

Bengal & Assam Investors Ltd

Vs

Commissioner of Income Tax, West Bengal

Civil Appeal No. 508 of 1964

(K. Subha Rao, J. C. Shah, S. M. Sikri JJ)

02.11.1965

JUDGMENT

SIKRI, J.

This is an appeal by certificate of the High Court of Calcutta against its judgment in a reference made to it under s. 66(1) of the Indian Income Tax Act, 1922 (hereinafter referred to as the Act.) The question referred by the Appellate Tribunal was :

"Whether, in the case of the assessee, an investment company, its dividend income is part of its profits and gains chargeable to tax under section 10 of the Indian Income-tax Act, 1922 ?"

In the Statement of the Case, dated December 3, 1953, the Appellate Tribunal gave the following facts : The appellant, Bengal and Assam Investors Ltd., hereinafter referred to as the assessee, was incorporated on January 30, 1947, and commenced business on March 19, 1947. According to its memorandum of association, the company's objects are :

"3. The objects for which the Company is established are (and it is expressly declared that the several sub-clauses of this clause and all the powers thereof are to be cumulative and in no case is the generality of any one sub-clause to be narrowed or restricted by any particularity of any other sub-clause, nor is any general expression in any sub-clause to be narrowed or restricted by any particularity of expression in the same sub-clause or by the application of any rule of construction ejusdem generis or otherwise) :-

(1) To acquire and hold shares, stocks, debentures, debenture-stock, bonds, obligations, and securities issued or guaranteed by any company constituted or carrying on business in British India or elsewhere, or in any British Colony, or dependency, or possession, or in any foreign country, and debentures, debenture-stock, bonds, obligations and securities, issued or guaranteed by any government, specially including the Government of India and a Provincial Government, sovereign ruler, commissioner, public body, or authority, imperial, supreme, national, municipal, local or otherwise, whether in India or elsewhere.

(2) To acquire any such shares, stocks, debentures, debenture-stock, bonds, obligations, or securities by original subscription, tender, purchase, exchange, or otherwise, and to subscribe for the same either conditionally or otherwise, and to

guarantee the subscription thereof and to exercise and enforce all rights, and powers conferred by or incident to the ownership thereof.

(8) To sell, invest in and vary the investment and to reinvest in any shares, stocks, debentures stocks, bonds, and obligations and securities.

(11) To advance, deposit with or lend money, securities and property to or receive loans or grants or deposits from the Government.

(12) To lend money, either with or without security, and generally to such persons and upon such terms and conditions as the Company may think fit.

(13) To undertake financial and commercial obligations, transactions and operations of all kinds.

Provided that nothing herein contained shall be deemed to empower the Company to carry on the business of banking."

The company closed its accounts for the first time on June 30, 1947 and its accounting period was the year ending with June. In the assessment for 1948-49 a nett loss of Rs. 2,194 was computed. In the assessment for 1949-50 its grossed-up dividend income was Rs. 32,727 but its expenditure (including interest on borrowing to acquire shares, etc.) was Rs. 106,583, the resultant loss being Rs. 73,856. The Income Tax Officer treated this figure as unabsorbed business loss. In the assessment for 1950-51, the gross dividend income was Rs. 1,18,238 and the expenditure (including interest on borrowing, etc.) was Rs. 51,843 leaving a nett income for the previous year ending with June 30, 1949, of Rs. 66,395. The Income Tax Officer in his order dated August 1, 1951, held that as the sum of Rs. 66,395 was profit from dividends, business losses of 1948-49 and 1949-50 could not be set off. The assessee filed two appeals against the assessments made for 1949-50 and 1950-51, and the Appellate Assistant Commissioner, by his order dated December 18, 1951, disposed of them by a common order. He held that the dividend income was not business income and was assessable under s. 12 of the Act. Accordingly, for the assessment year 1949-50 he determined the loss from other sources at Rs. 73,324 and he held that it could not be carried forward as it was a loss from other sources under s. 12. The assessee filed two appeals before the Income Tax Appellate Tribunal, which by its order dated January 12, 1953, dismissed the appeals on two alternative grounds; firstly it held that the dividend income was assessable only under s. 12 of the Act, as the assessee was an investment company. In the alternative, the Appellate Tribunal held that even if the company were to be a dealer in shares, even then in its opinion the dividend received as registered shareholders would be dividend as such and assessable under s. 12. The Appellate Tribunal concluded that "in our opinion, on either view of the case, the loss of the preceding years cannot be adjusted against the dividend income of the assessee earned during the years 1949-50 and 1950-51."

The assessee then applied for a reference and suggested three questions of law :

"(1) Whether in the facts and circumstances of the case the assessee company is an investment holding company or an investment dealing company.

(2) Whether in the facts and circumstances of the case the dividends earned by the company should have not been assessed under the head "Profits and gains of business, profession or vocation" under section 10 of the Indian Income Tax Act.

(3) Whether in the facts and circumstances of the case the loss brought forward from preceding years under section 24(2) of the Indian Income Tax Act should have not been set off against the dividends earned by the assessee company during the year in question."

The Commissioner of Income Tax in his reply suggested the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the loss sustained by the assessee in the preceding years cannot be set off against the dividend income earned by the assessee in the previous year for the assessment year 1950-51 under section 24(2) of the Income-tax Act ?"

The Tribunal, however, as mentioned earlier, referred the question already set out above.

The High Court, by its judgment dated August 31, 1955 found it impossible to deal with the reference and answer the question asked without obtaining from the Tribunal further and fuller statement of the case. The High Court, therefore, referred the case back to the Appellate Tribunal under s. 66(4) of the Act "in order that the Tribunal may draw up and submit to that Court a supplementary statement of the case, indicating clearly what view it took as to the effect of the Appellate Assistant Commissioner's order in passing its appellate judgment and on what basis regarding the year 1949-50 it has made the present reference. To put the matter in a more definite form, the Tribunal should indicate whether it regarded the Appellate Assistant Commissioner's order as having effectively revised the assessment order and if it took that view of the Appellate Assistant Commissioner's order, what the revision was, particularly whether any amount was left in the assessment as unabsorbed business loss after the transfer of an amount to loss under other sources, directed by the Appellate Assistant Commissioner, had been carried out."

The Appellate Tribunal submitted a supplementary statement of the case, dated February 18, 1957. It was observed in the statement of the case that "the Appellate Tribunal read the orders of the Appellate Assistant Commissioner to mean that the assessee company was an investment company and was not a company which dealt in shares. The quantum of the loss in the assessment year 1949-50 as suggested in the Appellate Assistant Commissioner's order was not adverted to by the Appellate Tribunal at the time of the hearing of appeal as no arguments were addressed to them on that point." The supplementary statement mostly contained an interpretation of the orders of the Appellate Assistant Commissioner and the Appellate Tribunal; the only fresh fact included was the information that the Income Tax Officer in conformity with the order of the Appellate Assistant Commissioner revised the assessment order for 1949-50 so as to change the figures and held that the loss arising from the set-off head 'other sources' while the balance was a business loss and directed to be carried forward. In this order the Income Tax Officer had stated that "loss under other sources cannot be carried forward as it is under section 12. Business loss of Rs. 532 will be carried forward."

The reference was then heard by a Bench consisting of Mitter and Ray, JJ. It was argued before the High Court that "inasmuch as dividend is not expressly mentioned in section 12 in the case of an investment company assessee whose business is to invest in shares dividend income therefrom should be computed under section 10 as its business income with the result that the assessee can claim the benefit of section 24(2) of the Act." This contention, however, did not appeal to the High Court. The High Court held that "it cannot be suggested in this case that "it cannot be suggested in this case that the assessee investment company had no business of any kind. It certainly had one but

when it held shares on which dividends were received tax has to be computed under s. 12 and the assessee cannot say that this being its main activity the income received was its 'business income' under section 10." In the result, the High Court answered the question in the negative.

Mr. S. T. Desai, learned counsel for the assessee, at the outset asked us to modify the question referred to the High Court. He said that he had asked for three questions to be framed and that the Commissioner in his reply had also suggested the real question which arose out of the order of the Appellate Tribunal. He further says that the real point in this case is not whether the dividend income is assessable under s. 10 or s. 12, but whether under s. 24(2) the assessee is entitled to set off the deficiency or loss occurring in the earlier years. But the High Court was neither requested to issue a mandamus nor requested to modify or formulate another question and we are not prepared to frame a new question by way of modification of the question referred to the High Court.

Confining ourselves then to the question actually referred to the High Court, the problem is quite simple, the problem being whether an investment company like the assessee company can claim to have its dividends computed under s. 10 or s. 12 of the Act. Mr. Desai contends that if you look at the objects of the company it is apparent that the company is carrying on business. He further relies on Commissioner of Income Tax v. Cocanada Radhaswami Bank Ltd. (57 I.T.R. 306) and that at any rate if the dividend income is computed under s. 12, it still is business income for the purpose of s. 24(2). He then draws our attention to Commissioner of Income-tax v. Chugandas and Co. ([1957] 8 S.C.R. 322) where this Court held that "there is no reason to restrict the condition of the applicability of the exemption under section 25(3) only to income on which the tax was payable under the head "Profits and gains of business, profession or vocation." The exemption under section 25(3) is general." But these two cases have no bearing on the question whether the dividend income has to be computed under s. 10 or s. 12 of the Act. They may have reference to the question sought to be raised before us by way of modification and which we have declined to modify. The main argument of Mr. Desai is that when a company is formed for the purpose of acquiring shares and making investments and generally undertaking financial and commercial obligations and transactions and operations of all kinds, the dividend income must be computed under s. 10 because the company is formed expressly for the purpose of carrying on business and holding shares in the course of it. In this connection he refers to the following passage from the judgment of Lord Sterndale in The Commissioner of Inland Revenue v. The Korean Syndicate Ltd. (12 T.C. 181 at p. 202) :

"But the fact that the limited company comes into existence in a different way is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for some particular purpose of carrying out a transaction by getting possession of concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not."

The learned counsel for the Revenue, Mr. Viswanatha Sastri, contends that the company was not holding shares as part of its stock-in-trade, but was holding them merely as an investment company, and he says that in this respect an investment company even though it is formed under Companies Act is in no way different from an individual who invests his own moneys or borrows and invests monies in shares for the purpose of getting dividends. He drew our attention to East India Prospecting Syndicate. Calcutta v. Commissioner of Excess Profits Tax, Calcutta (19 I.T.R. 571), where the Calcutta High Court in dealing with the Excess Profits Tax Act (XV of 1940) held that

"the mere holding of property or investments cannot amount to a business within the meaning of that term as used in the Indian Income-tax Act, 1922, and can only amount to a business as the term is used in the Excess Profits Tax Act, 1940, by reason of the proviso to Section 2(5) of that Act. The proviso to Section 2(5) of the Excess Profits Tax Act, 1940, only makes the holding of investments or property by limited companies and incorporated societies tantamount to carrying on of business." But the assessee in that case was not carrying on any investment business at all, and therefore, the decision is of not much assistance to us. The only assistance we can derive from that decision is that the Central Legislature in enacting the Excess Profits Tax Act understood the word "business" to mean that the term would not include a mere holding of investments, and made a special provision to rope in limited companies or incorporated societies which were holding investments or property within the definition of the word "business".

Before the amendment of s. 12 by s. 9 of the Finance Act, 1955, it had been held by the Bombay High Court in *Commissioner of Income Tax v. Ahmuty & Co. Ltd.* (27 I.T.R. 63) that where a company was a dealer in shares which constituted its stock-in-trade the dividend income received by the assessee in respect of its shares was income from business chargeable under s. 10 and the Income-tax authorities could not compel the assessee to show the income under s. 12. But there is no case where it had been held that even if the shares are not stock-in-trade of the assessee company, the dividend can be assessed under s. 10. It seems that in practice an investment company was being assessed under s. 12 in respect of dividend income received by it. (see for example *Eastern Investment Ltd. v. Commissioner of Income tax, West Bengal* (20 I.T.R. 1), which is a case which came up to the Supreme Court.)

It seems to us that on principle before dividends on shares can be assessed under s. 10, the assessee, be it an individual or a company or any other entity must carry on business in respect of shares; that is to say, the assessee must deal in those shares. It is evident that if an individual person invests in shares for the purpose of earning dividend he is not carrying on a business. The only way he can come under s. 10 is by converting the shares into stock-in-trade, i.e. by carrying on business of dealing in stock and shares as did the assessee in *Commissioner of Income Tax v. Bai Shirinbai K. Kokka* (46 I.T.R. 86).

Mr. Desai laid a great deal of stress on the argument that the very fact that a company is incorporated to carry on investment shows that the company is carrying on business. We are unable to agree with this contention. Bhagwati, J. observed in *Lakshminarayan Ram Gopal and Son Limited v. Government of Hyderabad* (25 I.T.R. 449) that "when a company is incorporated it may not necessarily come into existence for the purpose of carrying on a business." He further observed that "the objects of an incorporated company as laid down in the memorandum of association are certainly not conclusive of the question whether the activities of the company amount to carrying on of business."

Apart from showing mere investment, no facts have been brought out in this case to show that the company was in any way carrying on business in respect of shares. Its position, on the facts placed before us, is in no way different from an individual merely buying shares with a view to holding them for the purpose of earning dividends. No authority has been cited before us that in the case of an individual to acquire and hold shares with the object of receiving dividends is to carry on business. We are unable to hold that if a company does the same, it carried on business within s. 10 of the Act.

In the result we agree with the conclusion of the High Court that the answer to the question must be

in the negative. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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