ADMINISTRATOR-GENERAL OF WEST BENGAL

v.

COMMISSIONER OF INCOME-TAX, CALCUTTA

October 6, 1964

(K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI JJ.)

Indian Income-tax Act, 1922, s. 41—Administrator-General appointed administrator de bonis non of property passing under will—Residue of property to go to testator's sons after payment of various legacies—Administrator-General whether receives income of estate on behalf of the testator's sons during period of administration—Whether assessable under s. 41.

T died in 1938. According to his will certain legacies were to be paid out of his estate during a period of fifteen years after his death, the estate being managed by executors and trustees during that period; and the residue thereafter was to go to his five sons. Probate was granted to the five sons on August 24, 1938, but by an Order dated May 10, 1948, the High Court appointed the Administrator-General of West Bengal as Administrator *de bonis non* of the property. In income-tax proceedings relating to the assessment years 1950-51 and 1951-52 the Administrator-General—appellant herein—claimed that assessment should be made under s. 41 of the Indian Income-tax Act, 1922, because the income of the estate was receivable by him on behalf of the five sons of the testator, their shares in the said income being definite and determinate. His claim was rejected by the assessing and appellate authorities. The High Court held that the Administrator-General when appointed by the Court was expressly covered by s. 41 as one of the persons to whom that section applied, but the shares of the sons not being determinate as long as the administration lasted, the proviso to s. 41(1) was attracted, and tax was recoverable at the maximum rate. Appeal was filed by the Administrator-General before the Supreme Court, with a certificate under s. 66A(2) of the Act.

The appellant urged that the High Court had wrongly held that the shares of the five sons were not determinate. On behalf of the Revenue it was contended that s. 41 did not apply at all because the appellant received the income not on behalf of the five sons but as an executor.

HELD : The fact that the Administrator-General was mentioned in s. 41 did not conclude the matter. There was another condition to be fulfilled before that section could apply, namely, that the income had to be received by him on behalf of a person or persons. In the instant case the Administrator-General did not receive the income on behalf of the five sons. What the five sons were entitled to was the residue of the estate, and any savings that might be out of the income of the estate would be received by them finally not as their income but as a part of the residue. The position of an Administrator-General appointed *de bonis non* was in no way different from that of an executor *vis-a-vis* the income he received from the estate. [656 A-B; 659 B-C].

V. M. Raghavalu Naidu v. *Commissioner of Income-tax and Excess Profits Tax, Madras*, 18 I.T.R. 787, *R.* v. *Income-tax Special Commissioners*, 7 T.C. 646, *Lord Sudeley* v. *Attorney-General*, [1897] A.C. 11, *Maria Celeste Samaritan Society of the London Hospital* v. *Commissioner of Inland Revenue*, 11 .T.C. 226 and *Corbett* v. *Commissioner of Inland Revenue*, 21 T.C. 449, relied on.

A *Asit Kumar Ghose* v. *Commissioner of Agricultural Income-tax, West Bengal*, 22 I.T.R. 177 and *Birendra Kumar Dutta v. C.I.T. Calcutta*, (1961) 42 I.T.R. 661 referred to.

In re Cunliffe-Owen Mountain v. *Inland Revenue Commissioner*, (1953) 1 Ch. 545, distinguished.

B CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 168-169 of 1964.

Appeals from the judgment and order dated December 5, 1961, of the Calcutta High Court in Income-tax Reference No. 116 of 1957.

C *A. V. Viswanatha Sastri, K. Rajendra Chaudhuri, M. Rajagopal* and *K. R. Chaudhuri*, for the appellant (in C.A. No. 168 of 1964).

K. Rajendra Chaudhuri and *K. R. Chaudhuri*, for the appellant (in C.A. No. 169 of 1964).

D *C. K. Daphtary, Attorney-General, R. Ganapathy Iyer, R. H. Dhebar* and *R. N. Sachthey*, for the respondent (in C.A. Nos. 168-169 of 1964).

The Judgment of the Court was delivered by

Sikri J. These are two appeals by certificates under s. 66A(2) of the Indian Income Tax Act, 1922, against the judgment of E the High Court at Calcutta, answering two questions referred to it by the Income-tax Appellate Tribunal against the appellant. The two questions are :

> 1. Whether on the facts and in the circumstances of the case, the assessments on the Administrator-General of West Bengal as an individual and not as F representing the shares of the various beneficiaries under the Will of the late Raja P. N. Tagore separately was in accordance with law ?
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> 2. If the answer to Question No. 1 be in the affirmative, then whether on the facts and in the circumstances of the case, the assessment of the said Administrator-General at the maximum rate was legal ? G

The facts and circumstances referred to are set out in the statement of the case by the Appellate Tribunal and are as follows. One Raja Profulla Nath Tagore died on July 2, 1938, leaving an elaborate will dated March 14, 1927, by which certain H legacies were left to specified persons and institutions, the residue being given to five sons. The residue was disposed of thus by clause 81 of the Will :

"Save and except the legacies that I have provided for in this my present Will and save my garden house at Allambazar Tagore Villa together with articles of furniture I give to my sons all my remaining moveable and immoveable properties that will be left and also the moveable and immoveable properties whereto my right will accrue in future. Subject to the management and payment of these several trusts (Debutter etc.) and the legacies that I have created or I have directed the creation thereof in this Will my sons shall continue to hold and enjoy all the said moveable and immoveable properties."

Clause 10 of the said Will provided for the payment of the legacies thus :

"The legacies fixed in this my present Will shall have to be paid in full within 15 years of my death and these 15 years my Estate shall be managed under the supervision of my Executors and Trustees. As to the various legacies that I have made a mention of in this my Will, my Executors and Trustees shall pay up all the said legacies out of the small savings made from the income of my Estate year after year. For paying up the legacies my Executors and Trustees shall not be competent to sell any portion of my Estate or any immoveable property. As to what I have arranged to pay to the different parties, in this my present Will, my Executors and Trustees shall not pay any interest on those legacies nor shall the legatees be competent to claim any interest."

It is not necessary to set out the other clauses of the Will, but we may mention that there were numerous legacies which had to be paid before the residue could be ascertained.

Probate of the Will was granted to the said five sons on August 24, 1938, but by an order dated May 10, 1948, the High Court appointed the Administrator-General of West Bengal as Administrator and ordered that letters of administration *de bonis non* of the property and credits of the deceased (Raja Profulla Nath Tagore) with a copy of the Will annexed thereto be granted and issued out.

The Administrator-General of West Bengal, hereinafter referred to as the Appellant, submitted returns in respect of the Assessment years 1950-51 and 1951-52, the accounting years

A being 1949-50 (1356 B.S.) and 1950-51 (1357 B.S.), showing income of Rs. 33,611 for the first year and Rs. 39,630 for the second year. He claimed that the income was specifically receivable on behalf of the said five sons of the deceased, and their shares in the said income were definite and determinate. The Income-tax Officer rejected the claim for the Assessment B year 1950-51 on the ground that "the Administrator-General of West Bengal is only an executor of the estate of Raja P. N. Tagore and that the execution is not yet complete. Under the circumstances the question of the beneficiaries does not arise and the Administrator-General himself is assessable as Executor to estate P. N. Tagore." He passed a similar order in respect of C Assessment year 1951-52. The Appellate Assistant Commissioner upheld the orders of the Income Tax Officer. Following the principles laid down in the decisions in *V. M. Raghavalu Naidu* v. *Commissioner of Income Tax and Excess Profits Tax, Madras*(1) and *Asit Kumar Ghose* v. *Commissioner of Agricultural* D *Income-Tax, West Bengal*(2), he held that the "levy of tax on the separate individual incomes of the beneficiaries can be made only when the administration of the estate has been completed, and the residue of the estate has been ascertained." It was conceded before him that the administration of the estate was not completed till the end of the accounting year (1950-51). The Appel- E late Tribunal also rejected the contention. It held that :

> "It is the condition of the application of this section (s. 41) that the Administrator-General of West Bengal shall receive the income on behalf of the beneficiaries. We have held that having regard to Section 211 of the F Indian Succession Act the Administrator-General of West Bengal receives it as legal representative of the deceased person and not on behalf of the beneficiaries. The latter he can do only if the administration of the estate is complete or if there are specific directions to that effect. The proviso goes further and enacts that G when such income is not specifically receivable on behalf of one person or where the individual share of the person on whose behalf it was receivable is indeterminate or unknown, tax shall be levied and recoverable in the maximum rate. There is no doubt in this case that the Administrator-General of West Bengal is H not receiving the income specifically on behalf of any beneficiary. Further there are certain benefactions

(1) (1950) 18 I.T.R. 787. (2) (1952) 22 I.T.R. 177

and payment in their very nature involving the share income of the beneficiaries being indeterminate or unknown. So truly speaking the tax must be levied in the maximum rate. But the assessee is not entitled to claim that the income of the beneficiaries must be separately assessed and not together in the hands of the Administrator-General of West Bengal."

Then the Appellate Tribunal, on the application of the Appellant, referred the two questions reproduced above. The High Court held that "the Administrator-General when appointed by the Court is expressly covered by the section (s. 41) and it cannot be said that because he has the powers of an executor he must be treated differently." It further held that "the income from the properties did not so long as administration was incomplete become theirs. It cannot, therefore, be said of the sons that they had any determinate share in the profits or gains of the estate or any part thereof in the accounting years. The proviso to s. 41(1) is, therefore, attracted on the facts of this case, making the tax recoverable at the maximum rate."

The learned counsel for the appellant in Civil Appeal 168 of 1964, Mr. Viswanatha Sastri, has urged that the High Court was wrong in holding that the shares of the five sons were indeterminate. He said that their shares were 1/5th each, and what has to be seen is whether the shares are determinate and not whether the actual sum, which each son would get is variable or not. Income may be variable but the shares of the sons are fixed. In this connection, he relied on the decision in *Birendra Kumar Datta* v. *Commissioner of Income tax, Calcutta*(1). He further said that s. 41 was mandatory and if the proviso to s. 41 did not apply, the Income-tax Officer was bound to assess the appellant under s. 41.

The learned Attorney-General, on behalf of the Revenue, submitted that s. 41 did not apply at all because in the facts and circumstances of the case, the appellant did not receive the income on behalf of the five sons but received it like an executor. He said that an executor was not mentioned in s. 41 and was assessable under ss. 3 & 4 of the Act. In the alternative, he argued that the share of the sons were indeterminate. As we are inclined to accept the first submission of the learned Attorney-General, we need not express any opinion on the question whether

(1) (1961) 42 I.T.R. 661.

A the shares of the five sons were indeterminate or not, within the proviso to s. 41. Section 41 reads thus:

> "41. *Court of Wards, etc.* (1) In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrators-General,
B the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed instrument in writing whether testamentary or
C otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913) are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Court of Wards, Administrator-General, Official Trustee, receiver or
D manager or trustee, or trustees, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable, and all the provisions of this Act shall apply accordingly;
>
E Provided that where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate but,
F where such persons have no other personal income chargeable under this Act and none of them is an artificial judicial person, as if such income, profits or gains or such part thereof were the total income of an association of persons :"

G It is not disputed that before s. 41 can be applied, it must be found that the Administrator-General was entitled to receive income on behalf of a person or persons. It is common ground that the administration of the estate was not completed within the accounting periods in question. So the question boils down to this : Did the appellant receive the income on his behalf or
H on behalf of the five sons during this period ?

It seems to us that during the administration of the estate, the appellant did not receive the income on behalf of the five

sons. When he received the income, he had a discretion to use it either for paying legacy A or legacy B or for meeting other expenses. If there was a saving in one year, next year he could appropriate it for paying legacy C or D or for meeting other expenses. What the five sons were entitled to was the residue of the estate would be received by them finally, not as their income but as part of the residue. A B

In England, apart from statutory provisions, a residuary beneficiary is not regarded as taxable on income of an estate in the course of administration. A share of residue does not belong to the beneficiary until it is ascertained either in whole or part by transfer or assent to him or by appropriation (Wheatcroft on Law of Income Tax, Surtax and Profits Tax, section 1-1104). C

The decision in *R.* v. *Income Tax Special Commissioners*(1) (*Ex parte, Dr. Barnardo's Homes*) supports the contention of the learned Attorney-General. The facts may be taken from the headnote. "Mr. Denzil Thomson died on November 15, 1914, leaving the residue of his estate to Dr. Barnardo's Homes National Incorporated Association. The Testator's next-of-kin contested the will and the proceedings were compromised by the Association making over to the next-of-kin one-third of the residuary estate. The proceedings delayed the division of the residuary estate, and the investments constituting or representing the same remained under the control of the Executors until May 1916, between which date and December 1916, two-thirds of the investments were transferred to the association and one-third to the Testator's next-of-kin. The income arising from the investments was received under deduction of Income Tax and the total amount of tax deducted from such income during the period between the date of the Testator's death and the dates of transfer by the Executors amounted to £498 0s. 11d. The Association applied under Section 105 of the Income Tax Act, 1842, to the Special Commisioners of Income Tax for repayment of two-thirds of that sum, *viz.*, £332 0s. 7d., as being Income Tax on income payable to the Association and applicable, and in fact applied, by it solely for charitable purposes. The application being unsuccessful, the Secretary of the Association applied for and obtained a rule *nisi* calling upon the Special Commissioner of Income Tax to show cause why a writ of *mandamus* should not issue to them commanding them to allow exemption from Income D E F G H

(1) 7 T.C. 646.

A Tax on the income in question and to repay the sum of £332 0s. 7d.

The House of Lords held, *inter alia*, following the decision in *Lord Sudelev* v. *Attorney-General*(1), that "prior to the ascertainment of the residue, the Association as residuary legatee had
B no interest in the Testator's property, that the taxed income of the estate prior to such ascertainment was income of the Executors, and that it was not received by them as trustees on behalf of the Association."

In the Court of Appeal the Master of Rolls observed that
C 'the income that they were receiving in the meantime was income which they were receiving not on behalf of the residuary legatee at all but on behalf of themselves as executors for application in the administration of the estate.'

Viscount Finlay observed as follows :

D

> "It appears to me that the present case is really decided by the decision of this House in *Lord Sudelev's case*(1). It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascer-
> E tained. His right is to have the estate properly administered and applied for his benefit when the administration is complete. The income from which this Income Tax was deducted was not the income of the charity. It was the income of the executors. They were, of course, bound to apply it in due course of
> F administration, but they were not trustees of any part of it for the charity. There had been no creation of a trust in favour of the charity in respect of this income, it was never paid over to the charity as income. What was ultimately paid over on the close of the administration was the share of the whole estate, consisting of
> G capital and accumulated income, which fell to the charity. The executors, not the charity, were the recipients of this income, and there is no relation back in the case of the bequest of a residue. If no right of deduction at the source had existed it is the executors
> H and the executors only who could have been made liable for the tax."

(1) [1897] A.C. 11.

Viscount Cave put the point thus : A

"When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors, and are applicable by them as a mixed fund for the purposes of administration. This was fully explained in *Lord Sudeley* v. *The Attorney-General* [L.R. [1897] A.C. 11]." B C

Subsequent cases such as the *Maria Celeste Samaritan Society of the London Hospital* v. *The Commissioners of Inland Revenue*(1) and *Corbett* v. *Commissioners of Inland Revenue*(2) have taken the same view. In the latter case, the decision in Dr. Barnardo's case was held to have laid down "a general proposition applicable to all cases of residue which is being ascertained and which cannot be ascertained until the administration is complete." D

Mr. Sastri relied on *In re Cunliffe-Owen Mountain* v. *Inland Revenue Commissioners*(3), but, in our opinion, the Court of Appeal has not taken any different view. The Court of Appeal was concerned with the interpretation of s. 27(1) of the Finance Act, 1949, whereby legacy duty was not payable in certain events. It examined the nature of the title of a residuary legatee and held that "the title of a residuary legatee to a residuary estate remains the same both before and after the completion of the administration, notwithstanding that it is not until it is complete that he can say that any particular asset or any particular income is his, and not merely part of the general estate of the testator." It repelled the argument that pending final administration a residuary legatee has only an expectancy in the eye of law. But this conclusion does not lead to the next step that an executor or administrator receives the income on behalf of the residuary legatee. E F G

In *V. M. Raghavalu Naidu* v. *Commissioner of Income-tax and Excess Profits Tax*(4) the Madras High Court held that s. 41 of the Act had no application where the administration of the estate had not been completed by the executors. H

(1) 11 T.C. 226.
(2) 21 T.C. 449.
(3) [1953] 1 Ch. 545.
(4) (1950) 18 I.T.R. 787.

A The High Court in this case had repelled the argument on behalf of the Revenue that the Administrator-General did not come within the purview of s. 41 of the Act on the ground that "the Administrator-General when appointed by the Court is expressly covered by the section and it cannot be said that because he has the powers of an executor, he must be treated differently." B In our opinion, the fact that the Administrator-General is expressly mentioned in s. 41 does not conclude the matter. The section prescribes another condition and that is that the income must be received by him on behalf of a person or persons. This condition must be fulfilled before s. 41 becomes applicable. The C position of an Administrator-General appointed *de bonis non* is in no way different from that of an executor *vis-a-vis* the income he receives from the estate.

Accordingly, we hold that s. 41 of the Act is not applicable in the present case as the appellant received the income on his behalf and not on behalf of the five sons of the deceased Raja. D In view of the above, the answers to the two questions set out in the beginning of the judgment must be in the affirmative. The appeals are, therefore, dismissed with costs. One set of hearing fee.

Appeals dismissed.