(1984) 07 MAD CK 0064

In the Madras High Court

Case No : Tax Case No. 1258 of 1979

Commissioner of Income Tax — APPELLANT

Vs

Miss P. Sarada — RESPONDENT

Date of Decision : 03-07-1984

Acts Referred:
Income Tax Act, 1961 — Section 2(22)(c), 2(22)(e), 2(6A)(e)

Citation : (1985) 21 TAXMAN 94

Hon'ble Judges : V. Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : Nalini Chidambaram and C.V. Rajan, for the Appellant; T.V. Balakrishnan, for the Respondent

Judgement

G. Ramanujam, J.—The following question has been referred to this Court for its opinion by the Tribunal at the instance of the revenue : "Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the withdrawals made by the assessee from Universal Radiators (P.) Ltd'', totalling Rs. 93,027 cannot be assessed in the hands of the assessee u/s 2(22)(c) of the income tax Act, 1961, for the year 1973-74 ?"

The assessee, Miss P. Sarada, is the substantial shareholder in Universal Radiators (P.) Ltd., while completing the assessment for the year 1973-74 the ITO found that the assessee had withdrawn a sum of Rs. 93,027 from the above concern during the relevant accounting year over and above the credit she had with the said concern. This excess withdrawal was treated by the ITO as dividends u/s 2(22)(c) of the income tax Act, 1961 (''the Act'') on two grounds-

1. The assessee had no credit balance in her accounts with the said concern; and

2. that there was sufficient accumulated pro fits of the said concern at the time when the excess withdrawal was made by the assessee.

The ITO, therefore, added Rs. 93,027 to the total income of the assessee treating it as a dividend u/s 2(22)(e).

2. The assessee took the matter in appeal to the AAC, who agreed with the ITO and held that the excess withdrawals made by the assessee should be assessed as dividends within the meaning of section 2(22)(e). The assessee preferred further appeal to the Tribunal and the Tribunal allowed the assessee''s appeal and held that the withdrawals had to be taken as made out of the money lying to the credit of Shri A.C. Mahesh in view of the letter dated 3-4-1972 addressed by Shri A.P. Madhavan, the father of the minor son, Shri A.C. Mahesh, in which he had directed the company to make available to the assessee Rs. 1 lakh from out of his account. The Tribunal found that as Mahesh owed some money to the assessee and as Mahesh had directed repayments of the amount due to Sarada from out of his credit balance available with the concern, the withdrawals made by the assessee should be taken to be withdrawals from the accounts of Mahesh and not from and out of the accumulated profits of the concern, so as to attract section 2(22)(c). In this view, the Tribunal disallowed addition of the sum of Rs. 93,027 from the income of the assessee. Aggrieved by the said decision of the Tribunal, the revenue has come up before this Court by way of this reference.

3. There is no doubt that the assessee is a substantial shareholder in Universal Radiators (P.) Ltd. It is also not in dispute that the assessee was having a running account with the said company and the credit balance in her account as on 1-4-1972 was Rs. 30,168.86. There were periodical withdrawals from the company by the assessee till 22-3-1973, aggregating to Rs. 93,027, after wiping out the credit balance of Rs. 30,168.86 and the excess withdrawals were as follows :

Date of withdrawal

Excess withdrawal

Rs.

3-7-1972

1,831.14

3-8-1972

5,000.00

2-9-1972

5,000.00

12-9-1972

7,990.00

3-10-1972

5,000.00

3-11-1972

5,000.00

3-12-1972

5,000.00

11-12-1972

7,990.00

18-12-1972

4,740.00

18-12-1972

8,522.00

2-1-1973

5,000.00

3-2-1973

5,000.00

5-3-1973

5,000.00

9-3-1973

7,999.00

17-3-1973

10,000.00

22-3-1973

3,930.00

93,027.00(sic)

It is also not in dispute that the company had accumulated profits. On the various dates when the excess withdrawals were made by the assessee, there was, admittedly, accumulated profits and so the withdrawals will fall within the mischief of section 2(22)(c). It is only after realizing this position, that at the time of withdrawals of amounts from her account, there was no credit, but there was accumulated profits of the company and that was sufficient to attract section 2(22)(c), the assessee came forward with a claim that the withdrawals are not from the accumulated profits but from the credits available to one Mahesh who had made available to the assessee a sum of Rs. 1,00,000 from and out of his credit account. The ITO, however, did not accept this claim of the assessee on the ground that in books of account of the company the withdrawals by the assessee is only from her account, that the account of Mahesh was debited and the account of the assessee was credited with the said sum of Rs. 1,00,000 only on 31-3-1973, and that so long as the withdrawals by the assessee are shown in the accounts as withdrawals from the company, it is taken to be withdrawals from the company and out of the accumulated profits of the company and, therefore, it will clearly come within the mischief of section 2(22)(e). However, according to the Tribunal, though the withdrawals had been made from the assessee''s account, it should be taken to be a withdrawal made from and out of the credit of Mahesh and the fact that the credit and debit entries have been made in accordance with the letter dated 3-4-1972 given by Madhavan, the father of Mahesh, only on 31-3-1973 will not affect the tenability of the assessee''s claim. Thus, the main controversy between the parties is, whether the withdrawal made by the assessee from the company was from and out of the accumulated profits as contended by the revenue or whether it was a withdrawal from and out of the amounts due by the company to Mahesh. If really the amount withdrawn came from the credit of Mahesh, then it cannot be taken to be an advance or loan to a shareholder from the accumulated profits so as to attract section 2(22)(e). The entries in the books of account of the company, however, would go to show that the excess withdrawal is from the company''s funds. It is only on 31-3-1973 that the entries had been made debiting Rs. 1,00,000 in the account of Mahesh and crediting the same in the assessee''s account. However, the Tribunal relying on a letter dated 3-4-1972 said to have been written by Madhavan directing repayment of the amounts due to Sarada from and out of the credit available to Mahesh with the company, has also found that a sum of Rs. 70,000 was in fact due by Mahesh to Sarada, and it is only to discharge that liability the direction has been given to the company on behalf of Mahesh to repay the amounts due to the assessee. Based on the said letter, the Tribunal has held that the company has committed an error in not giving effect to the letter by making debit entries as against him and credit. entry in favour of the assessee in the books of account of the company and that the mere fact that the company had not made the entries then and there on 3-4-1972 itself, but had made the entries later, would not in any way alter the nature of the transaction and, therefore, the assessee should be taken to have made withdrawals only from and out of the credit available to Mahesh and not out of the accumulated profits.

4. On a due consideration of the matter, we are not in a position to agree with the view taken by the Tribunal in this case. Even, according to the Tribunal, the amount due by Mahesh to the assessee was only a sum of Rs. 70,000 as the accounts of Mahesh with the company as on 31-3-1972 indicate that he had to pay the assessee a sum of Rs. 70,000. In the accounts of the assessee with the company as on 1-4-1972 there is a reference to a loan of Rs. 1,00.000 less Rs. 30,000, i.e., Rs. 70,000, owed by Mahesh to the assessee during the relevant year. So the entries in the accounts of Mahesh and the assessee already made out that on 1-4-1972 Mahesh owed a sum of Rs. 70,000 to the assessee. Even

assuming that Mahesh had to pay the sum of Rs. 70,000 to the assessee as on 1-4-1972, it could be said to have been repaid only if his account is debited and the assessee''s account is credited to that extent. But such an event took place only on 31-3-1973 on the last day of the accounting year. Even assuming that the letter dated 3-4-1972 is genuine, as has been held by the Tribunal, in view of the fact that the assessing authority did not doubt ii s genuineness a sum of Rs. 70,000 only can be withdrawn by the assessee from her accounts. The letter dated 3-4-1972 does, however, authorize the assessee to withdraw from the account of Mahesh a sum of Rs. 1,00,000. But, the excess withdrawal was to the extent of Rs. 93,027 and the same is not limited to Rs. 70,000. From this it appears that the excess withdrawals by the assessee on various dates were without reference to the quantum of the amount due by Mahesh. Even with regard to Rs. 70,000 said to be due by Mahesh to the assessee till the assessee takes advantage of that letter and gets a credit for the amount mentioned in that letter in her accounts, her withdrawals cannot be said to relate to the amounts which came to be credited in the assessee''s account long afterwards. It has been held by the Supreme Court in Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal, that the statutory fiction u/s 2 (6A) (e) of the Indian income tax Act, 1922, would come into operation at the time of the payment of the advance or loan to a shareholder by a company in which the public are not substantially interested and tax is attracted to the loan or advance to the extent to which the company possesses accumulated profits the moment the loan or advance is received and that even if the loan or advance ceases to be outstanding at the end of the previous year in which the loan or advance was taken, it can still be deemed to be ''dividend'' if the conditions of section 2 (6A) (e) are satisfied. At the time when the excess withdrawals were made by the assessee, the amounts said to be due to Mahesh to the assessee had not been credited in her account and it came to be credited only on 31-3-1973 at the end of the previous year. Even assuming the letter to be genuine, as held by the Tribunal, so long as the letter has not been given effect to by making debit entries in the accounts of Mahesh, the amount referred to in that letter had remained to the credit of Mahesh. As already stated, the entries in the books of account maintained by the company till 31-3-1972 show that the assessee has overdrawn from the company''s fund and that the company had sufficient accumulated profits. It is only on 31-3-1973 the accounts of Mahesh was debited and credit was given to the assessee for the amounts directed to be transferred. The assessee should, therefore, be taken to have got credit for the amount due by Mahesh only on 31-3-1973 and this means that she has adjusted the excess withdrawals by a credit on 31-3-1973. As pointed out by the Supreme Court, the mere fact that the loan or advance made by the shareholder has been repaid before the close of the accounting year, that will not indicate that on the date of the withdrawal it was not a loan or advance by the company. In any event, even according to the Tribunal, the direction given in the letter dated 3-4-1972 is only for repayment of the sum of Rs. 70,000 due by Mahesh to the assessee and there is no explanation as to why Mahesh should provide the facility for the assessee to withdraw more than the said sum of Rs. 70,000. We are, therefore, of the view that the letter dated 3-4-1972, even if it is taken to be genuine, will not enable the assessee to claim that her excess withdrawals were from and out of the credit available to Mahesh. The finding of the Tribunal to the contrary in this case appears to be not only unreasonable but also perverse. Even if Mahesh has authorized the company to pay Rs. 1,00,000 to the assessee out of the amount standing to his credit with the company, so long as the amount is not transferred to the credit of the assessee and such a credit having been given only on 31-3-1973, the said amount of Rs. 1,00,000 cannot be said to have been made available to the assessee on the various dates when the excess (sic). As already pointed out the relevant date is the date of the loan or advance and in this case on the date of the excess withdrawals, there was no amount to the credit of the assessee and no amount had also been transferred to her credit from Mahesh''s account. The fact that the company had credited the amounts in the assessee''s account only on 31-3-1973 leads to the inference that the letter by Madhavan on behalf of the minor, Mahesh, authorizing a debit of his account and credit to the assessee''s account would have been given only on 31-3-1973 and not before. In this connection Mr. T.V. Balakrishnan for the assessee contends that it is not open to this Court to go behind the finding of fact given by the Tribunal that the letter dated 3-4-1972 is genuine. It is no doubt true that the Tribunal proceeds on the basis that the letter dated 3-4-1972 is genuine. But it is seen that the Tribunal proceeds to hold the letter to be genuine only because the ITO has not chosen to challenge the genuineness of the same. Whether the ITO has challenged it or not, in the circumstances of the case, we have to find out whether the letter would have been in existence on the dates when the excess withdrawals were made. If the letter has been there, the assessee would have referred to that letter and sought credit for the amounts mentioned in the letter when she withdrew the amounts from her accounts. In which case, the amounts withdrawn would not have been shown as excess withdrawal. If really, the letter from the father of Mahesh came into existence on 3-4-1972, there is no reason for the company not to give effect to that letter but to go on showing the withdrawals by the assessee as excess withdrawals. Thus, the excess withdrawals can only be taken to be a loan or advance made by the company. We hold that on the date of the excess withdrawals the credit facility referred to in the letter dated 3-4-1972 was not available and the excess withdrawals can only be treated as a loan or advance by the company. The learned counsel for the assessee vehemently contends that it is not open to this Court to ignore the letter dated 3-4-1972 which has been found to be genuine by the Tribunal and to hold that the excess withdrawals did not relate to the credit facility referred to therein. It is no doubt true that a finding of fact arrived at by the Tribunal cannot normally be interfered with by this Court. But if the Tribunal failed to take into account the relevant material or has acted on inadmissible material or has based its conclusion on conjectures and surmises, this Court can ignore such findings of the Tribunal and re-examine the issue arising for decision on the basis of materials on record. It has been pointed out by the Supreme Court in The

Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain, that the High Court and the Supreme Court have always the jurisdiction to interfere with the findings of the Tribunal if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it, or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination and imports facts and circumstances not apparent from the record or bases its conclusions on mere conjectures and surmises or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached and that in all such cases the findings arrived at are vitiated. As already stated, in this case, the books of the company show that the assessee had overdrawn from her accounts which means that she has taken an advance from the company which had admittedly accumulated profits. If really the letter has been given by Madhavan on behalf of Mahesh to the company to transfer any particular to the assessee''s account, the company would not show in the accounts the amounts drawn by the assessee as over payments. There is no reason given by the assessee why the letter dated 3-4-1972 has not been given effect to by debiting Mahesh''s account and crediting the assessee''s account. Admittedly, a large amount would stand to his credit, the letter had been given on 3-4-1972 as alleged by the assessee. It is only when the assessee found that she had overdrawn and, therefore, she will come within the mischief of section 2(22)(e), a letter appears to have been got from Madhavan, father of Mahesh, who had admittedly a credit in his account. If the letter dated 3-4-1972 has in fact been given on behalf of Mahesh, even if the company has not given effect to it by making a debit entry as against Mahesh and credit entry in favour of the assessee, the assessee can call upon the company to make that credit available for her when she withdrew the amounts. The fact that she had not called upon the company to debit the amount in Mahesh''s account and credit the same in her account shows that the letter must have come into existence only later. However, we are not basing our conclusions merely on the improbability of the letter having been produced on 3-4-1972 as pointed out by the assessee. We are proceeding on the basis that even if the letter is genuine, so long as the letter has not been given effect to, the assessee cannot be said to have overdrawn from the credit facility, referred to in the letter which has not been given effect to by the company. In this view of this matter, we are not inclined to agree with the Tribunal and, therefore, we are answering the question referred to us in the negative and against the assessee. The assessee will pay the costs of the revenue. Counsel fee Rs. 500.

