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(1965) 07 KL CK 0027

High Court Of Kerala

Case No: Income Tax R. 64 of 1964

Commissioner of Income Tax, Kerala		APPELLANT
	Vs	
Mackar Pillai Respondent		RESPONDENT

Date of Decision: July 27, 1965

Acts Referred:

- Income Tax Act, 1922 - Section 16(3), 23A

Citation: (1965) KLJ 788

Hon'ble Judges: M.S. Menon, C.J; V.P. Gopalan Nambiyar, J

Bench: Division Bench

Advocate: C.T. Peter, for the Appellant; M.M. Abulkhader, for the Respondent

Judgement

M.S. Menon, C.J.
This is a reference by the income tax Appellate Tribunal, Madras Bench, u/s 66(1) of the Indian income tax Act, 1922. The assessment year with which we are concerned is 1952-53. The question referred reads as follows:

Whether on the facts and circumstances of the case, the dividend income of Rs. 24,216/-deemed to have been distributed to the assesses wife and minor children u/s 23A is assessable in the hands for the assesses u/s 16 of the income tax Act, 1922?

Sub-section (3) of section 16 of the Indian income tax Act, 1922, provides that in computing the total income of any individual for the purpose of assessment, there shall be included so much of the income of a wife or minor child of such individual as arises directly or indirectly "from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart"; and "from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration". u/s

23A of the income tax Act,

1922--before-it was amended by the Finance Act of 1955--it was open to the income tax Officer in certain eventualities to make an order that the undistributed portion of the assessable income of a company, as computed for income tax purposes and reduced by the amount of income tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividends among the shareholders.

2. The words used in section 16 (3) are "so much of the income of a wife or minor child of such individual as arises directly or indirectly". It is not possible to say that what is deemed to be an income for the purpose of section 23A by virtue of a legal fiction is an income which arose directly or indirectly within the meaning of section 16 (3) of the Act. In Commissioner of Income Tax, Bombay City Vs. Phirozshaw Pallonji Mistry and Others, the Bombay High Court dealt with the matter as follows:

Section 6 (3) permits inclusion of the income of a wife in the income of her husband for purposes of assessment only if such income arises directly or indirectly from assets transferred to the wife by the husband otherwise than for adequate consideration; in other words, such inclusion is permissible only where the income of the wife actually arises directly or indirectly. Where by a mere fiction the income is deemed to have been received but which has not in fact been received, in our judgment, section 16 (3) can have no application. There is no warrant for the submission that the expression "as arises directly or indirectly in clause (a) of sub-section (3) of section 16 is to be equated with the expression "deemed to have been distributed" in section 23 A(1).

3. It has also to be noted that u/s 23 A the fictional income is included in the total income of the wife or minor child; whereas u/s 16 (3) it has to be included not in their total income but of the husband or the father as the case may be. In Commissioner of Income Tax, Bombay City Vs. Phirozshaw Pallonji Mistry and Others, the Privy Council had to deal with a similar situation.

4. Section 22 of the East African income tax (Management) Act, 1952 provided that the undistributed portion of the total income of certain companies, subject, to a limit of 60 per cent, of such income, should be deemed to have been distributed as dividend amongst the shareholders of the company if the Commissioner of income tax made an order to that effect, and that the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of that Act; and section 24:

Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.

The Privy Council said:

The two sections are independent charging provisions and the charges which they impose are mutually exclusive. It is not merely that there is to be a notional payment of dividend; it is also that each shareholder''s share of the dividend is to be included in his total income for the purpose of the Act. The dividend then must go into the total income of the child who owns the shares, and for the purpose of taxation it is to be treated as his income. Such an enactment would be blankly inconsistent with the enactment contained in section 24 that whatever is paid to or for the benefit of a child is to be treated for all the purposes of the Act as the income of the father and not as the income of any other person if ''paid'' in this section were to include what is deemed to be paid by the earlier section. It appears to their Lordships to be the unavoidable conclusion that in construing section 24 the income ''paid'' within the meaning of that section and as such attributed to the father cannot include income deemed to be distributed by virtue of section 22 and as such attributed to the child.

5. In the light of what is stated above we must answer the question referred in the negative, that is, against the Department and in favour of the assessee. We do so with costs, advocate''s fee Rs. 150/-. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal as required by sub-section (5) of section 66 of the Indian income tax Act, 1922.