

Kishinchand Chellaram and Others

Vs

Commissioner of Income-Tax, Bombay

Civil Appeals Nos. 462 to 465 of 1960

(CJI S. K. Das, M. Hidaytullah, J. C. Shah JJ)

19.04.1962

JUDGMENT

SHAH J. –

This is a group of appeals against orders passed by the High Court of Bombay in income-tax references under section 66(1) of the Indian Income-tax Act.

Chellsons Ltd. - a private company - was incorporated in April 1941. The shareholders of the company at the material time were Kishinchand Chellaram holding six shares and Shewakram Kishinchand, Lokumal Kishinchand and Murli Tahilram each holding three shares. Kishinchand, Shewakram and Lokumal were directors of the company. At a general meeting of the shareholders of the company held on July 10, 1943, it was resolved to declare dividend at "60% on the shares" of the company and for the purpose of that declaration the profits of the year 1941- 42 were included in the profit of the year 1942-43. Pursuant to this resolution, Rs. 46,000 were credited in the books of the company to the account of Kishinchand Chellaram on March 31, 1944, and Rs. 23,000 were credited to each of the other three shareholders. Another meeting of the shareholders was held on July 15, 1944, and it was resolved to declare dividend at "60% on the shares" out of the profit of the company for 1943-44. Pursuant to this resolution, on Septemb

In the respective returns for the assessment year 1945-46, Kishinchand, Shewakram, Lokumal and Murli - who will hereinafter be collectively called the assesseees - included the amounts credited to them in the company's books of account as dividends for the three years 1941-42 to 1943-44. On December 4, 1947, at an extraordinary general meeting another resolution purporting to reverse the earlier resolutions dated July 10, 1943, and July 15, 1944, was passed by the company. The resolution read as follows :

"The notice dated 25th November, 1947, calling the extraordinary general body meeting for today, was placed on the table.

Whereas the sum of Rs. 1,90,000 paid to the shareholders during the year 1944-45 as per details given below, viz :

#	For 1941-42	1942-43	1943-44	Total	-----
-----	Rs.	Rs.	Rs.	Rs.	Mr. Kishinchand Chellaram
	10,000	36,000	30,000		
	76,000				Mr. Shewakram Kishinchand
	5,000	18,000	15,000	38,000	Mr. Lokumal
					Kishinchand
	5,000	18,000	15,000	38,000	Mr. Murli Tahilram
	38,000				
					Total
	25,000	90,000	75,000	1,90,000	-----

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was sanctioned by the General Body inadvertently without taking into consideration the company's liability for taxation, including excess profits tax and all the shareholders having been fully apprised of the bona fide mistake it is hereby unanimously resolved that such dividend inadvertently paid be considered as loan to such individual shareholders, and be paid back to the company forthwith, and the consideration of any dividend to the shareholders be deferred to the next annual general meeting. The adjustment in this regard will now be made in the books of the company as on 6th April, 1947."

Even though this resolution was passed, and the proceedings for assessment before the Income-tax Officer were not disposed of the assessee did not file revised returns excluding the amounts credited as dividend, nor did they claim before the Income-tax Officer that those amounts not being income were not liable to tax.

By his order dated January 1, 1950, the Income-tax Officer brought the income returned by the assessee including the amounts credited to them as dividends for the three years to tax. In appeals to the Appellate Assistant Commissioner, the assessee contended that the amounts credited by the company to their accounts in respect of the years 1941-42, 1942-43 and 1943-44 were not, in view of the subsequent resolution, liable to be taxed as dividend income. The Appellate Assistant Commissioner rejected this plea. The assessee then appealed to the Appellate Tribunal and contended that the dividends for the three years in question were declared out of capital and such declaration of dividend being under the Indian Companies Act invalid, in the assessment the amounts credited to their accounts as dividends should be excluded. The Income-tax Appellate Tribunal held that the dividends in respect of the years, 1941-42 and 1942-43, having been received before the year of account relevant to the year of assessment 1945

"(1) Whether the shareholders of the company at the meeting held on December 4, 1947, could reverse the resolutions passed on July 10, 1943, and July 15, 1944 ?

(2) Whether the sum of Rs..... received by the assessee..... as dividend in the account year 1944-45 relevant for the assessment year 1945-46 has been lawfully taxed in the assessment year 1945-46 ? If not, could only the dividends that could have been paid out of the profits or a part thereof be taxed in the assessment year 1945-46 ?"

(In each set of questions the appropriate amount received and the name of the assessee was incorporated in the second question).

The Tribunal observed in the order of reference that the income-tax department challenged the correctness of the claim made by the shareholders that dividend was paid without making provision for payment of tax, but they did not desire to go into the accounts to ascertain whether provision for tax was made, as "the parties at the time of the hearing of the appeals proceeded on the footing that no such provision was made. Even if provision was made, it makes no difference in so far as the department is concerned. The question is whether any dividend has been declared out of capital and that question will have to be examined at the time of passing the order under section 66(5) of the Act, in view of question No. 2."

The High Court declined to answer the first question because in their view it was unnecessary, and answered the first part of the second question in the affirmative, and held that the second part did not on that view arise for decision. Against the order of the High Court these four appeals have been preferred by the assessees.

The only question material to these appeals which was argued by the assessees before the Tribunal was whether it was competent to the company by a subsequent resolution to reverse an earlier resolution declaring the dividend. The Tribunal held that the earlier resolution could not be reversed by a subsequent resolution and, therefore, what was paid and received as dividend could not by a subsequent resolution of the company be treated as paid otherwise than as dividend. The High Court held that the assessments were properly made by the Income-tax Officer. They observed that the assessment of an assessee for each year is self-contained and subsequent events cannot justify modification of the assessment.

Section 16(2) provided (in so far as it is material) that "for the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him....." It is common ground that on July 15, 1944, dividend was declared by a resolution of the company and the amounts payable to the assessee were, in fact, credited on September 29, 1944, in the accounts maintained by the company, to each of the shareholders as dividend. The amounts were therefore declared as dividend, treated as dividend, and received by the assessees as dividend. The assessees included the dividends so credited to their accounts in the returns. It may be assumed that the company failed to provide for payment of tax before declaring the dividend and that after providing for payment of tax, the net profits of the company may not have been sufficient to justify the declaration of dividend at 60% of the va

By virtue of section 16(2) the liability to pay tax attaches as soon as dividend is paid, credited or distributed or deemed to have been paid, credited or distributed to the shareholders and the Income-tax Act contains no provision for altering the incidence of liability to pay tax on the dividend, merely because it is found that in declaring dividend and paying it the company violated a prohibition relating to payment of dividend in the Indian Companies Act.

It is not necessary to consider in this case whether the shareholders may be compelled by the company to refund the amount improperly paid as dividend out of capital. Even if the shareholders agree to refund the amounts received by them as dividend the original character of the receipt as dividend is not thereby altered. In ascertaining whether the liability to pay income-tax on dividend arose, a resolution of the company whereby payments made to the shareholders as dividend are to be treated as loans cannot retrospectively alter the character if the payment and thereby exempt it from liability which has already attached thereto.

Before this court two contentions were raised by counsel for the assessees : (1) that on the amount received by each of the assessees tax was not exigible because it was not dividend at all, and (2) that what was declared and paid as dividend ceased to be such by virtue of the subsequent resolution. The first plea was not raised before the Tribunal, and on the question as framed it did not arise for decision on a reference under section 66 of the Indian Income-tax Act. The jurisdiction of the High Court under section 66 being advisory, they were concerned to give their opinion on questions which fairly arose out of the order of the Tribunal, and were in fact raised and referred. The question whether the payment made by the company was not in the nature of dividend not having fairly arisen out of the order of the Tribunal, it cannot be raised in this court as it could not in the High

Court. In any event, we are of the opinion that payment made as dividend by a company to its shareholders does not lose that cha

The appeals therefore fail and are dismissed. In the circumstances of the case there will be no order as to costs.

Appeals dismissed.

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