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SooperKanoon Citation : sooperkanoon.com/881078

Court : Kolkata

Decided On : Jun-08-1932

Reported in : [1933]1ITR1(Cal)

Appellant : Reckitt, in Re; Reckitt

Respondent : Reckitt.

Judgement :

LORD HANWORTH, M.R. - In this case we have an appeal from Eve, J., who of the testator was a direction to pay free, not only of Income-tax, but also of what is now known as sur-tax. The will that we have to consider is that of Sir Harold James Reckitt, and it was made on November 12, 1924. His death took place on December 29, 1930. In clause 12 of his will his words were as follows : 'I bequeath to my trustees the sum of Pound 200,000 upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of Pound 5,000 free in income-tax'. There are no further directions that are relevant. There is no direction to pay in quarterly payments, or equal quarterly payments, the words 'pay my wife during her life the annual sum of Pound 5,000 free of income-tax.' Eve, J., has held that that freedom so prescribed included freedom from sur-tax as well as income-tax. Counsel for the appellants, who have presented to us, both of them very useful and helpful arguments, contend that those words ought to be confined to income-tax alone, and cannot be made to cover the sur-tax. I am not unmindful that a distinction between what is known as sur-tax, or super-tax, and income-tax

can be drawn. I will use in future the words 'super-tax,' because sur-tax was introduced by the Finance Act of 1927, s. 38, sub-s. 1(b), but although the name is different I agree with Bennett, J., who said in the case *Hulton, In re : Hulton v. Midland Bank Executor and Trustee, Ltd.*, after going very carefully through the provisions relative to the matter : 'In every essential feature, super-tax and sur-tax are, in my judgment, the same tax.' Now what is super-tax It was originally imposed by the Finance (1909-10) Act, 1910, s. 66. By that section it is declared that : 'In addition to the income-tax charged there shall be charged, levied and paid for the year in respect of the income of any individual, the total of which from all sources exceeds' a certain standard, 'an additional duty of income-tax (in this Act referred to as super-tax)' Those words are reproduced not in section 4 of Income Tax Act, 1918. The relevant words are exactly the same : 'an additional duty of income tax (in this Act referred to as super-tax)' The question has arisen whether or not, for the purposes of the collection of super-tax, it was possible to rely upon the section which leaves standing, for the purpose of the maintenance and collection of income-tax, those sections from year to year. In the case of *Bowles v. Att-Gen.*, the question arose whether section 30 of the Customs and Inland Revenue Act, 1890, applied for the purpose of the super-tax, and Parker, J., said, in the course of the argument : 'Is not section 30 of the 1890 Act kept in operation for the purpose of collecting super-tax in due time ?' We all of us remember of controversy that took place in which Mr. Bowler was the champion. Parker, J., said (81 L.J. Ch., at pp. 161, 162; [1912] 1 Ch., at p. 134) : 'The only question I have to decide in this action is whether this section applies not only to ordinary income-tax, but the super-tax as well. In other words, I have to determine whether super-tax is a duty of income-tax within the meaning of this section,' and he held that it was that it was. He so held, in spite of a differentiation which it is not difficult to make, and which has been forcibly presented to us in the argument for the appellants. It is said that it is not the income tax for the year, but an additional tax. It is said, quite truly, that for the purposes of super-tax here is a duty cast upon every person chargeable therewith to give notice that he is chargeable to it, which shows that the initiative lies upon the subject, where in the case of the income-tax the assessment is made upon him by the surveyor of taxes. More than that, by sub-section 6 of section 7 of the Income Tax Act, 1918, it was necessary

to declare that : 'All provisions of this Act relating to persons.... to be chargeable with income-tax, and to income-tax assessments, and to appeals against those assessments, and to the collection and recovery of income-tax,.... shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of super-tax ...' Therefore it can be said that here is something which is an additional income-tax. It is called a super-tax, but the mode of its incidence the mode of its initiation, and the mode of its collection, are different. I pointed that out in the Michelham Case, where I said (14 L.T. at p. 168; 15 Tax Cas. at p. 750) : 'The fact that it is paid or may be paid a little differently from the income-tax, that deduction does not apply, does not alter its character.' The consideration, therefore, of the nature of super-tax seems to disclose that, in spite of the criticism that might be offered on which differentiation between it and income-tax can be founded, the difference is not effective to destroy the fact that it remains an additional duty of income-tax within the statutes to which I have referred, and for the purposes of the payment. With those observations I feel myself unable to carry into effect any differentiation between the income-tax and super-tax when the words 'income-tax' are used, as they are used in this clause 12 of this will. I am not unmindful of the inconvenience which would be caused to those who have to fulfill the duty cast upon them by this direction in law. Counsel has pointed that out quite plainly. It is easy to deal with income-tax which has to be deducted, but the duty in relation to super-tax is quite a different one, and more burdensome. In spite, therefore, of a desire, from matters of convenience, to hold that income-tax is income-tax, and super-tax is super-tax, I find it impossible to disregard to authority to which I have referred in the sequence of statutory phrases which are to be found in the statutes which are applicable.

I come now to the question of authority. We have been referred to three or four authorities which have been decided upon this point. Peterson, J., in the earliest case to which our attention was directed, that is, the case of *Crawshay In re; Crawshay v. Crawshay*, held that the phrase 'clear of all deductions, including income-tax,' did not include super-tax. The question was : Did that include super-tax The nature of super-tax is that it is paid upon an assessment made direct by the assessor; it is not paid by deduction, and rules 19 and 21 do not apply. You cannot deal with it in that way. Thus where you have the word, 'deduction',

indicating that the freedom which is to be allowed is in the course of deduction allowed, or not allowed - where you have the system of deduction - you may come to a different conclusion where those words do not appear, and as I have already stated they do not appear, and as I have already stated they do not appear in the present case. Then comes the case of *Doxat, In re; Doxat v. Doxat*, in which Sargant, J., took a different view. The words that had to be considered in that case were : 'I give to my wife an annuity of Pound 2,500 during her life, free of income-tax and of all other deduction.' There the Judge held, again relying upon the words introduced by reference to the deduction, that the widow was entitled to the amount of the annuity free from income-tax, and from super-tax. But it will be observed in both those cases that close attention was directed to the actual words used in order to determine what was the meaning of the direction given in the will.

Then comes the judgment of Russel, J., in *Bates, In re; Selmes v. Bates*. In that case there was a gift to the wife of 'such a sum in every year as, after the deduction of income-tax for the time being payable in respect thereof, will leave a clear sum of Pound 2,000.' Russell, J., held that that was free of income-tax only, and that the wife was not entitled to payment of any sum in respect of super-tax. He founded his judgment upon the reference to 'deduction', and pointed out (94 L.J. Ch., at p. 191; [1925] Ch., at p. 159) : 'Super-tax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipients whole income and was not a matter with which the trustees would be charged or concerned at all.' He is dealing there with the judgment of Peterson, J., but as he puts it : 'The question is : Did the testator mean that only income-tax in respect thereof was to be deducted, and that super-tax was not to be deducted ?' He then holds that : 'The testator did not intend that in addition to income-tax being deducted a proportion of the super-tax payable by his wife in respect of her total income should also be deducted.' In the use of the words : 'such a sum in every year as, after deduction of the income-tax for the time being payable in respect thereof, will leave a clear sum of Pound 2,000' is a restrictive indication. But in the present case the trustees are directed to hand over a sum of Pound 5,000 in each year. I have pointed out that it is not prescribed in what installments that is not be paid. No reference is made to the system, or the power of the trustees to make deduction; it is simple that a total sum in each year is not be paid free of income-

tax. As I have pointed out, whatever you may call it, call it super-tax, or call it sur-tax, it still remains in essence an additional income-tax and, that being so, there being no indication to restrict the words to income-tax as known for so many years, it must follow that immunity is given in respect of what is additional income-tax, and the freedom must be from both the income-tax, as we know it, and the additional income-tax to which has now been given the name of sur-tax.

For these reasons, I feel bound to agree with Eve, J., who has followed a sequence of authority in the cases to which I have referred, and also, I think, the indication of opinion, although perhaps it is older, in this Court in the Michelham Case. In these circumstances, the appeal fails, and must be dismissed.

LAWRENCE, L.J. - This case raises the question whether a direction to pay an annuity free from income-tax includes freedom from super-tax, or sur-tax, a question which, so far as Courts of first instance are concerned, has been settled for upwards of ten years. I refer to the case of Crosse, *In re : Oldham v. Crosse*, which was decided by Astbury, J., in 1920, and the case of Doxat, *In re; Doxat v. Doxat*, decided by Sargant, J., in the same year. Counsel for the appellant relied upon the decision of Russell, J., in *Bates, In re; Selmes v. Bates*, given in 1924. It is important to observe what were the word of the will in that case. It was not a gift of an annuity free from income-tax, as in the present case, but a gift of 'such a sum in every year, as after deduction of the income-tax for the time being payable in respect thereof, will leave a clear sum of Pound 2,000.' The learned Judge, at the outset of his judgment, expressly stated that the testator had not said that the annuitant was to be paid her annuity free from income-tax, and he referred in his judgment both to *Crosse, In re; Oldham v. Crosse*, and *Doxat, In re; Doxat v. Doxat*, and distinguished those cases on the ground that there the gift was of an annuity free from income-tax. He then proceeded to consider the words with which he had to deal, and came to the conclusion that, on the construction of the particular bequest, the freedom from income-tax did not include freedom from super-tax, relying (inter alia) upon the words 'in respect thereof' occurring in the bequest, and pointing out that super-tax was not strictly speaking a tax payable in respect of the annuity. Counsel, however, has contended that a gift of an annuity free from income tax must necessarily mean a gift of an annuity free from income

tax payable 'in respect thereof,' and that, therefore, the reasoning of Russell, J., Bates, In re; Selmes v. Bates, ought to be applied to the present case; but it is to be observed that the learned Judge in that case relied upon the express use of the words 'in respect thereof' as distinguishing the case from the case of a gift such as we have here.

I have said that the question was settled, so far as the Courts of first instance were concerned, but the matter does not quite rest there. In the Michelham Case there was an annuity free from income tax simpliciter. Although the question was not argued, the Master of the Rolls stated in his judgment, with regard to the liability in respect of super-tax (144 L.T., at p., 163; 15 Tax Cas., at p. 750) : 'The liability it appears to us is clear. The fact that it is paid or may be paid a little differently from the income tax that deduction does not apply, does not alter its character.' Slessor, L. J., agreed with the Master of the Rolls. Romer, L. J., said (15 Tax Cas., at p. 751) : 'The testator has also directed that the annuity shall be paid free of super-tax, and it was so held by the Court of Chancery, and in my opinion, was rightly so held,' thus expressing his approval of the decision that a gift of an annuity free from income tax is a gift of an annuity which carries with it freedom from super-tax, and therefore agreeing with what had been settled by the Courts of first instance.

In my judgment (quite apart from the question whether it is open in this Court or not) the decision in Crosse, In re; Oldham v. Crosse, and Doxat, In re; Doxat v. Doxat, were right, and no distinction can be drawn in the present case between income-tax properly so called, and super-tax, or sur-tax, both the latter being, in fact, additional income-tax, and therefore included in the words 'income tax.'

For these reasons I agree that the appeal fails and ought to be dismissed.

ROMER, L. J. - I agree. For the reasons given by the Master of the Rolls it is, in my opinion, clear that, prima facie, the words 'income-tax' include super-tax. Therefore it seems impossible to contend, where you find simpliciter a gift of an annuity free of income tax, that that is not a gift of an annuity free of income tax and super-tax; it is, indeed a gift to the annuitant of such a sum as will, after all questions as between the annuitant and the Crown in respect of income tax and super-tax for that year have been settled, leave the annuitant with the sum

mentioned. Of course, somebody has to pay the annuity, and the person who has to pay it will have to see that he pays, whether he be a trustee, or anybody else, such a sum as I have mentioned. If, therefore, in any particular year the annuitant has had to pay something in respect of super-tax on the annuity, by which I mean a sum calculated in the way indicated in the statute, the person whose duty it is to carry into effect the gift of the annuity will have to pay, not only the sum that is mentioned in the gift, but also the amount paid by the annuitant, or payable by the annuitant that year, in respect of super-tax. If that be so, I cannot conceive why it should make any difference that the gift of the annuity is only to be found in a direction to a trustee to pay. The trustee, in that case, has to perform the same duty as the executor or trustee, or other person would have had to perform in the first case that I have mentioned, namely, where there is a gift simpliciter of an annuity free of income tax. There are, of course, cases - the Master of the Rolls has referred to some of them - where the testator, by the use of the words 'pay without deduction' has shown that he is not dealing with the position as between the annuitant and the Crown, but is dealing with the position that will exist as between the annuitant and the trustee who has to pay, and words that give a direction 'to pay without any deduction' indicate that the testator is providing against a deduction by the trustee which, but for the provision, the trustee would be entitled to make. Now inasmuch as the trustee, in the absence of such words, is not entitled to make any deduction in respect of super-tax, it is plain that such words show that the testator, although referring to income-tax, does not intend to include in those words the super-tax.

For these reasons I think that this appeal fails and should be dismissed.

Appeal dismissed.

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