
(1962) 08 BOM CK 0034
In the Bombay High Court
Case No : IT Reference No. 66 of 1961

Commissioner of Income Tax

APPELLANT

Vs

J.B. Wadia

RESPONDENT

Date of Decision : 13-08-1962

Acts Referred:

Income Tax Act, 1922 — Section 10, 2(6), 2(6A)(c), 3, 41

Citation : (1963) 48 ITR 135

Hon'ble Judges : Y.S. Tambe, J; V.S. Desai, J

Bench : Division Bench

Advocate : G.N. Joshi and R.J. Joshi, for the Appellant; N.A. Palkhivala and B.A. Palkhivala, for the Respondent

Judgement

V.S. Desai, J.—The assessee is a beneficiary under the will and also under a trust deed executed by Lady Aimai Wadia, who died on the 14th of April, 1930. Under clause (3) of the trust deed which was executed by Lady Aimai Wadia on 28th March, 1928, interest, dividends and income from a moiety of the trust property was to be received by the assessee during his lifetime and after his death the said moiety both as to capital and income was to go to the child or children of the assessee, who attained or shall have attained the age of 18 years in equal shares as tenants-in-common. Amongst the properties held under this trust, there were 1,000 shares of the B.E.S.T. Company Limited. The company went into liquidation and a sum of Rs. 35,000 was paid by the liquidators to the trustees in respect of the said shares. The B.E.S.T. Company, at the time when it went into liquidation, had certain accumulated profits and the amount of Rs. 35,000, which the trustees received, included a sum of Rs. 6,125 which represented a distribution out of the accumulated profits during the six previous years of the company preceding the date of liquidation. In the assessment of the assessee for the assessment year 1955-56, the income tax Officer, applying section 41 of the Indian income tax Act, included a half share of the said sum of Rs. 6,125 in the assessment on the basis that the amount was dividend income of the assessee in accordance with the provisions of section 2(6A)(c) of the Act.

The assessee challenged the inclusion of this sum before the Appellate Assistant Commissioner in appeal, but the challenge was not accepted and his appeal was dismissed. The assessee then filed a second appeal before the income tax Appellate Tribunal and contended that the amount of Rs. 3,122-8-0 was not assessable in the hands of the assessee. The Tribunal upheld the said contention of the assessee and allowed his appeal. The Tribunal took the view that the said sum could not be regarded as income, which was receivable by the assessee under the trust deed, because although it could be regarded as "income" under the Indian income tax Act being included in the term "dividend", in order to regard it as "income" in the hands of the assessee, it will have further to be deemed to be received or receivable by the assessee when in fact it was neither received nor receivable. At the instance of the department, the Tribunal drew up a question of law as arising out of its order and referred it to this court. The said question is as follows: Whether the sum of Rs. 3,122-8-0 rightly treated as assessable u/s 2(6A)(c) out of the amount received from the B.E.S.T. Co., by the trust was liable to inclusion in the respondent's total income for 1955-56, having regard to the provisions of section 3 and section 41(2) of the Act, and clause 3 of the deed of settlement dated March 28, 1928?

The second question, which the Tribunal has referred to this court arises out of the assessee's assessment for the assessment year 1956-57 and arises in the following circumstances:

The assessee's grandmother, Lady Aimai Wadia, had executed a will on the 26th January, 1929, which she had further modified by a codicil dated 26th September, 1929. Under the will as modified by the said codicil certain immoveable properties were allowed to be sold and converted into cash by the trustees and the proceeds directed to be invested in the investments specified in the will. The income from the said investments was to go to the assessee for his lifetime. In exercise of the powers conferred upon them, the trustees sold the said immoveable properties and invested the proceeds in shares and securities as provided under clause 24 of the will. Under the said clause, the trustees had also power and liberty to vary the investments from time to time. In the relevant account year, the trustees sold some of the shares and the sale resulted in a surplus of Rs. 1,171. In the assessment of the assessee for the year 1956-57 this amount was included in his income as profit on sale of shares. In the appeal, which the assessee took against the assessment order, the Appellate Assistant Commissioner took the view that the entire amount of the surplus could not be regarded as profit on sale of shares, but only such part of it as had resulted from the sale of the shares, which were sold within three years of their purchase. On this basis he found that a sum of Rs. 907 was the profit on the sale of shares, which could be included in the income of the assessee. The assessee took a second appeal to the Appellate Tribunal. The Tribunal held that the entire amount of the surplus of Rs. 1,171 could not be regarded as received or receivable by the trustees on behalf of the assessee and hence could not be included in the income of the assessee u/s 41(2) of the Indian income tax Act. The Tribunal

accordingly allowed the appeal of the assessee. At the instance of the department, it then raised and referred to this court the following question of law as arising out of its order:

Whether the profit of Rs. 907 made by the trust on sale of shares was liable to inclusion in the assessee's total income for 1956-57 having regard to the provisions of the will and the provisions of section 41(2) read with sections 3 and 10 of the Act?

2. With regard to the first question, it is undisputed that the amount of Rs. 3,122-8-0, included in the sum of Rs. 35,000, which was received by the trustees on the liquidation of the B.E.S.T. Company Limited in respect of the 1,000 shares in the said company held by them, was a dividend within the provision of section 2(6A)(c) and, therefore, income under the definition in section 2(6) of the Indian income tax Act. The question, however, is whether the said amount was receivable by the trustees on behalf of the assessee so as to make it liable for assessment in his hands under the provisions of section 41(2) of the Act. Now, under the trust deed what was given to the assessee was the interest, dividend and income from a moiety of the property. No part of the corpus itself was given to the assessee, which was to be disposed of after his death in the manner indicated in the deed. The investment in the B.E.S.T. shares was part of the corpus. The income resulting therefrom was no doubt to go to the assessee, but no part of the corpus or any accretion thereof or any amount realised by sale or other disposal of the corpus could be said to belong or to be receivable on behalf of the assessee. The amount of Rs. 35,000 was what the trustees had received in respect of the said shares held by them. The entire amount of Rs. 35,000, which was received by the trustees, they were bound to reinvest and hold under the terms of the trust giving only the interest or income arising therefrom to the assessee. No doubt under the provisions of the Indian income tax Act, a part of the amount was to be deemed to be income for the purpose of taxation under the Act. That part, therefore, will no doubt attract the tax and the amount thereof will consequently be taxable in the hands of the trustees. These provisions of the Indian income tax Act, however, could not have the effect of entitling the assessee to the said amount or enabling the trustees to treat it as a payment or sum which will be payable by them to the assessee. Under the trust deed the said part as also the rest totalling to Rs. 35,000 had to be treated as a part of the corpus. The amount of Rs. 3,122-8-0, therefore, could not be regarded as income, profits or gains receivable by the trustees on behalf of the assessee so as to make it assessable in his hands u/s 41(2) of the Act.

3. In our opinion, therefore, the Tribunal was right in the conclusion to which it has arrived and our answer to the first question, therefore, is in the negative.

4. Coming now to the second question, the Tribunal has found that during the relevant assessment year, the trustees must be treated as having dealt in shares and the profit, which they have made on the sale of shares during the said year must be regarded as a taxable profit. It has, however, taken the view that

although the said profit could be taxable profit in the hands of the trustees, it could not be taxable in the hands of the present assessee because under the terms of the will, the said profit has not been received by the trustees on behalf of the assessee. As we have seen, under the terms of the will the trustees were directed to make investments in certain specified investments and they were given power to vary and transpose the said investments from time to time. The income from the said investments was to go to the assessee for his life. Under the powers with which the trustees were invested under the will, if they varied the investments, the proceeds obtained on the sale of the investments, they had to reinvest in other securities. The accretion arising on sale thus had to be treated as an accretion of the corpus to be re-invested again in the securities giving only the income resulting therefrom to the assessee. The income, interest or dividend from the investments, to which the assessee was entitled under the will, was income as distinguished from corpus as understood under the ordinary law. It may be that, under the Indian income tax Act, a part, which will be considered as an accretion of the capital under the ordinary law, may be treated as income for purposes of taxation. Such part of the income, however, could not be said to be receivable on behalf of the assessee, who was not entitled to it under the terms of the will. On the second question also, therefore, the Tribunal was right in the view that it has taken. Our answer to the second question also, therefore, is in the negative. The department will pay the costs of the assessee.