

SUREME COURT OF INDIA

S.A.L. Narayana Row, Commissioner of Income-Tax, Bombay City,

Vs.

Model Mills Nagpur Ltd.

(J Shah, V Khare and Y Chandrachud JJ.)

06.10.1966

JUDGMENT

SHAH, J.

1. The Income-tax Officer, Companies Circle 1 (4), Bombay, computed the respondent-company's total income for the assessment year 1952-53 at Rs. 23,596 and brought that amount to tax. The respondent-company had, however, distributed Rs. 2,66,788 as dividend in the previous year. The Income-tax Officer, by his order dated the 27th July, 1955, levied an additional tax on the excess dividend declared by the respondent-company and ordered the company to pay as additional tax on the excess dividend Rs. 33,348-8-0. The order was complied with. Thereafter, it appears that the Bombay High Court in *Khatau Makanji Spinning and Weaving Co. Ltd. v. Commissioner of Income-tax* held that the levy of tax on excess dividend was illegal. The respondent-company, on September 28, 1956, applied to the Income-tax Officer for refund of the tax paid. It was not expressly stated in the application that the order be rectified under section 35 of the Indian Income-tax Act, and an order for refund be made. But no Income-tax Officer is entitled to refund tax which has been lawfully imposed and collected. The request in substance was that the tax should be declared to be unlawfully collected and on that account be refunded. That could only mean a request for rectification.

2. By his order dated the 2nd November, 1957, the Income-tax Officer declined to accede to the request. He stated that the assessment for the year 1952-53 was completed a long time back and before the judgment in the case of *Khatau Makanji Spinning & Weaving Co. Ltd.* was pronounced by the Bombay High Court.

3. Against the order passed by the Income-tax Officer the respondent company moved the Commissioner of Income-tax under section 33A by an application to revise the order. The Commissioner of Income-tax rejected the application, holding that, considered as an application for cancellation of the levy of tax, it was barred; and as an application against refusal of the record but was one which could be discovered by a process of elucidation, argument and debate.

4. Against the order passed by the Commissioner, the respondent company moved the High Court of Bombay on the original side under article 226 of the Constitution, for an order compelling the

Income-tax Officer to "revise the order dated 2nd November, 1957, of the first respondent and issue direction in pursuance thereof." The High Court granted the application.

5. There is no doubt that, in view of the judgment of this court in Commissioner of Income-tax v. Khatau Makanji Spinning & Weaving Co. Ltd., the levy of an additional tax was illegal. It was urged, however, before the High Court that no application for rectification under section 35 of the Income-tax Act was presented by the respondent-company, and, therefore, the company was not entitled to the relief claimed by it. The High Court rejected the contention principally on the ground that the income-tax authorities had themselves treated the application as one under section 35 and had rejected the same on the merits. As already pointed out, the application to the Income-tax Officer was one in which a request for rectification of the order was implicit and the Commissioner in dealing with the application for refund treated that application in that light.

6. In our view, the High Court was right in making the order, directing the Commissioner to refund the amount of tax which was illegally collected. The appeal, therefore, fails and is dismissed. There will be no order as to costs in this appeal.

7. Appeal dismissed.