

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

New India Assurance Co. Ltd

(Beaumont, C.J.)

23.03.1938

JUDGMENT

Beaumont, C.J.

1. This is a reference by the Commissioner of Income-tax under Section 66(2) of the Indian Income-tax Act in which he raises the question, whether two sums of seventy-nine thousand and odd rupees and two lacs and odd rupees and two lacs and odd rupees respectively being interest accruing without British India on dollar securities and sterling securities respectively, were, in the circumstances of the case, received in, or brought into British India. The learned Advocate-General has contended in the first instance that this is really a question of fact which ought not to have been referred to us. No doubt, the question whether or not the sums were actually received in British India, is a question of fact, but, if the sums were not actually received, the question whether they ought to be treated as constructively received is a question of law. Unfortunately, the learned Commissioner of Income-tax has not stated the facts of the case very clearly in this reference. The reference in part concerns a question as to the construction of Rule 29, which eventually was not raised, and the material facts as to this interest on foreign investments are not found with clarity. However, the learned Advocate-General has admitted, for the purpose of this reference, that the income on these foreign investments has not been actually received in British India, but on the contrary has been invested, and remains invested, outside British India. His contention, which is also the contention of the Commissioner of Income-tax in the reference, is, that this income must be treated as having been brought into British India by reason of the way in which it was dealt with in the accounts of the company. In the accounts of the Company the total profits wear shown at a sum of eight lacs and odd rupees and in those total profits is undoubtedly included the interest on foreign investments. Then the profits are dealt with by a declaration of dividend, which, in the words of the directors, "will absorb" an amount of nearly six lacs of rupees leaving a sum of over two lacs of rupees to be carried forward to the next years account. Now, the contention of the Commissioner is that inasmuch as this interest on foreign investments was included in the profits of the company for the year and as these profits were applied largely in payment of dividend in India, the foreign income must be treated as having been brought into

India, because otherwise it could not have been applied in payment of the dividend in India. On the other hand it seems clear that if in fact this interest was not received in British India or could not have been applied towards payment of a dividend in British India. The explanation put forward by the assessee, which is not disputed by the Commissioner of Income-tax or the Assistant Commissioner, is that the dividend was in fact paid by raising a loan on the security of the reserve fund which was available for payment of dividend and that in point of fact although this foreign interest was taken into account for the purpose of ascertaining the amount of profits and the sum which should be applied in payment of dividend, the actual sum was not used in payment of dividend. The answer to the question raised really depends on the construction of Section 4 of the Indian Income-tax Act, which provides that the Act shall apply to income, profits or gains accruing or arising or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India. It is to be noticed that the profits which are to be deemed to be received are only those deemed to be received under the provisions of the Act. There are provisions in the Act, for example, in Section 7 (2), Section 11(3) and Section 42 under which income not in fact received in British India is to be deemed to be received in British India, but those provisions do not cover the present case. What we have to determine is whether the foreign interest was received in British India. No doubt, foreign income may be received in British India. No doubt, foreign income may be received in British India in a variety of forms. Income need not be transmitted to British India in specie in the form in which it was actually received abroad. It may be transformed in which it was actually received abroad. It may be transformed in which it was actually received abroad. It may be transmitted by any method recognised in the commercial world as appropriate for the transmission of money, and I think further, that it might be received in account, by means of cross entries. If, for example, it were shown that a sum representing income received abroad had been exchanged, by appropriate book entries, for an asset in India, and had then been applied as income in India, I should say that the foreign income had then been received in India. But so long as income is invested and remains invested outside British India, and the investments retain their character of interest received abroad I cannot see how the interest can be said to have been received in India. The mere fact that the amount of the income has been brought into account in ascertaining the profits for the year and has been taken into account also in determining the amount to be paid in dividend seems to me irrelevant unless it be proved that this actual income has been received in India and applied in payment of dividends, and that is not shown. The case seems to me to be covered in principle by the decision of the House of Lords in *Gresham Life Assurance Society v. Bishop* (1902) A.C. 287. The proviso to Section 4(2) of the Indian Income-tax Act also supports this view. In my opinion, therefore, we must answer the question raised in the negative. The assessee should get their costs from the Commissioner of Income-tax taxed on the original side scale.

Kania, J.

2. I agree. The short point for consideration is the construction of Section 4 of the Indian Income-tax Act. Under that section income from whatever source derived, accruing, arising or received in British India, or deemed under the provisions of the Act to accrue, arise or to be received in

India, if liable to be taxed. The latter part of the section which consists of income deemed under the provisions of the Act to be received in India is not applicable here, because it is conceded that the present case does not cover that situation. The only question therefore is whether the income in question was received in India. Before the Income-tax authorities the assessee company produced their accounts kept by Messrs. Coutts & Co., of investments and interest. Although those accounts are not included in the printed paper book, it is common ground, and now admitted by the learned Advocate-General, that the assessee company kept a separate account with Messrs. Coutts & Co., of their investments and interest thereon. Interest on that fund was again reinvested and retained either in the United Kingdom or America. It is therefore clear that the interest on those securities was not in fact remitted to India. It was urged that from the report of the directors and the balance-sheet of the company that foreign income should be considered or treated as received in British India. For this purpose the learned Advocate-General relied only on two facts : That the interest earned on those foreign securities and retained by Messrs. Coutts & Co., was included in the total interest shown in the balance-sheet. This does not go against the assessee, because the explanation to Section 4 clearly provides that the mere inclusion of such interest in the balance sheet does not make the amount, as received in British India. The next fact relied upon was the statement in the directors report that after taking into consideration the interest on those securities the total profit was determined and the dividend would absorb a certain amount. In my opinion the fallacy underlying this argument is that it is treated as if this profit was received in India. The report of the directors and the statements contained therein, in my opinion, do not amount to an admission that the foreign income was received in India. In considering the words "received in the United Kingdom" under the English Income-tax Act of 1842 it was further pointed out in *Gresham Life Assurance Society v. Bishop* (1902) A.C. 287 at page 297 that the fact of profits (shown in the account) having been distributed amongst shareholders of the company did not carry the case any further. Therefore the fact, that relying on the profits arrived at by including the interest earned on foreign investments, a dividend was paid to shareholders, did not make the interest on foreign investments as received in India. I agree that the questions should be answered as stated by the learned Chief Justice. Reference answered accordingly.