

(1944) 11 BOM CK 0006

In the Bombay High Court

Case No : Income-tax Reference No. 16 of 1944

Commissioner of Income Tax

APPELLANT

Vs

K.M. Madan

RESPONDENT

Date of Decision : 03-11-1944

Acts Referred:

Income Tax Act, 1922 — Section 14(2)(a)

Citation : AIR 1945 Bom 431 : (1945) 47 BOMLR 281

Hon'ble Judges : Leonard Stone, J;Kania, J

Bench : Division Bench

Judgement

Leonard Stone, Kt., C.J.—This is a reference u/s 66(1) of the Indian Income Tax Act, 1922. The relevant assessment year is the year 1941-42 for the accounting year, which in this case is from April 1, 1940, to March 31, 1941. The question referred to us is as follows:

Whether in the circumstances of the case the amount of Rs. 178-9-3 received by the assessee from the Tata Iron and Steel Co. in the year of account, according to the decree of the High Court, was rightly held to be the dividend income of the years prior to the year of account, and not the income of the relevant accounting period?

2. The sum of Rs. 178-9-3 is made up of a number of sums relevant to the different assessment years, but the principle is the same in all cases; and a sum of Rs. 26-1-1 in respect of the assessment year 1932-33 has been the sum around which the arguments and debate have revolved-

3. The facts have never been in dispute; but they raise a curious set of circumstances, relevant, so we are told, to a number of taxpayers, making this case in the nature of a test case so far as questions of principle are involved.

4. The assessee was one of the preference shareholders in the Tata Iron and Steel Co. Ltd. in respect of twenty six per cent. 1st cumulative preference shares and five seven and a half per cent. 2nd cumulative preference shares. For a

number of years the company did not pay its preferential dividends, and in 1926 a scheme of arrangement was proposed and ultimately sanctioned by the Court, which provided that for the future the current preferential dividends should be first paid as they fell due, and that the cumulative arrears should be paid out of fifty per cent of a fund calculated in accordance with the scheme.

5. The company in paying its shareholders the preferential dividend in years subsequent to the scheme in fact deducted Income Tax and gave a certificate, which is attached to the dividend warrant, and in which the following is the material extract:

We hereby certify that Income Tax on the entire (100%) profits and gains of the company, of which this dividend forms a part, has been or will be duly paid by us to the Government of India.

6. In fact by virtue of certain provisions in the Indian Income Tax Act allowing permissible allowances for depreciation to accumulate for years in respect of which there was no profit of the company from which they could be deducted or set off, the company did not itself have to pay any Income Tax at all during the relevant years. The shareholders accordingly objected and said that in these circumstances they were entitled to their dividends in gross without any deduction in respect of Income Tax, and the matter was ultimately litigated, and the test case in this Court will be found reported in *Lalita v. Tata Iron and Steel Company, Limited* (1939) 42 Bom. L.R. 57 : [1940] Bom. 165, F.B. There was no appeal from that decision, and it is, therefore, established, as was therein held, that the company was not entitled in the circumstances to make the deductions for tax and was liable to pay to its shareholders the balance of the dividends, that is to say, that portion of the gross dividend which the company had deducted in respect of Income Tax and in respect of which it had given the certificate, which I have already mentioned.

7. For the purposes of this reference the figures which have been taken relate to the assessment year 1932-33 and to the figure of Rs. 166-6-11 net dividend actually paid and Rs. 26-1-1 being twenty-six pies in the rupee Income Tax making gross total dividend figure of Rs. 192-8-0.

8. It is necessary to look at Section 14(2) and Section 16(1) and (2) of the Act as it stood before the 1939 amendments, since they are the sections relevant to this reference and to the year 1932-33.

9. Sub-section 14(2)(a) is as follows:

The tax shall not be payable by an assessee in respect of any sum which he receives by way of dividend as a shareholder in a company where the profits or gains of the company have been assessed to Income Tax.

10. Section 16, Sub-sections (1) and (2), provide:

(1) In computing the total income of an assessee sums exempted under the

proviso to Sub-section (1) of Section 7, the second and third provisos to Section 8, Sub-section (2) of Section 14 and Section 15, shall be included.

(2) For the purposes of Sub-section (1), any sum mentioned in Clause (a) of Sub-section (2) of Section 14 shall be increased by the amount of Income Tax payable by the company in respect of the dividend received.

11. Mr. Setalvad on behalf of the Crown says that when you look at the respondent's form of assessment to tax for the assessment year 1932-33, which you may do as it is referred to in the judgment of the Appellate Tribunal, which in its turn is referred to in the reference, it clearly shows that, although the assumption that the company has paid tax before the receipt of the dividend by the respondent is taken into account for the purpose of giving the respondent the benefits of reliefs and deductions, it is not taken into account for the purpose of making the respondent pay any more tax, although admittedly it is taken into account in order to assess the rate of tax on the respondent at twelve pies in the rupee; and although it is submitted that this is in any event immaterial, it is pointed out that it did not in fact increase the rate of tax, and did not, therefore, adversely affect the respondent in any way. It is accordingly submitted that the assessment for the year 1932-33 and the payment of tax thereunder cannot affect the receipt by the respondent of a sum which he in fact received in the accounting year 1940-41 under the order of the Court, and that you must regard the receipt of that sum apart from and unaffected by the assessment for 1932-33.

12. Attractive as that argument may be, it is not, in my judgment, tenable on the facts as found by the Appellate Tribunal, which it is not the function of this Court to attempt to controvert, provided there is some evidence to support them. But before referring to those facts, it is necessary to observe that under the scheme of the Indian Income Tax Act an assessee can be assessed to tax on income which has accrued and not only on income which has actually been received by him.

13. Sub-section 4(1) provides:

Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in Section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

14. Section 6 is the section which contains the heads of income, which go to make up what the Act describes as the "total income". The section is as follows:

Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to Income Tax in the manner hereinafter appearing, namely:

(i) Salaries.

(ii) Interest on securities.

(iii) Property.

(iv) Business.

(v) Professional earnings.

(vi) Other sources.

Head (vi) "Other sources" is the relevant head, under which preferential dividends are taxed.

15. The following are the facts found by the Appellate Tribunal and set out in the reference:

During the years, when the tax was deducted by the company, the assessee was not only assessed on the net income received from the company as dividend but the amount was grossed up by adding an amount invariably higher than the tax deducted.

Taking an instance in the assessment year 1932-33, the Tata Iron and Steel Co. declared a dividend of Rs. 192-8-0. The Company actually paid a sum of Rs. 166-6-11. The Income Tax Officer grossed this amount by adding a sum of Rs. 28-6-0. The total dividend income of Rs. 204 brought in the assessment form for 1932-33 included this sum of Rs. 28-6-0. The assessed total income for that year was a sum of Rs. 14,126, including the dividend-income which was brought to tax. The rate applicable to the assessee on this income was twelve pies in a rupee.

The assessee actually received during the assessment year 1932-33 Rs. 166-6-11, and by the order of the High Court he has received in the relevant accounting period a sum of Rs. 26-1-1, being the deduction made in the assessment year 1932-33. The total of such deductions made for a number of years amounted to Rs. 178-9-3. This amount has been received by the assessee during the relevant accounting period. We have held in our judgment in R.A.A. No. 137-Bombay of 1942-43 that the amount refunded under the decree of the High Court was a part of the dividend wrongly withheld by the company relating to the years prior to the accounting year under reference and that the whole of such dividend, including the amount received during the year, had already been brought to tax .

The reference continues by drawing a conclusion from this statement of fact. That conclusion is:

Therefore, it could not be treated as the dividend income of the relevant accounting; period.

The reference, as has been shown, refers to the judgment of the Appellate Tribunal, and in turning to it the two following passages appear to be very pertinent:

Paragraph 6 is as follows:

Now, let us see what was the net effect of grossing up. It only resulted in enhancing the dividend income to a figure which was admittedly higher than the gross dividend declared by the company at that time. Where the company deducted Rs. 26-1-1, Rs. 28-6-0 were actually added to the net dividend by the Income Tax Authorities. In other words, the whole gross dividend as declared by the company has been brought to tax. Part of this dividend was actually received by the assessee at that time and a part deducted on account of Income Tax has now been refunded to the assessee during the relevant accounting period.

Then the judgment states the following conclusion:

Therefore, this amount has obviously been assessed as dividend and borne the tax. The position might, perhaps, have been different if in those years when the dividend was declared and paid, the company had any liability to pay tax and the provisions of Section 16(2) had to be evoked.

In paragraph 8 it is further stated:

We have already held on a point of fact that the net result of grossing up this dividend was that an amount invariably higher than the gross dividend declared was brought to tax. Under the Act as it then stood this grossing up was not permissible, and the maximum amount of dividend which could be taxed has already been brought to tax by the Income Tax Authorities.

And, again, they state their conclusion:

It is therefore directed that the sum of Rs. 178-9-3 is not the dividend received by the assessee.

16. But Mr. Setalvad submits that, although stated as facts, these are conclusions drawn from placing a construction on the assessment form, which appears at p. 14 of the record and which is implemented by further figures contained on p. 16, and which are referred to in the judgment as "the assessment records". In my opinion, there is evidence upon which the Appellate Tribunal could come to the finding that "the whole of such dividend, including the amount received during the year, has already been brought to tax". Such a finding of fact having been reached by the Appellate Tribunal on the evidence, it is conclusive; and it is not open to us to go into the assessment form to see whether we should have reached a similar finding. But as this case may go further, I desire to add, in deference to Mr. Setalvad's argument, that we have looked at the assessment form annexed to the case and contained on pp. 14 and 16 of the record, and that when the figures are analysed, it appears that the total dividend of Rs. 193 is included in the figure of 204, which in its turn is brought in for the purpose of computing the total income figure of 14,126, with the result that, had it been open to us to look into the figures in the assessment form, we should have come to the same conclusion as the Appellate Tribunal.

17. In the result, the question must be answered by saying that the Rs. 178-9-3 is not the income of the relevant accounting period.

18. The Commissioner to pay costs.

Kania, J.

19. I agree. The relevant extracts from the judgment of the Appellate Tribunal and the statement of case have been set out in the judgment of the learned Chief Justice.

20. The short point for consideration is whether the sum of Rs. 26-1-1 in respect of the dividend of the twenty 1st preference shares and five 2nd preference shares of the Tata Iron and Steel Co. Ltd. of the assessee have been brought to tax in the assessment year 1932-33. This figure is taken as an illustration in this particular year. The total sum in question in the reference is Rs. 178-9-3. That is made up of different sums which, under a decree of the High Court in *Lalita v. Tata Iron & Steel Co.* (1939) 42 Bom. L.R. 57 : [1940] Bom. 165,, the Tata Iron and Steel Company was ordered to pay to the shareholders on its register in the years in which the Court held that the company had wrongfully withheld payment. The short facts in respect of those deductions are these. The company did not make profits for several years, and its depreciation account was allowed to grow. At a certain stage the company began to make profits. From those profits dividends were declared and ordered to be paid. In the assessment of the company itself, however, by virtue of the deductions permitted u/s 10, the company was not liable to pay any tax although it was assessed, that is, its income was computed for the purpose of taxation. Although the company thus did not pay any tax, it deducted out of the dividend which it paid to the preference shareholders an amount calculated at the maximum rate of tax permitted under the Finance Acts of the relevant years. Certain shareholders having found that the company had not paid the tax filed a representative suit and claimed that, while the company had not paid Income Tax on its income, the company had no right to deduct any amount for Income Tax as in fact that amount was not paid or liable to be paid to the Income Tax authorities. In that suit a decree was passed against the company, and the shareholders contention was upheld. The result was that the company under that decree was ordered to pay what it had wrongfully withheld in the shape of deduction for tax at the maximum rate. In respect of the assessment year 1932-33 for the assessee such amount came to Rs. 26-1-1.

21. After the Court passed the decree, the company paid the amount to the shareholders, including the assessee, in the year 1940-41. The taxing authorities contend that the sum having been received in the year 1940-41, it was dividend received by the assessee in that year and was liable to tax. The contention of the assessee, on the other hand, has been that the full dividend declared and made payable by the company on August 31, 193d, has been assessed and taxed in respect of the assessee, and, therefore, the taxing authorities are not entitled to

tax this sum again when it was received by the assessee in 1940-41. There can be no doubt that if this sum was taxed in the previous year, it cannot be taxed over again merely because it was received in a subsequent year. The question, therefore, to be decided by the Tribunal was whether in fact this sum and other sums so deducted in the other years were taxed by the Income Tax authorities in the previous years. On a consideration of the assessment records, the Tribunal as a fact has found that sums larger than the amounts of the gross dividends were taxed as dividend income of the assessee in the relevant years. If that conclusion stands, there can be no question of reassessment of the same amount.

22. On behalf of the Commissioner it was urged that this was not a finding of fact by the Tribunal. In my opinion, that contention is unsound. The question whether a particular sum was taxed or, to borrow the expression used by the Tribunal in the course of its judgment, "has borne the tax" is a question of fact. Whether it is validly taxed or not is a mixed question of law and fact. But the question whether a particular sum is taxed or not cannot, in my opinion, be anything but a question of fact. The Tribunal in the course of its judgment has said that the whole of the gross dividend income as declared by the company has been brought to tax. Words to the same effect are used in several places repeatedly not only in the judgment but in the statement of case. It was argued that because the Tribunal describes this as a question of fact it does not become a question of fact, if it is not so according to law. That proposition is not disputed. But, in my opinion, the question whether the gross dividend as declared by the company was brought to tax or not is a question of fact.

23. In this connection the observations of Mr. Justice Finlay in *H. and G. Kinemas, Ltd., v. Cook* (H.M. Inspector of Taxes) (1933) 18 T.C. 116 are relevant. In that case on certain facts the question was whether a trade started by an assessee was a new trade set up by him. The Commissioners recorded their finding in the affirmative. When the matter came before the Court, it was sought to be contended that it was not a new trade. Mr. Justice Finlay observed as follows (p. 121):

I have come to the conclusion in this case that I cannot interfere with the decision of the Commissioners. I desire to say quite definitely that it is their decision and not mine. It is not necessary that I should express an opinion, and I do not express an opinion, as to whether, if I had been in their position, I should have arrived at the same conclusion. There are two reasons, one of general application and one of special application, for saying this. The one of general application is that this is, in my opinion, a pure question of fact. It accordingly results that all questions of fact and of degree are for the Commissioners, and it is never proper for this Court to interfere, unless it is prepared to say that there was no evidence upon which the finding could be made. The second matter of more special application to this case is this. I agree with Mr. Needham in thinking that this case is, not to say inadequately, but somewhat shortly?meagrely, I think, was the adverb he used?and, perhaps, somewhat concisely and even

meagrely stated.

24. Having regard to the conclusion mentioned above it is not necessary to proceed further with the discussion of the assessment order. As, however, Mr. Setalvad took us through the figures of the assessment order in detail, although we have not heard the learned Counsel for the assessee on the point, there is no doubt that there is evidence on which the Tribunal could come to that finding of fact. Whether the evidence is sufficient or not is not the province of this Court to go into. The assessment order includes the dividend in question. It was argued on behalf of the Commissioner that the figure included in the assessment order was arrived at by grossing up the net receipt. It was, therefore, contended that the amount taxed was the actual receipt, and not the gross dividend. On the other hand, it is contended, as appears from the arguments submitted on the application for reference and as found by the Tribunal in its judgment, that the taxing authorities under the circumstances were not entitled to gross up this income at all, because u/s 16(2) of the Act before its amendment in 1939 no Income Tax was payable by the company in respect of the dividend received by the shareholders. It makes no difference how the gross figure was arrived at or whether it was arrived at by adding something which was authorised by law. The fact is that a sum larger than Rs. 26-1-1 was added to the receipt in making the figure of gross dividend. If, as a result of such addition, the total figure exceeds the amount of the gross dividend, and that total figure is brought to tax, it must be held that the gross dividend received by the assessee under the heading "dividend income" was brought to tax. The figures shown in the assessment order, when read with the details worked out in exhibit T-G, show that the taxing authorities had at that stage taxed not only what was covered by the taxable income, as then construed by the taxing authorities, of the company, but had separated a sum which, according to them, was liable to tax in the hands of the assessee, although not liable to tax in the hands of the company. I refer to the sum of Rs. 8-7-0, which is separated from Rs. 158 and separately taxed by the taxing authorities at the full rate applicable to the assessee. The question, as I have pointed out above, is not whether the taxing authorities have properly taxed the gross dividend income of the assessee in respect of the Tata preference shares, or by what process of calculation they arrived at their figure. They did tax his gross dividend income for those shares, as they construed the law at the time, fully. It is also immaterial whether the assessee was allowed, exemptions or deductions properly or not in the previous assessment years. The only question is whether the total amount which they taxed under the heading "dividend income" was less than the total dividend income on the shares in the year in question. As the answer to the question is that a sum exceeding that amount was taxed, as the dividend income of the assessee, the conclusion of the Tribunal that the gross dividend, as declared by the company, was brought to tax is not without evidence.

25. The result, therefore, is that the answer to the question is that the amount of Rs. 178-9-3 having already been taxed is not the income of the assessee of the

relevant accounting period.

26. I agree that the Commissioner must pay costs of the reference.