Tarulata Syam And Ors vs Commissioner Of Income-Tax, West ... on 28 April, 1977

Equivalent citations: 1977 AIR 1802, 1977 SCR (3) 697, AIR 1977 SUPREME COURT 1802, 1977 3 SCC 305, 1977 TAX. L. R. 989, 1977 UPTC 395, 1977 2 ITJ 269, 1977 SCC (TAX) 445, 1977 3 SCR 697, 1977 U J (SC) 450, 1977 2 SCJ 380, 1977 (108) ITR 345

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Bench: Ranjit Singh Sarkaria, P.N. Bhagwati, Syed Murtaza Fazalali

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           PETITIONER:
TARULATA SYAM AND ORS.

        Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX, WEST BENGAL

DATE OF JUDGMENT28/04/1977

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
BHAGWATI, P.N.
FAZALALI, SYED MURTAZA

CITATION:
 1977 AIR 1802            1977 SCR  (3) 697
 1977 SCC  (3) 305


ACT:
Indian Income Tax Act, 1922--S. 2(6A)(e)--Scope of.
            Company  a s. 23A Company in which public are  not  sub-
        stantially  interested --Had accumulated profits--Gave  loan
        to  a shareholder--Loan repaid before end of the   financial
        year--Loan if dividends within 2(6A)(e).



HEADNOTE:
           Under section  2(6A)(e).of the Indian  Income-tax  Act,
    , 1922 the term dividend includes any payment by  a  company
        not  being a company in which the public  are  substantially
        interested within the meaning of s. 23A of any sum  (whether
        as  representing  a  part of the assets of  the  company  or
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otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder to the extent to which the company in either case possesses accumulated profits. According to s. 12(1A) of the Act, income from other sources includes dividends. Sub-section (lB) of s. 12 provides any payment by a company to a shareholder by way of advance or loan which would have been treated as dividend within the meaning of s. 2(6A)(e) in any previous year relevant to any assessment year prior to the assessment year ending on the 31st day of March, 1956 had that clause been in force in that year, shall be treated as a dividend received by him in the previous year relevant to the assessment year ending on the 31st day of March, 1956, if such loan or advance remained outstanding on the first day of such previous year. The provisions of s. 2(6A)(e) and s. 12(lB) had been borrowed and adopted with certain alterations from s. 108(2) of the Commonwealth Income Tax Assessment Act of Australia the last limb of which provided that payment to a shareholder by way of advance or loan was to be treated as dividend paid by the company on the last day of the year of income of the company in which payment was made.

The appellant-assessee was a shareholder and Managing Director of a Private Ltd. Company. In the calendar year 1956 (assessment year 195758), the assessee withdrew in cash from the company a sum of Rs. 4.97 lakhs, which was less than the accumulated profits of the company. Before the end of the year, the assessee repaid the whole amount. Deducting a sum of Rs. 1.59 lakhs which was credited to the assessee's account by way of dividend in the company's books, the Income-tax Officer treated the balance of Rs. 2.72 lakhs as dividend income in the ,assessee's hands and grossed up the amount under s. 16(2). appeal, the Accountant Member of the Appellate Tribunal held that any payment made as envisaged in s. 2(6A)(e) became dividend and must be treated as the assessee's income and no subsequent repayment could take it out of the mischief of the provision. The Judicial Member on the other band held that since total income of the assessee during the relevant previous year could be computed and assessed only at the end of that year any advance or loan taken during the interim periods of the previous year would have to. be ignored. On reference the President agreed with the Accountant Member.

The High Court answered the reference in favour of the Revenue.

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were taken and (ii) the last limb of s. 108(1) of the Australian Act should be read into the Indian Act because what was explicit in. s. 108(1) of the Australian Act is implicit in s. 2(6A),(e) and s. 12(lB) of the Indian Act.

Dismissing the appeal,

HELD: The fiction created by s. 2(6A)(e) read with s. 12(lB) of the Act is attracted as soon as all the conditions necessary for its application exist in a case. [707 C]

1. In Navnit Lal C. Javeri v.K.K. Sen, Appellate Assistant Commissioner Income-tax [1965] 1 SCR 909, this Court held that the combined effect of these two provisions is that three kinds of payments made to a shareholder of a company are treated as taxable dividend to the extent of the accumulated profits held by the company, namely, payments made to the shareholder by way of advance or loan, payments made on his behalf and payments made for his individual benefit. The five conditions to be satisfied are: (i) The company must be one in which the public are not substantially interested within the meaning of s. 23A; (ii) The borrower must be a shareholder at the date when the loan was advanced; (iii) The loan advanced can be deemed to be dividend only to the extent of the accumulated profit on the date of the loan; (iv) The loan must not have been advanced by the company is the ordinary course of its business and (v) The loan must have remained outstanding at the commencement of the shareholder's previous year in relation to the assessment year 1955-56. [707 D-G]

In the instant case the company was a controlled company within the meaning of s. 23A; the assessee was its shareholder; the company possessed "accumulated profits" in excess of the amount paid to the assessee during the previous years; and the company's business was not money lending. The last condition was not applicable because it was a transitory provision applicable to the assessment year 1955-56 only while the assessment year in this case was 1957-58. [708 A]

2. (a) The language of ss. 2(6A)(e) and 12(lB) is clear and unambiguous. There is no scope for importing into the statute words which are not there. Such importation would be not to construe it but to amend the statute. Even if there be a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation. [708 H]

(b) No justification to depart from the normal rule of construction according to which the intention of the legislature is primarily to be gathered from the words used in the statute has been made out.

(c) The Indian Legislature has deliberately omitted to use in ss. 2(6A)(e) and 12(lB) words analogous to those in the last limb of s. 108(1) of the Australian Act. When ss. 2(6A)(e) and 12(lB) were inserted by Finance Act, 1955, Parliament must have been aware of the provision contained in s. 108 of the Australian Act. In spite of such awareness, Parliament has not thought it fit to borrow the whole hog what is said in s. 108(1) no far as the last limb of that section is concerned. Our Parliament imported only a very restricted version, and incorporated the same as the 5th condition in s. 12(lB) to the effect, that the payment deemed as dividend shall be treated as dividend received by him in the previous year relevant to the assessment year ending on the 31st March, 1956 if such loan or advance remained outstanding on the last day of such previous year The word "such" prefixed to the previous year shows that the application of this clause is confined to the assessment year ending on 31st March, 1956. [709 C-D]

In the instant case the assessment year did not end on 31st March, 1956 which showed that the Legislature has deliberately not made the subsistence of the loan or advance or its being outstanding on the last date of the previous year relevant to the assessment year, a prerequisite for raising the statutory fiction. In other words, even if the loan or advance ceased to, be
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outstanding at the end of the previous year, it could still be deemed as dividend if the other four conditions factually existed to the extent of the accumulated profits possessed by the company. [709 E-F]

(d) Under s. 3 which is the charging section, the previous year is the unit of time on which the assessment is based. As the taxability of income is related to its receipt or accrual in the previous year, the moment dividend is received whether, actual or deemed, income taxable under the residuary head, "income from other sources", arises. The charge being on accrual or receipt, the statutory fiction created by s. 2(6A)(e) and s. 12(lB) would come into operation at the time of payment by way of advance or loan provided the other conditions are satisfied. [709 G-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: C.A. No. 147 of 1972. (Appeal by Special Leave from the Judgment and Order dated 19.2.1971 of the Calcutta High Court in Income Tax Ref. No. 98/67) G.C. Sharma, D.N. Mukherjee, A. K. Ganguly and G.S. Chatterjee, for the appellants.

B.B. Ahuja and R.N. Sachthey, for respondent.

G.C. Sharma, D.K. Jain, Anup Sharma, S.P. Nayar and Miss K. Jaiswal for the Intervener.

The Judgment of the Court was delivered by SARKARIA J. Whether any payment by a Company, not being a Company in which the public are subsantially interested within the meaning of s. 23A, of any sum by way of advance or loan to a shareholder, not exceeding the accumulated profits possessed by the Company, is to be deemed as his dividend under Section 2(6A) (e) read with Section 12(lB) of the Income-tax Act, 1922, even if that advance or loan is subsequently repaid in its entirely during the relevant previous year in which it was taken, is the only question that falls to be determined in this appeal by special leave. The assessment year is 1957-58, and the corresponding previous year is the calendar year 1956. The assessee is a shareholder and the Managing Director of M/s. Dolaguri Tea Co. (P) Ltd. The Company is admittedly one in which the public are not substantially interested within the meaning of s. 23A of the Indian Income-tax Act, 1922 (for short, the Act). At the commencement of the previous year, there was in the books of the Company a credit balance of Rs. 65,246/- in the assessee's account, which had been brought' forward from the earlier year. Between the 11th January and the 12th November, 1956, the assessee withdrew in cash from time to time from the Company, amounts, aggregating Rs. 4,97,442/-. The first two cash amounts of Rs. 3,50,000/- and Rs. 40,400/-, were taken by the assessee on 11.1.1966. Deducting therefrom the opening balance of Rs. 65,246/- and two more item, namely, Rs. 1,40,000/- being outstand- ing dividends declared on 31.12.1955 of his major son, and transferred to his account, and a further dividend of Rs. 19,493/- credited to his account from Kathoni Tea Estate, there remained a sum of Rs. 2,72,703/- to the debit of the assessee in the books of the Company as on the 12th November, 1956. On December 29, 1956, the assessee paid back to the Company a sum of Rs. 1,90,000/-. On December 31, 1956, his account was credited with another sum of Rs. 80,000/- in respect of the dividend due to him and his wife, and with a further sum of Rs. 29,326/- for hypotecation. In this manner before the end of the previous year, the assessee's account was credited with an aggregated amount of Rs. 2,99,326/- which exceeded the debit balance of Rs. 2,72,70,3/- as on November 12, 1956.. Thus at the end of the relevant previous year, no advance or loan was due to the Company by the assessee. The Income-tax Officer found that the accumulated prof- its of the Company as on January 1, 1956, amounted to Rs. 6,83,005. He, therefore, deducted the two aforesaid items of Rs. 1,40,000/- and Rs. 19,493/-, aggregating Rs. 1,59,493/-, from the amount paid in cash to the assessee and treated the balance of Rs. 2,72,703/- as the net 'dividend' income in the hands of the assessee within the meaning of Section 2 (6A)(e). The/income-tax Officer grossed up that amount under Section 16(2) and gave credit for tax in ac- cordance with that Section to the assessee. The assessee's appeal to the Appellate Assistant Commissioner having failed, he preferred a further appeal to the Income-tax Appellate Tribunal. There was a divergence of opinion between the Members of the Tribunal. The Ac- countant Member took the view that the moment a payment is made as envisaged in Section 2(6A)(c) it becomes clothed with the character of a dividend and has to be treated as such income of the assessee, and no subsequent action or repayment by the share-holder can take it out of the mis- chief of this provision. He therefore held that the sum of Rs. 2,72,703/- was taxable dividend under Section 2(6A)(e).

The Judicial Member expressed a contrary opinion. In his view, the total income of the assessee during the rele- vant previous year could be computed and assessed only at the end of that year; it could not be computed at interim periods during the previous year. "If it is found that although the shareholder had taken by way of advance or loan an amount from the Company during the course of a previous year but had returned the same to the Company before the close of that previous year, it can only be said while computing the shareholder's total income at the end of that previous year that no advance or loan from the 23A Company of which he was a shareholder stood for his benefit at the time relevant for computation of his total income. The advances or loans taken during the interim periods of the previous year would just have to be ignored." On these premises, the Judicial Member came to the conclusion that the sum of Rs. 2,72,703/- grossed up to Rs. 3,19,245/-, was not a dividend within the fiction under Section 2(6A) (e) of the Act.

On account of this difference of opinion, the following question was referred to the President of the Tribunal:

"Whether on the facts and in the circum- stances of the case, the sum of Rs. 2,72,703/- net (Rs. 3,19,245/- gross) is to be treated as dividend income in the hands of the assessee within the meaning of Section 2(6A) (e) ?"

The President agreed with the Accountant Member and held that an "advance or loan received by the shareholder of a Private Company forthwith assumes the character of a divi- dend and becomes his income by virtue of the fiction created by Section 2(6A) (e) and it ceases to be a liability for the purpose of taxation, although the assessee may, in fact or in law, remain liable to the Company to-repay it. If the assessee repays the loan subsequently, such repayment would not liquidate or reduce the quantum of the income which had already accrued as such repayment is not be al- lowed as a permissible deduction under Section 12(2). On these premises he answered the question in the affirma- tive.

In accordance with the majority opinion, the Tribunal dismissed the assessee's appeal, but, at his instance, referred the same question for opinion to the High Court under Section 66(1) of the Act.

The High Court held that the tax was attracted at the point of time when the said loan was borrowed by the share- holder and it was immaterial whether the loan was repaid before the end of the accounting year or not. On this reasoning it answered the question in favour of the Revenue and against the assessee.

Hence this appeal by the assessee.

Before dealing with the contentions canvassed, it is necessary to have a look at the general scheme and the relevant provisions of the Act, Section 2 (6A)(e) of the Act reads as follows:

(6A) "dividend" includes---

(a) to (d) ..

(e) any payment by a company, not being a company in which the public are substantially interested within the meaning of section 23A of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits; but "dividend" does not include-

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ii) any advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the compa- ny;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of clause (e), to the extent to which it is so set off;

Explanation. The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and be-fore the 1st day of April, 1956;

Sub-section (15) defines 'total income' as meaning "total amount of income, profits and gains referred to in sub-section (1) of Section 4 computed in the manner laid down in this Act."

Section 3 is the charging section. Two of the princi- ples deducible from the Section are:

> (1) That the tax is levied on the total income of the assessable entity; (2) That each previous year is a distinct unit of time for the purpose of assessment, and the profits made or liabilities or losses incurred before or after the relevant previous year are wholly immaterial in assessing the profits of that year unless there is a statu-

tory provision to the contrary.

Section 4 (1) so far as it is material reads as follows:

> "Section 4(1): Subject to the provisions of this Act, the total' income of any previous year of any person includes all income, prof- its and gains from whatever source derived which-
>
> (a) are received or are deemed to be re-

ceived in the taxable territories in such year by or on behalf of such person, or

(b) if such person is resident in the taxa- ble territories during such year,--

(i) accrue or arise or any deemed to accrue or arise to him in the taxable territories during such year, or

(ii) accrue or arise to him without the taxable territories during such year, or

(iii) ....

(c) if such person is not resident in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year:

(emphasis supplied) "Provided that .. .."

The principles deducible from Sec. 4(1) are:

(1) The charge is on accrual or receipt basis. Such receipt or accrual may be actual or statutory, i.e. the result of any statutory fiction created by the Act.

(2) If a particular amount of income is taxed under any of the clauses (a), (b) or (c) of the sub-section the same amount cannot be taxed under any other clause either in the same year or in a different year. That is to say, income which is taxed on accrual under clause (b) (ii) cannot be taxed again on receipt under clause (a) or on remittance under clause (b)(iii) (see Kanga and Palkhiwa- la, Vol. I, 1959 Edition, page 153). (3) The receipt spoken of in this clause is the first receipt after the accrual of the income See the decision of this Court in Keshav Mills v. Commissioner of Income-

tax(1)].

Sub-section (1) of Sec. 4 also highlights the basic principle embodied in the charging section 3, that the accrual or receipt of income (actual or deemed) is taxed with regard to the relevant previous year.

Section 12 deals with the residuary head:

"Income from other sources".

Its sub-section (1A) says that:

"Income from other sources shah include 'dividends'. Sub-section (lB) in crucial. It provides:

"Any payment by a company to a share- holder by way of advance or loan which would have been treated as a dividend within the meaning of clause (e) of sub-section (6A) of section 2 in any previous year relevant to any assessment year prior to the assessment year ending on the 31st day of March, 1956 had that clause been in force in that year, shall be treated as a dividend received by him in the previous year relevant to the assessment year ending on the 31st day of March, 1956, if such loan or advance remained outstanding on the first day of such previous year".

Sub-section (2), inter alia lays down that in computing any income by way of dividend, allowance shah be given for any reasonable sum paid by way of commission or remuneration to a banker or any other person realising such dividend on behalf of the assessee.

It is to be noted that sub-section (6A) of section 2 and subsections (1A) and (lB) u/s 12 were inserted in the Act by the Finance Act, 1955, with effect from the 1 st April, 1956.

In the relevant assessment year, Section 16(2) of the Act was operative and ran as follows:

> "16(2) For the purpose of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or (1) [1953] 23 I.T.R. 230.

distributed to him, and shall be increased to such amount as would, if income-tax (but not super-tax) at the rate applicable to the total income of the company ..... for the finan- cial year in which the dividend is paid, credited or distributed or deemed to have been paid, credited or distributed were deducted therefrom, be equal to the amount of the dividend."

Mr. G.C. Sharma, Counsel for the appellants contends that the scope of the fiction created by Sec. 2(6A)(e) should be confined to those advances and loans only, which are not repaid but remain subsisting at the end of the previous year in which they were taken. It is argued that the sole object of this provision is to curb the evil of distributing profits under the guise of loans or advances; that if an advance or loan is repaid in the same accounting year, it cannot be said that it was a device for distribu- tion of profits. It is submitted that only in the case of an advance or loan which remains outstanding at the end of the accounting year, Sec. 2(6A) (e) raises an irrebutable presumption that it was a payment of dividend under the cloak of a loan. It is maintained that if this construc- tion of Sec. 2(6A)(e) is not adopted, it will lead to ex- tremely oppressive, unreasonable and anamolous results, including double taxation. To illustrate his point Counsel compares and contrasts the position of a shareholder who promptly, after a short period, repays the loan in the same year, with one who does not do so but allows it to remain outstanding and be carried over to the next year, and there- after a dividend is declared. If the interpretation adopted by the High Court is correct---says Mr. Sharma--the share- holder in the prior case who had promptly repaid the loan would not be entitled under sub-clause (iii) of Clause (e) of s. 2(6A) to set off any part of the subsequently declared dividend against the loan which he had repaid earlier, but will have to pay double tax on the same item, once on it as deemed dividend and then on it as declared dividend. His liability cannot be reduced to the extent of the dividend; because at the date on which the dividend was declared, no loan was outstanding against which. it could be set off. As against the former, the latter shareholder who makes full use of the loan and does not repay any part of the loan in the same year, but leaves it unpaid till a dividend is declared next year, will get relief by set off of the subse- quently declared dividend, in whole or in part against the loan outstanding against him.

Another example cited by Mr. Sharma is of a case where the accumulated profit, say is Rs. 9,000/- and the share- holder takes an advance or loan of Rs. 3,000/- and he repays it after a week, and again gets the same amount (Rs. 3,000/-) back as a loan, and again repays it after a week, and again retakes the same amount as loan--all the three loans being taken and repaid, in the same year. If the unrestricted interpretation of the provision, sought by the Revenue were to be adopted, the same amount of loan in all the three transactions of loan would be subjected to triple taxation. Such an absurd and oppressive result, says the Counsel, would be against the intendment of the provi- sion and inconsistent with the scheme of the Act which generally aims avoids double taxation. The upshot of the arguments of Mr. Sharma is that under the Act, only that item or entity is taxable which is rationally capable of being considered as the income of the assessee; that an advance or loan which is genuine and not a subterfuge for payment of dividend and is not subsisting or outstanding at the end of the previous year on account of its repayment by the shareholder cannot reasonably be deemed to be his dividend income within the contemplation of s. 2(6A)(e) read with s. 12 of the Act. Mr. Sharma has taken us through various decisions having a bearing on the problem. The cases referred to, discussed or sought to be distinguished by him are: K.M.S. Lakshman Aiyar v. Assistant Income-tax Officer,(1) Navnit Lal C. Javeri v.K.K. Sen, Appellate Assistant Commissioner, Income-tax, Bombay;(2) Commissioner of Income-tax, Madras v.K. Srini- vasan; (3) Walchand & Co. Ltd. v. Commissioner of Income- tax, Bombay;(4) Commissioner, Income-tax Bombay v.R.K. Badiani. (5) Mr. Sharma also has referred to Sec. 108 of the Commonwealth income-tax Act as in force in Australia, and submitted that since the substance of Sec. 2(6A)(e) and s. 12(lB) has been borrowed from s.108 of the said Act and the object of these provisions in the two enactments is the same, it will not be illegitimate to determine and circum- scribe the scope of the fiction created by the provision in question in the light of the principles indicated in Sec. 108 of the Commonwealth Act.

On the other hand, Mr. Ahuja appearing for the Revenue, submits that sub-clause (iii) which permits a set off against a loan deemed as dividend, does not apply in cases where the dividend is not declared in the same accounting year because to hold otherwise would be against the basic scheme ingrained in ss. 3 and 4 of the Act, according to which the unit of time for the purpose of assessment is the previous year of the assessee. Mr. Ahuja further maintains that even if during the same accounting year after repayment of the loan, a dividend is declared, sub-clause (iii) will apply, and the Income-tax Officer will not be debarred from reducing, in an appropriate case, the amount treated by him as 'dividend' under clause (e) of s. 2(6A) to the extent of the subsequently declared dividend, on the principle of notional set off underlying sub-clause (iii). The point sought to be made out is that since the treatment of the loan to the assessee shareholder as his dividend rests on a legal fiction, it will not be an illegitimate use of sub- clause (iii) to allow a notional set off to meet such a situation. Thus construed, says the Counsel, there would be no anomaly.

Mr. Ahuja further submitted that s. 2(6A)(e) was enact- ed to suppress the evil of receiving profits or dividends under the guise of loans by the shareholders of a controlled Company, as such a malpractice resulted in evasion of tax. This provision, it is urged should be construed in a manner which suppresses the mischief and advances the remedy. It is maintained that the language of the provisions in question (1) [1959] XL I.T.R.469 (Mad.) (2) [19651 1, SCR 909-56 I.T.R. 198.

(3) (1963) 50, ITR 788 (Mad). (4) 100 I.T.R. 598(Bom). (5) [1970] 76 I.T.R. 369 (Bom).

is plain and unambiguous and no question of seeking external aid for its interpretation arises; the Court must give effect to it regardless of the hardship, if any, resulting therefrom. The sum and substance of his arguments is, that since all the factual ingredients necessary for raising the fiction contemplated by s. 2(6A) (e) and s. 12(lB) have been found to exist by the Income-tax authorities and the Tribu- nal, the loan had to be treated as the assessee's dividend income, the moment it was received, and the subsequent repayment of the loan could not neutralise or take it out of that category of 'income'. Counsel has drawn our attention to the observations of this Court in Navnit Lal C. Javeri v. K.K. Sen, Appellate Assistant Commissioner of Income-tax (supra). He has further adopted the reasoning of the Bombay High Court in Walchand & Co. v. Commissioner of Income-tax, Bombay (supra)-

Section 2(6A)(e) and s. 12(lB) were inserted in the Act by. the Finance Act 1955 which came into operation on 1-4- 1955. These provisions seem to have been adapted, and borrowed with alterations, from s. 108 of the Commonwealth Income-tax Assessment Act in force in Australia. Section 108 reads as follows:

> "Loans to shareholders, (1) If amounts are paid or assets distributed by a private company to any of its shareholders by way of advances or loans, or payments are made by the company on behalf of or for the individual benefit of, any of its shareholders, so much, if any, of the amount or value of those ad- vances, loans or payments, as, in the opinion of the Commissioner, represents distributions of income shall, for the proposes of this Act other than the purposes of Division 11A of Part III and Division 4 of Part VI be deemed to be dividends paid by the company on the last day of the year of income of the company in which the payment or distribution is made. (2) Where the amount or value of an advance, loan or payment is deemed, under the last preceding sub-section, to be a dividend paid by a company to a shareholder, and the company subsequently sets off the whole or a part of a dividend distributed by it in satis-

faction in whole or in part of that advance, loan or payment, that dividend shall, to the extent to which it is so set off, be deemed, not to be a dividend for any purpose of this Act."

It will be seen that under s. 108(1) formation of "the opinion of the Commissioner" is the sine qua non for bring- ing this provision into provision into operation. It has been held be the Australian Board of Review that the mere fact that a shareholder in a private Company has become indebted to it, does not justify the formation of the opin- ion by the Commissioner such as is indicated in sub-section (1) of s. 108. "There must be something that goes beyond a mere debt automatically arising upon a taking of accounts and which points to a subterfuge whereby a payment which, upon examination, is found to relate to the income of the Company and to represent the distribution thereof, is made to appear to be a loan or advance" (I.C.T.B.R. (N.S.) Case No.80.) It is noteworthy that at least in one material aspect the Indian law is different from that under s. 108(1) of the Commonwealth Act as explained and interpreted by the Board in the case mentioned above. Under s. 108, the raising of the fiction is dependent upon a positive finding recorded by the Commissioner of Income-tax that the payment represents distribution of the Company's. income. But s. 2 (6A) (e) and s. 12 of the Act do not leave this question to the adjudica- tion of the income-tax authorities. Parliament has itself, in the exercise of its legislative judgment, raised a con- clusive presumption, that in all cases where loans are advanced to a shareholder in a Private Ltd. Company' having accumulated profits, the advances should be deemed to be the dividend income of the shareholder. It is this presumption juris et de jure which is the foundation of the statutory fiction incorporated in

s. 2(6A)(e).. Thus s. 108 of the Commonwealth Act appears to be more reasonable and less harsh than its Indian counterpart.

From the above discussion it emerges clear that the fiction created 2(6A) (e) read with s. 12(lB) of the Act is inexora- bly attracted as soon as all the conditions necessary for its application exist in a case. In Navnit Lags case (supra), this Court, after an analysis of these provisions, listed these conditions, as follows:

> "... the combined effect of these two provisions is that three kinds of payments made to the. shareholder of a company to which the said provisions apply, are treated as taxable dividend to the extent of the accumu- lated profits held by the :company. These three kinds of payments are: (1) payments made to the shareholder by way of advance or loan, (2) payments made on his behalf and (3) payments made for his individual benefit. There are five conditions which must be satis- fied before section 12(lB) can be invoked against a shareholder. The first condition is that the company in -question must be one in which the public are not 'substantially interested within the meaning of section 23A as it stood in the year in which the loan was advanced. The second condition is that the borrower must be a shareholder at the date 'when the loan was advanced; it is immaterial what the extent of his shareholding is. The third condition is that the loan advanced to a shareholder by such a company can be deemed to be dividend only to the extent to which it is shown that the company possessed accumulated profit at the date of the loan. This is an important limit prescribed by the relevant section. The fourth condition is that the loan must not have been advanced by' the company in the ordinary course of its busi- ness. In other word's, this provision would not apply to cases where the company which advances a loan to its shareholder earnes on the business of money lending itself; and the last condition is that the loan must have remained outstanding at the commencement of the shareholders previous year in relation to the assessment year 1955-56."

(emphasis supplied) The first four conditions factually exist in the instant case. The last condition is not applicable because it was a transitory provision 6--707 SCI 77 applicable to the assessment year 1955-56 only, while we are concerned with the assessment year 1957-58 and the previous year is the calendar year 1956. There is no dispute that the company is a controlled (Private Ltd.) company in which the public are not substantially interested within the meaning of s. 23A. Further-the assessee is admittedly a shareholder and Managing Director of that Company. It is also beyond controversy that at all material times, the company possessed "accumulated profits" in excess of the amount which the assessee-shareholder was paid during the previous year. The Income-tax Officer found that on January 1, 1956, the accumulated profits of the Company amounted to Rs. 6,83,005/- while from, 11.1.1956 to 12.11.1956, the assessee received in cash from time to time from the Company payments aggregating Rs. 4,97,449/-. After deducting the opening credit balance and some other items credited to his account, the Income-tax Officer found that in the previous year the assessee share-holder had received a net payment of Rs. 2,72,703/- by way of loan or advance from the Compa- ny. The Company's' business is not money lending and it could not be said that the loans had been advanced by the company in the ordinary course of its business. Thus all the factual conditions for raising statutory fiction created by ss.2(6A)(e) and 12(IB) appeared to have been satisfied in the instant case.

Mr. Sharma, however, contends that in order to attract the statutory fiction one other essential condition is, that the loan or advance must be outstanding at the end of the previous year, and if the loan had ceased to exist owing to repayment or otherwise before the end of the year-as in the present case-the fiction cannot be invoked. In this connec- tion, Counsel has again referred to the last limb of s. 108 (1) of the Commonwealth Income-tax Act, according to which, the payment to a shareholder by way of advance or loan is to be treated as a dividend paid by the Company on the last day of the year of income of the Company in which the payment is made.

It is urged that the principle in the last limb of sub- section (1) of s. 108 of the Commonwealth Act should also be read into. the Indian statute, It is maintained that the omission of such words from ss. 2(6A) (e) and 12(lB) does not show that the intendment of the Indian Legislature was different. According to the Counsel what is implicit in s. 108(1) of the Commonwealth Act, is implicit in ss. 2(6A)(e) and 12(1B) and the general scheme of the Act which re- quires that the assessment is to be made on the basis of total income of the whole previous year. Such a view concludes Mr. Sharma, would also be in consonance with reason and justice.

We have given anxious thought to the persuasive argu- ments of Mr. Sharma. His arguments, if accepted, will certainly soften the rigour of this extremely drastic provi- sion and bring it more in conformity with logic and equity. But the language of ss. 2(6A) (e) and 12(1B) is clear and unambiguous. There is no scope for importing into the statute words which are not there. Such importation would be, not to construe, but to amend the statute. Even if there be a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation.

To us, there appears no justification to depart from the normal rule of construction according to which the intention of the legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of Rowlatt J. in Cape Brandy Syndicase v. I.R.C.(1) at p. 71, that "in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no. presumption as to a tax. nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". Once it is shown that the case of the assessee comes within the letter of the law, he must be taxed, however great the hardship may appear to. the judicial mind to be. In our opinion, the Indian Legislature has deliberately omitted to use in ss. 2(6A)(e) and 12(lB) words analogous to those in the last limb of sub-section (1) of s. 108 of the Commonwealth Act. When Sections 2(6A) (e) and 12(lB) were inserted by the Finance Act, 1955, Parliament must have been aware of the provision contained in s. 108 of the Common- wealth Act. In spite of such awareness, Parliament has not thought it fit to borrow whole hog what is said in s. 108 (1) of the Commonwealth Act. So far as the last limb of s. 108(1) is concerned, our Parliament imported only a very restricted version and incorporated the same as the 'fifth condition' in sub-s. (lB) of s. 12 to the effect, that the "payment deemed as dividend shall be treat- ed as a dividend received by him in the previous year relevant to the assessment year ending on the 31st day of March, 1956 if such loan or advance remains outstanding on the last day of such previous year". The word "such" pre- fixed to the "previous year" shows that the application of this clause is confined to the assessment year ending on 31-3-1956. In the instant case we are not concerned with the assessment year ending on 31-3-56. This highlights the fact that the Legislature has deliberately not made the subsist- ence of the loan or advance, or its being outstanding on the last date of the previous year relevant to the assessment year, a prerequisite for raising the statutory fiction. In other words, even if the loan or advance ceases to be outstanding at the end of the previous year, it can still be deemed as a 'dividend' if the other four conditions factual- ly exist, to the extent of the accumulated profits possessed by the Company.

At the commencement of this judgment we have noticed some general principles, one of which is, that the previous year is the unit of time on which the assessment is based (s. 3). As the taxability of an income is related to its receipt or accrual in the previous year, the moment a dividend is received whether it is actual dividend declared by the company or is a deemed dividend, income taxable under the residuary head, "income from other sources", arises. The charge being on accrual or receipt the statutory fiction created by s. 2(6A)(e) and s.12(IB) would come into opera- tion at the time of the payment by way of advance or loan, provided the other conditions are satisfied. (1) (1921)1,K.B. 64 atp. 71.

We do not propose to examine the soundness or otherwise of the illustrations given by Mr. Sharma since they are founded on assumed facts which do not exist in the present case.

For the foregoing reasons we would answer the question posed in favour of the Revenue and dismiss this appeal with costs.

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P.B.R.                                  Appeal dismissed.
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