

(1934) 03 CAL CK 0027
In the Calcutta High Court
IN RE SIR DAVID YULES ESTATE.

Date of Decision : 13-03-1934

Acts Referred:

Income Tax Act, 1961 — Section 66(1)

Citation : (1935) 3 ITR 163

Hon'ble Judges : Costello, J;Buckland, J

Bench : Full Bench

Judgement

BUCKLAND, J. - This is a reference by the Commissioner of the Income Tax u/s 66 (1) of the Indian Income Tax Act, made in the following circumstances :

Sir David Yule died on the 3rd July, 1928. He left in India an Estate of the value of approximately pounds 10,000,000. The executors and trustees appointed by the testator by his will are his widow, The Mercantile Bank of India Ltd., Sir Onkarmull Jatia and Radha Krishna Iyer. Probate of the will was granted to the executors other than Radha Krishna Iyer in England on the 28th October, 1928, and in Indian on the 7th June, 1929. Under the power of appointment contained in the will Lady Yule has appointed her daughter to be a trustee of the will. The present trustees therefore are Lady Yule, Miss Yule, Sir Onkarmull Jatia and the Mercantile Bank of India Ltd.

The testators estate in India consisted substantially of holdings of shares in a number of companies most of them formed by him between the years 1917 and 1921 as private companies. They appear to have been what is known as investment companies, holding at the time of the testators death nothing but shares and securities, for a few years before his death the gardens or other properties of the companies had been disposed of. The principal Company was the Calcutta Discount Company which acted as agent for most of the other companies and controlled their finances by deposits and advances, but for the purposes of this case no distinction need be made as regards this particular company.

The Companies of which there were thirty have been sub divided by the Commissioner in his statement of facts into three groups with the first two of

which alone we are concerned. In the first group which comprises six companies all the capital is ordinary share capital wholly held by the Trustees in their own names or through nominees. The second group comprises 14 companies including the Calcutta Discount Co., Ltd. of which the share capital was held by the Trustees, their nominees, and in addition other companies. The compositions of the third group is irrelevant to this case. All the companies had very large accumulations of undistributed profits. The actual figures are immaterial. The trustees had to meet very heavy outgoings for duties payable both in the United Kingdom and in India in relation to the estate of the deceased and it was to provide funds for such duties that a scheme was devised whereby accumulated profits would come into their hands and be available for the purpose of meeting such charges without, it was hoped, their rendering themselves liable to assessment to income tax in respect of such monies as by such means reached them, though a far more simple method of providing such funds, which the testator himself by his will suggested, viz., to wind up voluntarily one or more of the companies, was open to them.

The proposal was to capitalise the companies reserves and make a distribution to the shareholders in the form of debentures on redemption of which the funds required would be available. In the case of companies in the first group in which the whole of the shares were held by the trustees or in the names of their individual nominees no difficulty was experienced involving any preliminary step, but in the case of companies in the second group, as shares also stood in the names of other companies, these were regarded as not being capable of being treated as nominees of the trustees, and the procedure adopted was to issue a nominal amount of preferred ordinary shares to the trustees under a power in the articles of association, and none to the other shareholders, and to issue to the trustees debentures upon these preferred ordinary shares alone, none being issued to the companies as ordinary shareholders. Taking the case of the Calcutta Discount Co., Ltd., as an instance, on the 22nd January, 1930, a resolution had been passed at an Extraordinary General Meeting on the 3rd January was confirmed as a Special resolution and it was resolved that the capital of the company be increased by the creation of 725 preferred ordinary shares of Rs. 100 each and the same be issued to such persons as the Secretaries might think fit. At the same meeting new articles of association were adopted by special resolution and among other articles it was provided by Articles 126 that "the company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend and (a) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares, debentures of debenture stock of the company or (b) being undivided net profit in the hands of the company, be capitalized, and that such sum be set free for distribution, and be appropriated as capital to and amongst the Preferred Ordinary Shareholders and Ordinary Shareholders respectively in the proportions in which they would have been

entitled thereto if the same had been surplus distributable profits, and such resolution shall be effective etc." A return of allotments made on the 11th February, 1928, pursuant to Section 104 of the Indian Companies Act shows that of these 725 shares 25 were allotted to Miss Yule, 71 to Lady Yule, and 629 to the Mercantile Bank of India Ltd., Lady Yule and Sir Onkarmull Jatia. On the 24th March, 1931, at an Extraordinary meeting of the shareholders the following resolution were passed : "That it is desirable to capitalise a sum of Rs. 1,45,00,000 being part of the amount standing to the credit of the Reserve Fund and accordingly that a special capital bonus of Rs. 1,45,00,000 free of income tax be declared and such capital bonus be applied on behalf of the persons who on the 24th day of March, 1931, were the holders of the 725 issued preferred Ordinary shares of the Company in payment in full for Rs. 1,45,00,000 of debentures of the company carrying interest at 3 per cent. per annum from the 1st day of January, 1931 (and to be charged upon the whole undertaking of the company.)" By a further resolution the Secretaries were empowered to carry out what had been so decided as to the issue of debentures and a minute of the secretaries dated the 25th March, 1931, shows that effect was given to the resolution of the company.

In the case of companies falling within the first group it appears that a resolution was passed similar to that passed on the 24th March, 1931, by the shareholders of the Calcutta Discount Co., Ltd., and that similarly debentures were subsequently issued to the Trustees.

That is as far as I need go far, though the debentures have been redeemed, the assessment with which this case is concerned is that of the year of issue and the Commissioner states that the assessment was "begun mainly ex cautela and to ensure the transactions being brought into consideration as a whole without leaving a loophole for evasion the two parts of the whole transaction."

On the 5th May, 1933, the Income Tax Officer assessed the assessee to super-tax and surcharge on the total amount of the debentures at Rs. 2,42,88,359-6. Against this assessment assessee filed an appeal to the Assistant Commissioner of Income Tax on the 4th September, 1933, and in the grounds of appeal is to be found a complete list of the companies in which debentures were issued to the trustees and of their nominal value. That appeal has not yet been disposed of and during its tendency the Commissioner of Income Tax u/s 66 (1) of the Act has on his own motion drawn up a statement of the case and referred to this Court with his own opinion thereon the following questions :-

First Question :- The assessee being in his own name and through nominees the holder (a) of the whole of the share capital of companies as specified in this case, and (b) together with two Trustees in their individual capacity of the whole of the share capital of one company as specified : these companies being investment companies of the nature described in the case : and the said companies having issued to the assessee by way of bonus, debentures which have subsequently been paid off through the transactions specified in the

case :..... (quaere) was there by these transactions any income, profits or gains which accrued or arose to or were received by the assessee within the meaning of Section 4 of the Act ?

Second question :- If any such income did arise, when did it so arise :

Third Question :- If any such income did arise, was its quantum an amount corresponding (a) to full amount of the debentures or (b) to such part only as derived from the received and accumulated revenue profits of the companies and excluding such part as derived from appreciated valuations of the companies investment holdings ?

Fourth Question :- In the latter alternative, on what principles are the respective quanta to be accounted and ascertained ?

At the hearing the learned Advocate-General for the Crown has invited us, even should our reply to the first question be adverse to the contentions preferred by him, to leave the third and fourth questions for determination by the Income Tax Departments as matters of assessment.

The case for the assesseees is based upon the decision of the House of Lords in *Commissioners of Inland Revenue v. Fishers Executors* (1926 A. C. 395: 10 T. C. 302 et seq). That was a case in which a limited company having capitalised a part of its undivided profits which it resolved to distribute to its shareholders as a bonus, did so by the issue of debenture stock in satisfaction of such bonus, there being no option on the part of the shareholders to receive such bonus in cash. It was contended by the Crown that by these means there was liberation of assets and a distribution of profits by the Company and that the amount received by the shareholders was income in their hands and liable to assessment to super-tax. Their Lordships held that the case was covered by the decision of their Lordships House in *Commissioners of Inland Revenue v. Blott* (1921 2 A. C. 171) and that the bonus paid to the ordinary shareholders was not a distribution of profits and did not constitute income in their hands for the purpose of super-tax.

I have referred to the authority cited on behalf of the assesseees in the fewest words possible for more than one reason. On the facts the case is as near on all fours with the present case as two cases arising out of different sets of circumstances can be and that being so it would be a work of supererogation to state the principles of the decision in the manner that is essential where it is sought to apply the principles of a decision to a totally different set of circumstances. A further reason is that the learned Advocate-General has in effect conceded that unless he can persuade us to follow *Swan Brewery Co. v. Rex* (1914 A. C. 231) which he has sought to do upon the very narrow ground upon which he has invited us to distinguish those two cases, he is precluded from contesting that this case is covered by *Fishers* case.

The *Swan Brewery Co.s* case was one decided by the Judicial Committee of the Privy Council on appeal from the Supreme Court of Western Australia and the

point that arose for determination was whether, a company having accumulated a reserve fund and having resolved to increase and having increased its capital by the issue of new shares equivalent in nominal value to the amount of its reserve fund and allotted such shares to the existing shareholders as fully paid pro rata according to their holdings of old shares, such transactions amounted to a declaration of a dividend within the Dividend Duties Act and were liable to duty accordingly. To this the answer by their Lordships of the Judicial Committee was in the affirmative. In *Fishers Case* that decision was not referred to but in *Blotts Case* all the learned Judges with the exception of LORD SUMNER who had delivered the judgment of the Board in *Swan Brewery* to have taken the view that the decision in the *Swan Brewery Case* turned upon the meaning of the local statute.

I should not refer to this but for the circumstance that the learned Advocate-General invited us to follow the *Swan Brewery Case* not upon any different principle which he submits it lays down and should be applied but on the grounds that it is a decision of the Judicial Committee of the Privy Council, by the decisions of which tribunal this Court is bound, giving a construction to the words of a statute which construction he submits is application to the language of the Indian Income Tax Act.

It appears that the Dividend Duties Act, 1906, of Western Australia defines "dividend" as including "every dividend, profit advantage or gain intended to be paid or credited....." The English Income Tax Act, 1918, Section 1, provides that income tax shall be charged, in respect of "all property, profits or gains etc." and Section 4 which imposes the charge of super-tax provides that "there shall be charged levied and paid..... in respect of the income of any individual etc." By the Indian Statute income tax is charged on "all income profits and gains etc." and super-tax on the "total income of any individual etc., which shall" for the purpose of super-tax be the total income as assessed for the purpose of income tax (see Sections 3, 4, 16, 55 & 56) with the result that the income, using the word in the popular sense, to be assessed is the same whether it has to be assessed to income tax or super-tax. The learned Advocate-General seeks to draw a distinction between "income" and "all property, profits or gains" in the two sections of the English Act, the later form of expression corresponding, he submits, more nearly to the language of the Indian and Australian Statutes, an argument which involves the exclusion from the operation of Section 4 of the English Act of something to which Section 1 would apply. On this ground he seeks to distinguish *Fishers Case* which was a case of assessment to super-tax and submits that the word "gains" in the Indian Statute has the same effect and intention as the word "advantage" in the Australian Statute. The conflict, if conflict there be, and I may use the word without disrespect, between *Fishers Case* and the *Swan Brewery Case* was considered by the High Court of Madras in *The Commissioner of Income Tax v. Binny & Co.* (I. L. R. Mad. 837) but the narrow scope of the argument of the learned Advocate-General founded on the *Swan Brewery Case* makes it unnecessary to look further for an answer than that

to be found in the observations of the Judicial Committee in *Income Tax Commissioner v. Shaw Wallace & Co.* (59 I. A. 206) in which SIR GEORGE LOWNDES in delivering the judgment of the Board said : "The object of the Indian Act is to tax "income", a term which it does not define. It is expanded, no doubt, into "income, profits and gains" but the expansion is more a matter of words than of substance." In my judgment the point involved in the first question submitted to us is completely covered by the decision in *Fishers Case* and the reply should be in the negative. This renders it unnecessary to consider the second question submitted.

It is necessary before concluding this judgment to refer to certain points which the learned Advocate-General desired to urge but which we declined to allow him to do. The learned Advocate-General was prepared to contend that (1) the capitalisation of the undivided profits of the companies was ultra vires the companies memoranda of association; (2) the amended articles of association do not authorise the issue of debentures to the Trustees as ordinary preferred shareholders without offering them to other shareholders and (3) if the companies did not act in accordance with their memoranda and articles of association the transactions are not binding upon the Revenue authorities.

In my judgment it was not open to the Crown so to contend upon the case stated by the Commissioner. The case stated proceeds throughout upon the footing that from the stand-point of company law and the memoranda and articles of association of the companies the transactions were unimpeachable. It may be that all the materials for the decision of further points were available. The Advocate-General said that they were but that does not exclude the possibility of the assessee wishing to adduce further evidence. The case stated contains no findings of fact as a foundation for such contentions nor has the Commissioner expressed any opinion upon the questions of law to which they give rise. If such points are to be submitted for decision they should be properly formulated in the case stated with all necessary findings of fact and the Commissioner's opinion in order that the assessee may have every reasonable opportunity of meeting them and the Court may know precisely what they are and how they arise. It may be, as the learned Advocate-General was disposed to indicate that the Commissioner with all the legal resources of the Crown at his disposal has not availed himself of them in the preparation of the case or that would have been done and if that is the explanation of the omission I can only observe that the result is unfortunate. In this connection I would again refer to the procedure followed in the matter of this assessment. The learned Advocate-General has suggested that the appeals to the Assistant Commissioner of Income Tax being indisposed of it is still open to that officer in determining the appeal to come to findings of fact adverse to the assessee even to the extent of forming the conclusion that the transactions were all carried out mala fide. From the order of the Assistant Commissioner an appeal would lie to the Commissioner whereupon I conceive the provisions of Section 66 (2) and 66 (3) of the Act could, if they were so advised, be invoked by the assessee. I express no opinion on the problems which even a superficial

appreciation of these considerations suggest, beyond observing that so far the questions have been touched upon they appear to be of doubtful value to the Crown, but if the learned Advocate-General has correctly expressed the course which this assessment may yet follow it furnishes an additional reason for declining to entertain points of law which hitherto have not been even remotely suggested. In conclusion, the multiplicity of proceedings which the learned Advocate-General adumbrates cannot be sufficiently deprecated. The competency of the Commissioner to make a reference u/s 66 (1) at the stage at which this reference has been made cannot be questioned, but unless such reference will result in finality, at least as regards the assessment for the year for which the assessment has been made, it would be better deferred until all relevant facts have been ascertained and the case then stated by the Commissioner with such legal assistance as he may deem necessary in a manner setting out all materials findings of fact and the several questions of law arising therefrom upon which the opinion of the Court is sought.

My learned brother MR. JUSTICE PANCKRIDGE, who has read this judgment but is unable to be present has asked me to say that he agrees.

COSTELLO, J. - I am of the same opinion.

Reference answered accordingly.