

PETITIONER:
COMMISSIONER OF INCOME-TAX, BOMBAY

Vs.

RESPONDENT:
ROBERT J. SAS

DATE OF JUDGMENT:
16/11/1962

BENCH:

ACT:
Income Tax-Notice of assessment-Limitation for-Income deemed to be distributed as dividend-Indian Income-tax Act, 1922 (11 of 1922), ss. 23 A (1), 34.

HEADNOTE:

The assessees were the three shareholders of a private company. The company made profits in the calendar year 1947, but did not declare any dividend at the shareholders meeting held on December 4, 1948. The Income-tax Officer passed an order under s. 23 A (1) of the Income-tax Act whereby the income of the company was deemed to have been divided amongst the three shareholders. He issued notices to the assessees which were served on them on April 1, 1954. The assessees contended that the notices were served beyond the period of four years allowed by s. 34 (1) (b). Held, that the notices served under s. 34 (1) of the Act were beyond time and the Income-tax Officer had no jurisdiction to assess the assessees. Under s. 23A (1) the dividend was to be deemed to have been distributed not on June 30, 1949, by which date the company should have distributed the dividend, but on the date of the general meeting i.e., December, 4, 1948 within the accounting year 1948 and assessment year

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1949-50. The notice was not served within four years from the end of the assessment year. It made no difference that under s. 23 A (1) an order could be passed at any time.

JUDGMENT:

CIVIL APPELLATE JURISDICTION :Civil Appeals Nos.138 to 138 of 1962.

Appeals by special leave from the judgment and order dated March 19, 1958, of the Bombay High Court in Income-tax Reference No. 74 of 1957.

Gopal Singh and R. N. Sachthey, for the appellant.

R. J. Kolah, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for the respondents.

R. Gopalakrishnan, for the Intervener.

1962. November 16. The judgment of the Court, was delivered by

KAPUR J.These 'three appeals by special leave are brought against the judgment and order of the High Court Bombay. The appellant in all the three appeals is the Commissioner of Income-Tax but in each of the appeals the respondent is different 1. C., one of: the three shareholders of a private limited company A.C.E.C. 'Private (India) Limited which was

carrying on business in India and made profits during the calendar year 1947. The accounting year is the calendar year ending, December 31, 1948, and the relevant assessment year 1949-50. Although the company had earned large profits during the year 1947 it did not declare any dividend at the shareholders' meeting held on December 4, 1948. On March 29, 1954, the Income-tax Officer passed an order under s. 23A(1), 'of the Income-tax Act, hereinafter termed the Act whereby the income of the 'Company. was in accordance with that provision, deemed to have been divided amongst the shareholders. By that order the following dividends were

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deemed to have been distributed amongst the three shareholders, each a respondent in one of the appeals.

Mr. Paul Rouffart :Rs. 1,09,8591-

Mr. Paul Victor Hermans :Rs. 1,00,189/-

Mr. Robert J. Sas :Rs. 1,09,859/-

The Income-tax Officer issued notices under s. 34 of the Act and the notices were served on the respective respondents on April 1, 1954. Thereafter the return of the income was submitted and the assessment was completed in regard 'to the shareholders. Appeals were taken first to the Appellate Assistant Commissioner and then to the Income tax Appellate Tribunal. One of the points taken before the Tribunal was that the Income-tax Officer had no jurisdiction to take proceedings as the notices were served on the assessee respondents beyond the period of four years allowed under s 34(1)(b) of the Act. This plea was accepted by the Tribunal and at the instance of the Commissioner of Income-tax a case was stated to the High Court under s. 66(1) of the Act and the following two questions were referred to it:

(1) Whether on the facts and circumstances of the case it was necessary for the Incometax Officer to initiate action under section 34 of the Indian Income-tax Act in order to tax the deemed income distributed by virtue of the order under section 23A(1) of the Act made in the cage of the A.C.E.C. Private (India) Ltd. ?

(2) If the answer to question No. 1 is in the affirmative whether having regard to the observations of their lordships in Navinchandra Mafatlal v. Commissioner of Income-tax,, Bombay City 1 (1955) 27 I.T.R. 245 the notice, served on April 1, 1954 was out of time;?

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The second question was reframed by the High Court as follows :

If the answer to question No. 1 is in the affirmative whether the notice served on April 1, 1954 was out of time ?

Both the questions were answered in the affirmative and against the Commissioner of Income-tax. Against that judgment and order he has come in appeal to this court by special leave.

In view of the decision of this court in Sardar Baldev Singh v. Commissioner of Income-tax, Delhi & Ajmer (1) and Commissioner of Income-tax V. Navinchandra Mafatlal (2) in which it was held that an assessment cannot be made under s.23A of the Act because that section does not make provision for an assessment to' be made and assessment can only be made under s. 34 of the Act, the first question no longer survives for decision and was rightly not argued before us.

The only question that remains for decision is the second question i. e., whether the notice served on April 1, 1954, was out of time. Counsel for the appellant-Commissioner of Income-tax-argued (1) that there was no limitation prescribed in regard to the order to be made under s. 23A of the Act and if the period mentioned in a. 34 (1) (b) is made applicable to orders under s. 23A then that section (s. 23A) would become unworkable; (2) that as under s. 23A(1) there was a period of six months up to the end of which dividends could be distributed the accounting year would, in the present case, be 1949 and the assessment year 1950-51 and therefore the notice could be served within four years of the end of that year i. e., up to March 31, 1955. Finally it was urged that proviso (1) to sub-s. (3) of s. 34 applied and as the notice was issued within four years under s. 34(1)(b) there was

(1) [1961] 1 S.C.R. 482.

(2) [1961] 42 I.T.R. 53.

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a period of one year from the date of service of the notice during which the assessment or reassessment could be made and the impugned order having been made within that period it was a proper and a valid order.

In the present case the High Court in its advisory jurisdiction had to give its opinion on the question submitted to it and it refrained the question in order to bring out the question which arises from the order of the Tribunal We did not allow the question of the applicability of proviso (1) to s. 34(3) to be raised as the question does not take in the point raised about the proviso to sub-s. (3) of s. 34. The question as framed by the High Court is whether the service of notice under s. 34(1)(b) was out of time. The proviso to sub-s. (3) of s. 34 relates to completion of assessment within a particular period when the notice is issued before the period of limitation referred to in s. 34(1)(b). The two are different questions and one does not include the other.

At the relevant date s. 23A which empowered the Income-tax Officer to assess individual members of certain companies read as under :

S. 23A. Power to assess individual members of certain companies (1). Where the Income tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of incometax and super-tax payable by the company in respect thereof he shall, unless, he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the

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payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion. of the assessable income of the company of that previous year 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' as at the date of the general meeting aforesaid and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income."

The Income-tax Officer has power to make an order under this section determining the amount of undistributed balance out of the profits of a company where the company has distributed by way of dividends out of the income of the previous year less than 60% of the assessable income; and if it has distributed less than 60% up to the sixth month after the holding of the general meeting then the undistributed assessable income shall be deemed to have been distributed as dividend amongst the shareholders as at the date of the general meeting. Thereafter the proportionate share of each shareholder shall be included in the total of such shareholder for the purpose of assessing his total income. It comes to this that if at the end of the sixth month after the general meeting of a company to consider its accounts of the previous year the income of which is being assessed, the Income-tax Officer finds that the dividends distributed are less than 60% of the assessable income then such undistributed income shall be deemed to have been distributed at the general meeting or in

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accordance with the resolution passed at the general meeting and proportionate share shall be included in the total income of each individual shareholder. Thus s. 23A(1) creates a fictional distribution of dividend which is deemed to be a receipt of dividend 'by the shareholder although in fact the shareholders does not receive it. It is deemed to have been distributed on the date on which accounts of the previous year were laid before the company at its general meeting. Thus construed the undistributed assessable income in the present case was rightly determined by the Income-tax Officer because 60% was not distributed by way of dividends up to the end of the sixth month after the holding of the meeting which was on December 4, 1948. Under s. 23A(1) of the Act dividend distributed by June 30, 1949, should not have been less than the statutory limit but the effect of the deeming provision is not that the income should be deemed to have been distributed on June 30, 1949, but on the date of the general meeting i.e. December 4, 1948, and therefore within the accounting year 1948, the relevant assessment year being 1949-50. It makes no difference that according to the wording of s. 23A(1) the order could be passed at any time, the assessment would still have to be 'Made under s. 34(1)(b) of the Act and if a notice is not served in accordance with that provision the Incometax Officer will have no jurisdiction to take any action against the shareholder. The notice under s. 34(1) is to be served within four years from the end of the assessment year. It was held by this court in First Additional Income-tax Officer, Mysore, v. H. N. S. lyengar that the period of eight or four years under s.34(1)(a) or (b) begins from the end of the assessment year. Besides we cannot see why s. 23A(1) 'Should, become unworkable merely because the notice under s. 34(1) which is the assessment section. prescribes a time limit for taking action for escaped incomes nor was any reason

(1)[1962] Supp. 1 S.C.R.I.

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brought to our attention in support of that submission.

In this view of the matter the answer given by the High Court to the second question was correct and the assessment made under s. 34(1)(b) of the Act after four years from the end of the relevant assessment year was out of time. This is the only question which survives for decision and in our opinion the High Court answered it correctly.

These appeals, therefore fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

JUDIS