
(1978) 06 KL CK 0017

In the High Court Of Kerala

Case No : Income-tax Reference No. 7 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Y.N.S. Hobbs

RESPONDENT

Date of Decision : 19-06-1978

Acts Referred:

Income Tax Act, 1961 — Section 194, 198, 5(1)

Citation : (1979) 116 ITR 20

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J;K.K. Narendran, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Judgement

Gopalan Nambiyar, J.—This reference was once heard and disposed of by our judgment dated 11th November, 1977. The question of law referred was answered in favour of the revenue and against the assessee. The assessee applied by C.M.P. No. 2468 of 1978 for rehearing on the ground that he had not been served with notice of the reference at the time, when the case was heard on the earlier occasion. We allowed the application and directed that the matter be reheard. The reference has accordingly come on before us for re-hearing.

2. The question of law sent up by the Income Tax Appellate Tribunal, Cochin Bench, for our determination is:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that Rs. 23,689 which represents the difference between ₹4,585 and ₹4,352 (converted into rupees) which was considered as income by the U.K. Income Tax authorities for the U.K. assessment year 1964-65, was not the income of the assessee under the I.T. Act, 1961 ?"

3. The assessee, an individual, having income from salary in India, also received dividends from M/s. Peirce Leslie & Co. Ltd., a company registered in the United Kingdom. The dividends were declared on May 20, 1964, and November 30,

1964, totalling in all to a net dividend of ₹2,808-6-3. As the dividend was declared in the United Kingdom it was assessable there in the financial year 1964-65. The United Kingdom authorities assessed the dividend at ₹4,585 less certain deductions and reliefs. The reliefs were apportioned between the Indian income and the United Kingdom income and the assessee was granted the refund of ₹57-0-6 by order dated September 8, 1965. Then followed the assessment under the I.T. Act for the assessment year 1966-67, which was completed on November 23, 1967. A sum of Rs. 44,695 by way of dividends declared on the two occasions, was included as foreign income from Peirce Leslie & Company Ltd. This represented a total of ₹3,352-2-7 converted into Indian coinage at the prevailing rate of exchange. The assessment was reopened u/s 147, by the ITO, and a further sum of Rs. 23,689 was brought to tax, which represented the equivalent in terms of Indian currency of ₹1,776-13-9 at the current rate of exchange. The sum thus added was the difference between the net dividend of ₹2,808-6-3 received and assessed in the Income Tax assessment for 1965-66, as Indian income received during the year ended 31st March, 1965, and the gross dividend of ₹4,585 included in the United Kingdom assessment for 1964-65. The amount of Rs. 23,689 was treated as benefit accrued to the assessee for purposes of taxation.

4. On appeal to the AAC, that officer agreed with the assessee that the dividend in question would not amount to an income for the assessee, as it was diverted at source. But as the assessee actually received a benefit, in respect of such deduction, the value of such benefit would be the income of the year. This benefit was the amount of refund received. He, therefore, directed that an amount equal to the refund received should be treated as assessable in the assessment year. On further appeal to the Tribunal, at the instance of the department, the Tribunal took the view that for the purpose of the I.T. Act in the United Kingdom, the tax deducted was income, but in order to constitute such under the Indian I.T. Act, it should either accrue or arise to the assessee u/s 5. For this purpose, the Tribunal was of the view that a debt should have been created in favour of the assessee. As there was no such debt, and the company which deducted the tax from the dividend had not paid over such amount to the Government, but had retained the same themselves, the Tribunal was of the view that the assessee got no right over this sum, apart from the statutory provision that for the purposes of personal assessment the gross dividend should be treated as his income and the tax deducted given credit. It held that there was no question of any benefit accruing to the assessee by the gross income being taken as his income. It also found that the nature of the refund was that of dividend only. At the instance of the revenue, the question of law has been referred.

5. Since the decision of the Tribunal, there have been at least two decisions which have considered the question and taken a view somewhat inconsistent with, and perhaps even contrary to, the view taken by the Tribunal. One decision has been referred to by the Commissioner of Income Tax Vs. Clive Insurance Co. Ltd., . The said decision exhaustively surveyed the provisions of Section 49D of

the Indian I.T. Act, 1922, with reference to the provisions of Sections 18(4) and 18(5) of the said Act. It then examined the provisions of Section 184 of the English I.T. Act, 1952, noticed the absence of a provision like Section 18(5) of the Indian I.T. Act, 1922, in the United Kingdom statute, and referred to the provisions of Sections 169, 184, 185, 186, 199, 350 and 493 of the English Act. Numerous decisions rendered with respect to the provisions of the English Act were also noticed, and their line of reasoning was discussed. For instance, in Blott's case [1921] 8 TC 101, it was stated that it was not correct to regard a company paying Income Tax on its profits as doing so as agent for its shareholders ; that it pays as a taxpayer ; and that if dividend is declared, the company is entitled to deduct from such dividend, a proportionate part of the amount of the tax previously paid by the company ; and that in that case, the payment by the company operates in relief of the shareholder ; but no agency, properly so called, was involved. In Bradbury v. English Sewing Cotton Company Ltd. [1923] 8 TC 481 , the principle stated was that for revenue receipts, a joint stock company should be treated as a large partnership, so that the payment of Income Tax by a company would discharge the quasi-partners. The reason for their discharge, it was stated, may be the avoidance of a double taxation ; but the law is not founded upon the introduction of such equitable principle, modifying the statute ; it is founded upon the provisions of the statute itself ; and the statute carries the analogy of a partnership firm. After examining these and other decisions, the Calcutta High Court summarised the position and held that the sums deducted from the dividend income of the assessee constitute payment of Income Tax by deduction by the assessee on the assessee's dividend income in the United Kingdom under the law prevailing in the United Kingdom. This reasoning of the Calcutta High Court was accepted and followed by the Commissioner of Income Tax Vs. Tata Sons Private Ltd., and by the Commissioner of Income Tax, Gujrat Vs. Cotton Fabrics Ltd., . We were impressed by this array of decisions at the earlier hearing, when the assessee was unrepresented before us ; and in the light of the principles of these decisions, we answered the question in favour of the revenue and against the assessee.

6. Counsel for the assessee, who now appeared before us, has levelled a powerful attack against the line of reasoning disclosed by our earlier judgment. Arguing basically with reference to the provisions of the I.T. Act, 1961, he invited our attention to Section 5 of the Act, which provides for assessment of the income of an assessee, from whatever source derived. The section, so far as it is material, reads:

"5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(c) accrues or arises to him outside India during such year : Provided that, in the case of a person not ordinarily resident in India within the meaning of Sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India." He next referred to Sections 194, 198 and 199 of the Act. Section 194 provides for dividends. It is really unnecessary to refer to that section. Ss. 198 and 199 are important and in so far as they are material, they are as follows :

"198. Tax deducted is income received.--All sums deducted in accordance with the provisions of Sections 192 to 194, Section 194A, Section 194B, Section 194C (Section 194D) and Section 195 shall, for the purpose of computing the income of an assessee, be deemed to be income received.

199. Credit for tax deducted,--Any deduction made in accordance with the provisions of Sections 192 to 194, Section 194A, Section 194B, Section 194C (Section 194D) and Section 195 and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished u/s 203 in the assessment (including a provisional assessment u/s 141A), if any, made for the immediately following assessment year under this Act.....: "

7. With reference to these provisions, counsel for the assessee squarely raised two important contentions: First, that in respect of the dividend from Indian companies dealt with in Section 194, Section 198 contains a specific provision that they shall be deemed to be income receipts. It was emphasised that there was no such similar deeming provision in respect of dividend received from a foreign company. Secondly, that the provisions of Section 5(1)(c) of the I.T. Act, 1961, contemplate and permit taxation only of actual receipts and not deemed receipts ; viz., it contemplates assessment of income which accrues or arises to the assessee outside India during the year in question and not income deemed to accrue or to arise outside India, as is provided for by Clauses (a) and (b) of the Section. Counsel argued with force that the implications of Section 198 and of Section 5(1)(c) had been missed and lost sight of in the three decisions of the Calcutta, Bombay and Gujarat High Courts referred to earlier, and that for that reason the principle of those decisions cannot be accepted. We are impressed by this contention of counsel for the assessee. Even assuming that the deduction of tax from out of dividends declared by a foreign company can be regarded as a payment made on behalf of the company, on the principle of the three decisions, a further step has still to be taken to assess it as income, viz., it should be shown that the said payment constitutes income which accrues or arises to the assessee u/s 5(1) of the Act. We find it difficult, in the absence of any deeming provision

in Section 198, to regard the deduction of tax from the dividend income of a foreign company as income actually arising or accruing to the assessee within the meaning of Section 5(c). For this reason, we find the three decisions referred to and the principles stated by them unhelpful and inapplicable. This aspect of the matter has been pointedly noticed in a Division Bench ruling of the Bombay High Court in Commissioner of Income Tax, Bombay City Vs. Blundell Spence and Co. Ltd., . A Division Bench consisting of Chief Justice Chagla and Justice Tendolkar, there referred to the provisions of Section 16(2) and Section 18(5) of the I.T. Act, 1922. The latter section corresponds to Section 198 of the 1961 Act. There is no provision in the 1961 Act corresponding to Section 16(2). After noticing the scheme relating to the grossing up of the dividends, the learned judges observed (page 31):

"If this scheme is borne in mind, then it is clear that both the AAC and the Tribunal were right in coming to the conclusion that the amount of tax paid in respect of the dividends in the United Kingdom has no bearing whatever as far as Sections 16(2) and 18(5) are concerned. And unless the Commissioner satisfies us that this case falls under some provision of the I.T. Act, no grossing up would be permissible at all. If the only section which permits grossing up is Section 16(2), .then, as pointed out, under that section the grossing up can only be in the manner indicated in that Sub-section. And that grossing up relates only to the adding to the dividend of a shareholder the tax payable by the company, of which he is a shareholder in India, on the total income of the company. Therefore, there is no provision whatever in the I.T. Act for adding to the dividend of a shareholder the tax paid by the company outside India." The above passage clearly highlights the absence of statutory provision in respect of dividends paid by a foreign company or a company outside India. This aspect so highlighted by the said decision was not unfortunately noticed by the three decisions to which we have made reference.

Counsel for the revenue invited our attention to a later Division Bench ruling of the Bombay High Court by the same two learned judges in Joseph Kay, K.B.E. Vs. Commissioner of Income Tax, Bombay City, Bombay, . Referring to the earlier decision in Commissioner of Income Tax, Bombay City Vs. Blundell Spence and Co. Ltd., , the learned judges explained that what was held there was that the assessee, a nonresident company registered in the United Kingdom with its head office in London, had received dividend in respect of some shares held by it in a company which was assessed to income both in the United Kingdom and in India, and that in grossing up the dividend received by the assessee the I.T. authorities were not entitled to take into consideration the tax paid by the company in the United Kingdom. It was observed that the case (in Commissioner of Income Tax, Bombay City Vs. Blundell Spence and Co. Ltd., was different from the later case (in Joseph Kay, K.B.E. Vs. Commissioner of Income Tax, Bombay City, Bombay, considered by the learned judges. Observed the learned judges (page 781) :

"We are upholding the action of the I.T. Act authorities in taxing Sir Joseph Kay

on the simple finding that in substance and in fact the income of Sir Joseph Kay is ₹500, that it accrued to him outside the tax-able territories and that as he is a resident he is liable to pay tax on that amount."

8. We cannot, with respect, adopt the above line of reasoning in the present case.

9. Having regard to the provisions of Sections 198 and 5(1)(c) of the Act, we answer the question referred in the affirmative, i.e., in favour of the assessee and against the revenue. We make no order as to costs.