

M. Ct. M. Chidambaram Chettiar (Deceased, Through His Legal Representatives and Others

Vs

Commissioner of Income-Tax

Civil Appeals Nos. 477 to 488 of 1964

(K. Subba Rao, J. C. Shah, S. M. Sikri JJ)

29.11.1965

JUDGMENT

SUBBA RAO J. –

These appeals raise the question of the liability of the appellants to pay income-tax under section 44D(1) of the Indian Income-tax Act, 1922, hereinafter called the Act, in respect of the income of the M. Ct. M. Banking Corporation Limited.

Sir M. Ct. M. Muthiah Chettiar, his wife, Deivanai Achi, his two sons, Chidambaram Chettiar and Muthiah Chettiar, and his two daughters, Umayal Achi and Vallia Murai Achi constituted an undivided Hindu family. The said family carried on money-lending business on an extensive scale in British India, Burma and elsewhere. Up to and inclusive of the year 1927-28, the undivided Hindu family was claimed that a partition had taken place in the said family and that Sir M. Ct. M. Muthiah Chettiar and his two sons constituted a firm. The said firm was duly registered and it was assessed to income-tax. After the death of the said Sir M. Ct. M. Muthiah Chettiar in 1929, his two sons and his wife continued the firm and it was assessed to income-tax as a firm. In June, 1929, the said firm started a new money-lending business at Kuala Lumpur in the Federated Malay States with a capital of Rs. 12 lakhs. The said capital was transferred from its business in Burma. On March 24, 1932, a company called the M. Ct. M. Banking Cor

"Whether the income made by the Corporation can be assessed under the provisions of section 44D of the Income-tax Act in the hands of the present assessee and, if so, to what extent."

A Division Bench of the High Court, by its judgment dated August 4, 1958, held that the said income of the Corporation was attracted by section 44D of the Act, but before giving a final answer to the question propounded, it directed the Tribunal to furnish a further statement of case on the question whether the assessee was entitled to relief under sub-section (3)(a) of section 44D of the Act. On December 23, 1958, the Tribunal submitted a finding that the assessee did not satisfy the requirements of the said sub-section. The High Court accepted the said finding and answered the question against the assessee in the affirmative. The present appeals were filed against the order of the High Court after obtaining a certificate from the said High Court.

We shall now proceed to consider the arguments advanced by Mr. Palkhivala, learned counsel for the assessee, in support of his contention that the income of the Corporation was not assessable to tax in the hands of the assessee. As all his arguments turned upon the provisions of section 44D of the Act, it would be convenient to read the same at the outset :

"Where any person has, by means of a transfer of assets, by virtue or in consequence whereof, either alone or in conjunction with associated operations, any income which if it were the income of such person would be chargeable to income-tax becomes payable to a person not resident or to a person resident but not ordinarily resident in the taxable territories, acquired and rights by virtue or in consequence of which he has within the meaning of the at income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of such first mentioned person for all the purposes of this Act."

Chapter V-B was inserted in the Income-tax Act, 1922, by the Indian Income-tax (Amendment) Act, 1939 (Act VII of 1939). Section 44D is one of the sections of that Chapter. The provisions of this Chapter were modeled on section 18 of the English Finance Act of 1936, as amended by section 28 of the English Finance Act of 1938. The object of section 44D of the Act, as disclosed by the provisions thereof, was to prevent residents of India from evading the payment of income-tax by transferring their assets to non-residents while enjoying the income by adopting devious methods. The sub-section suffers from want of clarity, but a deeper scrutiny brings out the following ingredients of it : (i) there must be a transfer of assets; (ii) by reason of that transfer, income traceable to the said assets becomes payable to a person non-resident or to a person resident but not ordinarily resident in the taxable territories; (iii) the resident by means of the transfer alone or in conjunction with associated operations, acqui

The first contention of Mr. Palkhivala is that the expression "by means of a transfer" in section 44D(1) of the Act means a transfer by an assessee and that, as in the instant case the transfer was by the firm, which was a juristic entity separate from the assessees, the income of the Corporation was not assessable to tax in their hands.

The language of the sub-section is plain. It does not say "when any person has transferred any assets", but it says, "by means of a transfer of assets". The person who transfers assets is not designated but emphasis is laid on the consequences flowing from such a transfer. Whosoever effects the transfer, if by such a transfer the assessee acquires a right to enjoy the income, he is liable to tax. The words "means" and "acquired" in the context are only words of passive nature. The hand that transfers is immaterial : what matters is the result envisaged by the said sections, namely, a non-resident is the transferee of the assets but the assessee acquires the power to enjoy the income from those assets. This construction is supported by the decisions of English courts given on a section which is in pari material with the relevant part of section 44D(1) of the Act. The material part of section 18 of the English Finance Act, 1936, as amended by section 28 of the English Finance Act, 1938, reads :

"(1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this sections, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income-tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income-tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income-tax Acts."

It would be noticed that in the said sub-section, as in section 44D(1) of the Act, both the expressions

"by means of any such transfer" and "acquired" are present. In *Congreve and Congreve v. Commissioners of Inland Revenue* Lord Simonds, repelling the argument similar to that presented to us, observed :

"... it is to my mind clear, first, that in their ordinary grammatical sense the words 'by means of' do not connote any personal activity on the part of the person who is said to enjoy or suffer something by those means, and, secondly, that in their present context it is not necessary or legitimate in order to give a limiting sense to the words to read them as if they were followed by such words to read them as if they were followed by such words as 'effected by him'."

This view was followed by Harman J. in *Bambridge v. Commissioners of Inland Revenue*. The words "by means of a transfer of assets" mean nothing more than "as a result or by virtue or in consequence of the transfer". We, therefore, reject the first contention of the learned counsel.

The second contention is that the said sub-section can be invoked only if at the time of the transfer the income from the said assets was liable to tax and that, as in the present case, when the transfer of the assets was effected in 1933, the income therefrom was not chargeable to income-tax, for it was foreign income not remitted to India - the said assets fell outside the ken of the said sub-section. This argument was sought to be sustained on the express terms of section 44D(1) of the Act. The clause "any income which if it were the income of such person would be chargeable to income-tax", it is said, is descriptive of the assets transferred and constitutes a limitation on the operation of the section. This construction is not only inconsistent with the phraseology used but will defeat the object of the section. The expressions "any income", "such income" and "that income" found in the sub-section refer to the same income. What is assessed in a particular year is that income which is deemed to be the inc

The next submission of the learned counsel for the assesseees is that the assesseees had not acquire, by means of the said transfer of assets to the Corporation or in consequence thereof, any power to enjoy the income therefrom within the meaning of section 44D(1) of the Act. While conceding that, if the assesseees had the controlling share in the Corporation, they would have the power to enjoy its income, it was said that there was no evidence on which it could be held that the assesseees, though closely related, were acting in unison and were controlling the affairs of the Corporation. Sub-section (5) of section 44D gives an enlarged meaning to the words "power to enjoy" in sub-section (1). The relevant clause of that sub-section is clause (e), which reads :

"(5) A person shall, for the purposes of this section, be deemed to have power to enjoy income of a person not resident, or resident but not ordinarily resident, in the taxable territories, if - ...

(e) such first-mentioned person is able, in any manner whatsoever and whether directly or indirectly, to control the application of the income."

If the assesseees were able directly or indirectly to control the income of the Corporation, they would be deemed to have the power to enjoy its income. In the present case, the circumstances are overwhelming to establish that the assesseees had a controlling voice in the affairs of the Corporation. They are closely related : two of them are brothers and the third is their mother. They were the partners of the firm which transferred the assets. The particulars of the shareholding as on December 31, 1938, show that Chaidambaram Chettiar and the other members of the family owned

1944 shares out of 2271 shares of the Corporation and the balance was held by their close relatives. Apart from the three partners, the other shareholders were the son, sisters and the wife of Chidambaram Chettiar. It is obvious that the Corporation was a close one and the partners of the firm had the controlling voice in the management of the affairs of the Corporation. The argument that there is no evidence that there was unity of int circumstances, the High Court rightly held that the assessee had the power to enjoy the income within the meaning of section 44D(1) of the Act.

Lastly, it was contended that the income in question was saved from the operation of sub-section (1) of section 44D of the Act by sub-section (3) thereof. To state it differently, the transfer of the assets to the Corporation was not for a purpose to avoid the tax liability but was only a bona fide commercial transaction. The burden was upon the assessee to show to the satisfaction of the Income-tax Officer that the transfer was saved under the said sub-section. The Tribunal found as a fact on the material placed before it that the transfer was to avoid the liability to taxation; and that being a finding of fact, the High Court rightly accepted it. The correctness of the said finding of fact cannot be permitted to be canvassed in these appeals.

In the result, we hold that the High Court has answered the question correctly. The appeals fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

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