1962

P.V. Narasimham v. State of Orissa

Subba Rao, J.

appeals belong to that class of cases where the High Court should have given definite findings on all the issues, for that would have prevented the unnecessary prolongation of this litigation and would have also enabled us to dispose of these appeals finally and more satisfactorily. But in the events that have happened we have no option but to set aside the judgment of the High Court and remand the said appeals to it for disposal on the other questions of fact and law raised therein. Costs of the said appeals will abide the result of the proceedings in the High Court.

Appeals Nos. 147 to 149, 152 to 154, 156 and 157 remanded. Appeals Nos. 150, 151 and 155 dismissed.

1962

October, 25.

COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY

v.

AFCO (P) LTD., BOMBAY

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Rebate—Claim by private company for rebate—"Claim to which the provisions of s. 23A of the Income-tax Act cannot be made applicable"—Indian Income-tax Act, 1922 (11 of 1922), s. 23-A—Finance Act, 1955 (15 of 1955), s. 2, Sch. I, Part I, Item B.

For the year of account ending March 31, 1955, the appellant, a private limited company, earned a total income of Rs. 49,843. The company declared a dividend of Rs. 11,712 on July 13, 1955, and before the close of the year of assessment 1955-56 declared an additional dividend of Rs. 5,612, thereby distributing in the aggregate dividend which was not less than

60% of the total income, reduced by the income-tax and super-tax payable by it. The company then claimed rebate at the rate of one anna in the rupee on the amount computed according to Sch. I, Part I, Item B, read with s. 2 of the Finance Act, 1955. The Income-tax authorities rejected the claim on the ground that the expression "company to which the provisions of s. 23A of the Income-tax Act cannot be made applicable" in the provision of law aforesaid in the Finance Act, 1955, on which the appellant company relied, referred to a company against which in no circumstances could an order under s. 23A be made, and private limited companies being companies in respect of which an order under s. 23A could be made if the conditions prescribed relating to distribution of dividend were fulfilled, the benefit of rebate was not admissible in favour of the appellant company. The Appellate Tribunal and the High Court took the view that the benefit of a rebate provided by the Finance Act could not be denied to a private company if the conditions prescribed in s. 23A(1) of the Income-tax Act were fulfilled, because, according to their view, the expression "can not be made applicable" only refers to a state of affairs in which having regard to the circumstances an order under s. 23A could not be made.

Held, that the appellant company was entitled to the rebate claimed by it.

The expression "to which the provisions of s. 23A of the Income-tax Act can not be made applicable" in Sch. I, Part I, Item B, of the Finance Act, 1955, meant that the applicability of s. 23A of the Income-tax Act depended upon an order to be made by the Income-tax Officer, and not upon any exclusion by the provisions of the Act. It was only when an order under s. 23A would not, having regard to the circumstances, be justified that the right to obtain rebate under the Finance Act was claimable.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 21 of 1962.

Appeal by special leave from the judgment and order dated September 23, 1958, of the Bombay High Court in I.T. Reference No. 87 of 1957.

H. N. Sanyal, Additional Solicitor-General of India, N. D. Karkhanis and *R. N. Sachthey*, for the appellant.

A. V. Viswanatha Sastri, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the respondent.

1962

Commissioner of Income-tax, Bombay City I, Bombay
v.
Afco (P) Ltd., Bombay

Shah, J.

1962. October 25. The judgment of the Court was delivered by

SHAH, J.—For the year of account ending March 31, 1955, Afco Private Ltd.—a private limited company—earned a total income which was finally computed in assessment proceedings by order of the Income-tax Tribunal, at Rs. 49,843/-. The company declared a dividend of Rs. 11,712/- on July 13, 1955, and before the close of the year of assessment 1955-56 declared an additional dividend of Rs.5,612/-, thereby distributing in the aggregate dividend which was not less than 60% of the total income, reduced by the income-tax and super-tax payable by it. The company then claimed rebate at the rate of one anna in the rupee on the amount computed according to Schedule I, Part I, Item B read with s. 2 of the Finance Act 15 of 1955. The Income-tax Officer and the Appellate Assistant Commissioner rejected the claim because in their view the claimant was a company to which the provisions of s. 23A of the Income-tax Act could not be made applicable. In appeal, the Income-tax Appellate Tribunal, Bombay, reversed the order of the Income-tax authorities. The Tribunal opined that the expression "cannot be made applicable" in Item B of Part I of Schedule I of Finance Act 15 of 1955 must be read in conjunction with s. 23A of the Income-tax Act, and the benefit of rebate provided by the Finance Act, 1955, cannot be denied to a Private Company if the conditions prescribed in s. 23A(1) are fulfilled.

The following question referred by the Tribunal to the High Court of Judicature at Bombay was answered in the affirmative :—

> "Whether on the facts and in the circumstances of the case, the assessee company having distributed dividends of over 60% of the company's total income less income-tax and super-tax payable thereon is entitled to the rebate of

1 anna per rupee on the undistributed balance of profits as provided in clause (i) of the proviso to item B of Part I of the 1st Schedule to the Finance Act of 1955 ?"

By the Finance Act 15 of 1955 Schedule I Item B read with s. 2 of the Act rates of tax were prescribed in the case of companies. Item B provided that "in the case of every company—

	Rate	*Surcharge*
on the whole of total income	Four annas in the rupee	one twentieth of the rate specified in the preceeding column.

Provided that in the case of a company which, in respect of its profits liable to tax under the Income-tax Act for the year ending on the 31st day of March, 1956, has made the prescribed arrangements for the declaration and payment within the territory of India, of the dividends payable out of such profits, and has deducted super-tax from the dividends in accordance with the provisions of sub-section (31) of section 18 of that Act—

(i) where the total income, as reduced by seven annas in the rupee and by the amount, if any, exempt from income-tax, exceeds the amount of any dividends (including dividends payable at a fixed rate) declared in respect of the whole or part of the previous year for the assessment for the year ending on the 31st day of March, 1956, and the company is a company to which the provisions of section 23A of the Income-tax Act cannot be made applicable, a rebate

1962

Commissioner of Income-tax, Bombay City I, Bombay
v.
Afco (P) Ltd., Bombay

Shah, J.

shall be allowed at the rate of one anna per rupee on the amount of such excess ;

(ii) x x x x"

By s. 23A(1) of the Income-tax Act at the material time the Income-tax Officer was authorised to order a company to pay super-tax, at the rate of eight annas in the rupee in the case of a company whose business consisted wholly or mainly in the dealings in or holding of investments, and at the rate of four annas in the rupee in the case of any other company, on the undistributed balance of the total income of the previous year, that is to say, on the total income reduced by the amounts of income-tax and super-tax and any other tax payable under any law in excess of the amounts allowed in computing the income, and in the case of Banking companies in addition to the taxes, funds actually transferred to a reserve fund, and the dividends actually distributed, if any, where in respect of any previous year the profits and gains distributed as dividend by the company within the twelve months immediately following the expiry of that previous year were less than 60% of the total income of the company of that year as reduced by the amounts aforesaid, unless the Income-tax Officer was satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable. It is manifest that the order under s. 23A(1) would (excluding certain procedural conditions) be ordinarily made if the company has distributed by way of dividend within the twelve months immediately following the expiry of the accounting year less than the prescribed percentage of the total income as reduced by the amount of taxes paid in the case of non-Banking Companies and reserve fund in addition thereto in the case of Banking Companies,

By the first paragraph of sub-s. (9) of s. 23A it is provided that "Nothing contained in this section shall apply to any company in which the public are substantially interested or to a subsidiary company of such company if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the previous year." This clause is followed by two explanations. Explanation 1, in so far as it is material to this case, provides :—

> "*Explanation 1*—For the purposes of this section, a company shall be deemed to be a company in which the public are substantially interested—
>
> (a) x x x x
>
> (b) if it is not a private company as defined in the Indian Companies Act, 1913 (VII of 1913), and
>
> (i) x x x x
>
> (ii) x x x x
>
> (iii) x x x x
>
> *Explanation 2.*— x x x x"

Section 23A was enacted to prevent evasion of liability to pay super-tax by shareholders of certain classes of companies taking advantage of the disparity between the rates of super-tax payable by individuals and by the companies. The rates of super-tax applicable to companies being lower than the highest rates applicable to individual assessees, to prevent individual assessees from avoiding the higher incidence of super-tax by the expedient of transferring to companies the sources of their income, and thereby securing instead of dividends the benefit of the profits of the company, the Legislature had by Act XXI of 1930, as modified by Act VII of 1939, enacted a special

1962

Commissioner of Income-tax, Bombay City I, Bombay
v.
Afco (P) Ltd., Bombay

Shah, J.

provision in s. 23A investing the Income-tax Officer with power, in certain contingencies prescribed in the section to order that the undistributed balance of the assessable income reduced by the amount of taxes and the dividends shall be deemed to have been distributed at the date of the general meeting. By the Finance Act 15 of 1955 s. 23A (1) was amended and the Income-tax Officer was directed to make an order that the Company shall be liable to pay super-tax on the undistributed balance at the rates prescribed under the section. But by virtue of sub. s. (9) of s. 23A the order can be made only in respect of a company in which the public are not substantially interested or of a subsidiary company of such company if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the previous year, and by cl. (b) of the first explanation thereto a private company as defined in the Indian Companies Act, 1913, is not a company in which the public are substantially interested. It is, therefore, competent to the Income-tax Officer to pass an order under s. 23A (1) if the conditions thereof are fulfilled directing payment of super-tax by a private company at the rates prescribed by the Finance Act 15 of 1955 on its undistributed balance. To reduce the rigour of this provision the Legislature has provided for inducement in the form of rebate on the difference between nine annas in every rupee of the total net income, and the amount of dividend declared, to companies which have declared dividends so as not to attract the application of an order under s. 23A. But that benefit is admissible only in favour of companies to which the provisions of s. 23A of the Act cannot be made applicable.

The Income-tax authorities held that the expression 'company to which the provisions of s. 23A of the Income-tax Act cannot be made applicable' is descriptive of a class of companies against which in no circumstances can an order under s. 23A of the

Indian Income-tax Act be made, and private limited companies being companies in respect of which an order under s. 23A of the Income-tax Act can be made if the conditions prescribed relating to distribution of dividend are fulfilled, the benefit of rebate is not admissible in their favour. The Tribunal and the High Court held that the expression "cannot be made applicable" only refers to a state of affairs in which having regard to the circumstances an order under s. 23A of the Indian Income-tax Act cannot be made. In our judgment the Income-tax Appellate Tribunal and the High Court were right in so holding. The Legislature has used the expression "cannot be *made* applicable" which clearly means that the applicability of s. 23A depends upon an order to be made by the Income-tax Officer, and not upon any exclusion by the provisions of the Act. Before an order can be made under s. 23A of the Income-tax Act, the Income-tax Officer has to ascertain (i) whether the cempany conforms to the description in sub-s. (9) of s. 23A; if it does, the Income-tax Officer has no power to make an order; and (ii) if the company is not one which falls within cl. (9) of s. 23A whether having regard to inadequacy of the declaration of dividend, an order for payment of super-tax should not, because of the losses incurred by the company in the earlier years, or to the smallness of the profits in the previous year, be made. Satisfaction of the Income-tax Officer as to the existence of several conditions prescribed thereby even if the company is one which does not fall within sub-s. (9) of s. 23A is a condition of the making of the order. The language used by the Legislature clearly indicates that it is only when an order under s. 23A will not, having regard to the circumstances, be justified that the right to obtain rebate under the Finance Act 15 of 1955 is claimable. The Legislature has not enacted that the benefit of rebate is admissible only to companies against which the order under sub-s. (1) of s. 23A can never be made.

1962

Commissioner of Income-tax, Bombay City I, Bombay
v.
Afco (P) Ltd., Bombay

Shah, J

The Legislative history as disclosed by the earlier Finance Acts supports this interpretation of the relevant provision. In the Finance Acts prior to 1955 rebate under Part I of the 1st Schedule Item B was admissible if the company had in respect of profits liable to tax under the Indian Income-tax Act made the prescribed arrangements for declaration and payment of dividends payable out of the profits and had deducted super-tax from the dividends in accordance with s. 18(3D) & (3E), where the total income reduced by seven annas in the rupee and the amount exempt from income-tax exceeded the amount of any dividends declared and no *order had been made under* sub-s. (1) of s. 23A of the Income-tax Act. The right to rebate arose under those Finance Acts if no order under s. 23A was made. The Income-tax Officer had therefore to decide even before completing the assessment of the company whether the circumstances justified the making of an order under s. 23A, and unless an order under s. 23A was made the assessee became entitled automatically to the rebate of one anna in the rupee. Such a provision led to delay in the disposal of assessment proceedings and caused administrative inconvenience. It appears that the Legislature modified the scheme of granting rebate in enacting the Finance Act of 1955 with a view to simplify the procedure and avoid delays, and not with the object of depriving the private limited companies as a class, of the benefit of rebate which was permissible under the earlier Acts.

Counsel for the Income-tax Commissioner invited our attention to the Finance Acts of 1956 and 1957 and contended that the Legislature in dealing with the right to rebate under Part II relating to the rates of super-tax used phraseology which restricted the right of rebate only to public companies. Ie must be noticed that even under the Finance Act ot 1955 by Part II of Schedule I, item D, a rebate of three annas per rupee of the total income was to bf

allowed to companies in respect of profits liable to tax under the Income-tax Act for the year ending March 31, 1956, if the company had made prescribed arrangements for payment of dividend payable out of profits and for reduction of super-tax from dividends in accordance with the provisions of sub-s. 3D of s. 18 of the Act and the company was a public company with a total income not exceeding Rs. 25,000/-. This provision was slightly modified in the Finance Act of 1956 where the rebate admissible was at the rate of five annas in the rupee, (other conditions being fulfilled) if the company was a public company with total income not exceeding Rs. 25,000/- to which the provisions of s. 23A could not be made applicable. Under the Finance Act of 1957 rebate was admissible in favour of companies "referred to in sub-s. (9) of s. 23A of the income-tax Act with total income not exceeding Rs. 25,000/-." All these provisions about rebate were enacted in prescribing the rates of super-tax. In the Finance Act of 1955 the Legislature in dealing with the right of rebate under Part I prescribing rates of income-tax, made it admissible in respect of companies to which provisions of s. 23A of the Income-tax Act could not be made applicable, whereas under Part II prescribing rates of super-tax, rebate was made admissible in respect of public companies having income not exceeding the prescribed amount and rebate at a lower rate where the income exceeded the prescribed limit. If it was intended by the Legislature to exclude private limited companies from the benefit of rebate the Legislature would have adopted the same phraseology as was used in that Act in dealing with the rebates in prescribing rates of super-tax. The legislative history instead of supporting the case of the Income-tax Department yields inference against their interpretation.

We are therefore of the view that the High Court was right in holding that the company was

1962

Commissioner of Income-tax, Bombay City I, Bombay
v.
Afco (P) Ltd., Bombay

Shah, J.

entitled to the rebate claimed by it. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

1962

October, 25.

A. V. THOMAS & CO., LTD., ALLEPPEY

v.

THE COMMISSIONER OF INCOME-TAX, (BANGALORE) KERALA

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Deduction—Bad debt—Expenditure—Amount advanced for purchase of shares—Indian Income-tax Act, 1922 (11 of 1922), ss. 10(2) (xi) and (xv).

The assessee company was incorporated in 1935 and its Memorandum of Association authorised it, *inter alia*, to promote and to undertake the formation and establishment of other companies and to assist any company financially or otherwise. There was another company known as the Southern Agencies Ltd. and Mr. A. V. Thomas was director of both these companies. In 1948 the Southern Agencies Ltd. began the promotion of a company to be known as the Rodier Textile Mills Ltd., with a view to buying up a Mill known as the Rodier Textile Mills. The assessee company made an advance of Rs. 6 lakhs odd to the promoter for the purchase of 6000 shares of the new company. The public took no interest in the new company and the whole project failed. No application for shares was made on behalf of the assessee company and no share was acquired. The Southern Agencies Ltd., however, did not return the entire amount. On December 7, 1951, it paid back only Rs. 2 lakhs which was received in full satisfaction. The balance of Rs. 4,05,071-8-6 was written off on December 31, 1951, which was the close of the year of account of the assessee company. For the assessment year 1952-53 the assessee company claimed a deduction of that amount as a bad debt actually written off, or alternatively as an expenditure, not of a capital nature laid out or expended wholly and exclusively for the purpose of its business.