

CALCUTTA HIGH COURT

Indian Explosives Ltd

Vs

Commissioner of Income Tax

(Ajit Kumar Sengupta, J.)

19.02.1985

JUDGEMENT

Ajit Kumar Sengupta, J.

(1.) AT the instance of the assessee, the following two questions of law have been referred to this court by the Tribunal for the assessment year 1967-68 under Section 18 of the Companies (Profits) Surtax Act, 1964, read with Section 256(1) of the Income-tax Act, 1961 : "1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 11,43,333 representing the increase in the share capital of the assessor company as a result of capitalisation of part of its reserves was not liable to be included in the capital base under Rule 3 of the Second Schedule to the Companies (Profits) Surtax Act ?

(2.) WHETHER, on the facts and in the circumstances of the case, the Tribunal was right in holding that the inclusion of the aforementioned sum of Rs. 11,43,333 in the capital base in the original assessment for the assessment year 1967-68 was a mistake apparent from the record and that the Income-tax Officer had jurisdiction to rectify that mistake under Section 13 of the Companies (Profits) Surtax Act, 1964, so as to exclude that sum from the capital base?" 2. The facts leading to the said reference are as stated hereunder : The capital computed as per order dated August 21, 1972, was Rs. 6,34,62,179 as on the first day of the relevant previous year. This included the proportionate increase in the share capital by issue of bonus shares consequent on utilization of share premium account and reserves. The ITO subsequently found that the capital computed in the original assessment was wrong inasmuch as the capital as on the first day of the previous year remained unchanged as the increase in the paid up capital was effected by reduction of reserves and share premium account. He, therefore, reduced the capital to Rs. 6,23,18,846 by his order under Section 13 of the Companies (Profits) Surtax Act, 1964, dated November 13, 1973. It was argued before the AAC that the matter was contentious and that there was no error rectifiable under Section 13. The AAC upheld the ITO's action and reasoning and dismissed the appeal. Before the Tribunal, it was argued that the ITO had no jurisdiction to rectify the debatable issue especially when there was a decision of the Himachal Pradesh High

Court in *CIT v. Mohan Meakin Breweries Ltd.* supporting the assessee's case. The Tribunal decided the appeal against the assessee following the order of the Tribunal in the case of *M/s. Alkali and Chemical Corporation of India Ltd.* where an identical issue came up for consideration before the Tribunal. The Tribunal held that the ITO was right in rectifying the order under Section 13. The reference arising out of the order of the Tribunal in the case of *M/s. Alkali and Chemical Corporation of India Ltd.* came up for consideration before this court. The decision of this court is in *Alkali and Chemical Corporation of India Ltd. v. CIT*¹. In that case, in the original surtax assessment of the assessee-company for the assessment year 1967-68, the ITO had included in the assessee's capital a sum of Rs. 41,44,658 under Rule 3 of Schedule II to the Surtax Act as being addition to the company's share capital during the relevant previous year by the issue of bonus shares from out of the assessee's general reserve and a part of its dividend equalisation reserve, losing sight of the fact that there would be a corresponding reduction in the reserves. The ITO subsequently passed an order of rectification under Section 13 excluding the said sum of Rs. 41,44,658 from the capital base. This court was of the view that (at p. 490): "what had been done originally was to accept the increase in the paid up share capital by taking into account bonus shares issued by capitalising the reserves and losing sight of the fact that by reason of the issue of the said shares the capital had been altered inasmuch as the reserves were reduced by being diverted to the same extent for the issue of bonus shares. This mistake was in the nature of an arithmetical mistake." It was observed (p. 498) : "On a consideration of the Rules of the Second Schedule to the Surtax Act, it appears to us that if Rule 3 is read in isolation from the other Rules, it would be possible to take two views in the matter as was possibly done in the instant case. Rule 3 if read by itself may suggest that any increase or decrease in the paid up share capital by itself would lead to an increase or decrease of the capital. There is no indication in this rule that there has to be a further enquiry as to the depletion of the capital on the other items. But if Rule 3 is read along with Rules 1 and 2, the controversy in our view becomes an arithmetical controversy. What is ultimately to be computed under the Second Schedule to the Surtax Act is the amount of capital and in the computation of the amount of capital, the amount of reserve is a necessary item. While taking note of the increase in the share capital by the issue of bonus share, the corresponding decrease in the amount of reserves cannot be overlooked. It may be possible to take two views of the matter but it appears to us that an alternative view can only be taken by misreading the Rules. For the reasons aforesaid, we are of the opinion that the rectification of the capital base on this count under Section 13 of the Surtax Act for the assessment year 1967-68 is sustainable." Dr. Debi Pal, the learned counsel appearing for the assessee, submitted that in the case of *CIT v. Sundaram Clayton Ltd.*², the Madras High Court held that a mere capitalisation of the reserves and issue of bonus shares subsequent to the first day of the previous year, could not come within the ambit of Rule 3 of Schedule II so as to enable the assessee to obtain an increase in the capital computed as on the first day of that previous year. Dr. Pal has submitted that against the said judgment of the Madras High Court, the Supreme Court has granted special leave to the assessee and, therefore, it cannot be said that the point in controversy is free from doubt. Dr. Pal has drawn our attention to the following news item appearing in [1985] 151 ITR (St)] 1 : "5-11-1984: Their Lordships O. Chinnappa Reddy

and Ranganath Misra JJ. granted special leave to the assessee to appeal against the judgment dated 21-10-1981 of the Madras High Court in T.C. Nos. 743-744 of 1977, reported in [1983] 140 ITR 235, whereby the High Court, on a reference, held that the value of bonus shares issued during the accounting year by capitalising a part of the general reserves of the assessee-company, and the provision for proposed dividends by the company, were not includible in the computation of the capital base for the purposes of the Companies (Profits) Surtax Act, 1964: Sundram Clayton Ltd. v. CIT : S.L.P. (Civil)

Nos. 12561-62 of 1982." We are, however, not impressed by the contention of Dr. Pal. Dr. Pal has not been able to bring to our attention any decision which has taken a contrary view on the question in controversy. The Madras High Court was not concerned with the validity of the order of rectification. We do not find any reasons to differ from the view expressed by this court in the case of Alkali and Chemical Corporation of India Lid. [1980] 122 ITR 490. The mere fact that the Supreme Court has granted special leave petition cannot alter the position as it stands today. This is a case, according to us, where, by misreading a provision, a mistake has been committed and such a mistake can be rectified.

(3.) FOR the aforesaid reasons, we answer both the questions in the affirmative and in favor of the Revenue. There will be no order as to costs. ;

Cases Referred.

1[1980] 122 ITR 490

2[1983] 140 ITR 235