

(1938) 04 AHC CK 0005
In the Allahabad High Court
MAJOR A. U. JOHN, IN RE.

Date of Decision : 25-04-1938

Acts Referred:

Income Tax Act, 1922 — Section 66(2)

Citation : (1938) 6 ITR 434

Judgement

This is a Reference by the Commissioner of Income Tax under Sec. 66(2) of the Income tax Act of 1922.

Two questions are submitted to the Court for decision. These questions are :-

(1) In the circumstances of the case, (a) is the item of Rs. 1,04,000 liable to tax as income accruing and arising in British Indian within the meaning of Sec. 4(1) of the Act, or (b), constitutes receipts falling under Sec. 4(3) (vii) of the Act and hence exempt ?

(2) If the answer to part (a) of question (1) is in the affirmative and to part (b) in the negative, was the Assistant Commissioner justified in holding that the item must be deemed to have been paid to the assessee on the day he deposited the sum of Rs. 26,000 representing the difference between the poundage and the commission ?

The matter came before a Bench of January 15, 1937. In view of a decision of another Bench of this Court, In re Gaya Prasad and Chotey Lal, the case has been referred to a larger Bench for consideration and decision.

The facts of the case which are set out in detail in the Reference may be briefly recapitulated. In 1920 a limited company - the Agra United Mills, Ltd. - purchased from Messrs. A. John & Co. three spinning mills and one flour mill, the purchase price being rupees one crore and twenty lacs. The company issued Rs. 50 lacs of debentures. The company fell into arrears in respect of payment of interest on the debentures and in 1927 the debenture holders sued the company for a sum of Rs. 62,00,000. The suit was decreed in February 1931. Four months were given to the company for payment of the decretal amount; in default of payment the debenture holders were given the right to sell the property. The

company did not pay, and on January 20, 1932, the mills were sold. At the time of the sale most debentures were held by Major A. U. Jhon, the assessee. He held rupees forty lacs of debentures, the other ten lacs were held by his brother Mr. George A. John.

As is stated in the Reference, there were no cash proceeds of the sale since the mills were knocked down to be debenture holders for the sum of Rs. 20,80,000. This sum of Rs. 20,80,000 was set off against the decretal amount.

Under Rule 2, Chapter 17, of the General Rules (Civil) of 1911 poundage was payable to the Government at 6 1/4 per cent. He prayed that the remaining 5 per cent. be treated as auctioneers commission. To this the Court agreed. Five per cent. amounted to Rs. 1,04,000. Accordingly, under rule 15 of the General Rules, the assessee Major A. U. Jhon paid into Court on March 9, 1932, Rs. 26,000 for poundage and Rs. 20,800 for the sale certificate.

The Income tax Officer claimed to assessee Major A. U. Jhon to income tax for the year 1931-32 in respect of the 5 per cent. auctioneers commission above referred to.

Whether or not the assessee is liable to assessment in respect of this sum depends upon whether the sum can be regarded as income within the meaning of the Indian Income tax Act.

Now, income is nowhere defined in the Act. The question as to what amounts to income under the Income tax Act however was considered by the Judicial Committee of the Privy Council in the case of the Commissioner of Income tax Bengal v. Shaw Wallace & Co. In the course of the judgment of the Board, which was delivered by Sir George Lowndes, it is observed :-

"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. Income, their Lordships think in this Act connotes a periodical monetary return coming in with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as capital. But capital though possibly the source in the case of income from securities is in most cases hardly more than an element in the process of production."

It is apparent to us that in making the above observation of Board had in view the various relevant sections of the Act, and that the Board's intention was to lay down for the guidance of the Courts in India some general principle on the question as to what can be treated as income under the Act. The terms of that part of their Lordships' judgment above quoted are undoubtedly general and, in our opinion, were not intended by their Lordships to be confined to the particular

facts and circumstances of the case which their Lordships were considering. It appears to us that their Lordships intended that the element of periodical receipt, regularity or expected regularity of monetary return was an essential ingredient of income under the Indian Income Tax Act. Their Lordships later in their judgment observe :

"The claim of the taxing authorities is that the sum in question is chargeable under head (iv) Business. By Section 2(4) business includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. u/s 10 the tax is to be payable by an assessee under the head business in respect of the profits or gains of any business carried on by him. Again, their Lordships think, the same central idea; the words italicised are an essential constituent of that which is to produce the taxable income; it is to be the profit earned by a process of production. And this is borne out by the provision for allowances which follows."..... "Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (vi) other sources and the corresponding provisions of Section 12".

In *Gaya Prasad and Chotey Lal, In re*, a Bench of this Court, however took view that the observations of the Privy Council above quoted should be taken in conjunction with the facts of the particular case and that the Board did not intend to lay down any general principle.

We are unable to agree with this view of their Lordships observations. In our opinion, the intention of the Board was to enunciate a working definition of income for the guidance of the Courts in India. We are confirmed in this view by the fact that in subsequent case *Maharaj Kumar Gopal Saran Narain Singh v. Commissioner of Income Tax, Bihar and Orissa*, in which the circumstances were entirely different the Board approved of the principal laid down in the case of *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.*

By Section 4(3) (vii) the Act shall not apply to "any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation which are of a casual and non recurring nature, or are not by way of addition to the remuneration of an employee." In our opinion, it cannot be maintained that the auctioneers commission in the present instance was a receipt arising from business or the exercise of a profession, vocation or occupation, or that it was not of a casual or non recurring nature, or was by way of addition to the remuneration of an employee. Major A. U. Jhon, who sold debentures belonging to himself and his brother is not an auctioneer and the commission which was earned, if it can be said in the circumstances that he earned commission did not arise out of the business in which he was engaged nor was it in any way connected therewith.

Sales in execution of a decree of the Court are generally carried out by the Court

Amin. Occasionally the duty is assigned to a private person. If that private person is an auctioneer then clearly commission on the sale would be regarded as income. We would observe that not only was commission unconnected with any business but in fact Major John received nothing at all. The mills were sold at a price a long way below the sum owed to the debenture holders. The court considered it equitable to relieve the debenture holders of the payment of auctioneers commission, the auctioneer being one of the debenture holders. In the circumstances it would be unreasonable to regard the relief as "income". In our opinion nothing in fact was received by Major A. U. Jhon as auctioneers commission and that in any event even if the relief granted to the debenture holders be regarded a receipt that receipt did not arise out of any business or the exercise of a profession, vocation or occupation and was of a casual or non recurring nature.

In the result we hold that the Income tax Officer was not entitled to assess Major A. U. Jhon for income tax in respect of the sum above referred to.

We would answer the questions referred as follows :-

1. (a) The item of Rs. 1,04,000 is not liable to income tax as income accruing and arising in British India within the meaning of Section 4(1) of the Act.

(b) Even if the same assessee be regarded as having received the sum of Rs. 1,04,000, this receipt is exempt u/s 4(3) (vii) of the Act.

In view of our answer to question 1, question 2 does not arise. We fix Rs. 400 as the fee of Council for the Income tax Department. He should file his certificate within six weeks.

Reference answered accordingly.