
(1959) 03 BOM CK 0004

Bombay High Court

Case No: Income-tax Reference No. 65 of 1958

Commissioner of
Income Tax, Bombay
City I

APPELLANT

Vs

Phirozshaw Pallonji
Mistry (By Legal
representatives) and
Another

RESPONDENT

Date of Decision: March 1, 1959

Acts Referred:

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

Citation: (1960) 36 ITR 582

Hon'ble Judges: Shah, J; S.T. Desai, J

Bench: Division Bench

Advocate: G.N. Joshi, for the Appellant; R.J. Kolah, for the Respondent

Judgement

Shah, J.

The assessment years in this reference are 1949-50 and 1950-51. Phirozshaw Pallonji Mistry and Shapurji Pallonji Mistry are two assesses. Their respective wives held shares in a private limited company styled Shapurji Pallonji & Co. Ltd. An order u/s 23A of the Income Tax Act was passed by the Income Tax Officer in making the assessment of Shapurji Pallonji & Co. Ltd., and the income deemed to have been distributed as dividend u/s 23A in the hands of the respective wives of the two assesses was sought to be included in the income of the two assesses relying upon section 16(3) of the Income Tax Act on the ground that the shares in the company held by the respective wives were purchased with the funds provided by the two assesses. It was contended by the assesses that where an order u/s 23A is passed the dividend income is only deemed to have been distributed amongst the shareholders and such income cannot be included in the income of the assesses u/s 16(3). The Income Tax Appellate Tribunal accepted that

contention of the assesses purporting to follow the judgment of this court in S. C. Cambatta v. Commissioner of Income Tax. At the instance of the Commissioner of Income Tax, the following question has been referred by the Tribunal :

"Whether on the facts and circumstances of the case the dividend income deemed to have been distributed to the assesses" wives u/s 23A is assessable in the hands of the assesses u/s 16(3) of the Income Tax Act ?"

2. u/s 23A of the Income Tax Act, before it was amended by the Finance Act, 1955, in certain eventualities it was open to the Income Tax Officer 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 amongst the shareholders. On the footing that the undistributed profits are deemed to have been distributed, the income will be taxable in the hands of the shareholders. But the liability is the consequence of a fictional distribution of income which in reality has not reached the hands of the shareholders. Section 16(3) provides for another fiction. In so far as it is material, that section provides :

"In computing the total income of any individual for the purpose of assessment, there shall be included - (a) so much of the income of a wife... as arises directly or indirectly - ... (iii) 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..."

3. There is no dispute that in this case certain assets were transferred by the two assesses to their respective wives and the shares were purchased out of those assets. But section 16(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 23A(1).

4. Mr. Joshi for the Department invited our attention to sub-section (4) of section 23A as it stood before that section was amended by the Finance Act, 1955. By that sub-section it was provided :

"Where tax has been paid in respect of any undistributed profits and gains of a company under this section, and such profits and gains are subsequently distributed in any year the proportionate share therein of any member of the company shall be excluded in computing his total income of that year."

5. Mr. Joshi says that in the year in which the undistributed profits are deemed by virtue of the order u/s 23A to be distributed they will not, on the view we are taking, be included in the income of the husband, and even when the profits are distributed as dividends, by the operation of sub-section (4) they will not be liable to be included in the husband's income. But the Legislature has provided for inclusion in the taxable income of the husband the income of the wife arising from assets transferred by him without consideration. Whether in the event of actual distribution of the undistributed profits by the company as dividend hereafter, the income received by the wife will be liable to be included in computing the total assessable income of the husband is a question which does not, in our judgment, fall to be decided at this stage, and we express no opinion on that question.

6. On the view taken by us, the answer to the question will be in the negative. The Commissioner of Income Tax to pay the costs of the assesses.

7. Question answered in the negative.