(1973) 04 AHC CK 0019

Allahabad High Court

Case No: Civil Miscellaneous Writ No. 2713 of 1972

Thakur Das Shyam Sunder		APPELLANT
	Vs	
Additional Commissioner of Income Tax and Another		RESPONDENT

Date of Decision: April 19, 1973

Citation: (1974) 93 ITR 27

Hon'ble Judges: Satish Chandra, J; N.D. Ojha, J; H.N. Seth, J

Bench: Full Bench

Advocate: R.K. Gulati and K.M.L. Hajela, for the Appellant; Deokinandan, for the Respondent

Judgement

H.N. Seth, J.

This is a petition under Article 226 of the Constitution. The petitioner, Messrs. Thakur Das Shy am Sunder, prays for a writ of certiorari for quashing the order of the Additional Commissioner of Income Tax, U.P., Lucknow, dated 15th of January, 1972.

2. The petitioner is a commission agent carrying on its business in Shahjahanpur, It claims that in the district of Shahjahanpur there is a long standing custom according to which the commission agents charge on every transaction of sale of goods worth Rs. 100, a sum of 15 paise from the person to whom goods are sold and 10 paise from the person whose goods are sold through them as dharmada. This charge is over and above the commission which a commission agent is entitled to receive from both the parties. Dharmada so collected is a customary levy which is realised and credited by the commission agent in a separate account known as dharmada account. This amount is held by them on trust to be utilised specifically and exclusively for charitable purposes. During the accounting year, relevant to the assessment year 1970-71, the petitioner received and credited a sum of Rs. 2,400 in its dharmada account. The Income Tax Officer, Shahjahanpur, treated this receipt as the petitioner''s income and brought it to tax. Being aggrieved by the order of the

Income Tax Officer, the petitioner filed a revision before the Commissioner of the Income Tax, U.P., Lucknow, which was rejected on January 15, 1972. The Additional Commissioner held that the amount in dispute was received by the petitioner during the course of business transaction and was undoubtedly its trading receipt; the ownership in the funds vested entirely in the petitioner, who was free to spend the amount according to its own discretion. In the circumstances, the Income Tax Officer was justified in treating the amount of dharmada received by the petitioner as its trading receipt and in including it in its income. The petitioner then filed the present writ petition before this court contending that the amount of dharmada collected by it was not its income and the Income Tax authorities had no jurisdiction to include the same in its total income.

3. Learned counsel for the petitioner pointed out that the petitioner had been collecting dharmada and crediting the same in the dharmada account for the last several years. From this account it had been making contribution to charity from time to time. For the assessment year 1968-69, when a similar question arose for consideration, the Appellate Assistant Commissioner of Income Tax held that the amount realised as dharmada was not the income of the petitioner and as such it was not liable to be taxed in its hands. During the accounting year relevant to the assessment year 1970-71 also the petitioner received a sum of Rs. 2,400 as dharmada for being credited to its dharmada account which was already in existence.

4. The Division Bench, before which the petition came up for hearing, thought that on the point raised in this petition there is a conflict between two decisions of this court, viz., in the cases of Bijli Cotton Mills Ltd. Vs. Commissioner of Income Tax, and KANPUR AGENCIES PRIVATE LTD. Vs. COMMISSIONER OF Income Tax, LUCKNOW., . It, accordingly, referred this case for decision by a larger Bench.

5. Petitioner''s allegation that in the district of Shahjahanpur there is a custom according to which the commission agents realise dharmada from their constituents and spend the same on charity has not been controverted by the respondents. It is also clear that in pursuance of that custom the petitioner opened an account several years before the previous year relevant to the assessment year 1970-71, in which all the amounts realised by him as dharmada were being credited and as and when occasion arose, the amount in that account was being utilised for charity. It can also be safely presumed that in this case the parties which in the relevant accounting year entered into transactions through the petitioner were aware of the trading custom and they paid dharmada to the petitioner with the knowledge and understanding that the amount so paid by them was to be credited to the fund which had already been opened by the petitioner for purposes of charity.

6. As pointed out by the Supreme Court in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., Income Tax is a levy on income. No doubt the Income Tax Act takes into account two points of time at which the liability

to tax is attracted, viz., the accrual of the income or its receipt, but the substance of the matter is the income. If income does not result at all there cannot be a tax even though in book-keeping an entry is made about hypothetical income which does not materialise. Where income has in fact been received and is subsequently given up it remains the income of the recipient, even though given up and the tax with regard to it is payable. Where, however, the income can be said not to have resulted at all there is obviously neither accrual nor receipt of income even though an entry to that effect might in certain circumstances have been made in the books of account.

7. The question, therefore, that arises for consideration is whether if while entering into business transactions through the petitioner, various parties made contribution to its dharmada fund, such contributions constituted the petitioner''s income.

8. In the case of The Commissioner of Income Tax, Bombay City II Vs. Shri Sitaldas Tirathdas, . the Supreme Court laid down the principle for determining as to when and in what circumstances receipt of an amount by an assessee can be considered to be his income for the purposes of the Income Tax Act. In this connection their Lordships of the Supreme Court observed as follows :

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligations cannot be said to be a part of the income of the assessee. Where by the obligation, income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one''s own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as a part of his income, but for and on behalf of the person to whom it is payable."

9. In the instant case what we find is that there was a custom in the market according to which commission agents realised dharmada from their constituents. The constituents paid that amount to the commission agents knowing that the same was being collected over and above the commission which was payable by them to the commission agents. This amount, under the custom, had to be spent on charities. The amount was being paid by the constituents for being made a part of the fund which had already been established by the commission agent for purposes of charity. From the very beginning it was clear to both the parties, viz., the one paying dharmada and the other receiving the same, that it was being received by the petitioner for being credited to an already existing fund for charity. Accordingly, when this amount reached the petitioner it did not in truth reach him as its income.

10. Learned counsel for the revenue placed strong reliance on the case of The Commissioner of Income Tax, Punjab Vs. Shri Thakur Das Bhargava, Advocate, Hissar, . In that case what had happened was that an assessee who was an advocate was originally reluctant but later on agreed to defend certain accused persons in a criminal trial on condition that he would be paid a sum of Rs. 40,000 for creating a public charitable trust. When the trial was over the assessee was paid a sum of Rs. 32,000 and he created a trust in respect of that amount by executing a trust deed. In the circumstances, the Supreme Court held that the sum of Rs. 32,000 received by the assessee was his professional income. At the time when the assessee received the amount no trust or obligation in the nature of a trust was created. When the assessee created a trust by executing the trust deed he applied a part of his professional income for purposes of that trust. It was further observed that mere desire on the part of the assessee to create a trust from out of the monies paid to him neither created a trust nor did it give rise to any legally enforceable obligation. Judgment of the Supreme Court makes it clear that according to it there was no trust in existence for and on behalf of which the money had been received by the assessee. Its judgment might well have been otherwise if it could be shown that there was a trust already in existence and the sum of Rs. 32,000 had been received by the advocate concerned for being credited to that fund.

11. Reliance was also placed on the case of India Pepper and Spice Trade Association Vs. Commissioner of Income Tax, Kerala, . In that case, under the bye-laws of the trade association, contribution at a certain rate in respect of goods sold, was payable to the association by the seller as well as the buyers as laga. The Income Tax authorities and the Tribunal held that the money collected by the association as laga was liable to be assessed as income of the association u/s 10(6) of the Income Tax Act. Learned judges of the Kerala High Court held that there was nothing in the case to justify an inference that the laga collected was a collection for religious or charitable purposes as alleged and that it was a remuneration, definitely related to the specific services performed by the members of the association. It was not a voluntary payment unrelated to the membership of the association, but was an overall charge for the services performed by the association in respect of buying and selling of goods over and above the separate fees prescribed for many of those services and as such that income had rightly been assessed u/s 10(6) of the Income Tax Act which provides that a tax is to be payable by an assessee under the head "profits and gains of business, profession or vocation". A trade, professional or similar association, performing specified services for its members for remuneration definitely related to those services, is deemed for the purposes of that section to carry on business in respect of those services and the profits and gains therefore are liable to tax accordingly. Facts of that case are clearly distinguishable from the facts of the present case. In this case, dharmada was being realised for being credited to a fund which had been reserved by the petitioner for purposes of charity and not for performing or rendering any specified services to the persons who

made the contribution.

12. Learned counsel for the revenue then relied upon the case of Kanpur Agencies Private Ltd. v. Commissioner of Income Tax. In that case the assessee who was the sole selling agent of a cotton mills realised from the purchasers, on each bale of goods, some amount towards charity and the same was collected and credited in a separate account in the assessee''s books which was styled as Marwari charitable account. The Tribunal found that although the amount was realised by the assessee from its customers apparently on the ground of charity and although the amount was credited to the account "Marwari Charitable Society", the disbursement of the amount was entirely within the discretion of the assessee and the assessee was not bound to devote any amount to. the Marwari Charitable Society. It was held that the amount having been realised by the assessee from its customers as a part of and in connection with the sale transactions must be treated as its business income. It will be seen that in that case the Tribunal did not accept the case of the assessee that the amount realised by the assessee from its customers had necessarily to be spent on charity. According to the findings arrived at in that case, the amount had been realised by the assessee for its own purposes and it had full discretion to spend the amount for any purpose whatsoever. The amount was not held in trust by the recipient and there was no binding obligation on it to apply the same for charitable purposes. In the case before us, however, the amount has been realised for the purposes of a fund reserved for charity. The facts of this case cited by the learned counsel for the revenue are, therefore, quite distinguishable.

13. Learned counsel for the revenue further relied on the case of Chowringhee Sales Bureau (P) Ltd. Vs. Commissioner of Income Tax , West Bengal, . In that case the assessee-company was a dealer in furniture and also acted as an auctioneer. In respect of the sales effected by it as auctioneer, during the accounting year ending 31st March, 1960, it realised in addition to its commission a sum of Rs. 32,986 as sales tax which was credited in the books of the assessee under the head "Sales tax collection account". Though the assessee as a seller was liable to deposit the sales tax with the State Exchequer yet it did not do so. It also did not pay the amount to the person whose goods it auctioned. The question that arose for consideration was whether in these circumstances the amount of sales tax retained by the assessee could be included in its business income for the assessment year 1960. The Supreme Court held that the sales tax was received by the assessee in its character as an auctioneer; accordingly it formed part of its trading or business receipts and as such was liable to be included in its business income. The assessee could claim the deduction in respect of that amount only when it paid it to the Government, It is the true nature and quality of the receipt and not the head under which it is entered in the account books that is decisive of the matter. If a receipt is a trading receipt, the fact that it is not shown in the account books of the assessee would not prevent the assessing authority from treating it as a trading receipt. Ratio of this case is that in order to determine whether a particular receipt is income or not, its true nature

and quality has to be determined. Considering the nature of the sales tax receipts and the liability of the dealer to pay the same, the Supreme court came to the conclusion that the amount collected under the head "sales tax" was really the income of the assessee. This decision does not lay down that each and every receipt, during the course of a business transaction, must necessarily be the income of the recipient. It emphasizes that in each case the true nature and the quality of the receipt has to be considered. As pointed out earlier, the case of the petitioner that in the district of Shahjahanpur, dharmada is a customary levy which is to be necessarily spent for purposes of charity has not been controverted in the present case. That being so, the fact that dharmada was being collected and credited to an account reserved for charity clearly shows that it was never intended to be the income of the recipient. Moreover, the custom is not that the petitioner is required to spend on charity some amount from out of its income whether or not it recovered the same from its constituents.

14. In view of the aforesaid discussion, we agree with the proposition laid down in the case of AGRA BULLION EXCHANGE LTD. Vs. COMMISSIONER OF Income Tax., wherein it has been held that a receipt earmarked as charity by the person making the payment does not accrue as an item of income to the assessee. In respect of the amounts given for charity, the assessee could be likened to a conduit pipe through whom the amounts pass- The decision of a Division Bench of the Calcutta High Court in the case of Commissioner of Income Tax Vs. Tollygunge Club Ltd., fully supports the view taken by us.

15. Learned counsel for the revenue then relied upon the observations made by the Additional Commissioner in his order dated 15th January, 1972, where he mentioned that the petitioner could not he held to be a trustee in respect of dharmada receipts inasmuch as it is well-settled that in the case of a trust the trustees have no dominion over the funds and no benefit is received by them. As, in the instant case, the ownership of the funds, realised by way of dharmada, vests entirely in the petitioner who is free to spend the amount according to its own discretion its position qua the dharmada account is not that of a trustee. The petitioner owns the amount which in fact is its income. We are unable to accept the submission that as the ownership of the amounts credited to the dharmada.dharmada. account vest in the petitioner and it enjoys some discretion with regard to its disposal it cannot be said that its position is that of a trustee. The question whether the position of the petitioner, when he received the amount, was that of a trustee or not will depend upon the actual custom which obliged the constituents to pay dharmada. As stated earlier, the petitioner''s case that the amount realised as dharmada has got to be spent on charity has not been controverted by the respondents. Under the law relating to trust, legal ownership over the trust fund and the power to control and dispose it of always vests in the trustee. Accordingly, merely because in this case the legal ownership over the amount deposited as dharmada vested in the petitioner, it cannot be said that its

position was not that of a trustee. Discretion vested in a trustee to spend the trust amount over charities will not affect the character of the deposit. In the case of Commissioner of Income Tax, West Bengal Vs. Sardar Bahadur Sardar Indra Singh Trust, . it has been pointed out that it is now well settled that to the (sic)that there is no valid trust unless the objects thereof are specified, charitable trusts are an exception. With regard to those trusts, a great deal of latitude is permitted and the. rule is that, provided there is a clear intention to make a gift for charity, the trust is not allowed to fail for uncertainty. The theory upon which the rule rests is that in the case of charitable trusts, charity in the abstract is to be taken to be the object and the specific purpose to which the fund or the income of the fund may be applied constitute only the mode of administering the trust. Indefiniteness as regards the specification of the objects is, therefore, regarded only as an indefiniteness in regard to the manner in which the trust will be administered. So, if a clear intention to create a trust in favour of charity is discernible, defects in the mode prescribed or absence of any such prescription does not invalidate the trust. The defect is taken as attaching to a matter which is not essential. It has, therefore, been held that a trust deed barely creating a trust for charities without specifying any charities at all is valid. The court in such cases can always intervene and choose appropriate charities which it considers proper although it will always pay regard to the wishes of the trustee in so far as they are ascertainable from the language of the deed. Accordingly, even if some discretion was given to the petitioner to spend the amount deposited with it on a charity of its own choice, it does not mean that either no trust was created or the trust so created was invalid. In our opinion the finding recorded by the Additional Commissioner of Income Tax merely means that the petitioner was free to apply the trust fund on a charity of its own choice. It does not mean that the petitioner could, if it so liked, appropriate the amount credited to dharmada account for its own purposes. After all, if dharmada was being collected for purposes of charity in accordance with a custom, its disposal was equally governed by the obligation created by that custom, i.e., the amount was to be spent only for some charitable purpose.

16. We are of opinion that in order to determine whether a particular receipt, by whatever name it is termed, is or is not the income of an assessee its real nature and quality has to be considered. If it was received under a custom, the answer to the question will depend on the nature of obligation treated by that custom. In this case it is not disputed that the petitioner received dharmada under a custom according to which it was obligatory upon it to spend the amount so collected on charity alone. The petitioner had created a fund for that purpose and dharmada collected by it had to be credited to that fund. In the circumstances we are of opinion that the amount so collected was not received by the assessee as its income. We further consider that there is no real conflict in the two decisions of this court, viz., that in the case of Bijli Cotton Mitts Ltd v. Commissioner of Income Tax and Kanpur Agencies Private Ltd. v. Commissioner of Income Tax.

17. In view of the aforesaid discussion the petition succeeds and is allowed with costs. The order passed by the Additional Commissioner of Income Tax dated 15th January, 1972, is set aside and that part of the assessment order dated 24th February, 1971, passed by the Income Tax Officer, Shahjahanpur, which provides for the adding back of a sum of Rs. 2,400 (representing dharmada) in the petitioner''s total income for assessment year 1970-71 is quashed. The Income Tax Officer is directed to modify his assessment order accordingly.