

Commissioner of Income-Tax, Bombay City I

Vs

Jubilee Mills Ltd.

Civil Appeal No. 525 of 1967

(V. Ramaswami-I, V. Bhargava, J. C. Shah JJ)

05.12.1967

JUDGMENT

RAMASWAMI J. –

This appeal is brought by certificate from the judgment of the Bombay High Court, dated May 3/4, 1963, in Income-tax Reference No. 40 of 1957.

The respondent-company is a limited company with a paid up capital of Rs. 15,25,000 as on June 30, 1947. Prior to 1930, the respondent- company had suffered large losses and in 1930, a debit balance of Rs. 12,75,000 in the profit and loss account of the respondent-company was adjusted by reducing the paid up capital. The face value of the ordinary shares was reduced from Rs. 100 to Rs. 10 each and of preference shares from the Rs. 100 to Rs. 25 each, after obtaining the sanction of the Bombay High Court. For the assessment year 1948-49, for which the relevant previous year was the year ended June 30, 1947, the respondent company was assessed to a total income of Rs. 7,47,639. On that amount, tax was calculated at Rs. 3,27,091 and the balance available for distribution by way of dividends for the purpose of section 23A of the Income-tax Act, 1922 (hereinafter referred to as "the Act") was, therefore, Rs. 4,20,548. Section 23A of the Act requires as company is which the public are not substantially interested

"It is true that the company incurred large losses in past years. But it reconstructed its capital in 1930. In that year, the debit balance in the profit and loss account had been set off against the paid-up capital thereby reducing the paid-up capital of the company. After the reconstruction, the company emerged in a new cloak of reduced capital. For the purpose of determining the applicability of the provision of section 23A, in our view, the reconstructed capital, a great portion of which had been wiped out by debiting losses. Those prior losses had already been wiped out by writing off against the paid Those prior losses had already been wiped out by writing off against the paid up capital. They cannot now be taken for consideration."

At the instance of the respondent-company the Appellate Tribunal referred the following questions of law for the opinion of the Bombay High Court :

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Officer was competent to pass an order under section 23(1) of the under the proviso (a) to Paragraph B of Part I of the Second Schedule of the Finance Act, 1948 ?

2. If the answer to question No. 1 is in the affirmative, whether, on the facts and in the

circumstances of the case, the assessee-company is a company in which the public are substantially interested for the purposes of section 23A of the Act ? and

3. Whether the loss of Rs. 12,75,000 incurred by the company prior to its reconstruction in 1930, could be taken into consideration for purposes of the applicability of section 23A (1) of the Act ?"

By its judgment dated march 13,1958, the High Court answered the first question in the affirmative, holding that the Income-tax Officer was competent to pass an order under section 23A (1) and he was not precluded from doing so by reason of his having granted rebate to the respondent-affiirmative, holding that the respondent-company was a company in which the public was substantially interested for the purposes of section 23A of the Act of the Act would not be applicable to the respondent-company and the third question became academic, and the High Court declined to answer it. The Commissioner of Income-tax took the matter in appeal to this court which reversed the answer which the High Court had given to question No. 2 and held that the respondent-company was a company in which the public were not substantially interested for the purpose of section 23A of the Act. In view of the decision of this court on the second question and this court therefore remanded the reference to the High Court for consideration

Section 23A of the Act before its amendment in 1955, in so far as it is material states as follows :

"23A. Power to assess individual members of certain companies. - (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than previous year are laid before the company in general meeting are less than sixth per cent. of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super- tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the inspecting Assistant Commissioner loan order in writing that the undistributed portion of the assessable income of the company of that previous year as compu

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company in the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

Explanation. - For the purpose of this sub-section, a company shall be deemed to be a company in which the public are not substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the previous year beneficially held by, the public (not including a company to which the provisions of this sub-section apply), and f any such shares have in the course of such previous year been the subject of dealings in any stock exchange n the taxable territories or are in fact freely transferable by the holders to other members of the public."

The applicability of section 23A of the Act is therefore attracted when it is found that the company in which the public are not substantially interested has declared a dividend of less than 60 per cent. of the assessable income of the company as reduced by the amount of income-tax and super-tax payable by the company in respect thereof for any previous year. The section, however, has provided that even if the applicability of the section is attracted, the Income-tax Officer has to consider whether, having regard to the losses incurred by the company in earlier years or having regard to the smallness of its profits, it would have been unreasonable for the company to declare a dividend larger than which it had actually declared. The object of the section is to collect super-tax from the shareholders which would be payable if the company had distributed its income by way of dividends and to discourage avoidance of tax by failing to distribute its income.

On behalf of the appellant Mr. B. Sen put forward the argument that, as a result of the reconstruction of the capital in 1930, a new chapter had opened in the life of the respondent-company and losses which it had suffered prior to the reconstruction of its capital were irrelevant and should not be considered for the purpose of section 23A of the Act so far as subsequent years are concerned. It was said that, for determining the application of section 23A of the Act, it was the re-constructed capital alone and not the original capital that had to be taken into account. It was pointed out that, though the reduction of the capital had been necessitated by losses suffered, the reconstruction of the capital had been necessitated by losses suffered, the reconstruction of the capital as its paid-up share capital. The argument was stressed that where the company adjusts losses against the paid-up capital and reconstructs its capital, the financial position of the company and its divided distributing capacity in su

But it is necessary to give certain effective directions, so that a mere order of dismissal of this appeal may not result in injustice. Section 66(5) of the Act requires the Tribunal on receiving a copy of the judgment of the High Court to pass such orders as are necessary to dispose of the case conformably such judgment. The section clearly imposes an obligation upon the Tribunal to dispose of the appeal in the light of and conformably with the judgment of the High Court. If the High Court agrees with the view of the Tribunal, the appeal may be disposed of by a formal order. But if the High Court disagrees with the Tribunal on a question of law, the Appellate Tribunal must modify its order in the light of the order of the High Court. If, for example, the High Court has held that the judgment of the Tribunal is vitiated, because it is based on no evidence or because the judgment proceeds upon a misconstruction of the statute, the Appellate Tribunal would be under a duty to dispose of the case conformably with

"..... when a reference is made to the High Court either under section 66(1) or section 66(2) the decision of the Appellate Tribunal cannot be looked upon as final; in other words, the appeal is not finally disposed of. It is only when the High Court decides the case, exercises its advisory jurisdiction, and gives directions to the Tribunal on question of law, and the Tribunal reconsiders the matter and decides it, that the appeal is finally disposed of..... it is clear that what the Appellate Tribunal is doing after the High Court has heard the case is to exercise its appellate powers under section 33. The shape that the appeal would ultimately take and the decision that the Appellate Tribunal would ultimately give would entirely depend upon the view taken by the High Court."

This passage was quoted with approval by this court in *Esthuri Aswathiah v. Commissioner of Income-tax*. In the present case, the High Court has held, and we agree with the High Court, that the judgment of the Appellate Tribunal is vitiated in law because it has proceeded on an erroneous

interpretation of the statute. The High Court accordingly answered the third question in the affirmative and in favour of the respondent-company. We must make it clear that the answer of the High Court to this question means that the Appellate Tribunal must now, in conformity with the judgment of the High Court, act under section 66(5) of the Act, that is to say, dispose of the case after rehearing the respondent-company and the Commissioner in the light of the evidence and according to law.

Subject to this direction, the appeal is dismissed with costs.

Appeal dismissed.

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