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Judgment -
37/1965

IN THE PRIVY COUNCIL

No. 45 of 1964

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
STUDIES
- 7 FEB 1966
2. ...
LONDON, W.C.1.

B E T W E E N:

PATRICK ALFRED REYNOLDS Appellant

- and -

THE COMMISSIONER OF INCOME TAX
Respondent

C A S E FOR THE APPELLANT

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10 1. This is an appeal from a Judgment and Order of the Court of Appeal of Trinidad and Tobago (hereinafter referred to as "the Court of Appeal") dated the 25th March, 1964, dismissing an appeal by way of Case Stated from a Judgment and Order of the Supreme Court of Trinidad and Tobago (hereinafter referred to as "the Supreme Court") dated the 31st July, 1959, which confirmed an assessment to income tax made upon the Appellant by the Respondent.

pp.45-70

20 The said assessment purported to assess the joint assessable income of the Appellant and his wife (Mrs. Audrey Jean Reynolds - hereinafter called "the wife") for the year of assessment ended the 31st December, 1957, at \$32,487.00 and the chargeable income of the Appellant for the said year at \$27,951.00, the tax thereon being charged at \$11,788.15.

pp.1-2
pp.37-38

30 The Respondent disallowed the Appellant's claim to deduct from the joint assessable income of the Appellant and his wife and from the Appellant's chargeable income, the sum of \$14,000.00 being the amount paid by the wife out

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of her income during the year ended 31st December, 1956, for the benefit of their four minor children under a Deed of Covenant, dated the 28th December, 1956.

p.38,11.6-18

2. The question for determination on this appeal is, as it is posed by the Case Stated -

"whether, having regard to the provisions of section 18 of the Income Tax Ordinance, annual payments made by a wife out of her own income under a Deed of Covenant to a trustee for the benefit of her minor children are allowable deductions in calculating the chargeable income of the husband with particular reference to the provisions of Sections 10(1)(f) and 34(2) of the Income Tax Ordinance."

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3. Relevant portions of the Income Tax Ordinance Cap.33 No.1, as amended, (hereinafter referred to as "the Income Tax Ordinance") are included in an Annexure hereto.

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4. The facts, as set out in the Case Stated for the opinion of the Court of Appeal, are as follows :-

p.38,11.21-34

"The Appellant and the wife live together and are both in receipt of income from earnings and investments. On the 28th December, 1956, the wife entered into a Deed of Covenant" Ex.A "whereby she created a trust for the benefit of the four minor children of the marriage. She appointed Mr. Alfred Jefferies Prior her trustee, and covenanted to pay to him for a period of 3 years the annual sums of \$3,500 in respect of each of the children, to be held by him for their benefit, maintenance and/or education, until their maturity or marriage whichever took place the sooner. At the time of the execution of the deed the children's ages ranged from 12 years down to one month.

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"The Appellant's return for the year of assessment ending 31st December, 1957, and based on income received in 1956 showed a total income of \$40,164.86. Of this sum \$18,202.00 represented his wife's income.

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p.38,1.35
to
p.39,1.12

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"Apart from the standard deductions allowable, Appellant in his return claimed as allowable deductions from income payments made under three dispositions. Two of these dispositions were made by himself and his claim was allowed in respect of these; the third was the disposition made by the wife under the aforesaid Deed of Covenant of the 28th December, 1956. Appellant's claim under this disposition (hereinafter referred to as "the wife's annual payments") was to deduct the whole amount paid thereunder for the year of assessment, namely \$14,000, from the wife's returned income of \$18,202.00 thus reducing it for tax purposes to \$4,202. The Commissioner disallowed this claim and the Appellant duly gave notice of objection. The Commissioner reviewed his assessment but confirmed it. It is from that assessment that the Appellant appealed."

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5. The appeal to the Supreme Court came up for hearing before Blagden A.C.J. who, on the 31st July, 1959, confirmed the assessment.

pp.3-35

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6. At the hearing before Blagden A.C.J. it was contended on behalf of the Appellant that -

"(a) Section 6 is the charging section of the Income Tax Ordinance and consequently it is not income which is charged with tax but only chargeable income.

p.41,1.16
to
p.42,1.23

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"(b) Section 18 is purely a machinery section: by it a wife's income is deemed to be her husband's income and is charged in his name. But this does not mean that the wife's income is the husband's income; any disposition made by her of her income remains a disposition by her and does not become, nor is it deemed to be, a disposition by her husband out of his income.

"(c) The word 'income' in Section 18 must

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be interpreted as 'chargeable income' since it is only chargeable income which is in fact charged.

"(d) The wife's annual payments are allowable deductions under Section 10(1)(f).

"(e) The onus is on the Crown to show that the wife's annual payments are brought back into tax by the provisions of Section 34(2). 10

"(f) On its proper construction Section 34(2) does not and cannot apply to the wife's annual payments for two reasons:

"(i) The phrase 'what would otherwise have been the income of the disponer' cannot be construed as including that which is the income of the disponer. The income dealt with in Section 34(2) is income derived from the corpus of the disposition and does not include the corpus itself even if the corpus is income of the disponer. 20

"(ii) The words 'such disponer shall, nevertheless, during the period of the minority of such minor, be liable to be taxed in respect of the sums so payable as if such disposition had not been made' cannot apply to the wife because, as she is a married woman living with her husband, she is not, having regard to the provisions of Section 18, liable to be taxed at all." 30

7. On behalf of the Crown it was contended that -

p.42, l.24
to
p.43, l.20

"(a) Section 5 is the charging Section of the Income Tax Ordinance and it charges income and not merely that which is defined in Section 2 as 'chargeable income.'

"(b) By virtue of the definition of 'incapacitated person' in Section 2, a married woman is an 'incapacitated person' for the purposes of the Income Tax Ordinance, and the effect of Section 18 is not only to make a wife's income her husband's for all purposes relating to income taxation, but also to preclude her from being a taxpayer or a disponent of income at all. Consequently she can have no 'chargeable income', and if she purports to make a disposition of her income, it is her husband who must be regarded as the true disponent for the purposes of the Income Tax Ordinance.

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"(c) The words of Section 10(1) prescribing as allowable deductions 'all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income' must be read as governing all the paragraphs which follow; and consequently the wife's annual payments cannot be considered as allowable deductions under Section 10(1)(f) inasmuch as the Appellant has failed to show that they were 'outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income'

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"(d) Section 10 must be read together with Section 34, so that the onus is on the Appellant to show not only that the wife's annual payments are allowable deductions under Section 10(1)(f) but also that they are not caught by the provisions of Section 34(2)."

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8. In the Case Stated Blagden A.C.J. summarised his conclusions thus :-

"(a) Section 5 is the paramount charging section of this Ordinance and it charges income generally and not only chargeable income.

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p.43,1.22
to
p.44,1.9

"(b) Section 6 is a composite section

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embodying both charging and machinery provisions.

"(c) The provisions of Section 18 whereby the income of a married woman living with her husband is deemed to be that of her husband and is charged in his name and not hers, include the whole of the wife's income and not only that part of it falling under the definition of 'chargeable income' but they do not operate so as to convert the wife's income into her husband's income. 10

Similarly, these provisions do not preclude the wife from being a taxpayer nor from being a disposer of her own income.

"(d) The effect of the word 'including' in Sub-Section (1) of Section 10 is to enlarge the ambit of the allowable deductions described therein as 'all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income', by the addition of all the items specified in paras (a) to (g) next following, and consequently the wife's annual payments, which are payments coming within the terms of para (f) are allowable deductions under Section 10(1)." 20 30

p.44,11.10-32

"(e) The onus is on the Crown to show that, pursuant to the provisions of Sections 5, 6 and 18, the wife's income is liable to taxation; thereafter the onus shifts to the appellant to show that the wife's annual payments are allowable deductions under Section 10(1)(f). The appellant having discharged that burden, the onus returns to the Crown, to show that the wife's annual payments are brought back into tax by the provisions of Section 34(2)." 40

10 "(f) Notwithstanding that by Section 2 the definition of 'incapacitated person' is expressed to include a 'married woman' and notwithstanding that by the provisions of Section 18 the income of a married woman living with her husband is deemed to be the income of her husband and is charged in her husband's name and not in her own name, where, as here, a wife makes a disposition out of her own income, she, and not her husband, is the disponer of it."

20 "(g) The word 'income' in Section 34(2) is not restricted to 'chargeable income' as defined in Section 2 and must be given its unrestricted and natural meaning of 'that which comes in' considered in relation to money or money's worth. In the light of this construction the wife's annual payments come within the ambit of the phrase 'what would otherwise have been the income of the disponer'."

p.44,l.33
to
p.45,l.16

30 "(h) The word 'taxed' in Section 34(2) where it occurs in the phrase 'such disponer shall, nevertheless, during the period of the minority of such minor, be liable to be taxed in respect of the sums so payable as if such disposition had not been made' must be construed as embracing the whole process of taxation, and the said phrase interpreted as meaning that such disponer shall be legally liable to the process of taxation. Accordingly the wife's annual payments which, by reason of their disposition are caught by the phrase 'what would otherwise have been the income of the disponer' become 'liable to be taxed in respect of the sums so payable as if such disposition had not been made', and are therefore not allowable deductions in ascertaining the Appellant's chargeable income."

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9. Dissatisfied with the Judgment of the Supreme Court the Appellant required Blagden A.C.J. to state a case for the opinion of the Full Court pursuant to the Income Tax Ordinance Section 43(10). The request was granted and in the Case Stated,

pp.37-45

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dated the 7th March, 1960, the facts, the contentions of both sides, the findings of Blagden A.C.J., and the question of law for determination by the Full Court were set out substantially in the terms referred to in previous paragraphs of this Case.

pp.45-69

10. The Case Stated came up for hearing in the Court of Appeal (which by that time had assumed the jurisdiction of the Full Court) comprising Wooding C.J., Hyatali J.A., and Phillips J.A. who, on the 25th March, 1964, dismissed the appeal. The learned Judges of the Court of Appeal were in agreement with the decision of Blagden A.C.J. but not with his reasoning.

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11. The learned Chief Justice commenced his judgment by referring to the judgment of Gilchrist J. in the appeal of J.G. Kelshall vs. C.I.R. No.443 of 1939, in these terms:-

p.46,1.9

"In March 1940 Gilchrist J., sitting as a judge in chambers, allowed the appeal of Joseph Galvan Kelshall. It was an appeal against the refusal by the Commissioners of Income Tax to allow in diminution of his chargeable income payments which he had covenanted to make annually to trustees for the benefit of his two sons. There was no appeal against that decision. Ever since then, the revenue authorities have accepted like annual payments by taxpayers as permissible deductions in ascertaining chargeable income. But, in order to contain such deductions within what may be regarded as not inappropriate limits, the legislature passed amending legislation making certain dispositions non-deductible. Two challenges, however, are raised by the instant case. Patrick Arthur Reynolds, to whom I shall hereafter refer as "the taxpayer", contends that the amending legislation is incompetent to deny him the deductions claimed; the Commissioner retorts by questioning the decision of Gilchrist J."

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The learned Chief Justice continued:-

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"...but Gilchrist J. also held, obiter, that annual payments under covenant out of income are comprehensible within paragraph (f) of Section 10(1) of the Ordinance and are not excluded by the proviso thereto...

p.49,1.45

"Obviously his decision had alarming potentialities; so the legislature moved quickly to repel the danger, first in 1941, then again ten years later, (and although this can in no way affect the instant case, once more in 1963) amending legislation was enacted as I stated earlier. The 1951 enactment included Section 34(2)...."

p.50,1.30

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The learned Chief Justice then considered the effect of Sections 10 and 12 of the Ordinance. He concluded that they were complementary sections and that they and Section 5 and the definition of "chargeable income" in Section 2 should be read together; that despite the word "include", the enlargements provided for by the lettered paragraphs of Section 10(1) should be associated in some way with the production of the taxpayer's income; that Section 12 was enacted "to make it abundantly clear that nothing in Section 10(1) should be thought effectual to allow the deduction of any outgoings or expenses which are domestic or private expenses or which are not laid out or expended wholly and exclusively for the purpose of acquiring the income."

p.54,1.22

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p.55,1.27

p.55,1.42

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The learned Chief Justice concluded:-

"....I have therefore considered that it should be said very plainly that, subject to the question which I reserve hereunder, unless an annual payment is an outgoing or expense "incurred in the production of the income", it cannot qualify as an allowable deduction under any paragraph of Section 10(1)....."

p.57,1.19

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"....The question which I reserve may now be stated. Although I strongly disapprove both the ratio and obiter dictum of Gilchrist J., I do not expressly overrule

p.57,1.40

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his decision. I refrain from so doing, not because I think, as Blagden J. did, that it "has stood unchallenged and unquestioned for so long". It was challenged in this case within a mere twenty years, so that it had acquired no antiquity deserving a venerable respect. What makes me hesitate is that I consider it an open question which it is quite unnecessary now to decide and on which therefore I expressly reserve my opinion, whether by its subsequent legislation the legislature has implicitly declared the Kelshall decision to be a correct interpretation of Section 10(1)(f)."

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12. In his Judgment, the learned Chief Justice, construing several sections of the Income Tax Ordinance, expressed, inter alia, the following views:-

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p.48,1.30

(A) A wife has no chargeable income and is not herself chargeable with tax. Her income is for the purposes of the Ordinance her husband's income.

p.48,1.40

(B) A husband must make a true and correct return of the whole of his income from every source whatever, which is inclusive of the whole of a wife's income. For the purposes of the Ordinance the whole of a wife's income is deemed to be the husband's.

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p.48,1.48

(C) A wife is an "incapacitated person" within the definition in Section 2. She has no right to object to an assessment of her income or to appeal therefrom. Those remedies are available to her husband only.

1.49,1.11

(D) Whenever the Ordinance speaks of "income" without any qualification, it means income derived from all sources specified in Section 5. Accordingly the whole of a wife's income is deemed by Section 18 to be the income of her husband and not merely her chargeable

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income. Blagden A.C.J. was wrong in holding that it is for the purpose only of its machinery and not at all of its charging sections that the Ordinance deems her income to be his.

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p.51,1.7

- 10 (E) Section 34 does not and cannot refer to a "disposition" by a wife. Since she is not liable to be taxed at all, she cannot be included within the meaning of the words "such disponent shall be liable to be taxed." Further, the income of the wife is deemed for the purpose of the Ordinance to be her husband's income. It is he who, within the contemplation of the Ordinance, may dispose of it to or for the benefit of another. She cannot. "Nemo dat quod non habet". Nor is it permissible for the husband to claim that any payment so made by her is an outgoing or expense incurred in the production of the income. Her obligations, however arising, cannot be a charge debitable against income which is deemed in whole to be her husband's.
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13. Hyatali J.A. and Phillips J.A. came to the same conclusion as did Wooding C.J.

14. Hyatali J.A. expressed views to the following effect:-

- 30 (A) Under the Income Tax Ordinance, as the wife's income is regarded as being her husband's, the husband, in the result, becomes liable to pay tax on the footing that he had actually earned the aggregate of her income and his. Section 34 was therefore inapplicable to a wife's income because she cannot be a disponent of income which in the contemplation of Section 18 belongs to her husband. p.62,1.1
- 40 (B) The word "income" bears its ordinary and natural meaning and that word in Section 18 means the whole of the income accruing to the wife from the sources specified in Section 5. p.62,1.37
- (C) If the wife is not entitled to and cannot p.62,1.45

- Record claim to have, a "chargeable income" she is debarred from invoking the provisions of Section 10(1)(f).
- p.63,1.4 (D) Section 10(1)(f) contemplates an annual payment made by the person chargeable to tax.
- p.63,1.12 (E) The decision in Kelshall's Case was not relevant to the present appeal. In any event "a Court should be slow to overrule a fiscal decision of this nature when citizens for more than 20 years have ordered and conducted their affairs on the faith of its validity; and more especially when the subsequent conduct of the Legislature may, with justification, be interpreted as a ratification thereof." 10
15. Phillips J.A. was of opinion that:-
- p.65,1.42 (A) A wife is an "incapacitated person" and the person chargeable with tax in respect of a wife living with her husband is the husband. 20
- p.66,1.10 (B) A wife has no "chargeable income" for the purposes of the Ordinance. Section 18 deems her "income" to be her husband's. There could not be any allowable deductions from her income qua her income. These deductions can only arise in relation to the husband's chargeable income which ex hypothesi includes the wife's income. 30
- p.68,1.1 (C) The only payments or expenses which fall within the scope of Section 10(1) are expenses incurred or payments made by the person chargeable to tax. They would not include alienations by a wife of a portion of her income by deed of covenant. Such alienations cannot be effective to reduce the amount of her income which, for the purposes of the Ordinance, is deemed to be her husband's. 40

- (D) Section 34(2) is applicable only to dispositions made by a taxpayer and not to those made by his wife who is an "incapacitated person" not assessable or chargeable with tax, and not "a disponent". Record
p.69,1.20

Dealing with the Kelshall Case, the learned Judge said:-

- 10 (E) "...Having had the advantage of perusing the judgment of the learned C.J., I find myself in complete agreement with his strictures in relation to Kelshall's Case... p.67,1.30

20 "...This enactment (Section 34(2)) may be said to be an express modification by the legislature of the effect of the erroneous construction put upon Section 10(1)(f) by the decision in Kelshall's Case. The intention of the enactment is manifestly to limit the effect of that decision by removing from its ambit the precise class of case now under consideration, namely, a disposition in favour of minors.... p. 69,1.4

30 "...For my part I do not think it strictly necessary for the determination of the present case to decide whether or not the judgement in Kelshall's case is correct, for the simple reason that in my opinion, even on the assumption that it is correct, it can have no application whatever to the circumstances of the case under consideration; whereas in Kelshall's case it was the taxpayer himself who had covenanted to make the annual payments, in the present case the covenantor making those payments is not the taxpayer himself but his wife." p.67,1.36

40 16. It is respectfully conceded that the contention for the Appellant both before Blagden J. and in the Court of Appeal that "income" in Section 18 means "chargeable income" went too far. In the appeal before the Board the Appellant will respectfully submit that the word "income" in Section 18 means "net income" (or gains and profits), and not either "gross income" or "chargeable income".

17. It is respectfully submitted that the judgments in the Court of Appeal are based upon

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four main erroneous conceptions, namely:-

- (A) that the word "income" when used in the Ordinance and particularly in Section 18 thereof means "gross income".
- (B) that because a wife is an "incapacitated person", she is not a legal "person" at all and can have no "income" and make no "disbursements" within the meaning of Section 10.
- (C) that because under Section 18 the "income" of the wife is, for the purpose of the Ordinance, "deemed to be the income of the husband", her income is therefore his and not hers for every purpose whatsoever. 10
- (D) that the decision in the Kelshall Case was wrong and in any event was not applicable to the present case.

18. An Order dismissing the appeal, in accordance with the Judgment of the Court of Appeal, was drawn up on the 25th March, 1964, and against the said Judgment and Order this appeal is now preferred to Her Majesty in Council, the Appellant having been granted Final Leave to Appeal by an Order of the High Court of Justice, dated the 29th July, 1962. 20

In the Appellant's respectful submission this appeal ought to be allowed, with costs throughout, and the question posed by the Case Stated answered in the affirmative, for the following among other 30

R E A S O N S

1. Because the word "income" when used without qualification in the Income Tax Ordinance Ch.33 No.1 means, not "gross income" or "chargeable income", but "gains and profits" or "net income", which, for income tax purposes, are synonymous expressions. 40

2. Because the "income" referred to in Section 5 is, as those references clearly indicate, "net income".
3. Because it is the "net income" of the wife and not her "gross income" which, by Section 18, is "deemed to be the income of the Appellant" for the purpose of calculating and collecting the tax to be imposed upon him.
- 10 4. Because the wife, although an "incapacitated person", is a legal person nonetheless and had, in fact, a "gross income" and a "net income", which could be, and had to be, calculated for the purpose of Section 18.
- 20 5. Because the respective "net incomes" of the Appellant and of the wife fell to be calculated by deducting from their respective "gross incomes" the amounts prescribed by Sections 10,11,12 & 13 of the Ordinance.
6. Because the annual payment made by the wife under the Deed of Covenant (which is the disputed deduction) is a proper deduction under Section 10(1)(f) in calculating the net income of the wife - as follows from the ratio decidendi in Kelshall's Case, which was rightly decided.
- 30 7. Because in any event, the decision in Kelshall's Case should not now be overruled for the reasons that :-
 - (a) it has provided a basis on which persons have arranged their affairs over a considerable period of time; has consistently been accepted by the Revenue as having been correctly decided; and was so accepted in the instant case in respect of two dispositions, one by the Appellant in favour of his mother and one by the wife of the Appellant in favour of hers.
 - 40 (b) it has been ratified by the legislature by Section 8 of the Income Tax (Amendment)

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Ordinance 1941 and by Section 5 of the Income Tax (Amendment) Ordinance 1951 and 1953, introducing Section 34(2) in its present form.

8. Because from the aggregate of the net incomes of the Appellant and the wife (calculated in manner aforesaid) there then falls to be deducted the "personal allowances" prescribed by Section 14, 15, 16 and 18A to be made to the Appellant, as the individual being taxed, to calculate his "chargeable income" upon which Section 6 imposes the tax. 10
9. Because Section 34(2) is inapplicable to the instant case for the reason that the disputed disposition is a disposition by the wife who, under the Ordinance, is not liable to be taxed.
10. Because the decision in the Court below is erroneous and ought to be set aside. 20

MALCOLM J. BUTT

R.K. HANDOO

No. 45 of 1964

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B E T W E E N:

PATRICK ALFRED REYNOLDS
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THE COMMISSIONER OF INCOME TAX
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C A S E FOR THE APPELLANT

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