

Commissioner of Income-Tax, West Bengal.

Vs

Tollygunge Club Ltd.

Civil Appeal No. 578 of 1972

(P. N. Bhagwati, Syed M. Fazal Ali JJ)

15.03.1977

JUDGMENT

BHAGWATI J. -

This is an appeal on a certificate of fitness granted by the High Court of Calcutta under section 66A, sub-section (2), of the Indian Income-tax Act, 1922. The facts giving rise to the appeal are few and may be briefly stated as follow :

The assessee is Tollygunge Club Ltd., a company limited by guarantee, and it owns a social and sports club one of whose activities consists of conducting Gymkhana races, that is, horse races with amateur riders. It charges for admission into the enclosure of the club at the time of the races, admission fee to the guests introduced by the members of the club as well as to the members of the public. There is no dispute between the parties that the admission fee received by the assessee constitutes trading receipt in the hands of the assessee exigible to tax. But it appears that on February 28, 1945, a resolution was passed at the meeting of the general body of the club for levying a surcharge of eight annas over and above the admission fee, the proceeds of which were to go to the Red Cross Fund. This resolution was subsequently varied by another resolution dated January 30, 1950, and the new resolution provided that the surcharge of eight annas on entrance ticket should be earmarked "for local charities and not solely for the Indian Red Cross". The assessee accordingly issued to every entrant to the enclosure on the race course two tickets, one an admission ticket for admission to the enclosure of the Club and the other, a separate ticket in respect of the saurcharge of eight annas for local charities. The slip in respect of the surcharge of eight annas was in the following term :

"Surcharge on admission to The Tollygunge Gymkhana Races for Local Charities
Rs. 4/8 Enclosure Surcharge As. - /8/-"##

The receipts from the surcharge were not credited to the profit and loss account but they were carried directly to a separate account styled "charity account". These receipts on account of surcharge were not treated as trading receipts of the assessee and were not brought to tax as income of the assessee in the assessment years prior to the assessment year 1960-61. But while making assessment for the assessment year 1960-61, the Income-tax Officer took the view that receipts on account of surcharge were revenue receipts in the hands of the assessee and they could not be excluded from the total income of the assessee merely on the ground that they were applied for charitable purposes. It may be pointed out at this stage that it was not disputed before the revenue

authorities that the amounts realised by way of surcharge had been disbursed to local charities and in fact a list was filed showing the local charities in whose favour such disbursement had been made. The Income-tax treated the disbursement of the amounts received on account of surcharge as application of the income belonging to the assessee and he accordingly included these receipts in the total income of the assessee, but allowed rebate under section 158 on the amounts actually disbursed in favour of local charities during the accounting year. This view taken by the Income-tax Officer was affirmed on appeal by the Appellate Assistant Commissioner who held that a person who wished to gain admission to the enclosure of the Club on any racing day had to pay the surcharge whether he was willing to contribute to the charity or not and as such the amount of the surcharge was a part of the price charged by the assessee for admission to the enclosure and it was, therefore, a revenue receipt in the hands of the assessee. This was followed by a further appeal to the Tribunal and this time the assessee was successful. The Tribunal held that the surcharge was levied on admission tickets for the purpose of charity and hence the receipts in respect of the surcharge were not income of the assessee at the point of time when they reached its hands and being "earmarked for charity", they "never belonged to the assessee" and were hence not includible in the taxable income of the assessee. The Tribunal, accordingly, directed that the receipt of the surcharge credited to the charity account should be deleted from the total income of the assessee.

The Commissioner then moved the Tribunal for stating a case to the High Court on the question of law which arose out of the order of the Tribunal. The Tribunal was of the opinion that a question of law did arise out of its order and hence it formulated a question in the following term :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee's receipts from the surcharge levied on admission tickets for purposes of charity could not be included in the assessee's taxable income for the assessment year 1960-61 ?", and referred it to the High Court for its opinion. The High Court agreed with the view taken by the Tribunal and held that since the surcharge on admission tickets was charged by the assessee and paid by the race-goers for the specific purpose of being applied to local charities pursuant to the resolution passed by the general meeting of the assessee, there was, at the time of receipt of the amounts in respect of the surcharge, a legally enforceable obligation on the assessee to apply them to local charities and these amounts, accordingly, did not reach the assessee as its income but were diverted to local charities before they reached the assessee. The correctness of this decision is questioned by the Commissioner in the present appeal under section 66A, sub-section(2), of the Act.

It is familiar learning and yet Lord Macnaghten had to draw our attention to it in *London County Council v. Attorney-General* [1901] AC 26(HL) that income tax is a tax on income. It is what reaches the assessee as income that is intended to be charged to tax under the Act. Every receipt by the assessee is not necessarily income in his hands. It is only when it bears the character of income at the time when it reaches the hands of the assessee that it becomes exigible to tax. The question which, therefore, arises for determination here is whether the amounts received on account of surcharge reached the hands of the assessee as its income. The argument of the revenue was that these amounts were received by the assessee as part of the price for admission into the enclosure of the Club and merely because the assessee expressed its desire or intention to apply them to local charities, they did not cease to be the income of the assessee. This argument is based on two assumption : first, that the amounts on account of surcharge were received as part of the price for admission to the Club enclosure, and secondly, that it was merely a voluntary desire on the part of the assessee to use these amounts for private charities and there was no legally enforceable

obligation on the assessee to do so. These two assumptions are in a way interrelated, each depending on and to some extent supporting the other, but, in our view, neither of them is well founded. It is not correct to say that merely because surcharge is levied from every race-goer who wants admission to the enclosure of the Club, it becomes a part of the price for admission. The test is not whether every race-goer seeking admittance to the enclosure of the Club is required to pay the surcharge but what is it for which the surcharge is taken. Is it taken as part of the price for admission, or for some other purpose, such as, benefit of local charities? Suppose every race-goer seeking admittance to the Club enclosure were told that in addition to the price of the admission ticket he would have to contribute a certain amount to a recognized charity, could it be contended that the amount which he is required to contribute to charity - and we are deliberately using the word "required" because otherwise he would not be able to secure admittance to the Club enclosure - is part of the price for admission? The surcharge is undoubtedly a payment which a race-goer is required to make in addition to the price of admission ticket if he wants to witness the race from the Club enclosure, but on that account it does not become part of the price for admission. The admission to the enclosure is the occasion and not the consideration for the surcharge taken from the race-goer. It is true that but for this insistence on payment of the surcharge at the time of admission to the enclosure, the race-goer might not have paid any amount for local charities. But that does not render the payment of the surcharge involuntary, because it is out of his own volition that he seeks admittance to the enclosure and if he wants such admittance, he has to pay not only the price of the admission ticket but it is a payment made for the specific purpose of being applied to local charities. Secondly, it is not a correct analysis of the nature of the legal relationship to say that there was nothing more than mere desire or intention on the part of the assessee to apply the amounts received on account of surcharge to local charities, without any legally enforceable obligation binding it to do so. We may straightaway concede that if nothing more had been done by the assessee than merely passing a resolution deciding to utilise a part of the admission fee received by it to charitable purposes, no legal obligation would have been created obliging the assessee to utilise this amount for the purpose of charity. Such a resolution would have left it open to the assessee to alter it or to rescind it and it would have been nothing but an expression of the desire or intention of the assessee to apply the amount for charitable purposes. But here a resolution was passed at the general meeting of the assessee for levying the surcharge for local charities and, pursuant to this resolution, the surcharge was paid by the race-goers and received by the assessee for the specific purpose of being applied to local charities. The surcharge when paid was clearly impressed with an obligation in the nature of trust for being applied for the benefit of local charities. It is settled law, as observed by this court in *Commissioner of Income-tax v. Thakar Das Bhargava* [1960] 40 ITR 301 (SC) that a trust may be created by any language sufficient to show the intention and no technical words are necessary and it may even be created by the use of words which are primarily words of condition. The only requisites which must be satisfied are that there should be "purposes independent of the donee to which the subject-matter of the gift is required to be applied and an obligation on the donee to satisfy those purposes". When the race-goers paid the surcharge to the assessee, they did so for a specific purpose and thereby imposed an obligation on the assessee to utilise it for local charities.

The question then arises whether this obligation to utilise the surcharge for local charities was an obligation to apply the surcharge to local charities after it reached the assessee as its income or it was diverted for being applied to local charities before it was received by the assessee. Did it involve an application by the assessee of a part of its income to local charities, or was it rather an allocation of a receipt for local charities before it became income in the hands of the assessee? The true test for determining this question is, to use the words of Hidayatullah J., in *Commissioner of Income-tax v. Sitaldas Tirathdas* [1961] 41 ITR 367, 374(SC) whether the amount sought to be

deducted, in truth, reaches the assessee as his income. The learned judge proceeded to explain this test in the following word :

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible : but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not a case in which by an overriding charge the assessee became only a collector of another's income."

It is clear on the application of this test that, in the present case, the surcharge being impressed with an obligation in the nature of trust for being applied to local charities was by this obligation diverted before it reached the hands of the assessee and, at no stage, it became a part of the income of the assessee. When the assessee received the amount on account of surcharge, they were impressed with a legal obligation to be applied for the benefit of local charities and they never reached the assessee as part of its income. The case clearly fell within the rule in *Bejoy Singh Dudhuria v. Commissioner of Income-tax* [1933] 1 ITR 135 (PC) and the surcharge received by the assessee could not be regarded as income assessable to tax.

Before we end the discussion of this question, we must refer to the decision of this court in *Thakar Das Bhargava's case* [1960] 40 ITR 301, 305, 306(SC) on which strong reliance was placed on behalf of the revenue. The assessee in this case was an advocate who agreed to defend certain accused persons in a criminal trial on condition that he would be provided with a sum of Rs. 40,000 for creating a public charitable trust. When the trial was over, the assessee was paid a sum of Rs. 32,500 and he created a trust of that amount by executing a trust deed. The question arose whether this sum of Rs. 32,500 was liable to be taxed as part of the professional income of the assessee. This question was answered by the High Court in favour of the assessee but the view taken by the High Court was reversed by this court on appeal. This court pointed out that the findings of the Tribunal clearly showed "that the persons who paid the sum of Rs. 32,500 did not use any words of an imperative nature creating a trust or an obligation. They were anxious to have the services of the assessee in Farrukhnagar case : proposing that he would himself create a charitable trust out of the money paid to him for defending the accused persons in the Farrukhnagar case. "Considerable reliance was placed by this court on the recital in the trust deed where the assessee had said "that he was reserving his professional income as an advocate accruing after June, 1944, for payment of taxes and charity and accordingly when he received his professional income in the Farrukhnagar case he created a charitable trust out of the money so received. "It was also emphasised by this court

that it was not stated anywhere "that the persons who paid the money created a trust or imposed a legally enforceable obligation on the assessee" and even in the affidavit made by the assessee there was "no suggestion that the persons who paid the money created the trust or imposed any obligation on the assessee" and it was "the assessee's own voluntary desire that he would create a trust out of the fees paid to him for defending the accused persons in the Farrukhnagar case" and "such a voluntary desire on the part of the assessee created no trust, nor did it give rise to any legally enforceable obligation". This court accordingly held that "the money when it was received by the assessee was his professional income, though the assessee had expressed a desire earlier to create a charitable trust out of the money when received by him". It will be seen from what is stated above that when the accused persons paid a sum of 'Rs. 32,500 to the assessee, they paid it by way of fees and they did not impose any obligation on the assessee that this amount should be utilised only for the purpose of charity. It was merely a voluntary desire on the part of the assessee that he would create a trust out of the amount of fees paid to him and until the trust was created by the assessee, there was no legal obligation to utilise that amount for charity. That is why this court held that the amount when received by the assessee was income in his hands and the creation of the trust was merely application of the amount after it reached his hands as his income. This court by approving the following observations of the Appellate Assistant Commissioner that "if the accused persons had themselves resolved to create a charitable trust in memory of the professional aid rendered to them by the appellant and had made the assessee trustee for the money so paid to him for that purpose, it could, perhaps, be argued that the money paid was earmarked for charity ab initio but of this there was no indication anywhere" clearly suggested that if the money paid by the accused persons had been "earmarked for charity ab initio" it would have been possible to say that they had made the assessee trustee for the money so paid to him and in that event the conclusion would have been that the money did not reach the hands of the assessee as his income. Here, the surcharge paid by the race-goers was earmarked for local charities ab initio and the surcharge was received by the assessee with a legal obligation to apply it to local charities. The decision of this court in Thakar Das Bhargava's case [1960] 40 ITR 301,(SC), therefore, far from militating against the contention of the assessee, supports it.

We must, accordingly, hold that the High Court was right in answering the questions referred to it in favour of the assessee and, in this view, the appeal must stand dismissed with costs.

Appeal dismissed.

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