CALCUTTA HIGH COURT

Tarunendra Nath Tagore

Vs.

Commissioner of Income-tax

Income-tax Ref. No. 107 of 1954

(P. Chakravartti, C.J. and B.K. Guha, J.)

03.09.1957

JUDGMENT

P. Chakravartti, C.J.

1. By a single Reference, the Income-tax Appellate Tribunal has referred to this Court two questions of law, said to be common to applications for refund made by eight different persons with respect to two consecutive years. It was conceded on behalf of the assessees that while a consolidated Reference concerning the assessment of the same assessee for different years could be made, if the question of law arising out of the Tribunal's order passed in regard to them was common, no such consolidated Reference was permissible in respect of assessments of or applications by different assessees. In the present case, there is a further irregularity. On the one hand, the cases of eight different assessees have been combined in a single Reference. On the other hand, all the necessary papers regarding even one of them have not been included in the paper book. Apparently, the Tribunal intended that the case of Tarunendra Nath Tagore, should be taken as typical of the whole group, but while purporting to include in the paper book the respondent's reply to his application under section 66 (1) of the Act, as the index would show, they have in fact included the respondent's reply to the application of another assessee, namely, Projen Ganguly.

2. In the circumstances above stated, it will appear that if we are to entertain the Reference at all, we must, in any event, overlook some irregularity. It was suggested by the learned Counsel for the assessees that we might answer the questions with reference to the case of Tarunendra Nath Tagore, though even as regards his case the paper book was defective and that we might direct the Tribunal to make proper References in respect of the cases of the other assessees. We accede to that suggestion.

3. The facts, as found, are as follows. In 1950, the bulk of the shares of a company, called Austin

Distributors Ltd., was owned by two groups of non-residents who have been compendiously described as the Thomson group and the Wilson group. Of the 40,000 shares of the face value of Rs. 10/- each, into which the share capital of the company was divided, the Thomsons held 20,749 shares and the Wilsons 18,750 shares. Only 501 shares were thus held by other persons. On the 25th of March, 1950. all the 39,499 shares held by the Thomsons and the Wilsons were sold by separate transactions to eight different persons, of whom some purchased 3,500 shares each and some a slightly smaller number. The sales appear to have been cum-dividend, already declared on the shares. After the transaction, the company paid the dividends to the purchasers and the dividend was necessarily paid out of funds on which the company had already paid income-tax at the company rate. On receipt of the dividends, the purchasers, who do not appear to have been otherwise assessable to tax, applied for refund under section 48 of the Income-tax Act. The applications of three of them were with respect to three assessment years, namely, 1949-50, 1950-51 and 1951-52, while those of the rest, including. Tarunendra Nath Tagore, related only to the assessment years 1950-51 and 1951-52. The Income-tax Officer rejected the applications in the view that the transfers were revocable transfers within the meaning of section 16 (1) (c) of the Act and, therefore, the dividend income was to be deemed to be the income of not the purchasers but the vendors who only would have the right to claim a refund, if they were otherwise entitled thereto. On appeal by the assessees, the Income-tax Officer's decision was reversed by the Appellate Assistant Commissioner. He held that the assessees being registered shareholders of a limited company, the tax deducted by the company and paid to Government before payment of the dividends was paid on their behalf and consequently it would be they who would be entitled to claim refund of any excess of tax thus paid on their behalf. Section 48 (3) of the Act was held to have no application. The decision of the Appellate Assistant Commissioner was, in its turn, reversed by the Appellate Tribunal which restored' the order of the Income-tax Officer. The Tribunal held that during the years in question which were within six years from the date of the transactions, the transfers were revocable under a condition in the transfer deed which was a perfectly valid condition and, therefore, the assessees were not entitled to the refund claimed by them.

4. Thereafter, the assessees applied to the Tribunal under section 66 (1) of the Act for a Reference to this Court of the questions of law arising out of their order. There had been nineteen applications for refund and nineteen appeals, but for a Reference under section 66 (1) of the Act, only sixteen applications were made. The three assessees, who had claimed refund in respect of three assessment years, dropped the year 1949-50 and like the rest of the assessees, made applications only with respect to the years 1950-51 and 1951-52. The Tribunal agreed that questions of law did arise out of their appellate order and they also accepted the form in which the questions were framed by the applicants. In the end, they made a combined Reference, as I have already stated and referred to this Court the following questions of law :

> 1. "Whether the dividend income received by the assessees on the shares of the Austin Distributors Limited held by them arises by virtue of revocable transfers of assets by the

transferors within the meaning of section 16 (1) (c) of the Indian Income-tax Act?"

2. "Whether in the circumstances of the case, the assessees are entitled to the refund claimed under section 48 of the Act?"

5. The facts relative to the transfers may now be stated in greater detail.

6. It appears that in the case of each of the transfers, there were three separate documents, first an agreement for sale and then a transfer deed find simultaneously therewith, a deed of acknowledgment of loan. By the agreement the price of the shares was fixed at Rs. 30/-per share, subject to abatement in certain circumstances to which I shall refer in a moment and it was payable immediately on the completion of the agreement. In fact, however, the price was not immediately paid, but, on the other hand, while it remained unpaid, it was not left outstanding as price. The agreement provided that if the price was not paid immediately, it was to be treated as a loan advanced by the seller to the purchaser, carrying interest at 1/4 per cent, per annum and such loan would be repayable on demand, as would be provided for in a deed of acknowledgment to be executed or in such time or times and in such amount or amounts as the purchaser might fix, subject, however, to the, condition that full payment would have in any event to be made on or before 31-12-1951. There can be no doubt that it was well-understood between the parties that the price was not going to be paid immediately and that in fact the mode of payment would be the alternative mode. The price would be deemed as a loan and it would be repaid in accordance with certain further terms and conditions which the agreement contained.

7. In the first place, the loan was to be secured. The agreement provided that immediately upon its full execution, the seller would deliver to the purchaser a duly executed deed of transfer in respect of the shares transferred, the share certificates and any power of attorney that might be required for registering the purchaser as the holder of the shares. The registration was to be completed within one month of the execution of the agreement. Immediately thereafter, the purchaser, in his turn, was to deposit with the National Bank of India Limited, as agents for the seller and by way of securing the loan, the very same share certificates, together with blank transfer forms and such a power of attorney as might be necessary for registration of the transfer, in case the security fell to be enforced. The documents were to be held by the bank till repayment of the loan.

8. As to the terms of repayment, I have already stated that the loan would be repayable at the option of the seller, either on demand or at such times and in such amounts as he might fix. But the agreement also provided that notwithstanding the stipulation for payment of demand which was to be incorporated in the deed of acknowledgment of loan, the power to demand such payment would be exercised only if the purchaser failed to carry out any of the terms and conditions of the agreement or if he became bankrupt. Otherwise, within the limit of time mentioned, the repayment would be graduated and made in the manner provided for in the agreement. It was provided specifically that although the dividend paid after the date of the

transfer would belong to the purchaser and would be paid to him. he in his turn, would be bound to cause an equivalent sum to be paid to the seller in repayment of the loan and the interest thereon till the loan was fully repaid. If, however, the purchaser was charged to any personal super-tax with respect to the dividend received by him and applied to the repayment of the loan, he would be entitled to abatement of the purchase price to the extent of the amount of the super-tax.

9. Before I refer to the powers reserved to the seller for exercise by him in case of default by the purchaser in the observance of the terms and conditions of the agreement or in case of his bankruptcy, it may be useful to mention certain subsidiary conditions by which complete control of the management of the company till the repayment of the loan was retained by the seller. The agreement provided that the business of the company was to be conducted in accordance with its usual business practice followed in the past. The Articles of Association were not to be altered. One of the sellers who was the existing Managing Director was to retain his office, but if he ever ceased to hold it, it would be the duty of the purchaser to use his votes for procuring the appointment of a successor whom his seller might nominate. Messrs. Lovelock and Lewes, who were the existing auditors of the company, were to continue as auditors and one of the firm was always to be a Director of the company. Two persons mentioned in the agreement were to be appointed Directors by the Managing Director in exercise of the powers conferred on him by Article 125 of the Articles of Association and a third person, also named would conduct the business of the company. They would have to submit monthly statements and six monthly accounts to the Managing Director who would be entitled, if he chose, to visit India at any time or from time to time and to take control of the business of the company. If he elected to visit India, it would be the duty of the purchaser to procure that the company should bear and pay him all travelling expenses, reasonable living expenses and a salary for the whole period of his absence from Great Britain. Except the transfer to the purchaser by the seller and the possible retransfer by the purchaser to the seller, there was to be no other transfer of any of the shares till the loan was fully repaid. Nor was any encumbrance to be created.

10. It will thus appear that though, nominally, the shares were transferred to the purchaser and were to be held by him as their legal owner, subject to their hypothecation to the seller, he was to have no rights at all till the price was fully paid off, either in regard to the disposition of the shares or as regards the management of the company. Except that he was to be used as an instrument for drawing the dividends and promptly repaying them to the seller, he seems to have been given no rights or privileges at all, nor any function of any particular importance in relation to the conduct of the company. Even his title to the shares was liable to be terminated in certain contingencies in two ways. If he continued to observe the terms and conditions of the agreement and to be solvent, the right to demand prompt payment of the price would not be exercised : but if he was found to be in breach of any of the provisions of the agreement or if he became bankrupt, the seller would be entitled not only to demand immediate payment of the price, but also to exercise both or either of two further powers. He would be entitled to complete the blank transfer forms and get the transfer of the shares to himself registered by the company and

thereafter to sell off the shares, either by public auction or by private treaty without any notice to the purchaser. He would also be entitled, if he chose to avail himself of that form of remedy, to cancel the sale of the shares altogether on service of a three months' notice on the purchaser and then to get the shares transferred to himself, as also to have the transfers recorded in the books of the company which it would be the duty of the purchaser to procure. In case, however, he chose to proceed in the latter way, he would repay to the purchaser the whole of the amount paid by him less, however, the difference between the current price of the shares and their price at Rs. 30/-per share, if the current price of each share was less than Rs. 30/-. It will thus appear that the seller made it certain that he would, in any event, get a price of Rs. 30/- per share.

11. The difference between the second and the third forms of remedy which would be open to the seller appears to be this. In case he chose merely to complete the blank transfer forms, have the retransfer to himself registered in the books of the company and to sell off the shares, be would be acting in exercise of his rights as a mortgagee in possession. In such event, if the sale of the shares fetched a price higher than the amount of the loan, the purchaser would obviously be entitled to the excess, due regard being paid to the amount which he had already paid. If, however, the seller chose to cancel the sale altogether, the sale would be wiped out as if it had never taken place. But the seller would not allow himself to suffer any loss by reason of the miscarried transaction, because while he would repay the amount paid by the purchaser, he would not repay the full amount, if it was found that the current price was less than the price of Rs. 30/- per share at which he had made the sale. In that event, he would reimburse himself to the extent of the deficiency and retain the requisite amount out of the sums paid by the purchaser.
12. It is not necessary to refer to any other terms of the agreement. The deed of acknowledgment of loan stated that the shares would be the absolute property of the purchaser, but they would be kept at his risk and expense in such custody as might be indicated by the seller. The hypothecation was necessarily recited. It was said further that the seller or his agents or nominees would be entitled at all times and without notice to the purchaser to sell the shares in the event of a default on his part, either in respect of the payment of money or in respect of the discharge of any of the obligations to the seller. There was, however, a saving clause which said that the seller would have no right to claim payment out of any of the other properties of the purchaser.

13. The question before us is whether the purchaser, who had acquired and was holding the shares under such terms and conditions, was entitled to claim a refund of any part of the tax retained and paid over to Government by the company with respect to the dividends paid to him. The assessment years concerned are, as I have already stated, 1950-51 and 1951-52. We were informed from the Bar and it is so stated in Tarunendra Nath Tagore's application for a Reference that the time for full payment, as fixed by the agreement, had been subsequently extended and that at the time of the application it stood extended up to 31-12-1954. Even without any extension, it is clear that during the accounting years now in question, the period initially fixed by the deed of agreement was still running. The loan had not yet been fully repaid and, therefore, the powers reserved to the seller were continuing to subsist.

14. The deeds of transfer have not been included in the paper-book, but the case of the assessee has always been that his purchase had been made in accordance with the terms and conditions laid down in the deed of agreement. At one stage of his argument, Mr. Mitra seemed inclined to suggest that we did not really know under what terms the purchase had actually been made, but when he was reminded of the case which his client had always made, he abandoned that contention. Indeed, even if the deeds of transfer had been included in the paper-book, they by themselves could have shown nothing, because they would be instruments in the form laid down in Regulation 19 of Table A of the Companies Act and would contain nothing but a bare recital of the transfer. The question as to whether the actual purchase was governed by the terms and conditions laid down in the agreement is set at rest by the assessee's own statement in his application for a Reference. In paragraph 2 of the statement of facts the following sentence occurs:

> "The applicant purchased the said shares in implementation of three agreements made on 25-3-1950, from the then holders, who duly executed the deeds of transfer in the applicant's favor."

There has never been any other case.

15. As has been seen, two questions have been referred for the opinion of the Court. Mr. Mitra submitted that the real question was the second one, but he had found it necessary to add the first question, because the Income-tax Officer had complicated matters by needlessly importing Section 16 (1) (c) of the Act. I do not see how the introduction of Section 16 (1) (c) could have been avoided. The claim of refund was undoubtedly made under Section 48 of the Act which Mr. Mitra repeatedly emphasised, but sub-section (1) of Section 48 is not the only provision which the section contains. There is also sub-section (3) which lays down that where income of one person is included under any provision of the Act in the total income of any other person, such other person shall be entitled to a refund under the section in respect of such income. It had, therefore, to be seen whether the income of the assessee was includible under any provision of the Act in the total income of his vendor. The Income-tax Officer thought that it was so includible under the provisions of Section 16 (1) (c) and therefore it was perfectly logical for him to examine the facts in the light of that section. Indeed, it appears to me that the question under Section 48 is only consequential to the question under Section 16 (1) (c) and the main question is one which relates to the former section.

16. To turn now to the questions referred to us, Mr. Mitra contended that the onus lay on the Department to establish that his client was not entitled to get the refund and not on his client to establish anything more after he had shown that he was the registered share-holder in respect of the shares in question. I am not quite certain that Mr. Mitra's contention is correct, but in the facts of the present case it is wholly unnecessary to decide on whom the onus lay. The position of the assessee in regard to the shares purchased by him is to be ascertained from the deed of agreement

which is in evidence in the case. It is therefore, wholly immaterial on which party the onus lies.

17. The Tribunal's reason for refusing the assessee's claim is that he held the shares under a revocable transfer and that the transfer was not any the less revocable, because the seller could enforce a re-transfer only in certain contingencies. In the Tribunal's view, Section 16 (1) (c) of the Act clearly applied and if by virtue of the provisions of that section, the income derived by the assessee from the shares was to be deemed to be the income of the seller, it would not be the assessee but the seller who would be entitled to claim refund under Section 48 (3) of the Act. It was contended that this view of the Tribunal was erroneous.

18. Before dealing with the argument advanced before us, it will be convenient to read at this stage the terms of Section 16 (1) (c) of the Act, so far as they are material. The section provides that

> "all income arising to any person by virtue of a settlement or disposition whether revocable or not * * * from assets remaining the property of the settlor or disponer, shall be deemed to be income of the settlor or disponer and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor."

19. We are really concerned with the last part of the sub-clause which speaks of a revocable transfer. Mr. Mitra contended that the word 'transfer', as used in the sub-clause, did not contemplate out and out sales, but only contemplated dispositions which the disponer could recall by a unilateral act, such as gifts. Ordinarily, one undoubtedly speaks of revocation only in respect of transactions which the person dealing with a property or entering into a transaction can recall at his pleasure, but a revocable sale is also not an impossible notion. Sale with a condition of repurchase is one of the well-known forms of transaction relating to property and if the option to repurchase is given to the seller by the deed of sale, I do not see why it cannot be said that there has been a revocable sale, although in itself the initial transaction is one of an out and out transfer. It is, however, not necessary to examine the concept of revocable transfers under the general law, because Section 16 (1) (c) provides its own dictionary for what the term 'revocable' means. The first proviso to the sub-clause says inter alia that for its purposes,

> "a transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the * * * * transferor, or in any way gives the * * * * transferor a right to resume power directly or indirectly over the income or assets."

It is thus clear that even where there is an out and out sale, there will be a revocable transfer within the meaning of the clause, if the transaction provides for retransfer of the income or assets to the transferor or even if it merely gives him a right to reassume power over the income or assets and that it will be so in both cases whether the re-transfer or resumption of power is direct

or indirect. There can thus be no question that if the transaction in the present case did contain a provision for the retransfer of the shares to the seller or gave him in any way a right to reassume power over the income or assets, directly or indirectly, it must be held that the transfer was a revocable transfer.

20. In my view, there could not possibly be a transaction with a clearer and more direct provision for a retransfer of the assets than the transaction in the present case, nor one which could contain a clearer and more direct provision for the resumption of power over both the income and the assets transferred. I have already summarised the terms of the deed of agreement in some detail. There is not one, but there are two provisions of retransfer, the first of them being contained in Clause 4 of the deed and the second of them in Clause 12. Both are to come into operation in the case of default on the part of the purchaser in the observance of any of the terms and conditions of the agreement or in the case of his bankruptcy. But both provide that the seller would be entitled of his own motion, in the case of Clause 4 even without notice to the purchaser, to complete the blank transfer forms and have the shares retransferred to himself. The retransfer is to be promptly registered in the books of the company and the purchaser is to employ all means in his power to procure such registration. In the case of Clause 4, after the seller has caused a retransfer of the shares to himself he is to proceed to sell them, but in the case of Clause 12, it is not necessary that the shares should be sold and it would appear that the seller might continue to hold them, just as he had been doing before the sale since cancelled. It was contended that the power to enforce a retransfer reserved to the seller was to be exercised only in certain contingencies and, therefore the power not being an absolute or unqualified power, the provision containing it could not be said to be a provision for retransfer of assets within the meaning of the first proviso to Section 16 (1) (c). I cannot accept that view of the proviso as correct. Power to cause retransfer reserved to a seller is generally exercisable on the happening of a contingency and so also a power to resume control over the income or assets transferred. The qualification contained in the deed of agreement in the present case that the power of causing a retransfer of the assets is not to be exercised by the seller except in certain contingencies is a perfectly normal provision and has not, in my view, the effect of taking the case out of the first proviso to Section 16 (1) (c). The proviso says nothing about an absolute or unqualified provision, but covers all provisions whether or not the retransfer or resumption of power is made dependent on a contingency. It speaks merely of a provision. In my view, a provision exists in the present case for a retransfer of the assets and it is a direct provision, made in two forms. The transfer, therefore, was a revocable transfer, as the Tribunal rightly held.

21. It appears to me that there is also a provision for resumption of power over the income and assets and that provision also is and direct provision. Sub-clause (e) of Clause 11 of the agreement provides that the Managing Director, who in the present case is the seller himself, shall be entitled to visit India at any time or from time to time and to take control of the business of the Company at his pleasure and if he chooses to do so, it shall be the duty of the purchaser to procure from the Company payment of all his expenses as also a high salary. The deed thus

provides directly that the seller may resume control of the Company itself at any time he chooses. Indeed, the seller does not seem to have parted with control or power over the income or assets at any time. The Managing Director who was the sole Managing Director was to retain his office. The business was to be conducted by persons named by the seller in the deed of agreement and that person together with two other Directors appointed by the Managing Director were to submit monthly statements and six-monthly accounts to the Managing Director. The proviso, however, does not speak of retention of power but of its resumption. In my view, there is a clear provision for resumption in sub-clause (e) of Clause 11 of the deed, because while the power that was given to the purchaser was very little indeed, even that little could be withdrawn by the seller, if only he chose to do so.

22. Since the right to cause re-transfer of the assets or the right to re-assume control over the Company was exercisable at any time, provided the contingencies mentioned in the deed arose, the third proviso to Section 16 (1) (c) can have no application. The main provision will, therefore, apply and the result is that the income arising to the assessee in the present case arose to him by virtue of a revocable transfer of the shares.

23. I have omitted to notice one argument of Mr. Meyer with respect to Mr. Mitra's contention that an out and out sale was not contemplated by the expression 'revocable transfer' occurring in Section 16 (1) (c). Mr. Meyer submitted that the totality of the transaction in the present case could well be regarded as an 'arrangement' even if it was not a transfer. I do not consider that contention sound but at any rate it would not help Mr. Meyer, because an arrangement is included by the second Proviso to Section 16 (1) (c) only in the definition of settlement or disposition. If the transaction in the present case was an arrangement, it would only be a settlement or disposition and if it was a settlement or disposition, Section 16 (1) (c) would be attracted only if there was some income arising from assets remaining the property of the settlor or disponer. It could not possibly be said in the present case that the shares remained the property of the sellers after the transaction of sale had taken place. Mr. Meyer's contention cannot, therefore, be accepted, but he does not require the aid of that contention for reasons which I have already given.

24. It is, strictly speaking, not necessary to discuss any other question, but since the matter was debated at the Bar, it is but right to mention that there appears to be a lacuna in Section 18 (5) of the Act. Section 16 (1) (C) deals with the general case where income arising to one person shall be deemed to be the income of another. Section 18 (5) deals with deductions made under the provisions of Section 18 and sums by which dividends have been increased under Section 16 (2). Deductions are made from the income of a person in various circumstances and also from the interest payable to the owners of securities. The dividend is increased or, as the expression goes, 'grossed up', in the case of the share-holder who receives the dividend. With regard to these three classes of persons, the main provision of Section 18 (5) lays down that the deduction made or the sum by which the dividend has been increased shall be treated as payment of income-tax or

super-tax

> "on behalf of the person from whose income the deduction was made or of the owner of the security or of the share-holder, as the case may be and credit shall be given to him therefor in the assessment, if any, made for the following year under this Act." It is thus the person from whose income the deduction is made including an owner of securities, or the share-holder the dividend paid to whom is grossed up, who is treated as the person on whose behalf the amount concerned has been paid as income-tax. The second proviso to the sub-section, however, lays down a qualification and it says inter alia that
> "where such person or owner is a person whose income is included under the provisions of Clause (c) of sub-section (1) * * * of Section 16 * * * in the total income of another person such other person shall be deemed to be the person on whose behalf payment has been made and to whom credit shall be given in the assessment for the following year."

It will be noticed that the proviso mentions only "such person or owner", who are two of the parties mentioned in the main provision, namely, "the person from whose income deduction was made" and "the owner of the security", but it does not mention the third, namely, the shareholder. It may, therefore, be said that since the main paragraph of Section 18 (5) provides that any sum by which a dividend has been increased under Section 16 (2) shall be treated as a payment Of income-tax or super-tax on behalf of the shareholder concerned and since the second proviso to the sub-section does not mention the shareholder and, therefore, does not purport to take away the privilege from him, it follows that even if the dividend income of a person receiving it is to be deemed under Section 16 (1) (c) to be the income of another person, the amount by which the dividend has been increased shall still be treated as payment of income-tax or super-tax on behalf of the actual recipient of the income and, therefore, shall not be treated as payment on behalf of the person, in whose total income the dividend income is included by the operation of Section 16 (1) (c).

25. I do not think that this contention is tenable. The omission of a reference to the share-holder in the second proviso to Section 18 (5) appears to me to have been accidental and caused by an oversight. It is to be noticed that Section 16 (1) (c) does not contain any qualification of any kind and makes no exception in favour of dividend income, arising from assets held under a revocable transfer. If dividend income is also subject to the provisions of Section 16 (1) (c), the consequence must be that such income will not be taken into consideration in computing the total income of the recipient and, therefore, the operation of grossing up provided for in Section 16 (2) will not be held with respect to his assessment. Section 16 (2) obviously provides for the normal case where the dividend income is really for the purposes of the Act, the income of the person who receives it. But dividend income is to be grossed up in the case of the assessment of a particular assessee only if it becomes necessary to do so for the purpose of its inclusion in his total income, as the opening words of Section 16 (2) provide. It is clear that if the Act does not regard the dividend income received by a particular person in a particular case to be his income

at all, there will be no question of including it in his total income and, therefore, there being no question of grossing it up for the purpose of his assessment, there will equally be no question of treating any amount by which the dividend income is increased as payment of income-tax or super-tax on his behalf under the provisions of the main paragraph of Section 18 (5). This consequence which must follow from Section 16 (1) (c) and Section 16 (2) cannot possibly be averted by the mere absence of any reference to share-holders in the second proviso to Section 18 (5). The real position is accurately indicated in Section 49-B which provides that where any dividend has been paid to a person who is a shareholder of a company, such person shall be deemed in respect of such dividend to have himself paid income-tax inclusive of super-tax. "if the dividend is included in his total income." This qualification was added by the Finance Act of 1948 and obviously the addition was made in contemplation of cases where the dividend income, actually received by a person, might not be includible and in fact included in his total income, in which case no question of treating the amount by which such dividend was increased as either payment of income-tax on behalf of the recipient of the income or as payment by himself, could possibly arise.

26. It is however, not necessary for us to discuss Section 18 (5) in answering the questions referred by the Tribunal. As Mr. Mitra himself pointed out, I think rightly, the answer to the questions depends on the true construction of Section 48 of the Act. So far as sub-section (1) of Section 48 is, concerned, it provides, so far as is material, that if an individual satisfies the Income-tax Officer that the amount of tax paid by him or on his behalf or treated as paid on his behalf for any year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of any such excess. Had the section stopped here, it might be arguable that since the assessee was a registered share-holder of a company and since he had received dividend income, the amount of proportionate tax paid by the company which could be related to the dividend amount paid to him was to be deemed as tax paid on his behalf and, therefore, if the amount exceeded the amount for which he was properly chargeable, a claim to refund was established. There is, however, sub-section (3) of the section to which I have already referred and to which I would refer again. It says,

> "Where income of one person is included under any provision of this Act in the total income of any other person such other person only shall be entitled to a refund under this section in respect of such income."

It is clear that if the dividend income of a person who has received it is included in the total income of another person under the provisions of Section 16 (1) (c), the former cannot be entitled to 'any refund and a claim will lie only by the person in whose total income the dividend income is included. Since I have already held that the dividend income received by the assessee in the present case was income arising to him from assets held under a revocable transfer, this income was liable to be included in the total income of his vendor. If so, any claim for refund could be made only by his vendor, but so far as he himself is concerned, he is expressly excluded by the

terms of Section 48 (3).

27. Some discussion took place at the Bar as to the true meaning of the expression 'is included". Mr. Mitra contended that the Department had not proved that the dividend income of his client had in fact been included in the total income of some other person. The argument obviously proceeded on the footing that what the sub-section contemplated was actual and factual inclusion of the income of one person in the total income of another. That view of the sub-section cannot possibly be correct, because if it were, one would have to wait, before any claim for refund could be entertained, till the assessment of every other person liable to tax under the Act was completed, because till such completion, it could not be known whether the dividend income had or had not been actually included in the total income of some other person. What the sub-section means is, to my mind obvious.When it says 'is included under the prolans ofthis Act', it means included by the Act, that is to say, includible under its provisions, it is not the actual inclusion in any assessment made which is in the contemplation of the section, but the includibility under the provisions of the Act. If the Act provides that in certain circumstances the income of one person shall be included in the income of another, there is a case where the income of one person 'is included under the provisions of the Act' in the total income of another person. Consequently, where the income of one person is liable to be included under Section 16 (1) (c) in the income of another person, the terms of the section are satisfied.

28. The assessee cannot claim that the proportion of the tax paid by the company which is referable to the dividend paid to him was to be treated as payment by himself under Section 49B, because the section would apply only if the dividend was actually included in his total income. Nor, it seems to me, can he make a claim on the basis of even Section 18 (5), because Section 18 (5) contemplates a case where the dividend received by a person has been increased by a certain sum under Section 16 (2), that is to say, where it has been included in his total income and subjected to the operation of grossing up. The assessee could not contend that this income had been treated as his income and that it had been grossed up for purpose of his own assessment and, therefore, under the terms of Section 18 (5), he could claim that there was a sum by which the dividend had been grossed up and that sum must be deemed to have been paid as tax on his behalf. There was thus no tax "paid by him or on his behalf or treated as paid on his behalf", on which he could found his claim. If that be correct, even Section 48 (1) would not be satisfied in the assessee's case, but in order to answer the questions, I need not rely upon this line of reasoning. It is sufficient to confine oneself to Section 48 (3) and to point out that the provisions of that section are a complete answer to the assessee's claim. His dividend income was includible, under Section 16 (1) (c) of the Act, in the total income of his vendor and therefore no claim for refund in respect of the tax paid on the dividends was maintainable by him.

29. For the reasons given above, the answers to the questions referred should, in my opinion, be as follows:

Question 1 : "Yes".
Question 2 : "No".

30. These answers are given only with reference to the case of Tarunendra Nath Tagore. We do not deal with the cases of the remaining assessees, because with respect to them, there is no proper reference before us. The Tribunal will be at liberty to make proper references with respect to their cases, if they desire to do so and if and when such references are made, they will be dealt with in accordance with law.

31. The Commissioner of Income-tax shall have the costs of this Reference.

B. K. Guha J.

32. I agree.

Reference answered.