BOMBAY HIGH COURT

D.M. Vakil

Vs

Commissioner of Income-Tax

(Kania, Ag. C.J.)

17.09.1945

JUDGMENT

Kania, Ag. C.J.

1. This is a reference made under Section 66(1) of the Indian Income-tax Act by the Income-tax Appellate Tribunal. The material facts, as found in the statement of the case, are these. The late Bai Bhicaiji Dhunjibhoy appointed her husband and her son and three daughters as the trustees under her last will and testament, dated January 28, 1937. By clause 5 of that will it was provided as follows :-

> "After deducting my death-bed and medical expenses and after payment of my debts, during the lifetime of my husband Dhunjibhoy Motabhoy Vakil, my trustees shall pay out of the net income of my movable and immovable properties such amounts as may be sufficient for the maintenance of my husband Dhunjibhoy Motabhoy Vakil, my daughter Motibai and my son Motabhoy Dhunjibhoy Vakil and the balance shall be accumulated and invested in Government Securities. During the lifetime of my husband Dhunjibhoy Motabhai Vakil my said husband, my daughter Motibai and my son Motabhoy shall have the right to use and occupy free of rent such portions of my immovable property at Warden Road as are now occupied by me and the other members of the family. Besides these three such of my children and grandchildren as may be invited shall alone have the right to reside and besides them none others shall be allowed to reside."

In pursuance of that provision, the parties named in the clause occupied the Warden road property for the assessment year 1942-43. The trustees were sought to be assessed under the head of "income from property" in respect of this Warden Road bungalow. It was contended on their behalf that the trustees cannot be said to have realized any income whatsoever from the property in question which could be computed under Section 9, and, therefore, they were not liable to pay any income-tax in respect of this Warden Road property. The Income-tax Officer rejected that

contention of the trustees but on appeal they succeeded before the Assistant Commissioner of Income-tax. The taxing authorities took the matter up to the Income-tax Appellate Tribunal and the Tribunal restored the order of the Income-tax Officer. The present reference is made at the instance of the trustees. The question submitted for the Courts consideration is in these Terms :-

> "Whether upon the facts found by the Tribunal, the annual value of the property on Warden Road, Bombay, has been rightly included in the assessment under Section 9 of the Income-tax Act ?"

On behalf of the trustees it was argued before us that the Indian Income-tax Act was enacted with the object of taxing income. In the present case the trustees cannot by virtue of the express provision of clause 5 of the will let these premises to any one and are obliged to give the bungalow for occupation to the persons named in the clause free of rent. It was therefore contended that there being no income, Section 3 and 4 of the Indian Income-tax Act could not be relied upon to tax the annual letting value of this bungalow, as was sought to be done by the taxing authorities. It was argued that under Section 41 of the Indian Income-tax Act the liability of the trustees was only to be taxed to the same extent as the beneficiaries were liable to be taxed, and as the right to occupy premises did not amount to receipt of any income, the beneficiaries would not be liable to be taxed in respect of this right of occupancy. In this connection the assessee relied on Tennant v. Smith, and particularly on the following observation of Lord Halsbury, Lord Chancellor, at p. 157 :-

> "I am of opinion, in the words of Lord Young, that the thing sought to be taxed is not income unless it can be turned into money."

The assessees also relied on Bejoy Singh Dudhuria v. Commissioners of Income-tax in support of their contention that when a sum of money is charged on the property such sum is not the income of the owner of the property although initially he receives the same.On behalf of the Commissioner it was urged that this line of reasoning is incorrect. The only question to be considered under the Income-tax Act is : what is the income under the charging Section 3 and 4 ? The expression there used is "total income" which is defined in Section 2 (15) of the Indian Income-tax Act in these terms :-

"total income means total amount of income, profits and gains referred to in sub-section (1) of Section 4 computed in the manner laid down in this Act."

Therefore to ascertain what is the total income, the Court must look at Sections 6 and 9 which contain the heads of income and how computation was to be made in respect of the head "income from property." It was argued that the scheme of the Income-tax Act was that once a party was

shown to be the owner of a property, he must be taxed under the head "income from property" and the computation of the income must be in accordance with Section 9 of the Indian Income-tax Act. It was contended that the actual receipt of the rent in the hands of the owner is quite immaterial for the purposes of assessment. The law has laid down a particular method of computation in respect of income from property and that must be applied to arrive at the figure to be inserted against the head "income from property" in the individual assessees assessment.In my opinion the contention of the trustees is not correct. The word "income" has not been defined in the Act, but for the purposes of the Indian Income-tax Act the expression"total income" is defined in Section 2(15). The legislature has used there the words "computed in the manner laid down in this Act." Therefore in order to ascertain the total income of an assessee his income must be computed in the manner laid down in the Act and particularly Chapter III. In this connection the words used in Section 9 may be particularly noted. The section provides as follows :-

> " The tax shall be payable by an assessee under the head Income from property in respect of the bona fide annual value of property consisting of any buildings..."

The legislature has therefore expressly provided that the tax shall be payable by the assessee in respect of the bona fide annual value irrespective of the question whether he receives that value or not. Section 9(2) provides that for the purposes of this section, the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year. It is again significant to note that the word used is "might" and not "can" or "is." Reading these two paragraphs of Section 9 together, it is clear that the income from property is thus an artificially defined income and the liability arises from the fact that the assessee is the owner of the property. It is further provided in the section that if the owner occupies the property he has to pay tax calculated in the manner provided therein. Therefore, by reason of the fact that the property is not let out, the assessee does not escape taxation.On behalf of the trustees it was argued that in the present case the trustees are prevented from letting out the property to any one by virtue of clause 5 of the will itself. That, however, in my opinion, makes no difference. The liability to tax does not depend on the power of the owner to let the property, as it also does not depend on the capacity of the owner to receive the bona fide annual value of the property. The law has laid down an artificial rule by which the amount is to be considered the income of the assessee from immovable property and provided that he should be taxed on that footing. In my opinion the argument of the Commissioner on this point is correct.The observation of Lord Halsbury, Lord Chancellor, in Tennant v. Smith, does not help the assessees. In that case the Court was concerned only with the liability of the occupant of the property to pay tax. On page 154 of the report at the bottom it is noted as follows :-

> "But the bald dry proposition that the mere fact of occupying a house, which house as property is already taxed, is not income in any sense, could, I think, hardly be disputed."

The Court, therefore, was considering the question of the liability of the occupant to pay tax in respect of a property the income of which was already taxed in the hands of the owner. That question does not arise for consideration here. It may be observed that the rules of taxation found in the Schedules annexed to the English Act are materially different from the rules of taxation contained in the Indian Income-tax Act. This has been noticed frequently by all Courts, and therefore it will not be proper to apply the observations made in respect of the liability of the occupant to pay tax under the English Act to the liability of the trustees, the owners of the property, under the Indian Income-tax Act. Bejoy Singh Dudhuria v. Commissioner of Income-tax does not help the trustees because in that case the Court was not concerned with the taxation of income from immovable property. There it was a general question in respect of the income of the assessee and the Court decided that if in fact the income was charged with the payment of a certain sum and payment was made to satisfy that charge, the amount so paid was never the income of the assessee and could not be considered his income. The report of the case shows that the recipient of the amount was assessed on the amount received and that question was not before the Court. In this connection Mr. Setalvad drew our attention to In the matter of the Official Assignee. In that case on the insolvency of a party a certain house became vested in the Official Assignee. That was the only property of the insolvent. The Official Assignee disputed his liability to be taxed under Section 9. The Court rejected that contention. At page 245, after noting the observations in Commissioners of Inland Revenue v. Fleming, the Court observed as follows :-

> "In the present case the income was in the nature of statutory income arrived at upon the basis of the bona fide annual value of the property in question."

The objection of the Official Assignee was overruled on that ground. In my opinion that is the correct view of the liability of an owner to pay income-tax having regard to the combined effect of Sections 3, 4, 2(15), 6 and 9 of the Indian Income-tax Act.Section 41 of the Indian Income-tax Act does not help the assessees because under that section two things have to be considered : first, the trustee become liable in the like manner and to the same amount as the tax would be leviable upon and recoverable from the beneficiaries; and, secondly, where the individual shares of the persons on whose behalf the income is receivable are indeterminate or unknown, the tax is ordered to be levied at the maximum rate. In India we have no distinction between legal and equitable estate. Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, the Judicial Committee of the Privy Council has held that the trustees in whom the property is vested are liable to be taxed under the Indian Income-tax Act. The extent of the liability is to be

determined on the true interpretations of Sections 3,4,2(15), 6 and 9 of the Indian Income-tax Act. The argument that under Section 41 the tax is to be levied in the like manner and in the same manner as to be recoverable from the beneficiaries does not help the assessee. If in the present case the ownership of this property is deemed to be vested in the beneficiaries, they could not avoid taxation on the ground that they themselves were occupying the property. It seems to me, therefore, that Section 41 of the Indian Income-tax Act does not help the assessees.The question of rate of taxation is not relevant to the present discussion. If in making a settlement the settlor does not choose to define clearly the specific and individual shares of the beneficiaries, the assessment must be at the maximum rate. Whether the taxation should be at the highest rate or not is a matter of policy, with which we are not concerned. In my opinion, therefore, the answer to the question submitted to us is in the affirmative.The assessees to pay the costs of the reference.

Chagla, J

I agree. It is true that under the Indian Income-tax Act the only thing that can be taxed is income and nothing else. The charging section is Section 3; it charges the total income of an assessee; and "total income" is defined in Section 2(15) as the total amount of income, profits and gains computed in the manner laid down in this Act. Before income can be computed in the manner laid down in the Act there must be income to which the mode of computation can be applied. Now it cannot be disputed that income from property is taxable income. The only question is : what is income from property or how is it to be computed ? And for that purpose one must turn to Section 9 of the Indian Income-tax Act. The scheme of the Income-tax Act is that the income from property which is made liable to tax is not the actual income but an artificial or statutory income as defined in Section 9 and that artificial or statutory income is the bona fide annual value of the property. Therefore the fact that the owner of the property receives no income in fact or even that there is no possibility of his receiving an income is irrelevant for the consideration of the question as to what the artificial or statutory income of an assessee is from property. The test and the only test laid down in the Act is the bona fide annual value of the property, and in the case of every property that test can be complied with and the annul value of the property can be determined. Therefore what the Act does is to make the annual rental value of the property the income of the owner of that property and it is that income that has got to be taxed under the Act.I, therefore, agree with the learned chief Justice that the answer to the question should be given in the affirmative.

Reference answered in the affirmative.