
(1981) 02 CAL CK 0033

In the Calcutta High Court

Case No : Income Tax Reference No. 395 of 1973

Commissioner of Income Tax (Central)

APPELLANT

Vs

Oriental Co. Ltd.

RESPONDENT

Date of Decision : 12-02-1981

Acts Referred:

Income Tax Act, 1961 — Section 194, 198, 5(1), 8, 91

Citation : (1981) 25 CTR 75 : (1982) 137 ITR 777

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : S.C. Sen and A. Sengupta, for the Appellant; D. Pal, R.K. Murarka and A.K. Dey, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this reference u/s 256(1) of the I.T. Act, 1961, we are concerned with the assessment years 1966-67, 1967-68 and 1968-69, for which the relevant previous years ended on 31st December, 1965, 31st December, 1966, and 31st December, 1967, respectively.

2. The assessee-company held certain shares in U. K. companies on which it also received dividends during the assessment years under reference. The ITO, observing that the assessee had a right to get tax credit or refund from the foreign government which would constitute income in its hands, held that the foreign dividends were to be taken at gross for inclusion in its total income. Such gross dividends worked out to Rs. 16,411, Rs. 13,901 and Rs. 2,287 in the assessment years 1966-67, 1967-68 and 1968-69, respectively. Simultaneously he also allowed reliefs u/s 91 of the Act on the above inclusions.

3. The assessee, thereafter, being aggrieved, went up before the AAC and contended that foreign dividends should have been taken only at the net figure and the reliefs should also have been allowed only on such net amount. The AAC, relying on the opinion given by the U.K. tax consultants, held that only the net foreign dividend should be taken for taxation and not the gross. Following certain decisions of the Tribunal, he also agreed with the assessee that it was entitled to

relief u/s 91 of the Act on such net foreign dividend included in its total income.

4. There was a further appeal by the Revenue before the Income Tax Appellate Tribunal. The Tribunal, after hearing the parties, referred to certain decisions of the Tribunal and held that it was only the net amount received by an assessee that could be included in its Indian assessment. Regarding the grant of relief u/s 91 also, it was held by them that the same should be granted on the net amount. The Tribunal found that in the order referred to in its previous order it had dealt with the U.K. law both before and after its amendment by the U.K. Finance Act, 1965. The Tribunal followed its previous order and held that the AAC was justified in his conclusion that it was only the net amount of foreign dividend which should be assessed in the hands of the assessee and that the relief u/s 91 of the Act was also admissible on such inclusion.

5. On these, the following questions have been referred to this court:

1966-67 :

"Whether, on the facts and in the circumstances of the case, and having held that only the net amount of dividend received from U. K. companies should be included in the assessee's total income, the Tribunal is right in holding that the assessee is entitled to relief u/s 91 of the Income Tax Act, 1961, on such net amount ?"

1967-68 & 1968-69 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that only the net amount of the dividends paid by the U. K. companies after deduction of the U. K. tax at source should be included in the assessee's total income and that the assessee is entitled to the relief u/s 91 of the Income Tax Act, 1961, on such net amount ?"

6. Before we proceed further, we must observe that so far as the first year's question is concerned, the finding of the Tribunal that only the net amount of dividend received from U.K. companies should be included in the assessee's total income has not been challenged. This finding is also corroborated by a Bench decision of this court in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., , as well as the decision of this court in the case of CIT v. Thomas Duff & Co (India) Pvt. Ltd. (I.T. Ref. No. 332 of 1975, judgment delivered on 24th July, 1980, (see p. 798 infra). As we have noticed, in the meantime, however, we must observe that in 1965 a new Act being the Finance Act of 1965 (U.K.) was passed. This did not cover the first year with which we are concerned, because that Finance Act of 1965 (U.K.) came into effect from 6th April, 1966, and the previous order relevant for the first assessment year with which we are concerned, viz., 1966-67, ended on 31st December, 1965. The basis for holding that only the net income was to be included was that what the assessee received in respect of the foreign dividend income prior to the Finance Act of 1965 (U.K.) was what was termed as "franked income", i.e., to say, an

income which had already borne tax. Therefore, it was not made liable to further taxation. In the decision before us in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., , referred to hereinbefore, that was the only question with which we were concerned. This Bench had also occasion to consider this question in the subsequent decision in the case of CIT v. Thomas Duff & Co., referred to hereinbefore (see p. 798 infra (Appendix)), where it was also held that even after the coming into operation of the Finance Act of 1965 (U.K.) in England, it was only the net income which was includible in the total income of an assessee under the I.T. Act, 1961.

7. It must be reiterated that the assessee in this case is a company. The assessee-company had received certain dividends. The income has to be assessed u/s 5 of the I.T. Act, 1961, read with other provisions, which we shall refer. The assessee is a company resident in India, as would be apparent from the assessment order. On a plain reading of Section 5(1), any sum which is received or is deemed to be received in India in the relevant year by the assessee or on its behalf as well as any sum which accrues or arises or is deemed to accrue or arise to the assessee during the relevant year in India or any sum which accrues or arises to the assessee outside India during the relevant year would be includible in the net income of the assessee. We have noticed in the decision in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., , that unlike Clause (a) and Clause (b) of Section 5(1) of the I.T. Act, 1961, Clause (c) provides that if an income which is deemed to accrue or arise outside India but does not actually accrue or arise to him outside India would not be includible in the total income of the assessee. We held that if the income is deemed to accrue or arise outside India, then such income u/s 5(1) of the Act cannot be included under Clause (c). Now, in the said decision, we had referred to the several authorities, some of which were again referred to us, and the relevant sections of the Act and we relied mainly on the decision of the Supreme Court in the case of Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd., , a decision which we will have occasion to refer. It is not necessary to refer to the numerous other decisions which have been discussed in our previous decision in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., , but we will also have occasion to refer to the decision of the Kerala High Court in the case of Commissioner of Income Tax Vs. Y.N.S. Hobbs, , and the observations of the Chief Justice Nambiyar in that decision and to the decision of the Australian High Court in the case of Jolly v. Federal Commissioner of Taxation [1933] 50 CLR 131. We may incidentally mention here that in the unreported decision of this court in the case of Commissioner of Income Tax Vs. India Textile Agency Ltd., , Mitter C.J. had held that the Finance Act, 1965, in England would not have any effect in respect of the assessment prior to that Act.

8. Section 91 of the I.T. Act, 1961, which replaces Section 49D of the Indian I.T. Act, 1922, with which the Supreme Court was concerned in the case of Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd., , deals

with relief for double taxation. It grants relief by way of "deduction from the Indian Income Tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is lower or at the Indian rate if both taxes are equal". So far as the first question is concerned, the Tribunal has proceeded on the basis that only the net income has to be included and only questions the applicability of relief u/s 91 of the Act.

9. We must, however, note that in the second question as posed, it questions the validity or otherwise of the Tribunal's holding that only the net income is includible and not the gross income. It further questions that, even in respect of net income, whether Section 91 of the Act was applicable for granting relief. So far as the first aspect of the question is concerned, in view of the ratio of this Bench in the two decisions, referred to hereinbefore, viz., the decision in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., , as well as the decision in the case of CIT v. Thomas Duff & Co. (India) Pvt. Ltd. (see p. 798 infra) (Appendix), we should answer the question against the Revenue and hold that only the net income was to be included. But in this case learned advocate for the Revenue sought to urge certain additional points and, therefore, we have to re-examine the validity of our conclusion that only the net income u/s 5(1)(c) of the Act was to be included in computing the total income of the assessee who is resident in India in respect of dividend income received from U.K. companies. The main basis of the argument of the learned advocate for the Revenue is that the declaration of a dividend brings into existence a debt owed by a company to a shareholder. It is further submitted that on a debt coming into existence there is accrual of liability. Under the Indian Act, on declaration of dividends, a right accrues in favour of the shareholders and, in that view of the matter, u/s 5(1)(c), it can be said, under the provisions of Indian law, as it is, that a debt accrues and arises to shareholders outside India the moment the dividends are declared, according to the Revenue. It was, therefore, urged that it was not necessary to consider whether the income which was deemed to accrue or arise outside India can be said to be includible under Clause (c) of Section 5(1) of the I.T. Act, 1961. It was submitted that even if it was held that Clause (c) of Section 5(1) of the Act did not contemplate deemed income, on the declaration by the U.K. company, the income arose or accrued to the Indian shareholder and such income was includible under Clause (c) of Section 5(1) of the I.T. Act, 1961. Learned advocate for the Revenue urged that if it was the true position, then, even in cases before 1965, the same income should be includible and the changes effected by the Finance Act of 1965 of England would not affect the position. In any event, he submitted that after the Finance Act of 1965 (U.K.), when the shareholder, according to the learned advocate for the Revenue, was to be assessed separately in the U.K., such income could be said to accrue or arise to him in India after the declaration of the dividend by the United Kingdom company. Therefore, the question that falls for consideration is mainly whether the declaration of dividend creates a right in favour of a shareholder in respect of the gross amount.

10. In this connection, it would be instructive, in our opinion, to refer to Section 8 of the I.T. Act, 1961, which deals with dividend income, and which provides that for the purpose of inclusion in the total income of an assessee any dividend declared by a company or distributed or paid by it within the meaning of Sub-clause (a) or Sub-clause (b) or Sub-clause (c) or Sub-clause (d) or Sub-Clause (e) of Clause (22) of Section 2 shall be "deemed to be the income of the previous year" in which it is so declared, distributed or paid, as the case may be. In this connection, reference may also be made to Section 194 of the Act which obliges the principal officer of an Indian company or a company which has made the prescribed arrangements for the declaration and payment of dividends within India, before, making any payment in! cash or before issuing any cheque or warrant in respect of a dividend or before making any distribution or payment to a shareholder of any dividend within the meaning of the different clauses we have mentioned, to deduct from the amount of such dividend, Income Tax at the rates in force. It is provided that, where in the case of a shareholder, not being a company, the ITO gives a certificate in writing in the prescribed manner that to the best of his belief the total income of the shareholder would be less than the minimum liable to Income Tax, such a deduction might not be necessary. The net effect of this section appears to be that the statute enjoined, leaving aside the case where there is a declaration given that the person to whom the dividend is paid is not taxable, that the company is not free but statutorily obliged to deduct the tax at source. This is important because the main question, in this case, is whether the whole amount becomes the income of the assessee the moment it is declared or in other words it can be said that the entirety of the amount declared, with the gross dividend declared, accrues or a right arises in favour of the assessee, on the declaration. As we have noticed, that the right, except in cases of certain special classes of assesseees, with which we are not concerned, viz., the assesseees whose total income do not exceed the minimum limit, the assessee is not entitled to receive the entirety of the amount nor is the company obliged to pay the entirety of the amount without deduction. There is no right accrued in favour of these kinds of assesseees to receive the gross amount and no obligation consequently upon the company to pay the gross amount. If this is the position, then read with Section 8 along with Sections 198 and 199, makes the sums deducted, in accordance with the provisions of Section 194, deemed "income received". If that is the position, then, under the Indian law, contrary to what was urged by the learned advocate for the Revenue, it cannot be said, leaving aside those kinds of assesseees who are not assessable to tax, that such amount of income which is liable to be deducted at source arises or accrues to the assessee in India the moment it is declared. Therefore, it cannot be said that the right to receive the same, or the right to treat the same as income, arises on the declaration of dividends. So it is not possible to accept, on principle, the first argument urged on behalf of the Revenue that declaration of dividend creates a right so far as gross dividend is concerned in favour of the shareholder and as such a declaration would be taken to have caused accrual of income to a shareholder. Whether the Finance Act of 1965 in England has made any

difference or not is a question which we shall examine later. The Supreme Court in the case of Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd., , proceeded on the basis of granting relief u/s 49D of the Indian I.T. Act, 1922, that the net amount received by the assessee was franked income and, therefore, could not be taxed again. The main ratio, in our opinion, would be applicable even in the case of pre-1965 as well as post-1965 income in respect of the dividends declared by the company in the United Kingdom.

11. So far as the position that was effected by the Finance Act, 1965 (U.K.), came up for consideration before this court. The relevant section is Section 47, which is as follows :

"47. (1) Except as otherwise provided by this Act, Corporation tax shall not be chargeable on dividends and other distribution of a company resident in the United Kingdom, nor shall any such dividends or distributions be taken into account in computing income for Corporation tax ; but Income Tax for a year of assessment after the year 1965-66, shall be chargeable under a new Schedule F in respect of all dividends and other distributions in that year of a company resident in the United Kingdom which are not charged under Schedule D or Schedule E and are not specially exempted from Income Tax, and for purposes of Income Tax all such distributions shall be regarded as income, however they fall to be dealt with in the hands of the recipient.

(2) Income Tax under Schedule F for any year of assessment shall be charged in respect of any distribution made in the year on such sum as after deduction of Income Tax thereon at the standard rate, equals the amount or value of the distribution after any deduction of Income Tax actually made, and, subject to any enactment to the contrary, the distribution shall be deemed for the purpose of Income Tax to represent income, of an amount equal to that sum, on which Income Tax has been borne by deduction :

Provided that in the case of preference dividends the tax chargeable and the amount of income represented by the dividends shall be determined by reference to the fixed gross rate of dividend."

12. It appears that it is correct that under Sub-section (2) of Section 47, Income Tax under Schedule F for any year of assessment should be charged in respect of any distribution made in the year of such sum as after deduction of income tax thereon at the standard rate equals the amount or value of the distribution after any deduction of Income Tax actually made and subject to the enactments contrary thereto the distribution shall be "deemed for the purpose of Income Tax to represent income" of an amount equal to that sum on which the Income Tax has been borne. Therefore, the effect of the said amendment was that the deducted amount became the deemed income for the purpose of the Income Tax. Now, as we have reiterated twice in the decision "deemed income" could not be included under Clause (c) of Section 5(1) of the I.T. Act, 1961. It was urged on behalf of the assessee that Section 47(1) of the Finance Act of 1965, inter

alia, provided that except as otherwise provided. Corporation tax should not be charged on dividends and other distributions of a company resident in the U.K. nor should any such dividend or distribution be taken into account in computing income for Corporation tax. The Income Tax, however, for the year of assessment after 1965-66, shall be chargeable under a new Schedule F in respect of dividends and other distributions in that year of a company resident in the U.K. which are (a) not charged under Schedule D, (b) not charged under Schedule E, and (c) not specifically exempted from Income Tax, and, for the purpose of Income Tax, all such distributions should be regarded as income if they fell to be dealt with in the hands of the recipients. Section 47(2), according to the assessee, laid down that the Income Tax under Schedule F for any of the assessment years should be charged in respect of any distribution made in the year of such sums as, after deduction of Income Tax thereon at the standard rates, equals the amount or value of distribution after any deduction of Income Tax actually made and, subject to any enactment contrary thereto, the distribution shall be deemed for the purpose of Income Tax to represent income of an amount equal to that sum on which the Income Tax has been borne by deduction. It was sought to be urged on behalf of the assessee that on a proper reading of Section 47(1) and Section 47(2) of the Finance Act read with the relevant provisions of the English Income Tax Act, specially Section 190 of the I.T. Act, 1952, which was not repealed, it would be clear that Income Tax was chargeable in respect of dividend income which a person not resident in the U.K. received from a U.K. company and, similarly, no allowance should be given to such a non-resident shareholder nor any repayment to be made in respect of assessed tax on dividend which was payable in the U.K. Section 47(2), it was submitted, only applied to dividends which were not chargeable under Schedule D or Schedule E and were specially exempted.

13. It was submitted on behalf of the assessee that the dividend income of a non-resident shareholder of a U.K. company being specially exempted from Income Tax by reason of Section 190 of the English Income Tax Act, 1952, no Income Tax under Schedule F is chargeable on such dividend in the case of a non-resident shareholder of a U.K. company, and continued to remain exempt from Income Tax in respect of his dividend income both before and after the Finance Act of 1965, by reason of Section 190 of the English Income Tax Act, 1952. The position, therefore, being the same both before and after the Finance Act of 1965, the question of any deduction of tax from the dividend income of a non-resident shareholder in the U.K. did not and could not arise. In view of Section 190 of the English Income Tax Act, 1952, it was submitted that the dividend income of the non-resident shareholder could not be grossed up because no Income Tax was chargeable on such dividend and even if any deduction was deemed to have been made by the company, no relief, allowance or repayment could be claimed by the non-resident shareholder in respect of the tax on dividend. In these circumstances it was submitted that a non-resident shareholder in the U.K. had only a right to receive the amount which was actually

made payable by the U.K. company and he had no legal right to claim any further amount by way of dividend from the company either actually or otherwise. Hence, the only income by way of dividend which accrued to him outside India is the actual amount paid to him by the U.K. company by way of dividend. This proposition was controverted by learned advocate for the Revenue. He drew our attention to Chap. IV of the English Income Tax Act, 1952, and submitted that foreign dividends were guided by this provision and Section 190 only exempted those dividends, namely, dividends which were received by the United Kingdom company for distribution to a non-resident from again a non-resident company. Dividends by an English company to a non-resident, according to him, would not be exempt dividends if Section 187 is read in conjunction with Section 190 of the I.T. Act of 1952 (U.K.). He in this connection drew our attention to Section 46 of the Finance Act of 1965, of England and referred to the other relevant sections. He then drew our attention to the observation in Halsbury's Laws of England, 3rd edn., Vol. 20, p. 376, and he also referred to the Corporation Tax by C. N. Beattie, 1965 edn., to the following effect:

At page 88 the following passage occurs :

"When a company not resident in the United Kingdom receives dividends or other distributions from a company resident in the United Kingdom, such dividends or distributions are not franked investment income of the non-resident company since such income is only franked investment income if the recipient is a company resident in the United Kingdom. (Finance Act, 1965 Section 48(1)). Such a company is not chargeable to corporation tax thereon (Finance Act, 1965, Section 50(2)(a)), and so is not exempt from Income Tax (Finance Act, 1965, Section 46(2)(b)), unless under a double taxation convention."

14. In our opinion, for the purpose of adjudicating the controversy in this case it is not necessary for us to express any opinion whether u/s 190 of the English Income Tax Act, 1952, the dividend income of a nonresident shareholder cannot be grossed up or no Income Tax is chargeable on such income. Even if we accept the position as we assumed in the case of CIT v. Thomas Duff and Company India Private Ltd. (see p. 798 *infra* (Appendix)) that by Section 47 of the Finance Act, 1965 (U.K.). it appears to us that under Sub-section (2) of the Finance Act, 1965 of England, Income Tax under Schedule F for any assessment year shall be charged in respect of any distribution made in the year on such sum as after deduction of Income Tax actually made, and, subject to any enactment to the contrary, the distribution shall be deemed for the purpose of Income Tax to represent income. Therefore, for our present purposes, we are of the opinion, that it is inadvisable to express any view on the question whether u/s 190 of the English Income Tax Act, 1952, the income of a company like the present company could be charged under the English Income Tax Act. We will proceed that such income should be so charged and tax deducted at source. It is not necessary, therefore, to refer to certain authorities upon which our attention was drawn in this connection.

15. We come, therefore, to the basic question whether on a declaration of dividend as such, the amount which is liable to be deducted under the relevant Finance Act accrues or arises to an assessee in India.

16. Learned advocate for the Revenue drew our attention to the well-known decision of the Supreme Court in the case of *E.D. Sassoon and Company Ltd. Vs. The Commissioner of Income Tax, Bombay City*, where the Supreme Court at p. 50 of the report has observed that the expression "accrues" or "arises" are used in contradistinction to "receive". These represent a state anterior to the point of time when the income becomes receivable. This proposition, in our opinion, would not resolve the question in issue, namely, whether an assessee has the right to receive the amount which is liable to be deducted for payment of Income Tax accrues or arises the moment there is a declaration of dividend by the company. He also referred to the decision in the case of *J. Dalmia Vs. Commissioner of Income Tax, New Delhi*, There, in the context of the fact that art. 74 of the articles of association of a company provided that "when in their opinion the profits of the company permit, the directors may declare an interim dividend", the board of directors of the company had declared an interim dividend at their meeting on August 30, 1950, and the assessee, which was a shareholder in the company, was paid by a dividend warrant issued on 28th of December, 1950. The date of the meeting of the board of directors fell within the accounting year ending on 30th of September, 1950, relevant to the assessment year 1951-52 and the date of the dividend warrant fell within the next accounting year ending on 30th of September, 1951, relevant to the assessment year 1952-53 and the question was in which of those years the dividend was liable to be included. It was held by the Supreme Court that the rule that when a company declared a dividend on its shares a debt immediately became payable to each shareholder in respect of his dividend applied only in the case of dividends declared by the company in general meeting. Learned advocate drew our attention to the observations of the court at p. 87, where the Supreme Court observed that declaration of dividend by a company in general gave rise to a debt. That court was not concerned with the question with which we are concerned in the instant reference, namely, whether a right accrued or arose in favour of the assessee, for the amount also is liable to be deducted under the provisions of Section 194 of the I.T. Act and similar provisions of the I.T. Act.

17. Our attention was also drawn to the case of *In re Kidner: Kidner v. Kidner* [1929] 2 All ER 551. There, it was held that a purchaser of shares was not entitled in the absence of any stipulation to the contrary to dividends declared on such shares before the date of contract of purchase, even though such dividend, or instalments thereof, was not payable until after the transfer of the shares. Learned advocate for the Revenue drew our attention to the observations of Mr. Justice Eve at p. 553 of the report, where it was observed as follows :

"It is to be remarked that under Clause 6 of the agreement Mr. Frank Kidner was to receive as part of his remuneration the dividends declared in respect of 4,900

shares so long as he remained the manager, and that immediately on his ceasing to be the manager he was to lose any right to the shares or any dividends thereon. Assuming that the question had arisen under that clause and that Mr. Kidner had ceased to be manager after a dividend had been declared but before it was paid, it is clear that he would have been entitled to the dividend, his remuneration being all dividends declared, not declared and paid, in respect of the 4,900 shares during his management. I think, although the point is not expressly dealt with in Clause 7, the same rule ought to be applied in the case of these shares. The declaration of the dividend on June 13, 1928, created a debt owing by the company to the trustees as the registered shareholders. It is true that no steps could have been successfully taken to enforce payment until the due date for payment of each instalment arrived, but none the less the title to that dividend was, in my opinion, determined by the declaration, and the mere fact that the payment was postponed does not operate to deprive those, who were the holders of the shares at the time of the declaration, of their right to each instalment of that debt. I come to the conclusion, therefore, that the transfer did not vest in the purchaser the right to claim and retain payment of the two last instalments of that dividend. That dividend remains where it was when it was declared, and belongs to the estate."

18. The context in which the aforesaid observations were made, in our opinion, were entirely different. We are concerned in this case with the obligation imposed by the statute in respect of the classes of assessee who are liable to pay Income Tax imposed upon the company to deduct tax from the gross dividend. In that context, the aforesaid observations of Mr. Justice Eve cannot, in our opinion, throw much light in determining the present controversy.

19. Similarly, our attention was drawn to the observations of this court in the case of Commissioner of Wealth Tax Vs. Mrs. Leena Mukherjee, . There the question was whether the declaration of an amount of Rs. 60,144 as dividend declared at the annual general meeting held on 26th March, 1965, was liable to be assessed to wealth-tax in the hands of the assessee on the valuation date, 31st March, 1965, even though it was payable at a later date. The only question was whether a debt had come into existence on that date for the amount of Rs. 60,144. In that context the Calcutta High Court held that on declaration of dividend the entire amount had become a debt due to the shareholder and it was, as such, a taxable wealth of the shareholder. The question whether in the case of an Indian shareholder the declaration of gross dividend itself, on receipt of a tax deduction certificate creates or gives an accrual of right to the entirety of the gross dividend or creates a debt for the entirety of the gross dividend in favour of a shareholder did not fall for consideration before the High Court in that case. Therefore, that question, was not examined, in our opinion, in that decision. The aforesaid ratio of the said decision, in our opinion, cannot, therefore, apply to the instant case. Learned advocate for the Revenue also sought to rely on certain decisions in aid of the proposition that a declaration of dividend creates a debt enforceable either immediately or in the future,

according to, whether the dividend is or is not expressed to be payable at a future date. The payment of the dividend was a different operation. It was an actual distribution of a part of the assets of the company. The two processes, declaration and payment, were quite different. In this connection, he drew our attention to the observations in the case of *Potel v. IRC* [1970] 46 TC 658 . The point was again emphasised by Macmillan L.J. in the case of *IRC v. Cull* [1939] 22 TC 603 : [1940] 8 ITR (Suppl) 1 . According to the learned advocate for the Revenue, the declaration of a dividend by a company at the annual general meeting brings into existence a debt. The company was to discharge the debt after it had accrued. Lord Wright had observed in the case of *Barnes v. Hely-Hutchinson* [1939] 22 TC 655 : [1940] 8 ITR (Suppl) 24; that the shareholder was never taxed on the company's fund of profit but only on the dividend which came to him in payment of the debt which was created when the company declared the dividend. It was further observed that the company could discharge the debt under the English law by, (a) paying the full amount of the dividend, after declaration, or (b) paying a net amount of dividend after deduction of Income Tax appropriate to the whole amount due and giving a certificate of deduction of tax in the statutory form. The company had an option to adopt the method either (a) or (b) but in either case the debt discharged was the debt created by the declaration of a dividend at the annual general meeting of the company. It was argued that under the English law, the company could discharge a debt by paying the full amount of the dividend declared or by paying the net amount of dividend after deduction of Income Tax. It seems that the method (a) stated above in the background of the Indian law should not be accepted to be the correct position. Under the Indian law, however, if the company follows the procedure indicated aforesaid, by paying the actual amount, then, the gross amount received by an Indian assessee, not resident in India, could be taxed in his hands u/s 5(1)(a) or Section 5(1)(b) but it could not be taxed in the context of Indian law only on the declaration of the dividend, that is, on accrual of right to a shareholder u/s 5(1)(c). Learned advocate for the Revenue sought to urge that if the whole amount or gross amount was not due and payable no question could arise for deduction of tax appropriate on that amount. The deduction could only be made from the amount due. That is true. The question is, whether on a declaration of dividend the right accrues, in view of the statutory provision of deduction at source, as we have indicated u/s 194 and Section 198 of the I.T. Act, 1961. Therefore, in this case, where the assessee was liable to Income Tax, it could not be said that the whole amount had become immediately due and payable to the shareholders as such. In this connection the scheme of the Indian Act may be looked at from this point of view which was examined by the Supreme Court in the case of *Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd.*, . It was further urged by learned advocate for the Revenue that the rule of deduction of Income Tax at source was explained by Lord Han worth in the case *F.H. Hamilton v. IRC* [1931] 16 TC 213 . There, his Lordship emphasised that the rule was plain enough. It clearly entitled the deductor to retain out of the recipient's interest or payment due to him a sum,

and he, the deductor, retained that, while the recipient was bound to give a discharge for the full amount as if he had actually received it. It was, therefore, urged that when a tax deduction was made under the law, a shareholder should give a discharge for the full amount of the dividend declared. In other words; the entire debt was being discharged by the second method mentioned hereinbefore under the provisions of the Income Tax laws of England. It was emphasised that Lord Hanworth had also pointed out at p. 229 of the report that "deduction should be allowed at the standard rate for the year in which the amount payable became due". It was further observed that even one had to keep an eye on the dividend to see to what the tax was appropriate. Relying on this basis, it was emphasised, that it was, therefore, clear that after the debt had come into existence by declaration of dividend and after a debt had accrued within the meaning of Section 5(1)(c) of the I.T. Act, 1961, provisions had been made by the English law of taxation for a discharge of debt either by paying the full amount or a net amount along with a certificate of deduction. It was, therefore, on this basis urged that unless the dividend income was diverted by overriding title, before accrual, the income would accrue to the assessee-shareholder. It was sought to be urged in this case that the assessee had a title to the dividends declared under the English law. Lord Justice Han-worth emphasised, once the debt became due or the income accrued, the destination of income or the application of income, whether by previous contract or any other previous legal obligation, statutory or otherwise, was of no relevance. Reliance in this connection was placed on the observations of the Supreme Court in the case of Provat Kumar Mitter Vs. Commissioner of Income Tax, West Bengal, , the decision in the case of Executors of The Estate of J.K. Dubash Vs. Commissioner of Income Tax, Bombay City, , the decision in the case of IRC v. Forth Conservancy Board [1931] 16 TC 103 and also in the case of E.D. Sassoon and Company Ltd. Vs. The Commissioner of Income Tax, Bombay City, . It was submitted on the authority of these cases that in case a debt came into existence on the date of the annual general meeting, the application or destination of the resulting income could not affect its taxability. It was further submitted that the company had an option to claim and deduct a sum as it was due from the shareholder. This was so because the company had paid the tax to the Revenue. If the company had not paid this tax, the company had no right to make this deduction. The legal effect of the deduction was, according to the learned advocate for the Revenue, that the assessee-shareholder was making a payment at the standard rate on the gross dividend and the company was paying in its turn the gross dividend to the assessee-shareholder, the claim against each other being cancelled out by payment of the net dividend. In the eye of law, a full payment of dividend had taken place. Reliance in this connection was placed on the observations in the case of Trinidad Lake Asphalt Operating Co. v. CIT for Trinidad & Tobago [1945] 13 ITR (Supp.) 14 , in the case of Commissioner of Income Tax, U.P. Vs. Nainital Bank Ltd., , in the case of Coren v. Keighley [1972] 48 PC 370 . In our opinion, in view of the scheme of Section 194 read with Section 198, in the case of the assessees who are liable to pay Income Tax, the

company is obliged by the statute to deduct that tax. In such cases, the assessee has no right to claim the deduction from the company even if the assessee is not liable to pay the taxes. The only right that the assessee gets is against the Revenue to claim refund if he is liable to pay a part or none at all of the tax deducted. The statute creates on the declaration of the dividend an obligation to deduct that tax. Therefore, in this scheme of the Indian I.T. Act, so far as the dividend income is concerned, in our opinion, Section 8 read with Section 194 and Section 198 of the I.T. Act, 1961, makes it clear that so far as the tax portion is concerned, there is diversion of that portion by statute at the declaration stage. Therefore, this was not a case of application of income after accrual. That income in the eye of law never accrues in the sense of a debt owing by the company to the assessee, that is a debt undoubtedly by the company to the Revenue but no debt on that amount accrues in favour of the assessee. In that view of the matter, we are unable to accept this contention urged on behalf of the Revenue. This has to be borne in mind that u/s 194 of the I.T. Act, 1961, the principal officer of an Indian company before making payment in cash or before issuing any cheque or warrant in respect of any dividend or making any distribution or payment to a shareholder of a dividend within the meaning of Section 2(22), Sub-clauses (a), (b), (c) or (d) is enjoined to deduct, from the amount of such dividend of the Indian company, Income Tax at the rates which are in force.

20. Section 198 of the I.T. Act of 1961, specifically provides that all sums deducted in accordance with the provisions of Section 194 and the other sections shall, "for the purpose of computing the income of an assessee, be deemed to be income received".

21. Section 199 of the I.T. Act, 1961, further provides that any deduction made in accordance with the provisions of Section 194 and paid to the Central Govt. should be treated as a payment of tax on behalf of the person from whose income the deduction was made and credit should be given to him for the amount so deducted on production of the certificate furnished u/s 203 in the immediately following assessment year under the I.T. Act, 1961.

22. It is apparent, therefore, that under the I.T. Act, 1961, and under the Indian law it is only in respect of the dividend of an Indian company that the Indian company was obliged to deduct tax which should be on the payment of the dividend and the amount deducted at the time of the payment of the dividend, vide the statutory fiction, was deemed to be the income of the assessee, for computing the income of the shareholders.

23. Learned advocate for the Revenue sought to urge that deemed to be the income should not be confined only to mean that it was fictional income in certain cases. It was sought to be urged that cases which are obvious are often, for statutory reasons, included as "deemed".

24. In this connection he referred us to Section 2(22) of the I.T. Act, 1961 and

he also referred us to certain provisions such as where under the I.T. Act, payment was not made by the assessee and the assessee was considered to be an assessee in default. The assessee was considered to be in default only when the assessee, though he had made the payment of the tax dues, had failed to make payment in accordance with the demand notice and for this reason in order to obviate the argument that those assesseees could not be said to be the assesseees in default while they made the entire payment, it is stipulated by the statute that such action of the assesseees should also be deemed to be in default. Reliance in this connection was placed on the observations of Lord Radcliffe in the case of *St. Aubyn v. Attorney-General* (No. 2) [1951] 2 All ER 473 ; 3 EDC 292. There, Lord Radcliffe observed as follows:

"Now Sub-section (2) is concerned to declare what persons are to be "deemed" to have made a transfer of property to a company. It identifies them, rather unhappily, not so much by what they have done as by the results of what they or other persons have done. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is in the ordinary sense, impossible. I think that it is in the last of these three ways that it is used in Section 58(2), for the sub-section begins its description of the class of persons who are to be deemed to have made a transfer with the person the effect of whose own disposition has been to add the property transferred to the resources of the company and ends with the person who has done no more than make a disposition which is "associated" with operations that have had a similar result. If I apply to Lord St. Levan this statutory conception of a transferor, I find this consequence. The investments were transferred to the company at his direction, for he so directed as tenant for life when he and Mr. Ponsonby jointly executed the deed of appointment dated March 25, 1927."

25. On a closer scrutiny, however, it appears that Lord Radcliffe was not indicating that the expression "deemed" to offer be used only to include what is obvious. It is true that sometimes the expression "deemed" is included to give a comprehensive description that includes what is obvious, what is uncertain and what is in the ordinary sense impossible. A deeming provision, however, is never used by the Legislature to cases to mean only what is obvious, or only to include the natural meaning of an expression. Section 8 of the I.T. Act, 1961, provides that for the purpose of inclusion in the total income of an assessee, any dividend declared by a company or distributed or paid by it within the meaning of Section 2(22)(a), (b), (c) and (d) of the I.T. Act, 1961, "shall be deemed to be the income of the previous year in which it is so declared, distributed or paid, as the case may be". It should be borne in mind that by fiction and by looking at Section 8, Clause (a) of the Act, the dividend is to be the deemed income of the previous year in which it was declared, in other words, this statutory fiction fixed

or determined the year in which the dividend was to be treated as the income and the fiction did not provide for the quantum of the dividend which was treated to be income of the shareholders, whether the net dividend or the gross dividend, and for that purpose one has to look to Section 198 or Section 194 as we have set out hereinbefore.

26. In this connection reliance may be placed on the observations of the Supreme Court in the case of *Keshav Mills Ltd. Vs. Commissioner of Income Tax, Bombay*, , where at p. 241 the Supreme Court observed in the context of the Indian Income Tax Act, 1922, as follows:

"It is clear that under these circumstances there is no receipt of the moneys at all, either actual or constructive, in cash or in kind, by actual payment or by adjustment or settlement of accounts. There is also no scope for the argument that even though these sums may not be said to be either actually or constructively received, they should be "deemed to be received". The expression "deemed to be received" only means deemed by the provisions of the Act to be received. The phrase statutory receipt might be conveniently employed to cover income which is "deemed to be received", and instances of such statutory receipts are to be found in the provisions of the Act, e.g., Section 18(4), Section 58E, Section 58J(3), Section 7(2), Section 16(1) c) and Sections 19(2)(vii) and 16(2) (See the observations of Beaumont C.J. in *COMMISSIONER OF Income Tax, BOMBAY Vs. NEW INDIA ASSURANCE CO. LTD.*, . An amount cannot be "deemed to be received" merely by the volition or sweet will of an individual. In all the cases which we have mentioned above the profits earned which were credited in the books of account according to the mercantile system of accounting were at best "treated as having been received" which is neither "received" nor "deemed to be received" and, therefore, not within the purview of Section 4(1)(a)."

27. Similarly, Mr. Justice Bose, who delivered the dissenting judgment, had also observed at p. 243 of the report as follows :

"Now the words "deemed to be received" can be excluded from consideration at once because I agree that they are confined, and are intended to be confined, to what I may call the deeming sections in the Act, that is to say, to cases where the deeming must be done under the express provisions of the Act. That leaves us with the word "received". I am of course only dealing with Section 4(1)(a) which deals with "receipts" and not with Section 4(1)(c) which refers to "accruals" and "arises" and to that which is deemed to "accrue" or "arise". "

28. Therefore, we are of the opinion, so far as the position before the introduction of the Finance Act, 1965, in England is concerned, it is indisputable that in order to be taxable in the hands of the assessee, resident in India it must come u/s 5(1){a) or (b) or (c). It is apparent that in this case, receipt of this income, which is the subject-matter of this reference, cannot be taxed either under Clause (a) or Clause (b) of Section 5(1) of the Act. The only question is,

therefore, that u/s 5(1)(c), whether it is taxable or not, as we have held in the two decisions of this Bench referred to hereinbefore, viz., in the case of Commissioner of Income Tax Vs. Shaw Wallace and Co. Ltd., ; as well as in the case of CIT v. Thomas Duff & Co. (India) Pvt. Ltd., I.T. Ref. No. 372 of 1975 (see p. 798 infra (Appendix)), in order to be taxable, the income must arise or accrue to an assessee and cannot cover income which is deemed to accrue or deemed to arise. We reiterated the said conclusion that the same is supported by the view of the Supreme Court in the case of Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd., , as well as the Full Bench decision of the Kerala High Court in the case of Commissioner of Income Tax Vs. Y.N.S. Hobbs, , and the observations of the Australian High Court in the case of Jolly v. Federal Commissioner of Taxation [1933] 50 CLR 131 Aus.

29. The next contention, therefore, is whether the changes in the English law by the Finance Act, 1965, have altered the position. We have set out the relevant provisions of Section 47(2) of the Act. The effect of Section 47(2) of the Act, as we have discussed in our case in the case of CIT v. Thomas Duff & Co. (India) Pvt. Ltd., I.T. Ref. No. 352 of 1975 (see p. 798 infra (Appendix)), that "subject to enactment to the contrary the distribution shall be deemed for the purpose of Income Tax to represent an income equal to an amount on which the income has been borne by deduction". There was a good deal of argument before us whether a non-resident Indian company was taxable in England after the Finance Act of 1965, or whether a non-resident Indian company, the assessee, whose tax has been deducted, is entitled to get refund from England as a result of the changes made in the English law.

30. It appears to us that it is not necessary and we do not think it would be reasonable to remark on this aspect. We will assume, as contended for by the learned advocate for the Revenue and contrary to the submission made by the learned advocate for the assessee, that the Indian resident-assessee was liable to be taxed in England on this income and further he was entitled in appropriate cases to get reliefs from England Revenue in England. But even then u/s 91, which is in pari materia with Section 49D of the I.T. Act, 1922, the net income which is taxable in the hands of the Indian assessee will be a doubly taxed income and such relief would be available to him. It appears, therefore, on an analysis of the propositions which we have dealt with that the correct position prior to 1965 is, (1) the company itself in England was chargeable to tax on its profits and it paid tax in discharge of its own liabilities and not as agent for its shareholders; (2) the shareholders prior to 1965 were not chargeable with tax on dividends, and they were not assessed in respect of them; (3) a company on paying dividend to its shareholders, were entitled but not bound to deduct Income Tax at the standard rate at the time of payment; (4) the statute contemplated a company declaring a dividend on the gross ratio and then on the face of the dividend warrant making a proportion to the deduction so that the shareholders whose total income was so small that they were exempted from tax or paid at a lower rate, could get the Income Tax which had been deducted on

the dividend warrant returned to them ; (5) the company deducting the tax was under no obligation to pay the amount so deducted to the Inland Revenue. It could retain for itself the tax; that was the position before the 1965 Act. This position led to an anomalous position which was mentioned by Lord Phillimore in the case of *Bradbury v. English Sewing Cotton Co. Ltd.* [1923] 8 TC 481 as follows :

"Their taxation (the taxation of the shareholder) would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has apparently proceeded on the idea that for revenue purposes 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."

31. The same view of the English law was expressed by the Supreme Court of India in the case of *Keshav Mills Ltd. Vs. Commissioner of Income Tax, Bombay*, , which we have referred to hereinbefore. This position was sought to be rectified by the Finance Act of 1965 (U.K.). We are concerned with Section 47(2) of the said Act, the consequences of which we have noticed.

32. Therefore, it appears to us that both u/s 47(2) of the U.K. Finance Act as introduced in 1947 and u/s 185(2) of the English I.T. Act, 1952, the amount deducted by the company at the time of distribution to the shareholder is deemed to be the income for the purpose of the English I.T. Act. It is a statutory receipt or a fictional income. The Supreme Court has reiterated the position in which an assessee paid Income Tax by deduction or otherwise in respect of the net dividend so as to be eligible for the relief contemplated by Section 49D of the old Act. Therefore, for the purpose of giving relief u/s 49D of the old Act, the enquiry was to be made whether the shareholder could be said to have paid Income Tax in U.K. by deduction or otherwise in respect of the net dividend. If he had so paid the tax by deduction or otherwise irrespective of any actual assessment of the dividend income in U.K., he was eligible for the relief u/s 49D of the old Act as well as u/s 91 of the new Act. In this connection, reference may be made to the observations of the Supreme Court in the case of *Commissioner of Income Tax, West Bengal Vs. Clive Insurance Co. Ltd.*, , The Supreme Court realised the difficulties of the rate and indicated that this should be deducted at the standard rate prescribed in the relevant section of the U.K. Finance Act.

33. We are conscious that this construction would lead to an anomalous position in the sense that an Indian shareholder receiving dividend income would be liable to pay tax on the gross income without any relief except that he gets credit to the extent of the tax deducted at source while an Indian shareholder owning foreign shares would be taxed only on the net income and he would get double taxation relief, that is to say, the relief on the basis that the tax has been deducted at source. This may lead to certain grave consequences of diverting the Indian money to foreign investments, but if it is so, then, it is a matter for the Legislature to interfere. The law as it stands, it seems to us, is, that only the net income is liable to be included for the computation of the total income of the

assessee in this case and the assessee is also entitled to relief u/s 91 of the I.T. Act, 1961. As we have said before, learned advocates for both sides have made elaborate arguments on the position of the English law after the introduction of the Finance Act, 1965. We feel that it was not advisable to embark on the question whether the present assessee was at all assessable to tax in England in the facts and circumstances of this case. We have proceeded on the basis that the deducted amount be deemed to be the income as stipulated u/s 47(2) of the Finance Act, 1965 (U.K.) of England.

34. In that view of the matter the question for the assessment year 1966-67 is answered in the affirmative and in favour of the assessee. The question for the two assessment years 1967-68 and 1968-69 is also answered in the affirmative and in favour of the assessee. In the facts and circumstances of this case, parties will pay and bear their own costs.

Sudhindra Mohan Guha , J.

35. I agree.