PADMAVATI R. SARAIYA AND OTHERS

v.

COMMISSIONER OF INCOME-TAX BOMBAY CITY-1

September 22, 1964

(K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI JJ.)

Income-tax Act (11 *of* 1922), *ss.* 16(2), 49*AA and Indo-Pakistan agreement dated* 10*th December,* 1947—*Scope of.*

The assessee was a share-holder in a company carrying on business both in India and Pakistan. It declared dividend out of the profits accruing to it in both the countries. For the following year, having declared the dividend similarly, the company also passed a resolution that half the amount of the dividend was payable on or after a certain date and the balance was payable "within two months after remittances from Pakistan became free". On the two questions, namely : (i) whether the assessee, having received the Pakistan portion of the dividend-income, was entitled to any relief under the provisions of the Indo-Pakistan Agreement dated 10th December, 1947, entered into between the two countries to avoid double taxation in pursuance of s. 49AA of the Income-tax Act, 1922, and (ii) whether the entire amount of dividend including the moiety payable later could be included in the total income of the assessee, the High Court answered the first, against, and the second, in favour of, the assessee. Both the assessee and the Commissioner appealed to the Supreme Court.

HELD : The appeals should be dismissed.

(i) Articles IV and VI of the Agreement show that each Dominion could make an assessment under its own laws and regardless of the Agreement. The only restrictions imposed were on the liberty to retain the tax and the obligation to allow certain abatements, if the conditions mentioned in the Agreement were satisfied. As no certificate of assessment in Pakistan had been produced before the income-tax officer as required by Art. VI(b), the assessee was not entitled to any relief. [313D,G; 314A].

(ii) As the dividend due to the assessee was not credited to any separate account of the assessee so that he could, if he wished, draw it, it must be held that the Pakistan portion of the dividend had not been credited or paid within the meaning of s. 16(2) of the Act and so, could not be included in the total income of the assessee. [315B-C].

J. Dalmia v. *Commissioner of Income-tax, Delhi,* 53 I.T.R. 83, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 704 to 715 of 1963.

Appeals from the judgments and orders dated March 17, 1958, of the Bombay High Court in Income-tax Reference Nos. 41, 42, 43, 57, 58, 59, 69, and 77 of 1957.

A. V. Viswanatha Sastri, T. A. Ramachandran, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellants (in C.A. Nos. 704, 706, 707, 709, 710, 711, 713 and 714 of

1963) and respondents (in C.As. Nos. 705, 708, 713 and 715 of 1963).

S. V. Gupte, Additional Solicitor-General, R. Ganapathy Iyer and *R. N. Sachthey*, for the appellants (in C.A. Nos. 705, 708, 712, and 715 of 1963) and respondents (in C.A. Nos. 704, 706, 707, 709, 710, 711, 713 and 714 of 1963).

The Judgment of the Court was delivered by

Sikri J. This judgment will dispose of 12 appeals from the judgments of the High Court of Bombay, dated March 17, 1958, whereby the High Court answered the questions referred to it partly in favour of the assessee and partly in favour of the Department. The four questions answered by the High Court are:

> "1. Whether the initiation of action under section 34 for the purpose of bringing to tax the net dividend income of Rs. 579 (suitably grossed) was valid ?
>
> 2. Whether the said 'P. portion of the dividend income' forms part of the assessee's total income as that term is defined in section 2(15) of the Indian Income Tax Act, 1922 ?
>
> 3. Whether having regard to the provisions of the Indo-Pakistan Agreement, the assessee is entitled to any 'relief' on the said 'P. portion of dividend income' ?
>
> 4. D. Whether the other moiety of the dividend of Rs. 1,71,992 declared by the Company on 14-10-1952 is properly includible in the total income of the assessee of the previous year S.Y. 2008 for the assessment year 1953-54 ?"

(The figures in these questions are in respect of Shri Purshottamdas Thakurdass.)

In C.A. 709/63 and C.A. 713/63 questions 1, 2 and 3 arise. Only questions 2 and 3 arise in C.A. 710/63, C.A. 711/63, C.A. 704/63, C.A. 707/63, C.A. 714/63, and 706/63. Question 'D' arises in C.A. 712/63, C.A. 705/63, C.A. 708/63, C.A. 712/63 and C.A. 715/63. The appeals involving question 'D' are by the Commissioner of Income Tax and appeals involving questions 1 to 3 are by assessees.

It will be convenient to give the facts in the case of the assessee, the late Shri Purshottamdas Thakurdass, hereinafter referred to as Assessee 'A'. He was a shareholder in Narandas Rajaram,

Ltd., which carries on business both in India and Pakistan. Profits accrued to it both in India and Pakistan. The company declared dividend out of the above profits. In the case of Assessee 'A', the portion of the dividend attributable to the profits that accrued in Pakistan amounted to Rs. 2,722 for the assessment year 1949-50. On May 20, 1952, the I.T.O. included this sum of Rs. 2,722 in the total income but held that no income tax or super-tax was payable in respect of this amount. The Income Tax Officer reopened the assessment of 1949-50 because Assessee 'A' was a shareholder in Industrial Corporation Ltd., and an order had been passed under s. 23A of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act) in respect of this Corporation. As a result of this order, Rs. 579 was deemed to have accrued to him. But in his re-assessment order, dated January 17, 1955, the Income Tax Officer brought to charge not only the said Rs. 579 but also the said sum of Rs. 2,722, *i.e.*, the Pakistan portion of the dividend received from Narandas Rajaram Ltd. The Appellate Assistant Commissioner upheld the assessment order both in respect of Rs. 579 and Rs. 2,722. The Appellate Tribunal also upheld the order. The Appellate Tribunal then referred the first three questions to the High Court but refused to refer the following question:

> "Whether on the facts and circumstances of the case, the relief allowed in the assessment under section 23(3) on that portion of dividend income from Narandas Rajaram & Co. Private Ltd., which is attributable to the income of the Company arising in Pakistan can be withdrawn while making re-assessment under section 34(1)(b)?"

Assessee 'A' took out a notice of motion for a reference of the said question.

The High Court, by its judgment dated March 17, 1958, answered the three questions against the Assessee. The High Court also directed the Appellate Tribunal to refer the above question, hereinafter to be referred to as the "Supplementary Question" which the Appellate Tribunal had declined to refer. On the Appellate Tribunal referring the said question, the High Court by its judgment dated April 14, 1960, answered the question in favour of the assessee.

On February 7, 1961, the High Court granted the necessary certificate to Assessee 'A'. The Commissioner of Income Tax,

however, did not appeal against the judgment of the High Court on the supplementary question.

For the assessment year 1952-53, the net dividend received by Assessee 'A' from Narandas Rajaram & Co., Ltd. was Rs. 1,12,867 out of which Rs. 23,167 was attributable to the profits of that company which accrued in Pakistan. The I.T.O. charged this sum to tax and the assessment was confirmed both by the Appellate Assistant Commissioner and the Appellate Tribunal. Two questions were referred to the High Court. The second question is the same as question No. 3 reproduced in the beginning of the judgment. The first question was in substance the same as question No. 2. The High Court on July 10, 1959, granted the certificate of fitness under s. 66A(2) of the Act.

The fourth question 'D' arose in the case of Assessee 'A' for the assessment year 1953-54 under the following circumstances. On October 14, 1952, the following resolution was adopted at the ordinary general meeting of Narandas Rajaram & Co. Ltd. :

> "Dividends, as mentioned below, be and are hereby declared out of the profits of the Company:
>
> (a) A dividend of 4 per cent on 'A' Preference Shares and 4 per cent on 'B' Preference Shares.
>
> (b) A dividend of 32 per cent free of income-tax on the Ordinary Shares and a consequential additional dividend at the rate of 13 per cent free of income-tax on 'B' Preference Shares.
>
> (c) A moiety of the amount of the dividend be paid to the share-holders on and after 16th October, 1952 whose names appear on the Register of the Company as on 6th October, 1952, and the other moiety be postponed for payment within two months from the date on which remittances from Pakistan become free and the moneys are actually received."

The certificate issued by the company under s. 20 of the Act also stated that half of the amount of the dividend was payable on or after October 16, 1952, and the balance was payable "within 2 months after remittances from Pakistan become free". The Income Tax Officer included the entire amount of Rs. 1,71,992 in the total income of Assessee 'A'. Both the Appellate Assistant Commissioner and the Appellate Tribunal confirmed this. On an application of Assessee 'A', the Tribunal referred three questions; the first question is Question 'D', the second question is

similar to the question No. 2 and the third similar to question No. 3, reproduced in the beginning of the judgment. The High Court answered question 'D' in the negative (*i.e.* against the Commissioner of Income Tax) and the others, as in the others references, against the assessee. The High Court granted certificates under s. 66A(2) of the Act both to the Assessee 'A' and the Commissioner of Income Tax.

It is not necessary to give the facts in the cases of other assessees for, apart from the amount of dividend involved, the facts are similar.

It is not necessary to discuss the first question, which raises the point of the validity of proceedings under s. 34 of the Act, because it is common ground that it has become academic. This common ground is based on the fact that the Commissioner of Income Tax has not appealed against the judgment of the High Court, dated April 14, 1960. By this judgment the High Court had answered the supplementary question in favour of the Assessee 'A'.

Regarding the second question, Mr. Viswanatha Sastri rightly concedes that the Pakistan portion of the dividend forms part of the assessee's total income, as defined in s. 2(15) of the Act. The High Court had followed its earlier judgment in the *Commissioner of Income-Tax, Bombay City* v. *Shanti K. Maheshwari*(1). We hold that the High Court was right in answering this question against the Assessee 'A'.

The next question involves the interpretation of s. 49AA of the Act, as it existed at the relevant time, and the Indo-Pakistan Agreement dated December 10, 1947. Mr. Sastri contends that on the true interpretation of the agreement each Dominion is entitled to charge only on the proportion of income allotted to it under the Agreement. The reply on behalf of the Revenue is that each Dominion is entitled to assess an assessee on the total income in the normal way but it has to allow an abatement subject to the conditions mentioned in the agreement being satisfied.

Section 49AA was in the following terms :

> "The Central Government may enter into an agreement with Pakistan or the United Kingdom for the avoidance of double taxation of income, profits and gains under this Act and under the corresponding law in force in Pakistan or the United Kingdom and may, by

notification in the official gazette, make such provision as may be necessary for implementing the agreement."

In pursuance of this section, agreement for the avoidance of double taxation of income was entered into between the Government of the Dominion of India and the Government of the Dominion of Pakistan. The following portions of the agreement are relevant for disposing of the point argued before us.

"*Article IV*. Each Dominion shall make assessment in the ordinary way under its own laws; and, where either Dominion under the operation of its laws charges any income from the sources or categories of transactions specified in column 1 of the Schedule to this Agreement (hereinafter referred to as the Schedule) in excess of the amount calculated according to the percentage specified in columns 2 and 3 thereof, that Dominion shall allow an abatement equal to the lower amount of tax payable on such excess in either Dominion as provided for in Article VI.

Article VI. (a) For the purposes of the abatement to be allowed under Article IV or V, the tax payable in each Dominion on the excess or the doubly taxed income, as the case may be, shall be such proportion of the tax payable in each Dominion as the excess or the doubly taxed income bears to the total income of the assessee in each Dominion.

(b) Where at the time of assessment in one Dominion, the tax payable on the total income in the other Dominion is not known, the first Dominion shall make a demand without allowing the abatement, but shall hold in abeyance for a period of one year (or such longer period as may be allowed by the Income-tax Officer in his discretion) the collection of a portion of the demand equal to the estimated abatement. If the assessee produces a certificate of assessment in the other Dominion within the period of one year or any longer period allowed by the Income-tax Officer, the uncollected portion of the demand will be adjusted against the abatement allowable under this Agreement; if no such certificate is produced, the abatement shall cease to be operative and the outstanding demand shall be collected forthwith.

THE SCHEDULE

(*See* Article IV)

Source of income or nature of transaction from which income is derived	Percentage of income which each Dominion is entitled to charge under the Agreement		Remarks
1	2	3	4
8. Dividends	By each Dominion in proportion to the profits of the company chargeable by each Dominion under this Agreement.	50 per cent of the profits by the Dominion in which goods are sold.	Relief in respect of any excess income-tax deemed to be paid by the share-holder shall be allowed by each Dominion in proportion to the profits of the company chargeable by each under this Agreement.

It seems to us that the opening sentence of Art. IV of the Agreement that each Dominion is entitled to make assessment in the ordinary way under its own laws clearly shows that each Dominion can make an assessment regardless of the Agreement. But a restriction is imposed on each Dominion and the restriction is not on the power of assessment but on the liberty to retain the tax assessed. Article IV directs each Dominion to allow abatement on the amount in excess of the amount mentioned in the Schedule. The scheme of the Schedule is to apportion income from various sources among the two Dominions. In the case of Dividends each Dominion is entitled to charge "in proportion to the profits of the company chargeable by each Dominion under this agreement." This refers us back to the other items. For instance, in respect of goods manufactured by the assessee partly in one Dominion and partly in the other, each Dominion is entitled to charge on 50% of the profits. But the Schedule does not limit the power of each Dominion to assess in the normal way all the income that is liable to taxation under its laws. The Schedule has been inserted only for the purpose of calculating the abatement to be allowed.

Article VI also leads to the same conclusion. For if no assessment could be made on the amount on which abatement is to be allowed, there could be no question of making a demand without allowing the abatement and holding in abeyance for a period the collection of a portion of the demand equal to the estimated abatement.

It is common ground that no certificate of assessment in the other Dominion has been produced before the Income Tax Officer. We agree with the High Court that the answer to this question is in the negative.

The other question that remains is question 'D', set out above. The High Court approached the question in the light of the decision of the Bombay High Court in *Commissioner of Income Tax* v. *Laxmidas Mulraj Khatau*(1). It came to the conclusion that the resolution created only a contingent liability, and, therefore, the dividend could not be said to have been paid in the previous year of the assessment year 1953-54. Mr. Gupte, the learned Additional Solicitor-General, has urged that this view is wrong but that in view of the recent decision of this Court in *J. Dalmia* v. *Commissioner of Income Tax, Delhi*(2), it is not necessary to decide this point as this Court had dissented from the decision in *Commissioner of Income Tax* v. *Laxmidas Mulraj Khatau*(1). He, however, urged that the amount had been credited within the meaning of s. 16(2) of the Act. He said that the profit and loss Account of the Company was debited with Rs. 5,85,000, that being the total amount of dividend declared. The corresponding credits, he points out, were given as follows:

"To seventh Dividend Account (being the amount payable to shareholders) ..	Rs. 5,74,144-4-0
To Income-tax Reserve Account (being the amount of income-tax deducted on dividend warrants)	Rs. 10,500-0-0
Non-resident shareholders' super-tax Account (being the amount of super-tax deducted from the dividend payable to non-resident shareholders) ..	Rs. 355-12-0"

Subsequently, after making payment, the seventh dividend account showed a credit balance of Rs. 2,92,500 representing a moiety of the dividend that remained to be paid out of the total dividend declared of Rs. 5,85,000.

We are unable to accept the contention. In *J. Dalmia* v. *Commissioner of Income Tax, Delhi*(2) Shah J., speaking for the Court had observed :

"In general, dividend may be said to be paid within the meaning of s. 16(2) when the Company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto".

This condition must also be fulfilled in case a dividend is credited. In other words, the credit must be in such form that the dividend is unconditionally available to the member.

It will be noticed that the dividend due to the assessee has not been credited to any separate account of the assessee, so that he could, if he wished, draw it. Before the High Court it was never suggested that the dividend was credited or distributed.

Accordingly we hold that the Pakistan portion of the dividend has not been credited or paid within the meaning of s. 16(2) of the Income Tax Act. The answer to the question is, therefore, in the negative.

In the result, all the appeals fail. All the parties will bear their own costs in this Court.

Appeals dismissed.