

Messrs Bharat
Fire & General
Insurance Ltd.
v.
The Commis-
sioner of Income-
tax, Delhi and
Rajasthan

Kapur, J.

in this year as well as in earlier years on dividend income and it was filing returns adopting the period ending December 31, as the previous year. The effect of section 23-A was that by reason of the fiction created thereby the undistributed portion of the assessable income of the company was deemed to have been distributed as dividend amongst the shareholders. By reason of this fiction the deemed dividend had to be added to the dividend income of the assessee company. Consequently the previous year opted for that source of income, namely, dividend income would also be the previous year, for the purposes of deemed dividend.

We are also unable to agree with the third contention of the learned counsel for the assessee company. Reference to section 2(6C) clearly shows that dividend is included within the term "income". As we have said earlier section 23-A, fictionally included an amount, though not distributed amongst the shareholders, in the category of the term income. If we are bidden to treat any imaginary state of affairs as real, we must also imagine as real the consequences which inevitably flow from it. By the creation of the fiction under section 23-A, the inevitable consequence that flows is that it becomes a dividend and would, therefore, fall under the definition of the term 'income' as given in section 2(6C). In the circumstances, we do not feel called upon to decide the question of the scope of third proviso to sub-section (1) of section 30.

In the result, the question must be answered against the assessee company and in the affirmative. There will, however, be no order as to costs.

Mahajan, J.

D. K. MAHAJAN, J.—I agree.

B.R.T.

FULL BENCH

Before D. Falshaw, C. J., D. K. Mahajan and S. K. Kapur, JJ.

UNION OF INDIA AND OTHERS,—*Petitioners*

versus

MESSRS CALTEX (INDIA) LIMITED,—*Respondent.*

Civil Reference No. 5-D of 1964.

1965

March 22nd

Indian Stamp Act (II of 1899)—Schedule I Article 35(a)(iii) and 35(c)—Lease for five years, monthly rent being Rs. 700, providing for payment of 3 years' rent in advance—Stamp payable—Whether under Article 35(a) (iii) or 35(c).

Held, that the lease is for a term of five years from the date of occupation, the monthly rent being Rs. 700, and the lessee is required to pay Rs. 25,500 on account of rent for thirty-six months in advance. This liability of the lessee is, therefore, to pay rent and not advance in addition to rent reserved. An amount for which there is both a liability and a covenant to pay as rent cannot be termed as advance. It cannot in the circumstances be said that this is a case of granting a lease for money advanced in addition to rent reserved. The legal character of Rs. 25,500 is rent and merely because that rent is paid in advance under a covenant, its character does not change. Such a lease-deed is required to be stamped under Article 35(a)(iii) of Schedule I of the Indian Stamp Act, 1899.

Held, that under article 35(c) of Schedule I of the Indian Stamp Act, 1899, the revenue has to prove that the money is advance, that is to say, it is payment prior to the arising of liability on account of rent and that the payment is in addition to the rent reserved. None of the two conditions are satisfied in this case and, therefore, article 35(c) is not applicable.

Reference under the provisions of Section 57 of the Indian Stamp Act, 1889 praying for decision of the question as to the proper stamp duty payable on the document annexure A and for such further directions as may be considered necessary in the facts and circumstances of the case, and further praying that costs of the proceedings be awarded to the petitioners.

S. N. SHANKER AND DALJIT SINGH, ADVOCATES, for the Petitioners.

BHAGWAT DAYAL AND KAILASH BEHARI LAL, ADVOCATES, for the Respondent.

ORDER

KAPUR, J.—This is a reference under section 57 of the Indian Stamp Act, 1899. The question referred for decision is as to the proper stamp duty payable on the instrument of lease, dated the 27th July, 1954, between P. C. Bhandari, the lessor, and Caltex (India) Limited, the lessee. What we have been called upon to decide is whether the article applicable to the lease deed is article 35(a)(iii) or 35(c) of Schedule I to the Indian Stamp Act. The effort on the part of the revenue is to establish a more lucrative interpretation of law and depart from what according to the respondents had been the interpretation previously followed by the department. Briefly, the facts leading to this dispute are that the said lease deed, dated the 27th of July,

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1964, was presented before the Sub-Registrar, New Delhi, for registration. The deed was executed on a non-judicial stamp paper of Rs. 85. The Sub-Registrar, however, felt that the document was not properly stamped and, therefore, impounded the same and forwarded it to the Collector of Stamps for necessary action. The Collector held that the lease deed in question was liable to stamp duty under article 35(c) of Schedule I to the Indian Stamp Act and determined the deficiency in duty at Rs. 765. He also imposed a penalty of Rs. 1,530. Aggrieved by the aforesaid order the respondents filed an appeal before the Chief Controlling Revenue Authority, Delhi, who took the view that the document had been executed for an advance in addition to the rent reserved and was liable to stamp duty under clause (c) of article 35. He, however, reduced the penalty to Rs. 100 only. The Chief Controlling Revenue Authority was asked to refer the case to this Court which request was declined by him. The respondents thereupon filed a writ petition challenging the order of the Chief Controlling Revenue Authority declining to refer the case to this Court. By order, dated the 7th of May, 1960, Grover, J., dismissed the petition. The respondents filed a Letters Patent appeal which was allowed and it was held that the respondents were entitled to have the whole question referred to this Court under section 57 of the Stamp Act. The Union of India was accordingly directed to make this reference. It may be relevant to mention a few facts about the lease deed itself. The lease is for a term of five years from the date of occupation, the monthly rent being Rs. 700.

Mr. Shanker, learned counsel for the Union, laid particular emphasis on clause I of the lease deed and it would be appropriate to quote the same. "Provided always and it is hereby mutually agreed as follows:—

- (1) A sum of Rs. 25,500 shall be paid to the lessor on the date of occupancy, as advanced rental for the first 36 months from the date of occupancy at the rate above-mentioned, namely, Rs. 700 per mensem."

On the basis of this clause it has been contended that the requirement as to payment of Rs. 25,500 on the date of

occupancy brings the case within article 35(c). Reliance has been placed on *In re Chief Controlling Revenue Authority* (1).

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Learned counsel for the respondents on the other hand contends that before article 35(c) can become applicable it has to be shown that the lease was granted for money advanced in addition to rent reserved. He submits that the payment of Rs. 25,500 was nothing but an advance rent for a period of first 36 months and consequently it was not a case of granting of lease for money advanced in addition to the rent reserved. He places reliance on *Reference Under Stamp Act, S. 46 (2)*, where it was held that one year's rent deposited with the lessor could not be regarded as fine or premium within the meaning of article 39(d). In that case by a document purporting to be a rent agreement, the lessee took a shop for five years agreeing to pay Rs. 30 per annum as rent. He also agreed to deposit one year's rent with lessor which was to be credited to the rent of the last year of the term. It was held that it was merely a payment of rent in advance and not a premium or fine. The learned counsel for the revenue seeks to distinguish this case on the ground that the words "or for money advanced in addition to rent reserved" did not exist in the section as fell for interpretation before the Madras High Court. Reverting to the Bombay decision we may straight-way point out that the same is of no avail to the revenue. That was a case where the High Court had to resolve between the applicability of article 35(a)(iii) and 35(b). It was held that the payment by the lessee in respect of the rent was prior to the liability for rent arising and was, therefore, nothing more than an advance. The distinction will become clear from the following observations of Chagla, C.J.:—

"The liability to pay rent can only arise under the lease and at stated periods or specific occasions mentioned in the lease; till the stated period or specific occasion arrives, there is no liability on the part of the lessee to pay rent. Therefore, if the lessee pays an amount in respect of the rent

(1) A.I.R. 1952 Bom. 285.

(2) I.L.R. 7 Mad. 203.

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prior to the liability arising, that payment is nothing more than an advance made by the lessee to the lessor. He makes an advance, and the agreement is that the lessor will satisfy the lessee's liability out of that amount when that liability arises. But the legal character of that payment is not rent, but moneys advanced by the lessee to the lessor. The liability only crystallises and takes on the character of rent when the stated period or the specific occasion arrives under the lease and the lessee becomes liable to pay rent. It could not possibly be stated that when the lessee paid the sums of Rs. 33,000 and Rs. 22,000 there was any liability upon him to pay rent; the liability would only arise in terms of the lease."

In this case the instrument of demise fixes the monthly rent. The lessee is required to pay Rs. 25,500 on account of rent for thirty-six months. This liability of the lessee is, therefore, to pay rent and not advance in addition to rent reserved. An amount for which there is both a liability and a covenant to pay as rent cannot be termed as advance. It cannot in the circumstances be said that this is a case of granting a lease for money advanced in addition to rent reserved. The legal character of Rs. 25,500 is rent and merely because that rent is paid in advance under a covenant, its character does not change. It may also be pointed out that the Bombay High Court was concerned with article 35(b) the language of which is entirely different and the words "in addition to rent reserved" are missing there. Under article 35(c) the revenue has to satisfy us that the money paid is advance, that is to say it is payment prior to the arising of liability on account of rent and that the payment is in addition to the rent reserved. None of the two conditions are satisfied in this case. It is not disputed that in case article 35(c) is not applicable the document must be held to be correctly stamped.

In the result our answer to the reference would be that the document of lease was properly stamped and article 35(c) was not applicable. The Union of India will pay the costs of this reference.

Falshaw, C.J.
Mahajan, J.

D. FALSHAW, C.J.—I agree.
D. K. MAHAJAN, J.—I entirely agree.
B. R. T.