PUNJAB AND HARYANA HIGH COURT

Commissioner of Income-Tax

Vs

Jai Parkash Co. Ltd

(Mahajan, J.)

29.08.1960

JUDGMENT

Mahajan, J.

1. This is an application under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax asking this court to issue a mandamus to the Income-tax Tribunal directing it to state the following question of law for the decision of this court :

> "Whether on the facts and in the circumstances of the case the sum of Rs. 94,253 or any part of it accrued or arose or could be deemed to accrue or arise or was received or could be deemed to be received by the assessee as income, profits and gains during the previous year."

The facts of this case are not in dispute. The assessee company entered into a contract for forward sale of 79 teeps of mustard on February 5, 1952, with a private chamber of commerce, namely, the Bharat Co. Ltd. at the rate of Rs. 27-8-0 per maund. The due date was June 7, 1952. On February 28, 1952, the assessee company sent a telegram to the chamber to the effect that if the chamber did not inform it within four hours of the receipt of the telegram about the acceptance of the settlement of the bargain at the rate of Rs. 16-14-6 per maund, it would presume that the chamber had accepted the settlement of the assessees outstanding bargain at that rate. No response was, however, made by the chamber to this telegram. This led to a suit by the assessee against the chamber for the recovery of Rs. 73,820-12-0 after adjusting a sum of Rs. 20,000 odd due from the assessee to the chamber on account of some earlier transactions. This suit was decreed by the District Judge, Bhatinda, on the 17th/27th of February, 1954. Against this decision an appeal is pending in this court. The present dispute relates to the assessment year 1953-54 and the account year 1952-53. In the return filed by the assessee the following note was appended :

> "According to the assessee there is a profit of Rs. 1,09,072 in the account of Bharat Co. Ltd., but the company does not admit its liability. The assessee has filed a suit for Rs. 75,000 after adjusting Rs. 34,072 received by the assessee. Unless the suit is decided, the exact amount of profit cannot be determined until the liability is admitted by the

company. The exact profit will be shown when the same is determined by the civil court."
It may be mentioned that the method of accounting employed by the assessee is on the mercantile basis. The Income-tax Officer took this amount of Rs. 94,000 odd as income which had accrued in the assessment year 1953-54. Against this inclusion an appeal was preferred by the assessee to the Appellate Assistant Commissioner of Income-tax who agreed with the contention of the Department. The assessee preferred an appeal to the Appellate Tribunal (Delhi Bench). The assessees appeal was allowed and its contention was accepted. While dealing with this matter, the Tribunal has observed as under :

> "The liability of the other contracting party to the assessee is yet in dispute. It is not till the assessee becomes indisputably entitled to the sum of Rs. 94,000 odd or another sum, that income, profits and gains can be said to accrue or arise to the assessee in respect of the transaction of February 5, 1952. The sum of Rs. 94,000 odd is, therefore, excluded from the assessment." An application was made to the Tribunal under section 66 (1) of the Act and was refused by the Tribunal on December 28, 1956. While refusing the application, the Tribunal observed as under :
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> "Before the Tribunal, it was contended on behalf of the assessee that the mere unilateral claims of the assessee for the aforementioned sum did not make that sum the income of the assessee. It was not till the other party had agreed to any figure and there arose a settled liability of the other party in favour of the assessee that any question of income, profits and gains in respect of the forward sale transaction could arise. The Tribunal accepted the assessees contention and concluded that no profit or loss could possibly arise till the dispute between the parties concerned was finally set at rest. The Departments case appears to be that a mere claim is tantamount to a right even where a dispute exists and no determination has been made. Even if it were a question of law, the answer to such a question is, in our opinion, so obvious that we would not like to waste the time of the court by making a reference of this kind."

It is argued that a question of law does arise and the Tribunal is wrong in hoping that no question of law arises. In support of this contention, the learned counsel for the Department relies on the provisions of section 4 of the Income-tax Act. The relevant provisions on which reliance has been placed are in these terms :

4. (1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which -
(a) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, or... Explanation 2. - Income which would be chargeable under the head salaries if payable in the taxable territories shall be deemed to accrue or arise in the taxable territories, wherever paid if it is earned in the taxable territories but any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in the taxable territories, if the pension is payable to a person referred to in arise in the taxable territories, if the pension is payable to a person referred to in article 314 of the Constitution or to a person, who, having been appointed before the 15th August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of the Constitution as a Judge in India.....
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Explanation 3. - A dividend paid by an Indian company without the taxable territories shall be deemed to be income accruing and arising in the taxable territories to the extent to which it has been paid out of profits subjected to income-tax in the taxable territories.....

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(2) For the purposes of sub-section (1) where a husband is not resident in the taxable territories remittances received by his wife resident in the taxable territories out of any part of the income which is not included in his total income shall be deemed to be income accruing in the taxable territories to the wife." The learned counsel contends that inasmuch as the assessee in his return showed the disputed amount as having accrued to him as income on the basis of the forward contract, it must be assumed that the said amount did accrue to him as income during the relevant accounting year. In order to appreciate the contention of the learned counsel, the exact scope and implication of the aforesaid provisions has to be seen. The scheme of the Act would show that only those sums are taxable which accrue as income, i.e., they must actually accrue or arise. No amount can be said to accrue unless it is actually due. Claim to an amount is not tantamount to the amount being due or in other words that the amount has accrued. In the instant case, the very foundation of the claim is in jeopardy. If the appeal goes against the assessee, then nothing would be due. It is only if it goes in his favour that the amount will accrue. The learned counsel did realise the implication of this situation and therefore, contended on the basis of the expression deemed to accrue" that it is not necessary that the amounts must accrue in reality and, therefore, even a claim to an amount would come within the ambit of the aforesaid expression. This is to misread the provisions of law. The words "deemed to accrue" have only relation to what has been so made to accrue under the provisions of the Act; whereas it was not in reality so, but by force of the statute it is treated to be so. This matter is settled beyond controversy : see in this connection the decision of the Privy Council in Commissioner of Income-tax v. Bombay Trust Corporation Ltd. the decision of the Federal Court in Raja Bahadur Kamakshya Narain Singh v. Commissioner of Income-tax and that of the Supreme Court in Keshav Mills Ltd. v. Commissioner of Income-tax. The implication of this expression has been fully set out in Law and Practice of Income-tax by Kanga at page 172 and it is not necessary to reproduce that passage here. This provision itself clearly illustrates my point that only what has actually accrued will be taken note of for the purposes of section 4 of the Income-tax Act and not what has not actually accrued unless of course the Act itself makes what in reality has not accrued to be so. There are a number of provisions in the Act making amounts which have not accrued in reality as having accrued, for instance, Explanations 2 and 3 of section 4 and sub-section (2) of this very section, sub-section (2) of section 7, sections 16, 18 (4), 41, 42, 44D, etc. For the reasons given above, we see no force in the contention of the counsel for the Department. In our view, the decision arrived at by the Tribunal is correct and it must be held that no question of law arises, for it will depend on the facts of each case whether the amount in question has or has not accrued. This application accordingly fails and is dismissed. As there is no appearance for the assessee, there will be no order as to costs.

G. D. KHOSLA, C. J. - I agree and I would like to add a word or two of my own. The main contention of the counsel for the Income-tax Department was that since the assessee was maintaining his accounts according to the mercantile procedure and the amount of Rs. 94,000 odd had actually been entered in his account books as profit accruing on the date when the accounts were settled and a telegram was sent to the chamber from whom the amount is claimed, the amount must be treated as profit which accrued to the assessee company on that date. Now, the question whether an entry, which is made, is in respect of profits accrued or not, is a question of fact depending on the peculiar circumstances of any particular case. In the present case, we

find, as has been very clearly set out by my Lord, Mahajan, J., that the profit was not actual, it had not accrued and was merely being claimed, the claim was being hotly contested and is still sub judice. That being so, the profit is nothing more than a notional figure which the assessee hopes to get. As has been pointed out by my brother, there has been no case which supports the contention of the Department. A reference was made to three or four cases which appear to have some relevance, but, when examined more closely, they are found to be entirely distinguishable. I may make a reference to three of them which were relied upon by Mr. Awasthy who appeared on behalf of the Department. The first case is In the matter of Keshardeo Chamria. In this case the assessee was held liable for income which he had received from some joint property. It was admitted on all sides that the assessee was owner of one-half of the property and he had, in fact, been drawing income to the extent of that half. A subsequent dispute regarding his title to this half of the property made no difference to the assessment and it was held that the amounts, which he had actually received and were assessed to income-tax, must be held to be income accruing to the assessee. Commissioner of Income-tax v. Thiagaraja Chetty & Co. is a decision of the Supreme Court which related to the commission due to a director who was the assessee in the case. The director was to be paid commission on sales, and during the accounting year a sum of over Rs. 2,00,000 was found payable to him. The company debited this amount in their accounts as income due to the director. The director, however, owed a sum of money to the company and he asked the company to set off this debt against the commission payable to him. This request was refused and so the director assessee claimed that the profits, which had been shown by him in his books kept according to the mercantile system, should not be treated as due profits. The Supreme Court held that these profits had accrued and that, therefore, the director was rightly assessed in respect of them. Now, in this case there was no dispute whatsoever with regard to the fact that the amount of commission was to be paid to the assessee. The only question was when it should be paid and whether it should be paid in cash or should be set off against the debt due from him. The amount had clearly accrued and was debited in the companys own account; it was credited in the assessees account, although it was not actually received by him. There was no dispute, therefore, that the amount had, in fact, accrued. In Sassoon & Co. Ltd. v. Commissioner of Income-tax there was the question of commission which was payable to the assessee. What had happened was that the managing agents, who were entitled to received commission, had assigned their rights to the assessee and the assessee thereafter became entitled to receive the commission on sales which the original managing agents would have received. The entire commission for the accounting year was credited to the account of the assessee and the income-tax authorities assessed him in respect of the entire sum, although there was a question whether some of this had to be accounted for the benefit of the original managing agents. It was held by the Supreme Court that the assessee was rightly assessed to this amount. The reason was that the commission is always calculated in respect of the entire year and it had accrued to the assessee and not to the original managing agents; it had, in fact, been paid to the assessee and, therefore, it could not be said that any part of this commission was notional.

These cases are, therefore, clearly distinguishable. In the case before us the profits, which the assessee is claiming, are entirely notional; he may get nothing at all, as the suit may go against him. That being so, it cannot be said that the failure of this suit has entailed actual loss to him, because it is deprivation of a notional profit-not an actual loss-which occurs on the date his suit ultimately fails in the High Court or the Supreme Court if an appeal is taken to it. In this view of the matter, it is quite clear to me that the income has not accrued and the amount was rightly excluded from the taxable income of the assessee. I would, therefore, decline to issue a mandamus requiring the income-tax authorities to state a case for the opinion of this court.

Petition dismissed.