
(1988) 11 BOM CK 0078

Bombay High Court

Case No: Income-tax Reference No. 135 of 1976

Commissioner of
Income Tax

APPELLANT

Vs

Trustees of Mrs.
Kasturbai Walchand

RESPONDENT

Date of Decision: Nov. 29, 1988

Acts Referred:

- Income Tax Act, 1961 - Section 11, 12, 13, 13(1), 13(2)

Citation: (1990) 181 ITR 47

Hon'ble Judges: T.D. Sugla, J; S.P. Bharucha, J

Bench: Division Bench

Judgement

T.D. Sugla, J.

The Income Tax Appellate Tribunal has referred to this court the following questions of law at the instance of the Department and the assessee :

2. At the instance of the Revenue :

"(1) Whether, on the facts and in the circumstances of the case, the dividend income of Rs. 41,726 from the investments referred to in paragraph 11 above would be exempt from tax u/s 11 of the Act read with section 13(1)(c)(ii) and section 13(2)(h) of the Act ?"

3. At the instance of the assessee :

"(2) Whether, on the facts and in the circumstances of the case, the application of the property of the trust for the benefit of specified persons can be said to be by way of compliance with the mandatory terms contained in clause 18 of the trust deed ?

(3) Whether, on the facts and in the circumstances of the case, the provisions of sub-clause (ii) of clause (c) of section 13(1) would apply in view of the first proviso thereto

?"

4. We propose to first deal with the question of law referred to us at the instance of the Revenue. The assessee-trust was created by a deed of trust dated November 25, 1946. The trust has all along been treated as a public charitable trust. The assessee filed a return showing "Nil" income for the assessment year 1971-72. The Income Tax Officer found that the investment of the assessee-trust in shares of four companies was for the benefit of persons specified in section 13(3) of the Act and, therefore, the income by way of dividend from these four companies was taxable. She rejected the assessee's contention that such investments were made by the assessee according to the mandatory terms of the trust and the assessee's case was covered by the first proviso to section 13(1)(c)(ii). The gross dividend being Rs. 1,49,900, after allowing the expenses of Rs. 2,500 on estimate and Rs. 3,000 as deduction u/s 80L, she computed the total income at Rs. 1,44,400. The Appellate Assistant Commissioner agreed with the Income Tax Officer that there was no obligation on the part of the assessee-trust to invest its income in the said four companies and that the first proviso to section 13(1)(c)(ii) did not cover the investments. However, he accepted the other plea of the assessee, viz., that the application of the property of the trust for the benefit of specified persons pertained to the period before June 1, 1970, and the case was covered by the second proviso to section 13(1)(c)(ii) and, therefore, income was exempt. It was contended before the Tribunal that the Appellate Assistant Commissioner had failed to consider the impact of section 13(2)(h) on section 13(1)(c). The above said two provisions read together, it was stated, the second proviso to section 13(1)(c) would not cover the assessee's case as the investments in the said four companies, though made before June 1, 1970, remained invested in those very companies even after January 1, 1971, and the assessee's case would not, therefore, be covered by the second proviso. The Tribunal found on facts that the assessee had gifted shares of Walchand and Company Pvt. Ltd. on December 28, 1970, and, therefore, the dividend received from that company would certainly qualify for exemption. As regards the dividend from the remaining three companies amounting to Rs. 41,726 also, the Tribunal did not accept the Department's case that the provisions of section 13(2)(h) created a further fiction so that even though the shares were invested before June 1, 1970, the dividend income therefrom would forfeit exemption as these investments continued as such even after January 1, 1971. Since the Tribunal was dismissing the Department's appeal, it treated the assessee's cross-appeal also as dismissed.

5. Shri Jetley learned counsel for the Department, reiterated that the investment was admittedly made by the assessee-trust in the shares of the companies in which the settlors had substantial interest within the meaning of sub-section (3) of section 13. Such investments continued beyond January 1, 1971, and, therefore, the income would forfeit exemption irrespective of the fact whether the same was applied by way of mandatory compliance with the provisions of the deed of trust or such an investment related to a period before June 1, 1970. In support, he placed reliance on the Andhra Pradesh High

Court decision in [Talaprolu Bapanaiah Vidya Dharma Nidhi Trust Vs. Commissioner of Income Tax,](#) . The proposition laid down in this case, it was stated, is that if the investments made or continued by an assessee-trust in companies in which the settlors had substantial interest within the meaning of sub-section (3) of section 13 beyond January 1, 1971, the income of the trust will have to be treated as taxable and not exempt u/s 11.

6. In order to appreciate the submissions made on behalf of the Department, it is desirable to refer to the provisions of sections 13(1)(c) and 13(2)(h) of the Income Tax Act, 1961. The provisions at the material time read thus :

"13.(1) Nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof - ...

(c) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof -

(i) if such trust or institution has been created or established after the commencement of this Act and under the terms of the trust or the rules governing the institution, any part of such income enures, or

(ii) if any part of such income or any property of the trust or institution (whenever created or established) is during the previous year used or applied,

directly or indirectly for the benefit of any person referred to in sub-section (3) :

7. Provided that in the case of a trust or institution created or established before the commencement of this Act, the provisions of sub-clause (ii) shall not apply to any use or application, whether directly or indirectly, of any part of such income or any property of the trust or institution for the benefit of any person referred to in sub-section (3), if such use or application is by way of compliance with a mandatory term of the trust or a mandatory rule governing the institution :

8. Provided further that in the case of a trust for religious purposes or a religious institution (whenever created or established) or a trust for charitable purposes or a charitable institution created or established before the commencement of this Act, the provisions of sub-clause (ii) shall not apply to any use or application, whether directly or indirectly, of any part of such income or any property of the trust or institution for the benefit of any person referred to in sub-section (3) in so far as such use or application relates to any period before the 1st day of June, 1970."

"13.(2) Without prejudice to the generality of the provisions of clause (c) of sub-section (1), the income or the property of the trust or institution or any part of such income or property shall, for the purposes of that clause, be deemed to have been used or applied for the benefit of a person referred to in sub-section (3), - ...

(h) if any funds of the trust or institution are, or continue to remain, invested for any period during the previous year (not being a period before the 1st January, 1971) in any concern in which any person referred to in sub-section (3) has a substantial interest."

9. There appears to be no dispute that, factually, the provisions of the second proviso to clause (c) of sub-section (1) of section 13 cover the assessee's case and that ordinarily the assessee would continue to qualify for exemption. The Department's case is that the case of the assessee also falls within section 13(2)(h) and that fact makes all the difference in the situation.

10. It may be mentioned as a statement of fact that a view contrary to what was taken by the Andhra Pradesh High Court in [Talaprohu Bapanaiah Vidya Dharma Nidhi Trust Vs. Commissioner of Income Tax](#), , regarding the meaning of the word "fund" and the investments made or continued to have been made was taken by the Calcutta High Court in [Commissioner of Income Tax Vs. Birla Charity Trust](#), . However, for the present, we will assume that the assessee's case falls u/s 13(2)(h). Let us now examine its impacts on section 13(1)(c). Section 13(2) along with its clauses including clause (h) is a non obstante proviso to section 13(1)(c) and thus broadens the net spread by section 13(1)(c) for the purpose of forfeiting the exemption. The pertinent question would still remain when one of the two proviso to clause (c) of sub-section (1) of section 13 (in this case the second proviso) is admittedly applicable, the effect of which is that the exemption cannot be forfeited, could one accept the Department's case that the date mentioned in proviso (ii) has lost relevance so much so that the proviso has become otiose. We will certainly avoid such a construction unless compelled by the plain language of the provisions. Under the circumstances, having regard to the undisputed finding of the Tribunal that the case falls within the proviso (ii) to clause (c) to sub-section (1) of section 13, it will, in our view, have to be held that the income is entitled to exemption and that the Tribunal was right in its conclusion.

11. Accordingly, the question of law referred to us at the instance of the Revenue is answered in the affirmative and in favour of the assessee.

12. Shri Jetley had contended that the Tribunal was not justified in referring the questions of law at the instance of the assessee when the assessee had not filed a separate reference application. This question has become academic as we have answered the question referred to us at the instance of the Revenue in favour of the assessee. Therefore, the questions of law referred to us by the Tribunal at the instance of the assessee do not survive and are not answered. No order as to costs.