The Nawn Estates (P) Ltd.

Vs

C. I. T., West Bengal

Civil Appeal Nos. 1760-1763 of 1971

(H.R. Khanna, Jaswant Singh JJ)

14.10.1976

JUDGMENT

JASWANT SINGH, J. –

1. These appeals by special leave are directed against the judgment dated February 9, 1971 of the Calcutta High Court whereby the following question referred to it under Section 66(1) of the Indian Income-tax Act, 1922 (hereinafter referred to as 'the Act') was answered in the affirmative i.e. in favour of the revenue and against the appellant :

> Whether on the facts and in the circumstances of the case, the assessee is a company whose business consists wholly or mainly in the dealing in or holding of investments ?

2. The facts material for our present purpose are : The assessee-appellant is a private limited company incorporated under the Indian Companies Act, 1913, its shares being held by the members of Nawn family. For the assessment years 1955-56, 1956-57, 1957-58 and 1959-60 corresponding to the financial years ending on March 31, 1955, March 31, 1956, March 31, 1957 and March 31, 1959 respectively, the Income Tax Officer being of the view that since the rents accruing to the appellant from lands and house properties held by it formed a major part of its income, it was a company whose business consisted mainly in holding of investments as envisaged by sub-section (1) of Section 23A of the Act and Explanation 2(i) thereto and since it had declared more than 60% but less than the prescribed statutory 100% of its total income as reduced by taxes referred to in clauses (a), (b) and (c) of the aforesaid sub-section as dividends, it was liable to super tax on the undistributed balance of the distributable profits at the prescribed rate of 50%. Accordingly with the previous approval of the Inspecting Assistant Commissioner, the Income Tax Officer levied additional super tax at 50% of the net distributable balance available with the appellant by applying the provisions of Section 23A(1) of the Act. Aggrieved by this order, the appellant took the matter in appeal to the Appellate Assistant Commissioner, who acceding to the contention of the appellant and following an order dated April 6, 1963, of the Income-tax Appellate Tribunal in Income-tax Appeal 5490 of 1961-62 for the assessment year 1958-59, held that 'the appellant was not a company whose business consisted wholly or mainly in the dealing in or holding of investments', and remitted the levy. Dissatisfied with the order of the Appellate Assistant Commissioner, the revenue took the matter to the tribunal but could not persuade it to hold that the appellant was a company whose business consisted wholly or mainly in the dealing in or holding of investments. The revenue then had the aforesaid question referred under Section 66(1) of the Act to the High Court at Calcutta which by its aforesaid judgment dated February 9, 1971, answered the question in favour of the revenue and against the appellant. It is against this judgment that the present appeals

are directed.

3. It would be seen that the expression 'company whose business consists wholly or mainly in the dealing in or holding of investments' consists of two parts viz. (1) a company whose business consists wholly or mainly in the dealing in investments and (2) a company whose business consists wholly or mainly in holding of investments, and what we are required in these appeals is to find out the true meaning of the latter part of the expression i.e. of 'a company whose business consists wholly or mainly in holding of investments' in the context of sub-section (1) of Section 23A of the Act and Explanation 2(i) thereto and to determine whether the appellant is a company whose business falls within the ambit of the said second part of the expression.

4. Our task has been facilitated to some extent because of the concession rightly and fairly made on behalf of the appellant that the objects for which it was incorporated included inter alia (1) purchase of lands and buildings and (2) letting out of lands and buildings in lieu of appropriate consideration, and that during the years in question, the appellant has been inter alia investing moneys in house properties and its major income every year has been derived from those properties. The controversy revolves only round the meaning of the expression 'holding of investments' in the context of Section 23A of the act and Explanation 2(1) thereto.

5. Mr. Mukherjee, counsel for the appellant, has strenuously urged that the expression not having been defined in the Act must necessarily take its colour from and be given the same technical meaning as borne by the expression 'investment companies' as used in Section 87(f) of the Indian Companies Act, 1913 (which was in operation when the Indian Income-tax Act, 1922 was enacted) or as used in Section 372(11) of the Companies Act, 1956 which followed it and thus has to be confined to such companies whose principal business is the acquisition and holding of shares, debentures, stocks or other securities. According to Mr. Mukherjee, the appellant cannot in this view of the matter be deemed to be a company falling within the purview of the aforesaid expression.

6. Mr. Ahuja, counsel appearing on behalf of the revenue has, on the other hand, contended that the expression 'a company whose business consists wholly or mainly in the holding of investments' appearing in Section 23A of the Act as amended by Finance Act, 1955 means a company whose income is derived from investments in contradistinction to the income received from manufacturing or processing or trading operations and the word 'investments' in the context in which it occurs not being a term of art with a defined and technical meaning should be understood in its ordinary popular sense as understood in business parlance.

7. We have given our careful consideration to the matter and are unable to persuade ourselves to accept the submission made by Mr. Mukherjee. It is true that the term 'investment' is not defined in the Income-tax Act but it cannot be ignored that the Act does not lay down that the terms and expressions not defined therein shall have the same meaning as given to them in the Companies Act in a particular context. It may also be noted in this connection that although the legislature amended Section 23A of the Act in 1955 and thereafter, it did not adopt the definition of 'investment companies' as given in Section 87(f) of the Indian Companies Act, 1913 or Section 372(11) of the Companies Act, 1956. It appears that while enacting Section 23A of the Act and Explanation 2(i) thereto, the legislature intended to cover fields of activity wider than those contemplated by the aforesaid provisions of the Companies Act, 1913 or 1956. The term 'investment' in the context in which it occurs not being a term of art, there is, in our judgment, no warrant for giving it the restricted meaning as canvassed by Mr. Mukherjee. We think, in a situation like the one with which we are confronted, resort should be had not to the technical meaning of the term but to its popular

meaning with reference to the context in which it occurs. (See decision of this Court in C.S.T., M. P., Indore v. Jaswant Singh Charan Singh [(1967) 19 STC 469 : (1967) 2 SCR 720 : AIR 1967 SC 1454].)

8. In the instant case, the aforesaid expression has to be understood in the ordinary popular sense as used by businessmen, and so construing it, it would, in our opinion, embrace within its sweep the appellant company whose primary or principal income is admittedly derived from house properties which it leases out to tenants. It will be profitable in this connection to refer to some English cases where the term 'investment' occurring in analogous provisions came up for interpretation for it is now well settled that on analogous provisions, fundamental concepts, and general principles unaffected by the specialities of the English income-tax statutes, English authorities can be useful guides. (See decision of this Court in C.I.T. v. Vazir Sultan & Sons [(1959) 36 ITR 175 : 1959 Supp 2 SCR 375 : AIR 1959 SC 814].)

9. In Commissioners of Inland Revenue v. Gas Lighting Improvement Co. Ltd. [(1923) 12 TC 503 : 1923 AC 723 (HL)] Viscount Cave, L.C. while construing the word 'investment' in Rule 8 of Part I of the Fourth Schedule to the Finance (No. 2) Act, 1915, observed at page 534 as under :

> That they (i.e. the shares and debentures held by the respondent company in a Belgian and two Rumanian oil producing companies) are investments in the ordinary sense of the term, probably no one would deny. They are money put out in the shares and securities of undertakings other than the undertaking of the appellant-company itself, with the expectation of receiving dividends or interest upon them; and they satisfy any one of the definitions quoted by the Master of the Rolls from well-known dictionaries and any other definition of an investment which I am able to conceive.

10. In Inland Revenue Commissioners v. Desoutter Bros. Ltd. [(1945) 29 TC 155, 160, 161 : (1946) 1 ALL ER 58, 59, 60 (CA)] Lord Green while construing the word 'investment' occurring in the expression income received from investment in Section 12(1)(4) of the English Finance (No. 2) Act, 1939 and Schedule 7, Part I, Paragraphs 6(1) and (2) thereof held that it is not a word of art and it has to be interpreted in the popular sense.

11. Again in Inland Revenue Commissioners v. Broadway Car Co. (Wimbledon) Ltd. [(1945) 29 TC 214, 220, 222 : (1946) 2 ALL ER 609, 610, 611 (CA)] (which is a direct authority on the question in hand), the Court of Appeal while construing the expression 'income received from investments' occurring in the Finance (No. 2) Act, 1939, held that the word 'investment' must be construed in the ordinary popular sense of the word as used by businessmen and not as a term of art having a defined or technical meaning and that it was impossible to say that the Commissioners had erred in law in coming to the conclusion that rents from leases or under-leases can properly be comprised within the phrase 'income from investments'. At page 611, Cohen, L.J. observed :

> The expression is, therefore, not limited to investments which you would buy on the advice of a stockbroker - stock exchange investments. If you once go beyond that field, it seems to me reasonably clear that rents from leases or under-leases can properly, in suitable circumstances, be comprised within the phrase 'income from investments'.

12. Again in Commissioners of Inland Revenue v. Tootal Broadhurst Lee Co. Ltd. [(1945) 29 TC 352, 373], Lord Normand while dealing with the question whether income described as royalties

received by the appellant company under three separate agreements relating to patent rights and admittedly part of the appellant's business profits was income from an investment within the meaning of Paragraph 6 of Part I of the Seventh Schedule to the Finance (No. 2) Act, 1939 observed at page 373, as follows :

> The meaning of 'investment' is not its meaning in the vernacular of the man in the street but in the vernacular of the businessman. It is a form of income-yielding property which the businessman looking at the total assets of the company would single out as an investment. . . . . The businessman would not limit income from investments to income from the kinds of securities which are quoted on the stock exchange, and he would, I think, regard as income from investment a profitable rent from a sub-lease of office premises, or the like. . . .

13. In Gas Lighting Improvement Co. Ltd. v. Inland Revenue Commissioneras [1923 AC 723], Lord Phillimore observed at page 742 as follows :

> The word 'investment', though it primarily means the act of investing, is in common use as meaning that which is thereby acquired; and the primary meaning of the transitive verb 'to invest' is to lay out money in the acquisition of some species of property; consequently, letters patent, which are undoubtedly a species of property; may properly be described as an investment. . . . Some light on the true interpretation of the word 'investment' in the Finance (No. 2) Act, 1939, Schedule VII, Paragraph 6(1), may, I think, be obtained from consideration of the provisions of sub-paragraph (2).

14. Thus the position that emerges from the abovementioned decisions is that the aforesaid expression cannot be limited to companies whose principal business is the acquisition and holding of shares, debentures, stocks or other securities as contended on behalf of the appellant but covers companies whose primary or principal source of income is house property or capital gains as well. The decision in C.I.T., Gujarat v. Distributors (Baroda) P. Ltd. [(1972) 83 ITR 377 : (1972) 1 SCR 726 : AIR 1972 SC 288] on which reliance has been placed by Mr. Mukherjee is not helpful to the appellant as it turned on the particular facts of that case.

15. The genesis and development of the law relating to additional super tax on undistributed profits of certain companies also confirms the conclusion reached by us that the expression 'a company whose business consists wholly or mainly in the dealing in or holding of investments' takes within its compass companies which wholly or mainly derive their income from house property.

16. It appears that it was for the first time in 1930 that deriving an inspiration from the corresponding law in the U.K. contained in the Finance Act of 1922 and the Acts that succeeded it a provision for inclusion of undistributed income of a company controlled by five or less members, in the total income of the members of the company was introduced in the Indian Income Tax Act, 1922, by insertion of Section 23A(2) by Section 4 of the Income Tax (Amendment) Act, 1930 (Act 21 of 1930). This section required the Income Tax Officer to pass an order including the undistributed income in the total income of the shareholders, whenever he was satisfied - (i) that the company's profits and gains were allowed to accumulate beyond its reasonable needs, existing or contingent, having regard to the maintenance and development of its business, and (ii) that such accumulation or failure to distribute was for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the profits and gains so accumulated or not

distributed. Because of the inclusion of the element of motive, which is difficult of ascertainment as held in David Garlow & Sons Ltd. v. C.I.R. [11 TC 96, 120] Section 23A(2) virtually remained a dead letter as only one order was passed under Section 23A(2) between 1930 when the section was introduced and March 31, 1936, when the Income-tax Inquiry Committee submitted its report.

17. By the Amendment Act VII of 1939, the law was recast and the element of motive as also of current needs and possible future requirements of the company for expansion was dropped. Instead a simple test was adopted by means of Section 23A, namely, whether a certain minimum percentage of the distributable income, 60 per cent generally and 100 per cent in certain cases, referred to as the statutory percentage, had or had not been distributed as dividends. In case of non-distribution, the section invested the Income Tax Officer with power to make an order levying additional super tax on the entire undistributed balance of the net income of the company and not merely on so much of it as was necessary to bring up the distribution to the statutory percentage of the net income. In other words, the Income Tax Officer was empowered to treat not only that part of the net undistributed income of the company which would be equivalent to the statutory percentage but to regard the whole of it to have been distributed amongst the members in accordance with their shares in the company and included in their total income. The Income Tax Officer was, however, permitted to refrain from making such order, if he thought it fit to do so, taking into consideration the past losses of the company and its meagre income for the current year. Although the Amendment Act, 1939 simplified the procedure, there still remained certain defects to be remedied. It left the definition of 'a company in which the public are substantially interested' untouched. Consequently, it remained possible for a company, though substantially controlled by a group of persons united together in interest, to escape the operation of Section 23A by so managing its affairs that on the last date of the accounting year its shares carrving 25% of the voting power were allotted to the members of the public which included relations. The cumbrous procedure of ascertaining the quantum of the additional super tax payable by relating it to the rate applicable to the total income of the shareholder after including the sum apportioned in his total income, was also allowed to continue. These and some other defects were noticed by the Mathai Commission in its report in paras 33 to 36 in the following words :

> 33. Application of 100 per cent cause to investment companies. - Section 23A of the Indian Income Tax Act does not make any distinction between investment companies and trading or manufacturing companies; the requirement of 60 per cent distribution applies equally to all. The formation of 'private' investment companies, or what may be termed as 'personal holding companies', enable rich persons to escape tax liability, by transferring their assets (including house property, stocks and shares) to such a company in exchange for the shares of the company inasmuch as personal super tax on 40 per cent of the distributable income of the company is saved. Such companies admittedly do not require funds for internal financing or capital formation as the industrial or trading companies do. It has, therefore, been suggested that the entire (100 per cent) amount of the distributable profits of such companies ought to be required to be distributed.
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> 34. The foreign practice on this point also shows that the Indian law is unduly lenient towards such investment companies. In the U.K., investment companies (companies the income whereof consists mainly of 'investment income') are treated on special lies in respect of their investment income (i.e., income which, if the company were an individual, would not be earned income); such income is automatically deemed to be the income of the members of the company according to their interests, while the

estate or trading income of such a company is treated in the same manner as the income of non-investment companies. (Section 262 of the U.K. Income Tax Act, 1952)

35. Very stringent regulations have been laid down in the income-tax law of the U.S.A. in respect of the distribution of earnings of 'personal holding companies'. A special surtax is payable by them upon their undistributed profits, subject to certain adjustments, in addition to the regular corporate normal tax and surtax. This surtax is at the rate of 75 per cent of the undistributed profits upto $ 2000 and 85 per cent of the amount of undistributed profits in excess of $ 2000. A corporation is a personal holding company if (i) at least 80 per cent (or 70 per cent in certain cases where a corporation was a personal holding company in a prior year) of its gross income for the taxable year is 'personal holding company income' and (ii) at any time during the last half of the taxable year more than 50 per cent in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. It has been specifically provided in Section 503 of the Internal Revenue Code that an individual is considered as owning the stock owned not only by or for himself but also the stock owned, directly or indirectly, by or for his family (brothers, sisters, spouse, ancestors and lineal descendants) or by or for his partner. 'Personal holding company income' is practically synonymous with income from investments or income from dealings in investments. In includes dividends and annuities, interest, royalties, gains from stock, security and commodity transactions, rents and certain income from estates and trusts, subject to certain qualifications.

36. It will thus be seen that the suggestion requiring investment companies in which the public are not substantially interested to distribute 100 per cent of their distributable profits is reasonable, and we accordingly recommend its incorporation in Section 23A.

18. Accordingly following the recommendations of the Mathai Committee, the provisions of Section 23A were tightened and recast by Section 15 of Finance Act 15 of 1955 and certain incomes which were not being taxed were brought into the net. The definition of 'a company in which public was substantially interested' was widened so as to include a company owned by the Government or a company in which the Government held 40% or more of the share capital. In the case of non-government companies, the definition made it essential that :

(i) at least 50 per cent of the voting power was in the hands of the public (in the case of an industrial company i.e. a company engaged in the manufacturing or processing of goods or in mining or in the generation or distribution of electricity or any other form of power at least 40 per cent),

(ii) the shares of the company were at some time during the previous year dealt with in any stock exchange in India, or were freely transferable by the holder to other members of the public,

(iii) the affairs of the company, or the share carrying more than 50 per cent of the total voting power (in the case of an industrial company more than 60 per cent) were controlled or held by at least six persons (an individual with his relatives, and a nominator and his nominee being treated as one single person), and

(iv) such dispersal of control and voting power was present throughout the previous year.

19. In addition, instead of treating the undistributed income as having been distributed as dividends and making the shareholders liable for the additional tax in the first instance, the Amendment Act made the company itself liable to pay the additional super tax straightaway, at a flat rate of four annas on each rupee of the undistributed income (after permitted deductions).

20. Power was also given to the company to apply to the Commissioner for fixing the statutory percentage of distribution at a reduced level on the ground of current and future needs of the company and a right of appeal was provided to the Board of Referees from the order of the Commissioner. The 1955 Amendment also provided for set-off of the amounts distributed in excess of the statutory percentage in earlier years against the shortfall of distribution in the accounting year.

21. In 1957, the law was again amended by Section 7 of Finance (No. 2) Act, 1957 (26 of 1957) which effect from first April, 1957. The provisions authorising ad hoc fixation of the statutory percentage for each company and the right of appeal to the Board of Referees were eliminated. The statutory percentage was fixed at 100 per cent for investment companies, 45 per cent for industrial companies and 60 per cent for all other companies. In the case of non-industrial companies with large accumulated profits, the statutory percentage was raised from 60 per cent to 90 per cent. The rate of penal tax was raised from four annas in the rupee i.e. 25 per cent, on the undistributed balance to 50 per cent in respect of an investment company and 37 per cent in respect of other companies.

22. In 1958 a new provision was introduced by Section 9 of Finance Act, 1958 (Act 11 of 1958) with effect from April 1, 1958, empowering the Income Tax Officer to refrain from passing an order under old Section 23A, if the payment of a dividend or a large dividend than that declared would not have resulted in a benefit to the revenue.

23. In 1959 the statutory percentage was raised to 50 per cent for industrial companies and to 65 per cent for non-industrial companies by means of Section 11 of Finance Act, 1959 (12 of 1959) with effect from April 1, 1960. The statutory percentage was reduced from 100 per cent to 90 per cent in respect of investment companies by means of Section 11(ii) of Finance Act, 1960 (13 of 1960) which effect from April 1, 1960.

24. In 1961, a radical change in the law relating to income tax was introduced by the Finance Act of that year. It exempted from additional super tax (i) a company in which the public were substantially interested, (ii) a subsidiary company of any company in which the public were substantially interest if the whole of the share capital of the subsidiary company had been held by the parent company or by its nominees throughout the previous year and (iii) a company whose share capital to the extent of at least 75 per cent was throughout the previous year beneficially held by a charitable institution or fund established in India and whose income from dividends was exempt from tax under Section 11 of the Act. Excepting these three classes of companies, all other companies were brought within the scheme of additional super taxation. The expression 'profits and gains distributed by any company' appearing in Section 104 was not confined to companies deriving income from business. The expression 'distributable income' was defined in Section 109(i) as meaning the 'total income' of a company as reduced by certain items. The 'total income' of any assessee under the Act comprised not merely business or profession income, but income under the various heads of income enumerated in Section 14. Consequently, the scheme for levy of additional super tax was also made

applicable to a company whose income arose wholly or in part from property (Section 22), or securities (Section 18), or capital gains (Section 45), or other sources (Section 56). An 'investment company' was defined in Section 109(i) of the Act as meaning a company whose business consisted wholly or mainly in the dealing in or holding of investments. The statutory percentage in the case of an investment company (whether Indian company or not) was fixed at 90 per cent by Section 109(iii)(1) of the Act. It is significant that even in this Act, the restricted definition of the expression 'investment company' as appearing in Section 372(11) of the Companies Act, 1956 was not adopted by the Legislature.

25. By Finance Act, 1966, which came into force with effect from April 1, 1966, the meaning of the term 'investment company' was clarified by amending clause (ii) of Section 109 and providing therein that investment company meant a company whose gross total income consisted mainly of income which, if it had been the income of an individual, would have been regarded as unearned income. An explanation was also added by this Act to the aforesaid clause (ii) reading as under :

> Explanation : In this clause the expression 'unearned income' has the meaning assigned to it in the Finance Act of the relevant year.

26. In Section 2(7)(e) of the Finance Act, 1966, 'unearned income' was defined as meaning income which is not earned income.

27. In Section 2(7)(c) of the Finance Act, 1966, 'earned income' was defined thus :

> "earned income" means any income of an assessee who is an individual,
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> (i) which is chargeable under the head 'Salaries', or
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> (ii) which is chargeable under the head 'profits and gains of business or profession', where the business or profession is carried on by the assessee or, in the case of a firm, where the assess is a partner actively engaged in the conduct of the business or profession, or
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> (iii) which is chargeable under the head 'income from other sources' if it is immediately derived for personal exertion or represents a pension or superannuation or other allowance given to the assessee in respect of the past services of any deceased person, or which is chargeable under that head under clause (ia) of sub-section (2) of Section 56 of the Income Tax Act, and
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> # * * * *##

28. Clause (ii) of Section 109 was again amended by Finance Act, 1968 (Act 19 of 1968) with effect from April 1, 1969. As a result of this amendment, the clause read as under :

> "Investment company" means a company whose gross total income consists mainly of income which is chargeable under the heads 'interest, or securities, income for house property, capital gains and income from other sources'.

29. In view of the foregoing discussion, we are clearly of opinion that the High Court was right in

holding that the appellant is a company whose business consisted wholly or mainly in holding of investments.

30. Assuming without holding that the aforesaid expression as used in Section 23A of the Act has a legal character, it would not make any difference in the result as the expression 'investment companies' has been defined in Dictionary of English Law by Earl Jowitt (Volume II) (1959 Edition) as "companies whose income consists mainly of investment income i.e. income which in the hands of an individual would not be earned income".

31. In the result, the appeals fail and are hereby dismissed but in the circumstances of the case without any order as to costs.

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