

# CALCUTTA HIGH COURT

Moore Avenue Properties Pvt. Ltd

Vs.

Commissioner of Income-Tax

I.T. Ref. No. 67 of 1961

(Sankar Prasad Mitra and S.A. Masud, JJ.)

11.06.1964

## JUDGMENT

**S.P. Mitra J.**

1. The assessee is a private limited company owning properties. The assessment years are 1955-56 and 1956-57. The relevant accounting periods are the years ending January 31, 1955, and January 31, 1956, respectively.
2. For the assessment year 1955-56, the assessee's total income was determined at Rs. 16,697. The tax payable thereon amounted to Rs. 7,253. There was a distributable surplus of Rs. 9,444. The assessee did not declare any dividend within the 12 months immediately following the expiry of the previous year but a dividend of Rs. 6,959 was declared on October 15, 1957.
3. For the assessment year 1956-57, the total income was Rs. 17,000. The tax thereon was Rs. 7,384. The distributable surplus was Rs. 9,616. Here again no dividend was declared within twelve months immediately following the expiry of the previous year and a dividend of Rs. 6,959 was declared on October 15, 1957.
4. The Income-tax Officer invoked the provisions of section 23A(1) and levied an extra super-tax under that section on the distributable surplus which amounted to Rs. 9,444 in the first year and Rs. 9,616 in the second year. His view was that distribution of dividends by the company after the expiry of the prescribed period, i.e., the 12 months immediately following the end of the previous year, was not distribution in terms of section 23A(1).
5. The Appellate Assistant Commissioner agreed with the Income-tax Officer. But another argument was advanced before the Appellate Assistant Commissioner, namely, that even before the statutory period had expired, the directors of the company had received advances from the

company, which were to be treated as dividends within the meaning of section 2(6A) (e). The Appellate Assistant Commissioner refused to entertain this argument as it involved investigation of facts.

6. Before the Tribunal various points were urged. It is not necessary to refer to all of them inasmuch as learned counsel appearing for the assessee has confined himself mainly to two points. The first point relates to the advances made by the company to its own shareholders, and the second point to the deduction of dividends already distributed from the amounts estimated as deemed dividends by the income-tax authorities.

7. The Appellate Tribunal has dismissed the appeals preferred by the assessee, and the following question of law has been referred to us :

"Whether on the facts and in the circumstances of the case the provisions of section 23A(1) could be applied to the company for the respective assessment years ?"

8. Now it is admitted by the parties appearing before us that there is evidence that the company advanced to its controlling Hindu undivided family a sum of Rs. 2,21,714 on January 3, 1955, and a sum of Rs. 1,48,801 on January 3-1-1956.

Section 2(6A) (e) of the Act is as follows :

"Dividend includes -....

(e) any payment by a company, not being a company in which the public are substantially interested within the meaning of section 23A, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits."

9. It was urged on behalf of the assessee before the Appellate Tribunal that the advances by the company to the controlling shareholders amounted to a distribution of dividend within the meaning of section 2(6A) (e) (vide paragraph 4, page 12 of the paper-book). The Tribunal has dealt with this point in paragraph 7 of its order at page 13. This paragraph runs thus :

"With regard to the advances to the shareholders treated as dividends under section 2(6A) (e), the snag in the appellants arguments is that section 23A(1) is concerned only with dividends distributed within the twelve months immediately following the expiry of the previous year of the company. Now it is clear that advances in the first year were made in the previous year so that no question of their distribution arises after the expiry of the previous year. With regard to the second year, in fact the advances were less than those in the preceding year, so that far from advances being made, the advances had been reduced.

In both the years, therefore, the dividends deemed to have been distributed had not satisfied the requirements of section 23A(1), namely, the dividends distributed must be those which were so distributed within the twelve months immediately following the expiry of the previous year. In this view of the matter, we do not think it necessary to consider the suggestion of the departmental representative that the dividends distributed by the company are to be distinguished under section 2(6A) (e)..."

10. There appears to be no doubt that an advance or loan to a shareholder must be deemed to be dividend in terms of section 2(6A) (e) for purposes of section 23A. It may be that in the instant case the advances were not made within the 12 months immediately following the expiry of the previous year. They were in fact made during the accounting years concerned. But that does not, in our opinion, attract to the case the provisions of section 23A. The period specified in section 23A appears to be the maximum period on the expiry whereof the Income-tax Officer would be entitled to take steps provided for in the section. It cannot be said that if the company had complied with the requirements of the section before the period mentioned therein had commenced, the penalties contemplated by the section can be imposed. Supposing a company is to declare Rs. 4,000 as dividend and it decides upon declaring Rs. 2,000 as interim dividend during the accounting year and the balance of Rs. 2,000 is declared within the 12 months immediately following the expiry of the previous year. Can it be urged that the provisions of section 23A can be applied to this company because it did not distribute the sum of Rs. 4,000 within the period specified in that section ? Such an argument would be wholly unacceptable. To deny the company the right, if it is in a position to do so, to pay interim dividends would not only be oppressive, but would also be an abuse of the power given to the Income-tax Officer under section 23A. It could not have been the intention of the legislature that unless the whole amount is distributed within the 12 months immediately following the expiry of the previous year and not prior thereto a company will not escape the consequences provided for in section 23A. We are of opinion that in the present reference by reason of advances made to shareholders on January 31, 1955, and January 31, 1956, section 23A became inapplicable.

11. In view of our decision on the first point urged before us by learned counsel for the applicant, we need not discuss the second point at all; but since the point has been taken we may briefly deal with it. The argument is that even assuming that section 23A is attracted to this case, it would be applicable only to the undistributed balance of the total income of the assessee, that is to say, on the total income as reduced by the amount of tax payable on the assessed income and the dividends actually distributed, if any. In this case on October 15, 1957, for each of the assessment years, the company had actually distributed the sum of Rs. 6,959. The tax authorities have not given to the company credit for these sums in applying to the company the provisions of section 23A. The ground is that these sums were not actually distributed within the statutory period. We are not inclined to uphold this decision.

12. We are here concerned with section 23A as it stood after the Finance Act of 1955. In sub-

section (1) of section 23A it is clearly provided that the Income-tax Officer shall make the assessee liable to pay super-tax on the undistributed balance of the total income of the previous year, that is to say, on the total income as reduced by the amount of income-tax and super-tax payable, the amount of any other tax levied and in the case of a banking company, the amount actually transferred to a reserve fund as well as the dividends actually distributed, if any. It cannot, in my judgment, be urged that these dividends must be actually distributed during the statutory period. In our opinion, so long as the Income-tax Officer on the day he makes his order is satisfied that dividends have actually been distributed, he ought to deduct such dividends from the total; otherwise the result would be that the undistributed balance which is assessed by the Income-tax Officer would exceed the company's commercial profits. And the company can declare dividends only out of commercial profits without falling back either upon its reserves or upon its capital : vide the judgment of the Supreme Court in *Commissioner of Income-tax v. Bipin Chandra Maganlal & Co. Ltd*<sup>1</sup>. We are confirmed in this view by section 23A as it stood before the Finance Act of 1955. Sub-section 4 of section 23A prior to 1955 was as follows :

"Where tax has been paid in respect of any undistributed profits and gains of a company under this section, and such profits and gains are subsequently distributed in any year, the proportionate share therein of any member of the company shall be excluded in computing his total income of that year."

13. To my mind, a similar intention has been expressed by the legislature in section 23A(1) at the time of amending it by the Finance Act of 1955.

14. In the premises while applying section 23A to the facts herein, the tax authorities should have given credit for the dividends actually distributed subsequent to the statutory period.

15. But, as I have said, this point does not call for a decision by us having regard to the conclusions we have reached on the question of advances made by the company to its shareholders.

16. I have not in this judgment referred to the arguments of learned counsel for the Commissioner. Mr. Gupta, appearing for the Commissioner, did not concede any of the points decided by us; but no substantial reasons were advanced by him in support of the Tribunal's order.

17. The answer to the question referred to us is, therefore, in the negative. The respondent will pay to the applicant the costs of this reference.

Answered accordingly.

<sup>1</sup>(1962)2S.C.J.649:(1963)1M.L.J.(S.C.)290:(1961)2S.C.R.493:A.I.R.1961S.C.8:(1963)1An.W.R.(S.C.)8:(1961)4I.T.R . 1040 at 1043