

Commissioner of Income Tax, Bombay City 1

Vs

Jalgaon Electric Supply Co. Ltd.

Civil Appeal No. 477 of 1957

(S. K. Das, J. L. Kapur, M. Hidayatullah JJ)

04.05.1960

JUDGMENT

HIDAYATULLAH, J. –

This appeal is with a certificate granted by the High Court against its judgment and order dated September 9, 1955, in a reference under section 66(1) of the Indian Income-tax Act. The Tribunal had referred the following questions for the decision of the High Court :

"(1) Whether there was any excess dividend declared by the assessee company ?

(2) Whether the assessee company is liable to pay additional income- tax in respect of the excess dividend paid by the assessee company ?"

The High Court answered the first question in the affirmative and the second in the negative. The Commissioner of Income-tax, Bombay, is the appellant before us, and the Jalgaon Electric Supply Co. Ltd. (the assessee company) is the respondent.

The facts of the case are simple. For the assessment years 1949-50 and 1950-51, the book profits of the assessee company were respectively Rs. 1,22,469 and Rs. 76,886. After adjustment of depreciation allowance and other deductions, the income of the assessee company was finally assessed at Rs. 3,423 and Rs. 3,312 respectively. The assessee company declared a dividend of Rs. 46,024 in the first year and Rs. 56,326 in the next. The Income-tax Officer, applying the proviso to paragraph B of Part I of the Third and First Schedules of the Finance Acts, 1949, and 1950 respectively, assessed the difference in each year to additional income-tax, and charged income-tax at the rate of 5 annas in the rupee on the amounts for the two assessment years. The assessee company appealed first to the Appellate Assistant Commissioner and then to the Tribunal. In the Tribunal, there was a difference of opinion between the President and the Accountant Member, the former holding that the assessee company was not liable and the la

Paragraph B or Part I of the First Schedule of the Finance Act, 1950, corresponds to the corresponding paragraph of the Finance Act, 1949. It is, therefore, not necessary to refer to them separately. We shall confine ourselves to the Finance Act, 1949. It may also be pointed out that the circumstances of the two years are also on par, except that the amounts of income and the excess dividends are different. The paragraph reads as follows :

"B. In the case of every company-

# RateOn the whole of total income.... .... Five annas in the rupee :##

Provided that in the case of an Indian company-

(i) where the total income, as reduced by seven annas in the rupee and by the amount, if any, exempt from income-tax, exceeds the amount of any dividends (including dividends payable at a fixed rate) declared in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1950, and no order has been made under sub-section (1) of section 23A of the Income-tax Act, a rebate shall be allowed at the rate of one anna per rupee on the amount of such excess;

(ii) where the amount of dividends referred to in clause (i) above exceeds the total income as reduced by seven annas in the rupee and by the amount, if any, exempt from income-tax, there shall be charged on the total income an additional income-tax equal to the sum, if any, by which the aggregate amount of income-tax actually borne by such excess (hereinafter referred to as 'the excess dividend') falls short of the amount calculated at the rate of five annas per rupee on the excess dividend.

For the purposes of the above proviso, the expression 'dividend' shall have the meaning assigned to it in clause (6A) of section 2 of the Income-tax Act but any distribution included in that expression, made during the year ending on the 31st day of March, 1950, shall be deemed to be a dividend declared in respect of the whole or part of the previous year.

For the purpose of clause (ii) of the above proviso, the aggregate amount of income-tax actually borne by the excess dividend shall be determined as follows :

(i) the excess dividend shall be deemed to be out of the whole or such portion of the undistributed profits of one or more years immediately preceding the previous year as would be just sufficient to cover the amount of the excess dividend and as have not likewise been taken into account to cover an excess dividend of a preceding year;

(ii) such portion of the excess dividend as is deemed to be out of the undistributed profits of each of the said years shall be deemed to have borne tax, -

(a) if and order has been made under sub-section (1) of section 23A of the Income-tax Act, in respect of the undistributed profits of that year, at the rate of five annas in the rupee, and

(b) in respect of any other year, at the rate applicable to the total income of the company, for that year reduced by the rate at which rebate, if any, was allowed on the undistributed profits."

The scheme of the Finance Act in relation to excess dividends and their chargeability to additional income-tax has been examined by us in Civil Appeal No. 427 of 1957 decided today. We are concerned in this case with the application of the second proviso to the paragraph, read with the explanations (not so-called), which set out the manner of calculation of the tax. As we have already pointed out in the other limit fixed by the Legislature are paid in any year. This additional income-tax takes note of such tax as might have been paid on the profits, albeit at a lower rate, in any previous assessment year and gives deduction for that amount. The additional income-tax is payable

on the excess dividends calculated at a different rate but allowing for the tax already paid. For this purpose, the aggregate amount of income-tax to be borne by the excess dividends has to be calculated in a particular manner. This manner is indicated in the paragraph, and it begins by providing that the excess dividend shall be deemed

The fictions which have been introduced postulate that there should be undistributed profits of one or more years immediately preceding the previous year, that such undistributed profits should be sufficient to cover the amount of excess dividend actually paid out in the previous year under assessment, and that the undistributed profits should not have been taken likewise to cover an excess dividend of any other previous year. Where there are no profits of any preceding year or years, the fiction wholly fails and the method of calculation, equally so. We do not agree with the argument of the Commissioner that the fiction can be given effect to, even if the profits of preceding years do not exist. The argument suggests that the chargeability of excess dividends to additional income-tax can arise under the terms of the paragraph even in such circumstances. But a plain reading of the proviso clearly shows that the excess dividends have first to be connected with the profits of the preceding years and then the tax

The Accountant Member, whose decision was in a minority, gave two reasons. The first was that "the explanation provides for the determination of the years out of the profits of which the excess dividend has come", and the second was that "in order to escape the liability imposed by clause (ii), the company must prove that the excess dividend has borne tax of 5 annas in the rupee as it is only in that event that the additional tax payable will be nil." These reasons were also put before us for acceptance. We are, however, unable to agree. The fiction cannot be whittled down in the manner suggested in the first reason. The fiction incorporates within itself not only what the Accountant Member says but also a mode of calculation, which is not a part of the fiction. It is the mode of calculation which cannot be given effect to, though we would go further and say that the fiction itself fails because no profits of preceding years at all existed. The second reason given by the Accountant Member assumes the liability

The Commissioner also suggested numerous modifications of the language to give effect to the intention to levy additional income-tax on excess dividends, and pointed out, as did the Accountant Member, that it would be unjust to allow an escapement of tax, where there were no profits of preceding years to set off against the excess dividends. In our opinion, the question of modification of the language cannot arise in the circumstances of the case. Our reasons have been given in Civil Appeal No. 427 of 1957 decided today, and we need not go over the ground again. There is also no question of unjustness involved. The income-tax law seeks to put in the net certain class of income, and can only successfully do so, if it frames a provision appropriate to that end. If the law fails and the taxpayer cannot be brought within its letter, no question of unjustness, as such, arises. The answers given by the High Court to the two questions were correct in the circumstances of the case.

In the result, the appeal fails, and will be dismissed with costs.

Appeal dismissed.

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