

Commissioner of Income-Tax, West Bengal

Vs

Jeewanlal Ltd., Calcutta.

(CJI M.Patanjali Sastri, S. R. Dass, Vivian Bose, Ghulam Hasan, N.H. Bhagwati JJ)

08.10.1953

JUDGEMENT

DAS, J.-

This is an appeal from the judgement and order of a Bench of the Calcutta High Court delivered on a reference made by the Income- tax Act Appellate Tribunal under Section 21 of the Excess Profits Tax Act, 1940, read with Section 21 of the Excess profits Tax Act, 1940, read with Section 66 (I) of the Indian Income-tax Act, whereby the High Court answered in the affirmative the question of law referred to it. The question referred was :-

"Whether in the facts and circumstances of these cases, the Income-tax Appellate Tribunal was right in holding that the directors of the respondent company had a controlling interest in it as contemplated by Section 2 (21) of the Excess Profits Tax Act".

The controversy arose between the parties during proceedings for assessment of excess profits tax for five chargeable accounting periods ending on the 31st December of each of the years 1939 to 1943.

The relevant facts which are not in dispute are these : The respondent company is a company incorporated in what was then British India having a capital of Rs. 36,00,000 divided into into 3,60,000 shares each. The Aluminium Limited, a company incorporated in Canada, held 3,59,790 shares in the chargeable accounting periods ending on 31st December, 1942, and 31st December, 1940, and 3,59,600 shares in the chargeable accounting periods ending on 31st December, 1941, 31st December, 1942, and 31st Decemeber, 1943. In excercise of the power given to it by Article 105 of the Articles of Association of the respondent company, the Aluminium Ltd., appointed three permanent directors on the board of directors of the respondent company. Two of these directors eventually retired and only one, namely, Mr. L. G. Bash continued to be director of the respondent company nominated by the Aluminium Ltd. Mr. L. G. Bash and the other directors had between them during the chargeable accounting periods ending on 31st December, 1939, and 31st December, 1940, only 210 shares and in the chargeable accounting periods ending on 31st December, 1941, 31st December, 1942, and 31st December, 1943, 400 shares, Mr. L. G. Bash not having a single shares during during these last mentioned chargeable accounting periods. By a resolution passed by the directors of the Aluminium Ltd., Mr. L. G. Bash was appointed to vote and/or from time to time to appoint a special or general proxy to vote for and on behalf of the Aluminium Ltd. in respect of the shares held by it in the respondent company at all ordinary or extraordianry general meetings of the shareholders of the respondent company provides :-

"90. Where a company registered under the provisions of the Indian Companies Act or not is a member of this company a person duly appointed to represent such company at a meeting of this company in accordance with the provisions of Section 80 of the Indian Companies Act, 1913, shall not be deemed to be a proxy but shall be entitled to vote for such company on a show of hands and to exercise the same power on behalf of the company which he represents as if he were an individual member of this company including the power to appoint a proxy whether special or general and the production at the meeting of a company of such resolution appointing such company and by the secretary (if any) and certified by them or him as being a true copy of the resolution shall on production at the meeting be accepted by this company as sufficient evidence of the validity of his appointment".

Mr. L. G. Bash has at all material times been exercising the powers conferred by the above article as the representative of the Aluminium Ltd.

The claim of the Bash has at all respondent company was that it should be regarded as a company the directors whereof had a controlling interest therein, inasmuch as Mr. L. G. Bash, one of the directors, had the authority to exercise the voting power of the Aluminium Ltd. and, as such, could control the affairs of the respondent company and that in computing the standard profits the statutory percentage should be taken at 10 per cent. per annum and not at 8 percent. This contention was rejected by the Excess Profits Tax Officer. On appeal by the respondent company Appellate Assistant Commissioner of Excess Profits Tax upheld the decision of the Excess Profits Tax Officer. the respondent company thereupon appealed to the Income-tax Act Appellate Tribunal which reversed the decision of the Appellate Assistant Commissioner observing that in view of the power of attorney that was given to Mr. L. G. Bash by the Aluminium Ltd. there was no room for doubt that the respondent company, which was then the appellant before the Tribunal, was director-controlled company. On the application of the Commissioner of Income-tax, Appellate Tribunal referred the question of law herein before set out. By its judgement dated the 11th January, 1951, the High Court of Calcutta has answered the question in the affirmative. the Commissioner Excess Profits Tax Officer, West Bengal, has now come up on appeal to this Court with a certificate under Section 66-A (2) of the Indian Income-tax Act.

In common parlance a person is said to have a "controlling interest" in a company when such a person acquires, by purchase or otherwise, the majority of the vote-carrying shares in that company, for the control of the company resides in the voting powers of its shareholders. In this sense, the directors of a company may be regarded as having "a controlling interest" in the company when they hold and are entered in the share register as holders of the majority of the shares which, under the Articles of Association of the company, carry the right to vote. (See Glasgow Expanded Metal Co. Ltd. v. Commissioner of Inland Revenue (1923) 12 Tax Cas. 573. and Commissioner of Inland Revenue v. B. W. Noble (1926) 12 Tax Cas. 911). It is not, however, necessary that in order to have "a controlling carrying shares must have a beneficial interest in the shares held by them. These persons may hold the shares as trustees and may even be accountable to their beneficiaries and may be brought to book for exercising their votes in breach of trust, nevertheless, as between them as shareholders and the company, they are the shareholders, and as such, have "a controlling interest" in the company. (See Inland Revenue Commissioners v. J. Bibby & sons Ltd. (1946) 14 ITR Suppl. 7; 29 Tax Cas. 167 and Commissioner and Income-tax v. Bipin Silk Mills Ltd. (1946) 14 ITR 1947 Bom. 45). According to the facts found in the statement of the case the directors of the respondent company do not themselves hold the majority of shares which, on the contrary, are

registered in the name of the Aluminium Ltd. and therefore, according to the principles discussed above, they cannot be said to have "a controlling interest" in the respondent company.

Learned counsel for the respondent company, however, contends, on the analogy of the reasonings adopted by the House of Lords in *British American Tobacco Co. Ltd. v. Commissioner of Inland Revenue* ([1943] 11 ITR Suppl. 29; 29 Tax Cas. 49.), that although Mr. L. G. Bash does not hold the majority of shares and has no beneficial interest in the shares held by the Aluminium Ltd. in the respondent company and although he may be bound to cast the votes according to the directions of his principals, the Aluminium Ltd., and may be answerable to the latter if he acts in breach of his duty, nevertheless, as long as his authority is not revoked, as far as the respondent company is concerned, the majority of its vote-carrying shares are subject, directly or indirectly or indirectly, to his will and ordering and therefore, the directors of the respondent company in fact control its affairs at general meetings and as such have "a controlling interest" therein, no matter by what machinery or means that result has been effected. This line of argument found favour with the Appellate Tribunal and the High Court. We are unable, with all respect, to accept this argument as sound, for this argument appears to us to oversimplify the position. Assuming, but without expressing any final opinion as to, the correctness of the decision in the last mentioned case of directors, who hold the majority of shares as trustees they, so far as the company is concerned, are the registered shareholders and the right to vote is vested in them although as between them and their beneficiaries holders of the shares and the votes they cast are their own votes. That case is entirely different from the case of directors who are only the agents of the holders of the majority of shares. When a shareholder holding the majority of shares authorises an agent to vote for him in respect of the shares so held by him, the agent acquires no interest, legal or beneficial, in the shares. The title in the shares remains vested in the shareholders. The shareholder may revoke the authority of the agent at any time. In spite of the appointment of the agent the shareholder may himself appear at the meeting and cast his votes personally. Therefore, the shares being always subject to his will and ordering the controlling interest which the holder of the majority of shares has never passes to the agent. Let us take the facts of the present case. Under Article 90, when Mr. L. G. Bash as agent of the Aluminium Ltd. attends a general meeting of the respondent company he has to produce the resolution of his principals authorising him to cast the votes of his principal. The votes he casts are not his votes but are the votes of the Aluminium Ltd. In such a situation, in the eye of law, the controlling interest remains vested in the Aluminium Ltd. and is at no time vested in Mr. L. G. Bash. The shares in question which give the controlling interest are neither held by Mr. L. G. Bash nor are they subject, directly or indirectly, to his will and ordering, and, therefore, he cannot, applying either of the tests mentioned above, be said to have controlling interest. The decision of the Court of Appeal in *Commission of Inland Revenue v. James Hodgkinson (Salford) Ltd.* appears to us to be opposite. It is unfortunate that the last mentioned case was not brought to the notice of the High Court before the judgment under appeal was delivered.

Dissent has been expressed in the judgment under appeal from the recent decision of the Bombay High Court in *New Shorrock Spinning and Manufacturing Co. Ltd. v. Commissioner of Income-tax, Bombay* ([1950] 18 ITR 712; AIR 1950 Bom. 391). The facts of that case are entirely different from the facts of the case before us and that decision has no manner of application to the present case. It is, therefore, unnecessary for us to discuss or express any opinion as to whether the observations to be found in the judgment in that case are or are not well-founded.

For reasons stated above, we accept this appeal and hold that the answer to the question referred by the Appellate Tribunal to the High Court should be in the negative. The respondent company must pay the costs of the appellant in this Court as well as in the High Court.

Appeal allowed.

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