

BOMBAY HIGH COURT

The Accountant-General

Vs

Commissioner of Income-Tax

(Chagla, C.J.)

12.03.1948

JUDGMENT

Chagla, C.J.

1. The question raised by this reference is whether the Baroda State is entitled to a refund of income-tax paid by several companies as assesses on their respective total incomes in which the Baroda State is a shareholder. The second question raised refers to the refund of super-tax paid by the companies in which also the Baroda State is a shareholder. Now it cannot be disputed that the Ruler of the Baroda State has certain attributes of sovereignty and as a sovereign he is not subject to the Municipal Laws of India. Therefore, the Indian Income Tax Act does not apply to him. He is not liable to pay tax on his income and he cannot be treated as an assessee for any purposes under the Income-tax Act. Sir Jamshedji's contention is that the Ruler of the Baroda State has been subjected to taxation contrary to International Law. He says that when the companies paid tax on their profits prior to the distribution of dividends they paid tax on behalf of the different shareholders including the Ruler of the State and by taxing the companies the shareholders including the Ruler himself have been taxed and therefore Sir Jamshedji says that he is entitled to ask for a refund having been wrongfully taxed. Now turning to the provisions of the Income-tax Act with regard to refund one must look at Section 49B. That section provides that when a dividend is received by a shareholder he is deemed to have paid tax on the profits which the dividend represents at the total rate applicable to the total income of a company. Now the whole object of Section 49B is to avoid double taxation. If the company has already paid tax on its profits and then those profits are distributed to the shareholders it is against the policy of the law that the shareholders should again be taxed on those very dividends. Then we come to Section 48 which deals with refunds and entitles any individual Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association who individually satisfies the Income-tax Officer that the amount of tax paid by him or on his behalf for any year exceeds the amount with which he is properly chargeable under

the Act for that year to a refund of any such excess. Therefore taking Section 49B and Section 48 together the scheme is that no assessee should be made to pay double taxation nor should he be made to pay tax at a higher rate than what he would be liable to pay on his own income and if the company in which he is a shareholder pays the tax at a higher rate in respect of the profits in which he gets a dividend then he gets a relief. Now Sir Jamshedji says that the Ruler of the Baroda State is an individual and as an individual he is entitled to claim a refund because he is not properly chargeable to any tax at all and therefore the whole of the tax paid by the company on his dividends should be refunded to him. Now the very scheme of Section 48 makes it clear that only those individuals can apply for a refund who are liable to be assessed to tax under Section 3 of the Income-tax Act. It is only an individual who can be made liable as an assessee who can apply for refund. The very foundation of Sir Jamshedjis application is that his client being a Ruler and being a sovereign cannot be an assessee under the Act. In my opinion the argument advanced by Sir Jamshedji is self-destructive. If he is not an assessee and cannot be assessed and cannot be subject to tax much less can he apply for a refund under Section 48 which is a right granted only to those who can become assessee under the Act. Sir Jamshedji cannot have it both ways. He cannot say that he will not bear the burden of the tax but will only claim the benefit of the Act. In my opinion there is also a fallacy in the argument advanced by Sir Jamshedji that he has been taxed by the Income-tax authorities, that the tax has been levied upon the profits of the company and that the tax that was paid was on behalf of the shareholders. It was paid by the company itself as an assessee. It is only after the tax is paid that the company distributes its profits in the shape of dividends to its shareholders, and as I have pointed out it is only for the purposes of avoiding double taxation that we have Sections 49B and 48 enacted. But it can never be said that a shareholder is taxed through the company. The company is taxed in its own capacity as a company. Sir Jamshedji has argued that he is claiming relief in this case because he has been wrongly taxed. Even if he were right that he has been wrongly taxed the procedure that he has adopted is entirely wrong. Assuming that he is entitled to some relief because of the tax paid by the company the procedure that he should have adopted was not to come under the Income-tax Act to ask for a refund but possible to go against the State claiming relief in respect of the amount paid by the company. But it is difficult to see how he can possible support the position taken up by him that although he is not an assessee and cannot be assessed still he would be entitled to a refund under Section 48 of the Act. We took the same view of the law in the case which is reported in (*Commissioner of Income-tax, Bombay v. A. H. Wadia*¹). There we had the Gwalior State before us and one of the main questions raised in that case was whether the Gwalior State was entitled to a refund in respect of the shares it held in certain companies in India. It is true that one distinguishing feature in that case was that the Gwalior Durbar did business and came within the provisions of the Government Trading Taxation Act but as far as the question of refund was concerned it had nothing whatever to do with that particular

Act. The Durbar had invested large amounts in the purchase of shares of limited companies and this investment had no connection with the money-lending business which the Durbar was doing in British India. What Stone, C.J., and myself held was that as the Ruler was not an assessee within the meaning of Section 3 of the Act he was not entitled to apply for a refund under Section 48. With regard to the super-tax the position is even worse as far as Sir Jamshedji's client is concerned because Section 49B does not apply to super-tax and it cannot be said that super-tax is deemed to have been paid by the company on behalf of the shareholders. Sir Jamshedji concedes that as far as super-tax is concerned his application cannot lie under Section 49B. If that be so he cannot apply for a refund under Section 48. I would therefore answer both the questions raised by the Tribunal in the negative. The assessee must pay the costs of the reference.

Tendolkar, J.

2. This reference arises out of two claims for refund of super-tax amounting to Rs. 43,249 and income-tax and super-tax amounting to Rs. 1,19,686 deducted from the dividends on shares held by the Baroda State in certain joint stock companies in British India in the years 1938-39 and 1939-40; and the questions referred to us are whether the claims for refund are maintainable. Now an application for refund can be made under the Income-tax Act only under Section 48 thereof. Sub-section (1) of that section is in these terms :-

"If any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or member of an association individually satisfies the Income-tax Officer or other authority appointed by the Central Government in this behalf 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 this Act for that year, he shall be entitled to a refund of any such excess."

It is an essential pre-requisite to the application of this section that tax should have been paid by or on behalf of or treated as paid on behalf of the entity which applies for a refund; and the first question which we have therefore to determine is whether any tax was paid on behalf of the Baroda State. Income-tax and super-tax paid by joint stock companies is paid on the profits made by them and it is not tax paid on the income of the shareholders. But by reason of Section 49B as it stood at the relevant date prior to its amendment in 1941, "where a shareholder has received a dividend from a company which has paid income-tax imposed in British India or elsewhere he shall be deemed in respect of such dividend himself to have paid the income-tax (exclusive of super-tax) paid by the company." By virtue of this section, therefore, the Baroda State must be deemed to have paid income-tax on the dividends received by the State; but it cannot be deemed to have paid super-tax which was deducted by the companies from such dividends. So far, therefore, as the claim for refund of super-tax is concerned it cannot be entertained at all, because no payment of super-tax was made either by the Baroda State or on behalf of the State nor can

any payment be treated as having been paid by the State. So far as income-tax is concerned, the first condition is no doubt satisfied and income-tax must be deemed to have been paid on behalf of the Baroda State. But before any entity can apply for a refund under Section 48 it must fall within one of the categories of entities which are enumerated at the beginning of that section, viz., any individual, Hindu undivided family, company, local authority, firm or other association of persons, or any partner of a firm or a member of an association. A reference to Section 3 of the Act which deals with the change of income-tax will show that these are the exact entities which are assessable to tax. Moreover, Section 48 (1) later on states that what shall be refunded to such an entity is the difference between the amount paid and the amount with which he is properly chargeable under the Act for that year, which clearly indicates, to my mind, that the entity which can apply for a refund under Section 48 is an entity which is assessable to tax under the Act. Now it is the contention of the Baroda State that by virtue of the fact that the Ruler of that State is a sovereign prince they are exempted from tax under the Act. That position has been conceded at the Bar. If so, the Baroda State could never have been assessable under the Income Tax Act at all, and is not amongst the classes of entities enumerated in Section 48 (1). They have, therefore, no right to take advantage of the machinery provided by that section for refund in the case of an assessee assessed or liable to be assessed to tax in British India. The answer to both the questions will therefore be in the negative.

Reference answered accordingly.

Cases Referred.

1[1947] 15 I.T.R. 367