
(1977) 07 CAL CK 0011

In the Calcutta High Court

Case No : Appeal form Original Order No. 120 of 1973

Income Tax Officer, D-Ward and Another

APPELLANT

Vs

Chandmull Batia

RESPONDENT

Date of Decision : 06-07-1977

Acts Referred:

Companies Act, 1956 — Section 153
Income Tax Act, 1961 — Section 2(22)

Citation : (1978) 115 ITR 388

Hon'ble Judges : Pyne, J; Ghose, J

Bench : Division Bench

Advocate : Suhas Sen and Ajit Sengupta, for the Appellant; Sohan L. Saraf, for the Respondent

Judgement

Ghose J.

1. This appeal arises out of a judgment and order dated 31st January, 1973, passed by T. K. Basu J. The facts of the case are as follows :

2. One Punam Chand Batia and Padam Chand Banthia held substantial shares in Messrs. Kalinagar Khoreel Tea Co. Ltd., Bullion Tea Co. Ltd., Burdwar Tea Timber Co. Ltd., and Sarugaon Tea Co. Ltd. (hereinafter referred to as the "said companies"). The said Punam Chand Batia and Padam Chand Banthia were at all material times partners of the respondent-firm, Messrs. Chandmull Batia. Although the abovenamed two persons of the respondent-firm were the registered shareholders in the abovementioned tea companies, in the balance-sheet of the respondent-firm the shares, inter alia, in the said companies were shown as stock-in-trade or assets of the said firm and moneys received from the said tea companies were shown as deposits made by the said companies in the books of the firm. The revenue sought to reopen the assessment proceedings of the firm in regard to the assessment years 1955-56, 1957-58 and 1958-59, by three notices dated 15th January, 1968, and the assessment for the year 1959-60, by a notice dated 25th October, 1967, on the ground that these

deposits or loans received by the above-mentioned partners who held 50% share each in the said firm shall be deemed to be dividend received by the said firm from the above-mentioned tea companies within the meaning of Section 2(22)(e) of the LT. Act, 1961, corresponding to Section 2(6A)(e) of the I.T. Act, 1922, since repealed. The learned judge followed the decision of the Supreme Court in the case of Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, and was pleased to hold that Section 2(6A)(e) of the LT. Act, 1922, or Section 2(22)(e) of the present Act must receive a strict construction and a shareholder mentioned in the sections would refer to a registered shareholder and not a beneficial owner of the shares.

3. For the purpose of this appeal, it is necessary for us to reproduce Section 2(22)(e) of the new Act corresponding substantially to Section 2(6A)(e) of the repealed Act.

"2. In this Act, unless the context otherwise requires,--...

(22) "dividend" includes--...

(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder, being a person who has a substantial interest in the company, or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits."

"2. (6A)(e) any payment by a company, not being a company in which the public are substantially interested within the meaning, of Section 23A, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits."

4. Mr. Sen, appearing on behalf of the revenue in this appeal, submitted that it was unfortunate that before the learned judges deciding the case of Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, , the case of Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, , decided, by the Supreme Court only a few days before the above-mentioned case, was not cited and their Lordships did not have the benefit of looking at the decision in Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, . Mr. Sen submitted further that in the instant case the shareholders are partners of the respondent-firm and partnership is only a compendious way of describing partners and as such, in the instant case, Section 2(22)(e) applies and the loans and/or deposits must be deemed to be dividends in the hands of the firm.

5. In the case of Commissioner of Income Tax, Assam, Tripura, Manipur and

Nagaland Vs. Rameshwarlal Sanwarmal, , a karta of a HUF held certain shares in a private company. The Tribunal found that the karta held those shares as the karta of his HUF. In previous years, relevant to the assessment years 1955-56 and 1956-57, certain loans were advanced by the company to the HUF. It was held by the Supreme Court that the shares held by the karta could be considered to be the shares held by the HUF and the loans made to the family could fall within the definition of dividend in Clause (e) of Section 2(6A) of the I.T. Act, 1922. The said decision was arrived at by following a decision of Kishanchand Lunidasingh Bajaj Vs. Commissioner of Income Tax, Mysore, . In the said case, it was held that shares which were acquired with the money belonging to a HUF, though held in the name of the karta of the family, the HUF would be assessed to tax under the I.T. Act, 1922, on the dividend received on those shares. It should be noted here that in the said case there was no occasion for the construction of Section 2(6A)(e) of the repealed Act and the money received were actual dividends. Their Lordships of the Supreme Court in the case of Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, followed the ratio of the above-mentioned case of Kishanchand Lunidasingh Bajaj Vs. Commissioner of Income Tax, Mysore, and came to the conclusion as mentioned hereinabove.

6. The above-mentioned two sections came to be considered, as mentioned hereinabove, in Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, . In that case facts were that members of a HUF acquired shares in a company with the funds of the family. Loans were granted to the HUF and the question was whether the loans could be treated as dividend income of the family falling within Section 2(6A)(e) of the I.T. Act, 1922. The Supreme Court held that loans and advances to shareholders could be deemed to be dividend u/s 2(6A)(e) of the repealed Act, but a HUF could not be a shareholder and as such loans given to a HUF could not be an advance to a shareholder of the company and could not be deemed to be its income. According to the Supreme Court when Section 2(6A)(e) speaks of a "shareholder" it refers to the registered shareholder and not to the beneficial owner. Distinguishing the case of Kishanchand Lunidasingh Bajaj Vs. Commissioner of Income Tax, Mysore, , the Supreme Court observed thus Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, :

"Therein the question was whether a HUF could be charged to tax in respect of dividends received by some of the coparceners of that family in respect of shares held by them, those shares having been purchased from out of the family funds. This court ruled that the dividends paid to the shareholders was the income of the family and, that being so, the same was assessable in the hands of the HUF. We see no conflict between this decision and the decisions earlier referred to. In the case of actual receipt of dividends there is a receipt of income. That income is received on behalf of the family. Hence the same was assessable in the hands of the family. In the case of deemed dividends u/s 2(6A)(e) the family does not get any income at all. The dividend referred to by that provision is only a

deemed dividend and not a real dividend. Hence, no income is either received by the family or accrued to it. Therefore, only the person who is deemed to have received that income can be assessed in respect of that income."

7. Relying on a decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat III Vs. Mankeklal Harilal Spg. and Mfg. Co. Ltd., , Mr. Sen submitted that if action u/s 147 was validly taken by the ITO on the basis of the law which at the relevant time was in force then the subsequent decision of the Supreme Court holding otherwise would not make such action bad. It was further submitted that in the instant case subsequent pronouncement of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, overruling the case in Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, would not, therefore, make the action taken for reopening of the assessment u/s 147(a) bad although it may be that in respect of the item regarding which the reassessment proceedings were started, it may ultimately turn out to have been correctly assessed when the reassessment proceedings are considered. It appears that the said Gujarat decision (Commissioner of Income Tax, Gujarat III Vs. Mankeklal Harilal Spg. and Mfg. Co. Ltd.,) was based on the peculiar facts of that case. It should also be noted that the decision in Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, upon which reliance was placed by Mr. Sen for supporting the validity of the action taken u/s 147 in the instant case was given long after the date of the impugned notice. Therefore, the ITO's action u/s 147, in the instant case, cannot be supported on the basis of the said decision in Commissioner of Income Tax, Assam, Tripura, Manipur and Nagaland Vs. Rameshwarlal Sanwarmal, . On the contrary it appears that the position in law at the relevant time was otherwise as would appear from the observation of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, of the report referring to Commissioner of Income Tax, Bombay City II Vs. Shakuntala and two Ors. etc., , the Supreme Court observed that: "From the above decisions it is clear that when the Act speaks of the "shareholder" it refers to the registered shareholder." Therefore, we are unable to accept the contention of Mr. Sen.

8. In the instant case before us, it has been urged by Mr. Saraf that the appeal must fail on two grounds: first, the companies which advanced the loans to the shareholders are public limited companies and not companies within the meaning of Section 2(22)(e) of the Act, and secondly, a "shareholder" must be construed strictly as has been done by the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. C.P. Sarathy Mudaliar, . A shareholder is one whose name is registered as the owner or holder of the share in the register of shares of the company. Save and except such a shareholder nobody can be said to be a shareholder of a company. Companies Act, 1956, by Section 153 does not recognise any trust or beneficial interest of any person in any share. The I.T. Act being a taxing statute, in our opinion for the purpose of charging tax the expressions contained in the Act must be strictly construed. Admittedly, the

respondent-firm is not a registered shareholder in the instant case. Two of the partners of the said firm are the registered shareholders. Thus, no loan was advanced by the companies to the shareholder whose name appeared on the share register of the companies concerned. By reason of the premises, it cannot be contended that the said loans given to the respondent-firm could be deemed to be dividends in the hands of the respondent-firm within the meaning of Section 2(22)(e) of the Act.

9. By reason of the aforesaid, we are of the opinion that there is no merit in this appeal. The appeal, therefore, must fail and is hereby dismissed. There shall be no order as to costs. There shall be a stay of operation of the order for eight weeks. All interim orders made by the court of the first instance in favour of the petitioner shall continue for eight weeks.

Pyne, J.

10. I agree.