause (3) of that clause the company is bound in each year for each contribution of each subscriber to the Fund to contribute a like amount so that the contributions of the company shall be equal to the aggregate of the contributions to the Fund for such year of all subscribers to the Fund. Clause 14 deals with the distribution of the Fund and it provides that each subscriber shall on retiring from the service of the company receive the total sum standing to his credit at the date of his leaving provided that (a) in the event of the retirement of a subscriber within less than fifteen years service or of his leaving in order to enter other

employment or of the company terminating his employment for any reason whatsoever other than those set out below, (but in fact no reasons are so set out) no more than the amount actually paid in by him plus simple interest at a rate or rates decided by the Trust Board shall be refunded; (b) in the event of the retirement of a subscriber in order to escape dismissal for misconduct of any kind, no more than the amount actually paid in by him shall be refunded; Sub-clause (c) is not material. In clause 15 it is provided that in the event of the death of any subscriber, the total sum to his credit at the date of his death shall, subject as there mentioned be paid to his widow, or at the discretion of the Trust Board, applied for her benefit or, for the benefit of his children or other near relatives or next of kin or in such manner as the Trust Board shall think fit. In clause 16 it is provided that the aforesaid moneys shall be inalienable and in the event of the bankruptcy or insolvency of any subscriber or in the event of proceedings being taken by any creditor for the attachment of such moneys, the sum then standing to the credit of such subscriber shall, subject to the provisions of clauses 14 and 15 become forfeited to the Trust Board.

The assessee retired from service of the Company as from 31st December 1935 presumably having served for fifteen years though that fact is not stated, and on his retirement he was paid the two sums which are mentioned in the Commissioners question representing, as stated, payment on account of the companys contribution to the Fund and interest on the total contributions to the Fund including the assessee's own contribution. The Income Tax Officer held that the sum paid to the assessee was assessable to tax and on appeal his decision was upheld by the Assistant Commissioner. After the date of the Assistant Commissioners judgment a decision of the Privy Council (*Commissioner of Income Tax, Madras v. B. J. Fletcher*, 39 Bom. L. R. 1050) was given and the learned Commissioner has referred the question to this Court in order to determine whether the principle of that decision covers the present case. The learned Commissioner has expressed a view that it does not.

Now, in that case the Privy Council were dealing with a provident fund conducted under rules very similar to those of the provident fund in this case, but, there were two points of distinction between the rules in that case and the rules in this case on which the Commissioner relies. In that case the company was not bound to contribute to the fund, it was discretionary for the company to contribute or not; and, every employee was not entitled to the benefit of the fund; that again was a matter left in the discretion of the company. No doubt, those two features are amongst the reasons which Sir George Lowndes in giving the opinion of the Board relied on. But, in my opinion, those two special features do not form the real basis of the decision of the Privy Council. The Privy Council say that if the sum represented merely the payment of accumulated portions of salary held up by the employers until the employees retirement it would be received by him as deferred income and therefore be taxable. Their Lordships thought that the payment in that case was similar to the payment of a lump sum from an ordinary provident fund and represented in fact a capital receipt and not deferred salary.

In my opinion the reasoning of that case applies to the present case. It seems to me clear that in this case the payment is not merely deferred salary. If it were salary the employee would be entitled to it in any event. He is entitled to it only if he retires after fifteen years service and otherwise than for the purpose of entering other employment. But if he retires within fifteen years, or after fifteen years for the purpose of entering other employment, or if he is dismissed or retires in order to avoid dismissal, or if he dies he is not entitled to any benefit from the fund although in the event of his death his dependents may benefit. Under clause 16 he does not get any benefit if he becomes insolvent. That clause might perhaps be challenged in the insolvency court : but its inclusion in the Trust deed shows the fact that the scheme of the provident fund was not to give any definite right to the employee to share in the fund except in one particular event. That being the nature of the fund and the interest of the employee therein it seems to me impossible to contend that the payment which the assessee received out of the fund was merely deferred salary. In my opinion it was a payment in the nature of a capital bonus to be paid to a faithful employee of long standing. The case is covered by the decision in *Fletcher's Case* and the answer to the question must be in the negative. The Commissioner to pay the costs.

Kania, J. - I agree. The test as laid down in *Fletcher's Case* is whether the sum in question was received by the assessee as income or was it in the nature of capital receipt. In the later part of the judgment it is stated that a lump sum from a provident fund received on the employee's retirement was in the nature of capital receipt. In the present case, I think, Rule 14 (a) of the Rules of the provident Fund shows clearly that the employee had no right to the fund and was entitled to receive it practically at the mercy of the employers. That rule excludes him from the right to receive anything if he retires before 15 years are completed. It excludes him if he leaves the service in order to enter another employment. It excludes him if the company terminates his appointment for any reason whatsoever. The words "other than those set out below" have no particular meaning as no other reasons are set out in the later clauses. It is significant that even in those contingencies his own contribution with simple interest has to be paid to him but the company's contribution and interest are to be paid only if the company chooses. The employee has no right to it. These features clearly refute the contention that this was salary of which the payment was deferred. If the employee had no right to the salary and was not entitled to it except under very limited special circumstances and that too practically at the discretion of the employers I do not think it could be called deferred salary, as suggested in the Reference.

Reference answered in the negative.