

Commissioner Of Income-Tax, Bombay ... vs Navinchandra Mafatlal on 10 January, 1961

Equivalent citations: AIR1961SC1717, [1961]42ITR53(SC), AIR 1961 SUPREME COURT 1717

Bench: J.C. Shah, M. Hidayatullah

JUDGMENT

Hidayatullah, J.

1. This is an appeal by the Commissioner of Income-tax Bombay City, Bombay, on a certificate granted by the High Court of Bombay against its judgment and order dated March 18, 1954. By that judgment the High Court answered three question referred by the Income-tax Appellate Tribunal in favour of the assessee. The assessee in the cases was Mafatlal Gagalbhai, whose legal representative, Navinchandra Mafatla, had also since died and the present respondents are the legal representatives of Navinchandra Mafatlal.

2. We are concerned in this case with the assessment of the income of Mafatlal Gagalbhai for the accounting years 1941 and 1942, corresponding to the assessment years 1942-43 and 1943-44. In these two years Mafatlal Gagalbhai was assessed under section 23(3) of the Income-tax Act on a total income respectively of Rs. 3,76,539 and Rs. 4,42,693. In the first year, no appeal was preferred, and in the second, the appeals to the Appellate Assistant Commissioner and the Tribunal were unsuccessful.

3. In the accounting year 1941 Mafatlal Gagalbhai held 12,485 ordinary shares and 2,500 preference shares in a company called Gagalbhai Jute Mills Ltd. Calcutta. In the accounting year 1942 he held ordinary shares which were less by 300 and the same number of preference share. At the general meeting of the company, for the years ending March 31, 1941 and March 31, 1942, no dividend was declared either on the ordinary or on the preference shares. In respect of the company, the Income-tax Officer passed order on February 20, 1947, applying section 23A to the company and holding that Rs. 5,71,072 for the assessment year 1941-42 and Rs. 10,00,411 for the assessment year 1942-43 must be deemed to have been distributed as dividend to the shareholders of the company. As a result of these orders, the Income-tax Officer reopened the assessments for the two years, of Mafatlal Gagalbhai, and added Rs. 4,48,502 and Rs. 7,96,082 as amounts deemed to have been distributed to him on the ordinary shares. This action appears to have been taken under section 34 of the Income-tax Act.

4. The company appealed against the order under section 23A to the Appellate Assistant Commissioner, who agreed with the Income-tax Officer. The legal representative of the assessee also

appealed to the Appellate Assistant Commissioner against the demand for tax on the additional sums, but the order was confirmed. The company took a further appeal to the Tribunal against the order under section 23A and the Tribunal by its order dated July 29, 1948, took the view that the undistributed profits had not been properly distributed and that there should have been first a distribution among the preference shareholders and the balance thereafter must be deemed to have been distributed amongst the ordinary shareholders. The respondent also had appealed to the Tribunal against the order of the Appellate Assistant Commissioner; but seeing the order of the Tribunal in the appeals of the company, it was realised that if the appeals were to be proceeded with, there would be additional levy of tax if the matter was referred back to the Department in accordance with the decision in the appeals of the company. The legal representative of the assessee, therefore, withdrew the appeals with the leave of the Tribunal.

5. When the matter went back to the Department on the order of the Tribunal in the appeals of the company, the Income-tax Officer reopened the assessment of Mafatlal Gagalbhai without sending a notice under section 34 of the Income-tax Act. He reassessed the income of Mafatlal Gagalbhai, reducing the amounts which were deemed to be distributed in respect of the ordinary shares, and included the dividends which, he held, must be deemed to have been distributed in respect of the preference share. He added a note to the order of assessment that this action was taken to give effect to the directions of the Tribunal and issued a notice of demand.

6. The legal representative of Mafatlal Gagalbhai then appealed to the Appellate Assistant Commissioner; but it was held that no appeal lay under section 30 of the Income-tax Act and the appeal was dismissed. This view of the Appellate Assistant Commissioner was confirmed by the Tribunal; but the Tribunal at the instance of the legal representative of Mafatlal Gagalbhai stated a case and referred the following question to the High court under section 66(1) for its decision :

"(1) Whether the orders of the Income-tax Officer dated January 23, 1950, are appealable ?

(2) Whether it was incumbent upon the Income-tax Officer to take action under section 34 of the Indian-tax Act before he revised the assessment on January 23, 1950 ?

(3) If the answer to question No. (2) is in the affirmative, whether the bar of limitation specified in section 34 of the Indian Income-tax Act would apply to the inclusion in the total income of a shareholder of the dividend which is deemed to have been distributed under section 23A(1) of the Act ?

7. The reference was heard by Chagla, C.J. and Tendolkar, J. On the question whether the assessment could be said to have been properly made, the learned judges gave different reasons, but both held that section 23A was either a procedural section or a computation section but did not give the right to the Department to make an assessment. In doing so they purported to follow an earlier decision of the same High Court reported in *S. G. Cambatta v. Commissioner of Income-tax*, where it was stated as follows :

"..... section 23A is a mandatory section and lays down ruled of computation in computing the total income of the shareholder referred to in that section" : per Chagla, J. (as he then was). Stone, C.J., observed in that case :

"In my opinion looking at the scheme of the Act, section 23A is a procedural section and not a charging section".

8. It may be pointed out that the Tribunal in its order had earlier said as follows :

"Where an order is passed under section 23A(I) of the Indian Income- tax Act in the case of a company it is not necessary that action under section 34 of the Act has to be taken if necessary for the purpose of revising the assessment made on a shareholder. The fact that action was taken under section 34 in the past does not mean that action under section 34 has to be taken under the law as it stands. The relevant part of section 23A(I) is as follows :

'.... 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 provision is mandatory and has nothing to do with the provisions of section 34 of the Act".

9. In dealing with this matter the High Court was of the opinion that action under section 34 was necessary, and that since notice was a condition precedent to such action, the act of the Income-tax Officer in bringing to charge the income without issuing a notice under section 34 was illegal.

10. The commissioner of Income-tax who has filed this appeal has not attempted to argue any other point except the validity of the assessment made by the Income-tax Officer without resort to section 34 and a notice prior to assessment. He contended that section 23A is a self-contained section and brings to charge dividends deemed to have been distributed and, in terms does not require any other assessment proceedings either by way of section 23 or section 34 of the Act. In our opinion, this matter is no longer open to argument after the decision of this court in *Sardar Baldev Singh v. Commissioner of Income-tax*. Dealing with 23A and section 34 it was observed by this court as follows :

"It seems to us that the Tribunal was wrong in the view that it took. The learned Solicitor-General conceded that this is so. We are unable to agree that an assessment could be made under section 23A. That section does not provide for any assessment being made. It only talks of the fictional income being included in the total income of the shareholders for the purpose of assessing his total income. The assessment, therefore, has to be made under the other provisions of the Act, including section 34, authorizing assessments".

11. It was contended before us that this must be regarded as obiter and not applicable to the present case. It was also stated that it proceeded on a concession by the Solicitor-General. In our opinion

both these contentions are without foundation. No doubt, the Solicitor-General conceded the point, but the court went on to state its own view of the matter and the question appears to have been raised and answered. In view of the clear pronouncement of this court, in our opinion, the decision of the High Court under appeal must be regarded as correct.

12. The appeal fails and is dismissed with costs.

13. Appeal dismissed.