

# CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Shaw Wallace & Co. Ltd

(Sabyasachi Mukharji and S M Guha, JJ.)

24.07.1980

## JUDGMENT

### **Sabyasachi Mukharji, J.**

1. The assessee is a company. The assessment year involved is 1963-64, and the relevant accounting year ended on December 31, 1962. The assessee-company received a net dividend of Rs. 2,29,948 from certain companies in the United Kingdom and Ceylon. The said amounts were paid to the assessee-company after deduction of certain taxes which the companies had to pay. The net dividend was received by the assessee. The ITO was of the view that the gross dividend of Rs. 3,77,501 was liable to be taxed as it was in the nature of income within the provisions of Section 5(1)(c) of the I.T. Act, 1961.

2. The assessee, being aggrieved, preferred an appeal before the AAC. It was urged before him that only the net foreign dividend received by the assessee should be taxed and not the gross dividend. The AAC was of the view that the tax deducted in the United Kingdom and Ceylon had to be ignored and only the net foreign dividend had to be taxed. In that view of the matter, the AAC allowed the assessee's contention.

3. Being aggrieved, the revenue went up in appeal before the Tribunal. It was urged before the Tribunal that it was the gross dividend that should be taxed and not the net dividend. According to the revenue, under s, 5(1)(c) all incomes which accrue or arise to the assessee outside India should be included in the total income. It was submitted by the revenue that the AAC was not right in holding that the taxes deducted in foreign countries had to be ignored and the net dividend alone should be taxed. On behalf of the assessee, the order of the AAC was sought to be justified. After considering the rival contentions, the Tribunal was of the opinion that in the instant case the amounts deducted towards taxes in the foreign countries never accrued to the assessee nor it had any right to get back what was paid in U.K. and Ceylon as taxes. The assessee had received only the net dividend which had accrued to it. In that view of the matter, relying on certain authorities, which we shall presently note, the Tribunal upheld the order of the AAC. In these circumstances, at the instance of the revenue, the following question was referred to this

court under Section 256(1) of the I.T. Act, 1961 "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that only the net foreign dividend received by the assessee was includible in its total income under the provisions of the Income-tax Act, 1961 ?"

4. Before we consider this question, it would be necessary to bear in mind certain relevant provisions of the statute. Section 5 of the Act is material for our present purpose. It will be necessary to refer to that Section. Section 5(1) provides that subject to the provisions of the said Act, the total income of any previous year of a person who is a resident includes certain income from whatever sources mentioned in Clauses (a), (b) and (c). Now, we may mention that the assessee-company, in this case, is a resident in India. Clause (a) of Section 5(1) of the Act includes any income which is received or is deemed to be received in India in such year by or on behalf of such person. Clause (b) makes any income which accrues or arises or is "deemed to accrue or arise to him in India" during such year, the income of the assessee. Clause (c), however, only makes income which accrues or arises to him outside India during such year as his income. The provision provides that in the case of a person not ordinarily resident in India within the meaning of Sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India. We are not concerned with the proviso nor are we concerned with Sub-section (2) of Section 5 of the Act, which deals with the total income of any previous year of a person who is a non-resident. For our present purposes, it is important to remember that under Clause (c) of Section 5(1) of the Act it is only that income which accrues or arises to him outside India that is includible and not any income which is deemed to accrue or arise outside India unlike Clause (a) or Clause (b) of Sub-section (1) of Section 5 of the Act. While on this aspect of the matter, we may refer to Section 8 of the Act, which provides for dividend income and provides as follows ;

"8. Dividend income.--For the purposes of inclusion in the total income of an assessee,--

(a) any dividend declared by a company or distributed or paid by it within the meaning of Sub-clause (a) or Sub-clause (b) or Sub-clause (c) or Sub-clause (d) or Sub-clause (e) of Clause (22) of Section 2 shall be deemed to be the income of the previous year in which it is so declared, distributed or paid, as the case may be ;

(b) any interim dividend shall be deemed to be the income of the previous year in which the amount of such dividend is unconditionally made available by the company to the member who is entitled to it."

5. Section 195 of the Act deals with deduction of tax at source from certain income and stipulates that any person responsible for paying to a non-resident, not being a company, or to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, certain deductions have to be made. It is not necessary to set out in detail the provision of the said section. If those deductions are made, the certificate of those deductions are given to the person on whose behalf or from whose payment deductions are made and that person or persons is or are entitled to get benefit in their

taxation in India in respect of those deductions.

6. Section 196 makes interest or dividend or other sums payable to the Government, Reserve Bank or certain corporations not to be deducted. Section 197 deals with certificate for deduction at certain rate. Section 198 provides that tax deducted is income received and stipulates that all sums deducted in accordance with the provisions of Sections 192 to 194, Section 194A, Section 194B, Section 194C, Section 194D and Section 195 shall, for the purpose of computing the income of an assessee, be deemed to be the income received. It is important to emphasize that amounts deducted under Section 198 are deemed to be the income. In this case, the assessee-company received certain income from the companies in U. K. as well as Ceylon. The amount that the assessee has received is Rs. 2,29,948. It is indisputable that the position of law, both in England and in Ceylon, at the relevant time was similar. If any authority is needed for this proposition, we shall presently refer to the decision of the Madras High Court on this aspect. This amount, that is to say, Rs. 2,29,948, was received by the assessee-company, as dividends from the foreign companies, viz., the companies in U.K. and in Ceylon. Before getting or receiving this amount, the companies had made certain profits and out of these profits, the companies had to suffer certain taxes before they distributed those dividends to the assessee concerned. The question is about the amount of taxation which those companies suffered before they distributed those dividends to the assessee concerned--could those amounts be treated to be amounts received by or accrued to the assessee in India ? In this context, perhaps the use of the expression "net and gross dividend" is a little misleading because the position of dividend received by a shareholder of a company is a little different from the position of a shareholder of an Indian company and the Indian law. Firstly, the assessee is not subject to income-tax on dividend income under the law of U.K. and the reason is historical and peculiar to the English law. We are dealing with the position that prevailed before the English Finance Act, 1965. We are not concerned with the position subsequent to that Act, because the relevant assessment year concerned is previous to that Act. This aspect has been considered by several English authorities and our attention was drawn to several English decisions. But the position, in our opinion, is clear from the enunciation of the law on this aspect by the Supreme Court in the case of CIT v. Clive Insurance Co. Lid. , a decision in which the Supreme Court affirmed a decision of the Calcutta High Court in the case , which incidentally we shall note. There, the assessee-company was a resident in India. It held shares in certain U.K. based companies. In exercise of the option under Section 184 of the U.K. Income Tax Act, 1952, to reimburse themselves the tax paid by them, the U.K. companies deducted income-tax at the standard rate from the gross dividend paid to their shareholders. During the calendar year 1959, which was the previous year relevant to the assessment year 1960-61, with which the Supreme Court was concerned, the assessee received a net dividend income of Rs. 15,266 from the U.K. companies after deduction of the sum of Rs. 9,881 at the standard rate under Section 184 of the U.K. I.T. Act, 1952. The assessee claimed double taxation relief under Section 49D of the Indian I.T. Act, 1922, on the ground that the assessee had paid the amount deducted from the gross dividend in the U.K. income-tax by deduction. There was no reciprocal arrangement for relief or avoidance of double taxation

between India and the U.K. The Appellate Tribunal accepted the claim of the assessee and the High Court, on a reference, confirmed the decision of the Tribunal. It was held by the Supreme Court, affirming the decision of the Calcutta High Court, that according to the law of the U.K. dividends which had borne tax in the hands of the paying company were treated as "franked" income in the hands of the shareholder and that meant that the income in the form of dividends had been subjected to tax. It was immaterial whether they were taxed in the hands of the shareholder or not but they were deemed to be taxed in the hands of the shareholder in the U.K. The Supreme Court further held that the expression "income assessed in the foreign country" in para, (iii) of the Explanation to Section 49D, in the context in which it was used, meant, subjected to tax in the foreign country ; and in that case there was no difficulty in ascertaining the rate of tax of the foreign country for the purpose of para, (iii) of the Explanation because the respondent being a company was neither liable to any surtax nor entitled to any relief in the U.K. and, therefore, the rate of tax could be worked out with certainty, consistent with the provisions of para, (iii) of the Explanation. The assessee-company had paid the tax at the standard rate and that was the rate of tax of the foreign country for the purpose of para, (iii) of the Explanation. There, it was further held that the assessee-company could be said to have paid income-tax in the U.K., by deduction or otherwise, in respect of the net dividend of Rs. 15,266 so as to be eligible for the relief contemplated by Section 49D of the Act.

7. In order to appreciate this decision, it will be necessary, therefore, to bear in mind the provisions of Section 49D of the Indian I.T. Act, 1922, Sub-section (1) of which provided that if any person who was resident in the taxable territories in any year provided that, in respect of his income which accrued or arose during that year without the taxable territories and which was not deemed to accrue or arise in the taxable territories, he had paid in any country, with which there was no reciprocal arrangement for relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he should be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever was the lower.

8. The Explanation, with which the Supreme Court was concerned, by Sub-clause (iii) thereof provided as follows :

"(iii) the expression 'rate of tax of the said country' means income-tax and super-tax actually paid in the said country in accordance with the corresponding laws of the said country after deduction of all reliefs due, but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income assessed in the said country."

9. Bearing in mind the aforesaid provision, the Supreme Court analysed the position of law in the United Kingdom. Discussing several authorities, to some of which our attention was drawn in this reference which we shall presently note, the Supreme Court, at p. 643 of the report, observed

that it was well established according to the statute law of the United Kingdom and the interpretation put on it by the highest court in that country that the dividends which had borne tax in the hands of the paying company were treated as "franked income" in the hands of the assessee. In other words, it would mean that the income in the form of dividends had been subjected to tax. The Supreme Court noted that it was immaterial whether they were taxed in the hands of the assessee or not but they were deemed to have been taxed in the hands of the assessee in the U. K. The Supreme Court felt that it would be advantageous to refer to Simon's Income Tax, 2nd Edn., Vol. I, p. 307, where it was stated as follows ;

"It is a general principle of the Income Tax Acts in U.K. that as far as possible tax is charged at the point where the income first emerges from the source and this is so even if the person primarily in receipt of the income does not ultimately enjoy it but pays it over or accounts for it to another who is the person beneficially entitled to it. In such cases, the person assessed has the right to recoup himself, when making a payment of income to the person entitled thereto, by deducting the tax appropriate to that income, or by crediting himself with the amount when accounting. The author includes dividend income as one such income."

10. The Supreme Court thereupon went on to say that it clearly emerged that dividends which were styled as franked income had borne tax at the source and that was why they were not assessable to income-tax in the hands of the shareholder. The Supreme Court observed that if thus the dividends styled as franked income had been charged to income-tax at the source, it would mean that it is the income in respect of which income-tax had been paid by deduction or otherwise in accordance with the law in force in the country in which the income accrued. If it was now charged to tax under the Indian I.T. Act, it obviously became a doubly taxed income. The Supreme Court noted the argument that the assessee had not paid the tax. The Supreme Court found that it was immaterial to decide whether the assessee itself or himself had paid the tax. If the income itself had borne the tax then the assessee was entitled to the benefit under Section 49D of the Indian I.T. Act, 1922, if the other conditions were fulfilled. Learned advocate for the revenue particularly drew our attention and sought sustenance from the observations of the Supreme Court at p. 646 of the report that it could be said with reasonable certainty that in respect of dividend income of the assessee income-tax had been paid by deduction or otherwise under the law in force in the country in which income had arisen. The Supreme Court noted that the principle of agency in payment by the company was worked out on the basis of the company being treated as a large partnership so that its payment of the tax was on behalf of the quasi-partners. Relying on the aforesaid observations of the Supreme Court, learned advocate for the revenue sought to argue that if it was on the basis of the principle- of agency then the assessee had the benefit of this payment and, therefore, this income had accrued or arisen to the assessee. The Supreme Court had specifically pointed out that no specific provisions had been mentioned which would show that, dividend income in the hands of the assessee-company was exempt from payment of income-tax. The company was liable to pay income-tax on its own profits and gains

and Section 184 enabled the company to deduct from the dividend paid out of profits, tax at the standard rate for the year in which the amount payable became due. Dividends which represented the distribution of a taxed fund was, therefore, styled as franked income so far as it concerned any further taxation at the standard rate, that is to say, the rate at which the deduction had been made. The assumption underlying this position was that the dividend represented the residue of the total income which had already been taxed in the hands of the company, the fiction being that if tax was not paid by the company there would have been a higher dividend and, therefore, the dividend income was already taxed. But this fiction had a number of complications because the company was an independent juristic person and the scheme of the I.T. Act in the United Kingdom did not imply that the company paid tax on behalf of its member. To reconcile this position, the Supreme Court observed and noted the observations of Lord Phillimore in *Bradbury v. English Sewing Cotton Co. Ltd.* [1923] 8 TC 481 at 518 and 519 (HL) which are as follows :

"Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income-tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principles as modifying the statute ; it is founded upon the provisions of the statute itself; and the statute carries the analogy of a partnership further, for, it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income-tax or pays at a lower rate, can get the income-tax which has been deducted on the dividend warrant returned to him."

11. Reliance was also placed on the observations of Lord Atkin in the decision in the case of *IRC v. Cull*<sup>1</sup> There, Lord Atkin, inter alia, made the following observations :

"My Lords, it is now clearly established that in the case of a limited company the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income-tax on dividends, and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company, and that it is thought inequitable to charge it again. At one time it was thought that the company, in paying tax, paid on behalf of the shareholder : but this theory is now exploded by decisions in this House, and the position of the shareholders as to tax is as I have stated it,"

12. Reliance was placed by the Supreme Court in the case of *Canadian Eagle Oil Co. Ltd. v. King*<sup>2</sup> The Supreme Court relied on the observations of Lord Macmillan. These cases were also

relied on by the revenue in the instant case before us. But, reviewing the position the Supreme Court stated that the position in law was that when the income in the form of dividends was subjected to tax it was immaterial whether they were taxed in the hands of the shareholder or not. The Supreme Court, however, noted that the amount could be treated to be only a deemed income of the shareholder. As we have noted, under Section 5(1), Sub-clause (c) of the I.T. Act, 1961, it is only the income which accrues or arises outside India to a person which is taxable and not which is deemed to accrue or arise outside India unlike under Clause (a) or Clause (b) of Sub-section (1) of Section 5 of the Act. Therefore, if the income is deemed to accrue or arise outside India, then, such an income under Section 5(1) of the Act cannot, in our opinion, be included. This follows on the principle of construction of the section and in the light of the position of dividend income in the United Kingdom, as explained by the Supreme Court. This position has been clearly brought out and we respectfully adopt the reasoning in the decision of the Kerala High Court in the case of *CIT v. Y.N.S. Hobbs*<sup>3</sup> where dealing with this aspect, the Chief Justice, Gopalan Nambiyar observed at p. 24 of the report as follows:

"With reference to these provisions, counsel for the assessee squarely raised two important contentions : First, that in respect of the dividend from Indian companies dealt with in Section 194, Section 198 contains a specific provision that they shall be deemed to be income receipts. It was emphasised that there was no such similar deeming provision in respect of dividend received from a foreign company. Secondly, that the provisions of Section 5(1)(c) of the I.T. Act, 1961, contemplate and permit taxation only of actual receipts and not deemed receipts, viz., it contemplates assessment of income which accrues or arises to the assessee outside India during the year in question and not income deemed to accrue or to arise outside India, as is provided for by Clauses (a) and (b) of the section."

13. The learned Chief Justice found himself impressed by the aforesaid contentions. He, however, went on to observe that it was difficult, in the absence of any deeming provision in Section 198, to regard the deduction of tax from the dividend income of a foreign company as income actually arising or accruing to the assessee-company within the meaning of Section 5(1)(c) of the Act. We are in respectful agreement with the aforesaid construction and the view of the Chief Justice. The learned Chief Justice noted that the Calcutta, Bombay and Gujarat High Courts, in three separate cases, which we shall presently note, had taken a view, in construing Section 49D where the question was whether the income which had suffered taxation in the United Kingdom was entitled to be treated as a doubly taxed income, that the payments that were made on behalf of the shareholders were deemed to be made on behalf of the shareholder. The learned Chief Justice felt that this was not quite correct. But we are not, however, concerned with that aspect of the controversy in the instant case. Even if it is considered to be the payment or deemed to be the payment on behalf of the shareholders the income which had arisen or accrued would be deemed to be the income of the assessee as the income which had arisen or accrued outside India could not become, in view of Section 5(1)(c) of the Act read with Section 198, the

income of the assessee which was includible under Section 5(1) of the Act. The other decisions really do not deal with this question as this question did not fall for their Lordships' consideration. That the position regarding the dividend income in the United Kingdom as also in Ceylon was the same was noted by the Division Bench of the Madras High Court in the case of *V. Ramaswami Naidu v. CIT*<sup>4</sup> where at p. 38 of the report, it was observed by the Division Bench that the provisions of the Ceylon Income Tax Ordinance merely incorporated the appropriate provisions of the English law on the subject. The position regarding taxation at source in the case of dividend income in England was clearly clarified by the decision of the Australian High Court in the case of *Jolly v. Federal Commissioner of Taxation*<sup>5</sup>, which is instructive and there it was observed as follows (at pp. 140-141, 143, 148-150):

"A governing principle of British income tax law is taxation at the source, and, in accordance with this principle, the profits and gains of a body of persons, an expression which includes a joint stock company, are brought into charge before they are divided, and the body of persons paying a dividend is entitled to deduct the tax appropriate thereto (rule 20 of the All Schedules Rules, Income Tax Act, 1918). When a company declares a tax-free dividend, it is regarded, at any rate for many purposes, as dividing profits sufficient in amount to pay a gross dividend which, after deduction of tax, will leave the net amount at which the dividend is expressly declared. The system, however, of taxation at the source involves a treatment of corporate profits which is not compatible with any general inclusion of dividends in the shareholder's own assessment to income-tax. The profits and gains are assessed in the hands of the company prior to distribution. They are taxed collectively. Upon distribution, the company is authorised, but not required, to deduct from the dividend the tax which would be payable upon the dividend. The company does not account to the Crown for the amount deducted, for, the profits distributed have already borne tax in its hands. But, for the purposes of reliefs allowed to taxpayers, the shareholder is entitled to treat himself, as having paid by deduction the amount which the company has withheld in paying his dividend ; and in assessing his liability to, super-tax or surtax which is levied on his total income from all sources, the amount so withheld as well as the dividend must be included...The question whether the shareholder obtains immunity from taxation by direct assessment if, and only if, he suffers a deduction in respect of tax from the dividend, appears to me to be of some importance in relation to the question whether the actual or imputed deduction made should be considered dividend or profit credited or paid to the shareholder within the meaning of Section 14(b) of the Commonwealth Income Tax Assessment Act, 1915-1921. Unless this be so, I think the remaining incidents of the relation of the shareholder to the gross amount, actual or notional, of the dividends are against the view that the excess over the amount he receives is credited or paid to him. That excess the company is by law entitled to withhold whether it is included within, or excluded from, the amount of the dividend expressly declared. When the company retains such a sum, it forms part of its general funds and is applicable accordingly. The fact that it specifies in its declaration

of dividend a larger sum or rate than it in fact pays, does not seem of importance. In point of law it incurs no liability to the shareholder by doing so for any amount except the net sum after the deduction. Whether it be correct or not, that before Section 7 of the Finance Act, 1931, the company was authorised to make a deduction from dividends out of profits on which the company paid no tax (see per Romer L.J. in Newmann's case [1933] 1 K.B. 728, 747, 749), it is clear that deduction of tax did not operate by way of set-off or otherwise to discharge any liability for any sum paid by the company for tax. There is no appropriation to or for the use of the shareholder ; nothing done by the company on his account or for his use. If it be true the shareholder's immunity from direct assessment depends upon his suffering a deduction from dividend, all that can be said is that, by making the deduction, the company ipso facto discharges or absolves the shareholder from a direct liability to the Crown for tax in respect of the dividend. I do not think that in the peculiar situation in which the shareholder stands this would be enough to constitute a credit to him of the profits within Section 14(b) as construed in Webb's case [1922] 30 CLR 450 and Jame's case [1924] 34 CLR 404. The destruction or prevention of the shareholder's liability to tax would be a consequence ensuing from the deduction as a result of an express provision of positive law, a statutory phenomenon, and not a discharge by payment or appropriation of money for the purpose. The money would not be credited to the taxpayer and applied by the company in discharge of his liabilities."

14. Chief Justice, Chakravarti in the case of *Angus Co. Ltd. v. CIT*<sup>6</sup> had occasion to deal with this aspect where the learned Chief Justice, Chakravarti had observed as follows (p. 445) :

"To my mind, the one fact which seems to remove all doubts as to the true character of the payment of the tax of Rs. 70,313 is that the company did not have to pay it and did not in fact pay it, because it declared the dividend, but would have to pay it as a part of the charge on its own profits, in any event, whether it declared any dividend or not. The payment was therefore not on account of the declaration of the dividend and it was not by reason of the declaration that the funds of the company were depleted to the extent of Rs. 70,313. The depletion of the company's funds which can really be said to have been caused by the declaration of the dividend was limited to Rs. 1,54,687 which was the only amount that the company would not have to part with, if it did not declare a dividend, and, therefore, it seems clear to me that the financial effect of the declaration was co-extensive with that sum and did not extend to the further sum of Rs. 70,313. As I have already said, that amount of Rs. 70,313, the company would have to pay and part with it in any event irrespective of any declaration of dividend, because it was a part of the tax payable by it on its own profits. This in my view is the right approach to the question. The provision in the Finance Act is looking at a dividend declaration from the point of view of the company and not from the point of view of the shareholder and it is directed at ascertaining what was left in the hands of the company after the declaration of the dividend and to what extent the funds of the company were affected by reason of the

declaration. The receipts of the company, after the deduction of expenditure, are subject to two payments which cause a depletion where a dividend is declared. One is the payment of tax by the company, the other is a distribution by way of dividend. The provision in the Finance Act is not asking to what extent the funds of the company have been depleted by payment of tax, but, is asking to what extent they have been depleted by the declaration of a dividend. It seems to me that the funds of the company are affected, in a case of a declaration of dividend, only to the extent of the sum which the company has to pay because of the declaration and which it would not have to pay otherwise and that sum obviously is the sum which it actually distributes as dividends."

15. It is contended on behalf of the revenue that this position was not quite correct in view of the subsequent pronouncement by the Supreme Court on this aspect. But we do not think that it will be proper to say that the Supreme Court in the decision, which we have noted hereinbefore, observed anything which was contrary to the observations of the learned Chief Justice, Chakravarti. Reliance was also placed on several other decisions on behalf of the revenue. It is not necessary, in view of the construction of the section, to deal with those decisions in any greater detail but we would, out of deference to the arguments advanced before us, note the said decisions. Reliance was placed on the case of Sir *Marcus Samuel v. IRC*<sup>7</sup> There the assessee was a holder of certain ordinary shares in a company and under the authority of a resolution of the directors duly confirmed by the company at its annual general meeting, the dividends upon these shares had been paid free of income-tax. In arriving at the super-tax assessments, the Special Commissioner had computed certain amount. Affirming the decision of the Special Commissioner, it was held that the amount to be included in the assessee's return of total income for the purpose of super-tax was not the amount of dividend actually received by him, but that amount with the addition thereto of the amount of income-tax in respect of it, as set out in the judgment. One has to bear in mind that the English provisions were different. Furthermore, it was a case of super-tax. In England, even the assessee is not assessable to income-tax in respect of franked income but is assessable to super-tax in respect of the same.

16. Next, reliance was placed on the decision in the case of *North British Railway Company v. Scott*<sup>8</sup> and that was a case dealing with salary. The position of the dividend paid by a corporate body is a little different, as we have noted. But the advocate for the revenue drew our attention to certain observations at p. 340 of the report which read as follows ! "The sums paid by the company to satisfy the debts which those officers respectively owed to the revenue remain part of the profits and gains those officers derive from the offices they respectively hold, and are liable to be assessed to income tax just as the amount of the income tax deducted by a" railway company from the dividends it pays its shareholders is part of the income of those shareholders."

17. As we have mentioned before, that was a case dealing with deduction made on account of salary. Furthermore, fundamentally it was a case of taxation of an assessee in the United Kingdom whose income arose or accrued in that country. In the instant case, we are, however,

concerned with the income of a resident of India whose income arose or accrued outside this country. Therefore, it must come strictly within the purview of Section 5(1)(c) read with Section 198 of the I.T. Act, 1961.

18. Reliance was also placed on certain observations in the case of *Bradbury v. English Sewing Cotton Co, Ltd.*<sup>9</sup> Our attention was drawn to the observations of Lord Phillimore at pp. 518-519 which we have mentioned hereinbefore. We have also noted that the Supreme Court considered this case in the case of *CIT v. Clive Insurance Co. Ltd.* , mentioned hereinbefore.

19. Our attention was also drawn to a decision in the case of *IRC v. Cull*<sup>10</sup> and reliance was placed on the observations of Lord Atkin at p. 636. We have already mentioned that these observations were considered by the Supreme Court in the aforesaid decision and, therefore, it is not necessary for us to deal with it separately.

20. Learned advocate for the revenue also drew our attention to the decision in the case of *IRC v. Cook*<sup>11</sup> and reliance was placed on the observations of Viscount Maugham at p. 505 of the report. But that was a case of annuity and in any event the position of franked income in respect of dividend has been explained by the Supreme Court in the decision mentioned hereinbefore. We are, therefore, of the opinion that it will not be of much assistance to us in considering this decision in any further detail.

21. Reliance was also placed on the observations of Buckley J. in the case of *Attorney-General v. Ashton Gas Co*<sup>12</sup>. There, it was held that where by the special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate, there, in calculating the rate of dividend, income-tax ought to be included. There, at p. 626, Vaughan Williams L.J. referred to the agreement only. Reliance was also placed on the observations of Romer L.J. at p. 630 of the report to the effect that out of the profits income-tax would have to be payable directly by the shareholders themselves if it had not been paid by the company. The aforesaid observation, which was approved by the House of Lords in the case of *Ashton Gas Co. v. Attorney-General*<sup>13</sup> is not of much assistance in construing Section 5(1)(c) read with Section 198 of the Act as to the question whether income which had arisen or accrued outside could be considered or deemed to be the income of the assessee which could be said to be the income accrued or arising in India which was includible in its total income. Reliance was also placed on the decision of the Mysore High Court in the case of *Tokyo Shibaura Electric Co. Ltd. v. CIT*<sup>14</sup> which was a case of royalty and the position of the dividend income being what it is, as was explained by the Supreme Court might be different. Our attention was also drawn to a Division Bench judgment of the Calcutta High Court in the case of *CIT v. Clive Insurance Co.* , which, as we have noted before, was affirmed by the Supreme Court on the ground that income, irrespective of whether it had suffered taxation at the hands of the assessee, was entitled to relief under Section 49D of the Indian I.T. Act, 1922, in which the issue with which we are concerned, viz., whether, even if something is deemed to be the income of the

assessee or deemed to have been paid on behalf of the assessee could be treated to be the income accruing or arising to the assessee under Section 5(1)(c) read with Section 198 of the I.T. Act, 1961, did not fall for consideration. Therefore, in that context, the said observations would not be of any assistance to us in disposing of the present reference. Our attention was drawn to a decision of the Bombay High Court in the case of *CIT v. Blundell Spence & Co. Ltd*<sup>15</sup>, where it was held that Section 16(2) and Section 18(5) of the Indian I.T. Act, 1922, constituted self-contained provisions with regard to grossing up. Section 49B dealt with altogether a different matter and that was a case where refund was asked for by the assessee. Section 16(2) could apply only to the income-tax paid by the company in India at the rate laid down by the Finance Act and it could not apply to the tax paid by the company outside India. There was no provision in the Act for adding to the dividend of a shareholder, a tax paid by the company outside India. The assessee-company was a non-resident company. We are in respectful agreement with the principle laid down by the learned Chief Justice, Chakravarti, in the decision mentioned before, in view of Section 5(1)(c) of the I.T. Act, 1961, read with Section 198 of the Act. In a subsequent decision of the Bombay High Court in the case of *Sir Joseph Kay v. CIT*<sup>16</sup> the assessee was a resident of India and was entitled to receive 500 from three insurance companies in the United Kingdom in respect of certain annuity policies. The position of the insurance policies is different from the dividend income which is considered to be franked income in view of the special provision in respect of joint stock companies in England, as explained in the aforesaid decision. Our attention was drawn to a decision of this court, which is unreported, in the case of *CIT v. India Textile Agency in*<sup>17</sup> judgment delivered on the 14th January, 1977 [since reported as appendix below], by Chief Justice, Mitra. There, of course, the argument was that the position had changed after the Finance Act of 1965, in England. As the Division Bench found that the assessment year involved was prior to that Act, the change effected by the Finance Act did not affect the position. But actually the decision was that, before the Finance Act, only the net income of the assessee accrued was assessable.

22. In that view of the matter and the principle, as we have said on the construction of the section, we are of the opinion that the Tribunal was right in its decision and the question must, therefore, be answered in the affirmative and in favour of the assessee. In the facts and circumstances of the case, the parties will pay and bear their own costs.

**Sudhindra Mohan Guha, J.**

**23. I agree.**

Cases Referred.

1[1939] 22 TC 603 at p. 636 ; [1940] 8 ITR (Suppl) 1, 4 (HL)

2[1945] 21 TC 205 (HL)

3[1979] 116 ITR 20

4[1959] 35 ITR 33

5[1933] 50 CLR 131  
6[1954] 25 ITR 431 (Cal)  
7[1918] 7 TC 277 (KB)  
8[1922] 8 TC 332 (HL)  
9[1923] 8 TC 481 (HL)  
10[1939] 22 TC 603 ; [1940] 8 ITR (Supp) 1 (HL)  
11[1945] 26 TC 489 (HL)  
12[1904] 2 Ch 621 (CA)  
13[1906] AC 10  
14[1964] 52 ITR 283  
15 [1952] 21 ITR 28  
16[1956] 29 ITR 774  
17I.T. R. No. 80 of 1972