BOMBAY HIGH COURT

Girdhardas & Co. Ltd

Vs

Commissioner of Income-Tax

(Chagla, C.J. Tendolkar, J.)

24.08.1956

JUDGMENT

Chagla, C.J.

1. The assessee company went into liquidation on the 23rd August, 1952. Its accounting year ended on the 30th September, 1952, and we are concerned with the assessment year 1953-54. Prior to liquidation the profits made by the company were Rs. 98,000. The accumulated profits of the company for six years prior to its previous year were Rs. 50,500, and the Income-tax Officer in computing its profits also included a sum of Rs. 21,142 which was a notional profit under section 23A of the Income-tax Act.

2. Now, the liquidator distributed Rs. 15,00,000 to the shareholders on the 9th September, 1952, and Rs. 2,25,000 on the 25th September, 1952, and the question that arose was whether in making this distribution he had distributed Rs. 98,000 as part of the dividend of the company which was liable to tax as dividend. There was no dispute as to the sum of Rs. 50,500. It was conceded by the company that that amount fell within the definition of "dividend" in section 2 (6A) (c). With regard to the notional dividend of Rs. 21,142 the Tribunal overruled the contention of the Department and held that as the income was only notional it was not available for distribution and therefore it was not in fact distributed by the liquidator. The real controversy centered round the sum of Rs. 98,000. Admittedly, these were profits of the current year, admittedly they were distributed by the liquidator, and the Tribunal contrary to the contention of the assessee came to the conclusion that this amount constituted dividend and it was distributed as dividend by the liquidator. The question assumed importance because if this amount was distributed as dividend then the company would become liable to the payment of tax on excess dividend. When we turn the definition of "dividend" contained in section 2 (6A) it is clear that the case does not fall under clause (a). That clause states :

"any distribution by a company of accumulated profits, whether capitalised or not, if such

distribution entails the realease by the company to its shareholder of all or any part of the assets of the company."

3. In the first place, looking to the scheme of this sub-section, this distribution refers to the distribution by a company which is not in liquidation. Further, it refers to a distribution of accumulated profits, and what we are dealing with here is not accumulated profits but current profits. Then turning to clause (c), which is the only clause which has any application, it states :

> "any distribution made to the shareholders of a company out of the accumulated profits of the company on the liquidation of the company :Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included."

4. Therefore, when the company goes into liquidation and a distribution is made out of accumulated profits, which accumulated profits are restricted to six previous years, then that distribution would be dividend. Therefore, under section 2 (6A) (c) the Legislature has limited and restricted the distribution of only certain type of profits which should be included in the definition of dividend. It is not all profits or any profits distributed by the liquidator which constitute dividend. The limitation imposed by the Legislature is that the profits must in the first place be accumulated in contradistinction to the profits being current, and in the second place the accumulated profits must be of six previous years and not beyond that. It seems to us that on the clear language used by the Legislature it is not possible to take any other view of this sub-section.

5. What is urged by Mr. Joshi is that the definition of "dividend" in section 2 (6A) is an inclusive definition and not an exhaustive definition and therefore if he could satisfy us that what is distributed is dividend independently of section 2 (6A) he must succeed. In a sense the definition of "dividend" in section 2 (6A) gives to dividend an extended meaning. It constitutes something which is not dividend as artificial dividend and therefore Mr. Joshi is right that if any particular distribution can fall within the ordinary meaning of "dividend", the definition given in section 2 (6A) will not exclude that distribution from being dividend. But can it possibly be said that under the ordinary meaning of "dividend" what the liquidator distributed was dividend ? It is well-settled law that when a company goes into liquidation, the distinction between capital and profits disappears and everything that the liquidator distributes is the assets of the company which is in liquidation. Therefore, if we exclude the definition under section 2 (6A) under the ordinary law what the liquidator would be distributing would be assets of the company which is in liquidation. All the profits of the company, accumulated or current, and for whatever period, distributed by the liquidator would be a distribution by him of the assets of the company. The Legislature therefore had to step in and mark out a portion of these assets distributed by the liquidator as artificially constituting dividend. Therefore, we must strictly construe section 2 (6A) as carving

out of the assets distributed by the liquidator a certain portion as constituting dividend. If that be the true view of the law, then independently of section 2 (6A) (c) no part of the assets distributed by the liquidator can ever be dividend under the ordinary law, and if in order to succeed the Department must come within the ambit of section 2 (6A) (c), then it is clear that this is not a case of a distribution of accumulated profits of the company for six previous years preceding the date of liquidation.

6. This view of the law was indicated by us in Sheth Haridas Achratlal v. Commissioner of Income-tax. At page 689 we stated :

> "The contention of the Advocate-General is that once the company goes into liquidation the duty of the liquidator is to realise the assets of the company and the assets of the company so realised do not bear any particular impress. They are neither profits nor capital, and according to the Advocate-General the intention of the Legislature was that when these assets are distributed they should be looked upon as dividends and liable to tax. It is impossible to accept that contention because the Legislature has clearly subjected only particular kinds of assets distributed by the liquidator to tax. It is not all assets distributed by the liquidator which are liable to tax or which can fall in the category of dividends as defined by section 2 (6A). It is only those assets distributed by the liquidator which are referable to accumulated profits of the six previous years preceding the date of liquidation that fall in the category of dividend and are liable to tax." :

and on the same page we referred to an old English decision, Commissioners of Inland Revenue v. Burrell which case laid down that when the liquidation of a company begins all distinction disappears and there are only surplus assets and the shareholder only gets this money in that character and that money no longer bears the character of profits which are liable to tax; and it was because of this view that the Court held that the surplus assets on liquidation distributed to a shareholder were not liable to income-tax. We also pointed out that it was because of this decision that the Legislature incorporated sub-clause (c) in section 2 (6A) of the Income-tax Act.

7. We find that the Madras High Court has taken the same view as we took of the law in T. Appavu Chettiar v. Commissioner of Income-tax and the decision of the Madras High Court is directly in point because they held that assuming that the distribution by the liquidator was out of accumulated profits of the company, the proviso to sub-clause (c) of section 2 (6A) excluded the profits which accrued to it in its year of account ending with 31st March, 1947. The view, therefore, of the Madras High Court was that current profits could not be included in the expression "accumulated profits" used in section 2 (6A) (c), and if current profits were distributed they did not constitute dividend. Mr. Joshi says that there is no reason or logic why profits of the current year distributed by the liquidator should not constitute dividend and should

not be liable to tax in the hands of the shareholder as dividend. It is always a mistake to try and look for logic or reason in the provisions of any taxing statute. It may be that the Legislature did not want to subject all the assets distributed by the liquidator to tax and therefore it enacted that only those assets which represented accumulated profits of six previous years should be artificially looked upon as dividends and be liable to tax as dividend.

8. Another question has been submitted to us by the Tribunal which was raised by the Commissioner, and Mr. Palkhivala has preliminary objection to take to the raising of this question. His contention is that the application for a reference was made by the assessee and it was on that application that a question of law was submitted to us. As the Commissioner had made no application for reference it was not open to the Commissioner on his application to ask for a reference of a question of law which according to him arose from the order of the Tribunal. Now, this point was considered by us in Commissioner of Income-tax, Bombay South v. Banthia Bank Ltd., and we said there :

> "Whoever may be the party who asks for a reference, once a reference is determined upon, all questions of law which arise out of the order of the Tribunal can be referred to the High Court for its determination. Questions may be suggested either by the party which wants a reference or by the party which is content with the decision of the Tribunal. Once the decision of the Tribunal is assailed and is to come before the High Court, there is no reason why the party that loses should be given the sole right of suggesting questions of law that arise from the order of the Tribunal. It is equally open to the winning party to point out to the Tribunal that other questions of law arise from the order made by the Tribunal which may well be considered by the High Court."

9. It is obvious that there may be cases where a winning party would be seriously prejudiced if it was precluded from raising a question of law merely because it had not made an application for a reference and the reference was asked for at the instance of the losing party. The winning party can never apply for a reference. But it may happen that if the Court takes a particular view on the reference asked for by the losing party, certain other questions of law may arise which may have to be decided in the interest of the winning party. Therefore, it would not be proper to shut out a party before the Tribunal from raising a question of law which clearly arises from the order of the Tribunal merely because it so happens that it has not made an application for a reference. In this particular case, undoubtedly, the Commissioner could have made an application for a reference, but there may be cases, as we have just pointed out, where the Commissioner could not have made an application for a reference because he had won before the Tribunal. We therefore overrule the preliminary objection taken by Mr. Palkhivala. Coming to the question raised by the Commissioner, which deals with the sum of Rs. 21,142 to which reference has been made, in our

opinion, the Tribunal was right in the view that it took that that amount cannot be consider to have been distributed when the distribution was made by the liquidator, and therefore that amount cannot possibly bear the impress of dividend in any view of the case.

10. The result is that we will answer the question raised at the instance of the assessee in the negative, and the question raised at the instance of the Commissioner also in the negative. The Commissioner must pay the costs of the reference.

11. Questions answered in the negative.