

# **BOMBAY HIGH COURT**

Commissioner of Income-Tax

Vs.

Balwantrao Jethalal Vaidya

Income-tax Reference No. 73 of 1957

(Chagla, C.J. and S.T. Desai, J.)

18.03.1958

## **JUDGMENT**

### **Chagla, C.J.**

1. It is sufficient to state only those facts which are necessary for the disposal of this reference. The assessee is trustee under a scheme framed by the District Court, Ahmedabad and as such trustee he carries on the business of a dispensary and the business made profits in the relevant assessment years. As trustee he also is possessed of certain property which fetches income and he is also the registered owner of shares which bring in dividend income. The question that arises is whether it is obligatory upon the Department to tax him with regard to these different kinds of income under Sections 9, 10 and 12 read with Section 41 of the Income-tax Act or it is open to the Department to contend that at its option it could tax the trustee under Sections 9, 10 and 12 without regard to the provisions of Section 41.

2. Now, in order to answer this question, we must first look at the scheme of the Act. The charging section, as has been so often pointed out, is Section 3 of the Act Chapter III and Sections 6 to 12 deal with computation of income. That chapter lays down various provisions which have to be applied with regard to different kinds of income which have got to be grouped under the different heads indicated in Section 6 and the three heads with which we are concerned here are the head which falls under Section 9 "Income from Property", income which falls under the head of "Business income" under Section 10 and lastly the income from "Other Sources" dealt with in Section 12. Section 41 falls under Chapter V which deals with "Liability in special cases" and Section 41 deals with trustees who are entitled to receive on behalf of any person income and in the case of these trustees who fall under Section 41 it is provided that tax shall be levied upon and recoverable from such trustees "in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable". Now it will be noticed that this section deals with levy and recovery of tax, Section 3 having charged a particular income to tax and Sections 6 to 12 having dealt with computation of income. Section 41 deals with the liability to pay tax and the person from whom the tax is to be recovered. It should also be noticed that Section 41 imposes a vicarious liability upon the trustees and that liability is co-extensive with the liability of the beneficiaries. In other

words, the Legislature, in the special case of trustees, has provided that instead of the tax being recovered from the beneficiaries to whom in law the income belongs and who ordinarily would be liable to pay the tax, it should in this particular case be recovered from the trustees. But the Legislature has made it clear that the liability of the trustees should not in any case be larger or wider than the liability of the beneficiaries. It will also be noticed that Section 41 is mandatory in its language. Therefore if a person makes the return of his income as a trustee, the assessment upon his income would be in accordance with the provisions laid down in Chapter III of the Act, but his liability to pay tax as a trustee must be determined according to Section 41. Now there is no dispute here that the assessee has been assessed to tax as trustee and the contention of the Department is that it is open to them to ignore the provisions of Section 41 and proceed to tax the trustees in the same way as they would proceed to tax any assessee who is not fulfilling the character of a trustee. In other words, the contention of the Department is that, if a trustee is the owner of a property or he is carrying on business or he is the owner of shares, his income could be computed in accordance with Sections 9, 10 and 12 and he could be made to pay tax without observing the special provisions laid down in Section 41 with regard to the liability of trustees. Now, in the first place, Section 41 gives no such option to the taxing Department. If the assessment is upon a trustee, the tax has to be levied and recovered in the manner provided in Section 41. The only option that the Legislature gives is the option embodied in Sub-Section (2) of Section 41 and that option is that the Department may assess the beneficiaries instead of the trustees, or having assessed the trustees it may proceed to recover the tax from the beneficiaries. But on principle the contention of the Department cannot be accepted that, when a trustee is being assessed to tax, his burden which will ultimately fall upon the beneficiaries should be increased and whether that burden should be increased or not should be left to the option of the Department. The basic idea underlying Section 41 and which is in conformity with principle, is that the liability of the trustees should be co-extensive with that of the beneficiaries and in no sense a wider or larger liability. Therefore, it is clear that every case of an assessment against a trustee must fall under Section 41 and it is equally clear that, even though a trustee is being assessed, the assessment must proceed in the manner laid down in Chapter III. In other words, even though the income to be assessed is the income of a trustee, the income must be put under one of the heads mentioned in Chapter III and the provisions laid down with regard to the computation of that income in Chapter III must be carried out. Section 41 only comes into play after the income has been computed in accordance with Chapter III. Then the question of payment of tax arises and it is at that stage that Section 41 issues a mandate to the Taxing Department that, when they are dealing with the income of a trustee, they must levy the tax and recover it in the manner laid down in Section 41. Therefore, there is no inconsistency between the provisions of Sections 9, 10 and 12 and the provisions of Section 41.

3. The difficulty has been caused - and we do not blame the Department for it - by our own observations in *Saifudin Alimahomed v. Commissioner of Income-tax, Bombay City*<sup>1</sup>. There are observations in that judgment which seem to justify the Department in the attitude they have taken up and the attitude is that they are entitled to assess the assessee under Sections 9, 10 and 12 with regard to the three different kinds of income without giving to them and ultimately to the beneficiaries, the benefit of Section 41. Now, before

we look at the observations, let us first consider what the case was about and what it was

<sup>1</sup>(1954) 25 ITR 237

necessary to decide in that case. The assessee in that case died leaving behind him two minor daughters and the Court appointed two guardians for the minors and the guardians were

authorised to carry on the business. The assessment was made upon the guardians under Section 10 read with Section 40 - there the appropriate section was Section 40 and not Section 41 and the narrow contention of the Department there was that under Section 40 you have to assume that the minors are in the same position as majors and availing itself of this legal fiction the Department urged that, although the guardians were being assessed to tax under Section 10 read with Section 40, the guardians were liable to pay tax on the whole income and the income had not to be allocated to the shares of the two minors, because it was urged that the minors must be looked upon as majors competent to carry on the business and if the minors were competent to carry on the business the minors could be assessed to tax as an association of persons and if so, the guardians could equally be taxed in the same way and the liability of the guardians would then be co-extensive with that of the minors. We rejected this contention and we pointed out that the legal fiction incorporated in Section 40 need not be carried beyond what was absolutely necessary and we held that under Section 40 the guardians must be taxed in the same way as if the minors were being taxed in respect of their respective shares of the profits. Now, the important thing to note is that the Department was actually proceeding against the guardians under Section 10 read with Section 40 and Counsel before us have admitted that till this decision was given it was never suggested by the Department that a trustee could ever be assessed to tax irrespective of the provisions of Section 41. It is because of certain observations in this case that the Department now claimed to have the option of proceeding against the trustees under Sections 9, 10 and 12 without taking into consideration the provisions of Section 41. The observations on which the Department relies are at p. 244 (of ITR) : (at pp. 221-222 of AIR) and there we have suggested that the Department has the option of availing itself of the machinery of Section 41 or assessing the guardians as carrying on the business under Section 10. It is clear that these observations were not necessary for the decision of the case, and, what is more, having heard a full argument on the scheme of the Act and especially the scheme of Section 41, we feel that the observations made were not quite correct if they were intended to convey the meaning that the provisions of Section 41 were not mandatory but those provisions may or may not be followed at the option of the Department. To the extent that the judgment decided what it did, Mr. Palkhivala for the assessee does not find any fault. To the extent that the observations are obiter and were unnecessary for the decision of the case, Mr. Palkhivala says that in the interests of the assessee we must make it clear that we should not have conveyed to the Department the impression that it was open to them to increase the burden of the assessee to pay tax. Mr. Palkhivala is right that any such interpretation would be opposed to well-known principles of taxation law. If the Legislature lays down that in a certain case the burden of taxation upon a particular type of assessee should be a particular burden and not a larger or a higher burden, then it cannot possibly be left to the Taxing Department at its option to increase the burden; and we are quite satisfied that the provisions of Section 41 are clear and explicit and in the case of a trustee the burden of tax is limited to what is clearly laid down in that section itself.

4. Mr. Joshi also relied on another judgment - an earlier one - which deals with property tax and that is in *D.M. Vakil v. Commissioner of Income-tax*<sup>2</sup>, Fortunately, that judgment  
<sup>2</sup>(1946) 14 ITR 298

does not require to be explained, because in that case the question that arose was the liability of trustees in whom certain property was vested to pay property tax. Now the trustees did not receive any income from the property; the beneficiaries had the right to stay in that property; and what was urged by the trustees was that, inasmuch as they did not receive any income, they were not liable to pay tax. Both Mr. Justice Kania (Acting Chief Justice) and myself pointed out in that

judgment that the income under Section 9 was an artificial statutory income and it had no relationship whatever to the actual income received by the assessee. The consideration of Section 41 only arose indirectly because what was urged was that, inasmuch as the beneficiaries received no income from the property, under Section 41 the liability of the trustees was co-extensive. We repelled this argument pointing out that, even if the beneficiaries were owners of the property, they would be as much liable to pay tax as the trustees were. The same principle of taxability applied to them and they would have to pay the artificial statutory income as provided by Section 41.

5. Mr. Joshi has suggested that a distinction may be drawn between "Business income" and "Income from property" and "Income from Other Sources"; and Mr. Joshi says that, whatever the position may be with regard to income from property and from other sources, as far as income from business is concerned, in view of the decision in (1954) 25 ITR 237, the position is different. It is true that in that case we did say that a person liable to pay a tax on business income was a person who carried on business; and we pointed out the difference in language used in Section 10 and Section 9. Whereas Section 9 imposed the tax upon the owner of a property, Section 10 imposed the tax upon a person who carried on business. But even assuming that the distinction we had drawn between the two sections is sound, it makes no difference as far as Section 41 is concerned, Whether the assessee carries on business or is the owner of a property or owns shares and receives dividend, if he is a trustee and if he is being assessed as a trustee then Section 41 must come into play and his liability to pay tax must be determined according to the provisions of Section 41. The sole question, which should be easy to answer, would be : Is the assessment being made upon a trustee or not? If the assessment is made upon a trustee, whatever the nature of the property, whatever the nature of the income, whatever the mode of computation, his liability to pay tax must be determined in accordance with Section 41.

6. The first question is in the alternative. Our answer to the latter part of this question must be in the affirmative.

7. In view of this answer, it is unnecessary to answer questions Nos. (2) and (3).

8. No order as to costs of the reference.

Answer accordingly.