BOMBAY HIGH COURT

Kishinchand Chellaram

Vs

Commissioner of Income-Tax

(Chagla, C.J. Tendolkar, J.)

26.09.1955

JUDGMENT

Chagla, C.J.

1. The assessees are father Kishinchand Chellaram, his two sons Shewakram and Lokumal and grandson Murli Tahilram. A private limited company called Chellson Ltd., was incorporated in 1941 and its shareholders were Kishinchand, his two sons and grandson. We are concerned with the assessment of these four individuals for the assessment year 1945-46, and our decision with regard to Kishinchand will also apply to the facts relating to the assessment of his two sons and grandson.

2. It appears that in the year of account of these assessees, which was the financial year 1944-45, this limited company passed a resolution on the July 15, 1944, declaring a dividend at 60% and pursuant to this resolution a sum of Rs. 30,000 was credited to Kishinchand's account on the September 29, 1944. An extraordinary general meeting of the shareholders was held on the December 4, 1947, and at that meeting a resolution was passed that the company had discovered that the dividends were paid not only for the year 1943-44, with which we are concerned in this reference, but also for the years 1941-42 and 1942-43 which were inadvertently paid because no provision was made for the payment of tax, and therefore the resolution directed that the necessary adjustment, will be made in the books of the company as on the April 6, 1947. Kishinchand in his assessment for the assessment year 1946-46 showed Rs. 30,000 as his dividend income. When the matter went in appeal to the Appellate Assistant Commissioner the resolution of the December 4, 1947, had been passed, and therefore at that stage kishinchand contended that inasmuch as he was compelled to refund the dividend which he had received pursuant to this resolution, Rs. 30,000 did not represent his dividend income and it should be excluded from his assessment. The Appellate Assistant Commissioner rejected that contention and in appeal the Tribunal upheld the view of the Appellate Assistant Commissioner and the matter has now come before us on this reference under section 66.

3. What is urged by Sir Jamshedji on behalf of the assessee is that under section 4 of the Income-tax Act what is charged to tax is the real income of the assessee and what we have to consider is whether Rs. 30,000 represented the real income of the assessee Kishinchand. It is pointed out that as the limited company had adopted a mercantile system, if tax was due for the year 1943-44 a provision had to be made for the payment of that tax, and profits could only be ascertained after a provision was made for the payment of tax, and inasmuch as dividend was paid out of profits without marking any provision for taxation, the result was that dividend was paid out of capital and not out of profits and therefore the payment of dividend was illegal. It is further pointed out that it is well established under companies law that the funds of the company constituted trust funds which are under the direction and control of the directors, and the directors are not authorised to pay out of profits, and if the directors paid dividends out of capital they are liable to refund that amount. It is also pointed out on the authority of Palmer's Company Precedents at page 637 that even a shareholder who has knowledge that he has received dividend out of capital is liable to refund the dividend, and it is further urged that as far as India is concerned under section 72 of the Contract Act if dividend was being paid to a shareholder under a mistake of law or of fact, even though he might have no knowledge that the dividend was being paid out of capital, he would be liable to refund that amount. Therefore it is contended that when the company passed the resolution reversing its earlier resolution, the position became clear that the shareholder was never entitled to the dividend which he had received, that it was not his real income, and therefore that dividend could not be taxed as his dividend income in his assessment.

4. We are prepared to accept all the propositions put forward by Sir Jamshedji as sound and correct propositions of law, but the insuperable difficulty in the way of Sir Jamshedji is this that we must look upon every assessment as a self-contained assessment. That is an elementary principle of taxation law. The dividend was paid to Kishinchand in the assessment year 1945-46, relevant to his year of account 1944-45. At that date there is no suggestion that dividend was not properly paid or that Kishinchand was liable to refund that dividend. It constituted his dividend income and he properly showed it in his assessment. What Sir Jamshedji wants to rely on is the fact that came to light on the December 4, 1947, long after the year of account of the assessee.

5. It is a pure accident that the assessment was not finalised but that the appeal from the assessment was pending before the Appellate Assistant Commissioner. There may have been an appeal preferred to the Appellate Assistant Commissioner in respect of this assessment, in which case the assessment would have been completed after the Income-tax Officer had passed the assessment order. Then sir Jamshedji concedes, as he must concede, that it would have been his misfortune and he could not have taken up this contention. Are we to take the view that the correctness of an assessment with regard to a particular income depends upon a pure accident of the time when the objection is taken and the stage at which the assessment has reached ? If we

look upon the assessment as self-contained, then it is clear that when the assessment was made by the Income-tax Officer it was properly made and that the sum of Rs. 30,000 represented the income of Kishinchand. It is only before the Appellate Assistant Commissioner that a fact that arose after the year of account is relied upon by the assessee in order to get relief from taxation. It is difficult to understand on what principle of taxation law can an assessee rely on a subsequent event in order to escape taxation which he is properly liable to pay as far as the assessment year itself is concerned. Therefore the correct approach to this case is whether the sum of Rs. 30,000 represented the dividend income of the assessee as far as the assessment year 1945-46 is concerned, and to that the answer can only be one that on the facts established for that assessment year the dividend was properly paid by the company to the assessee and the assessee received it as his dividend income. Whether rights the assessee may be entitled to by reason of the fact that subsequently he became liable to refund the dividend, those rights are outside the ambit of the particular assessment with which we are concerned. He may have relief under the Income-tax Act or he may not, but we are not concerned with the position that arose on the December 4, 1947, which would correspond with the assessment year 1948-49. We are only concerned with the assessment year 1946-46, and as far as that assessment is concerned the assessee had no answer to the contention of the Department that the sum of Rs. 30,000 represented his dividend income.

6. Our answers to the questions submitted to us will therefore be :

7. Question (1) is unnecessary.

8. Question (2) in the affirmative as to the first part.

9. The latter part of question (2) does not arise.

10. The assessee to pay the costs.

11. Notice of motion dismissed. No orders as to costs of the notice of motion.

12. Appeal dismissed.