SUNDARAM & COMPANY (P.) LTD. MADURAI

v.

COMMISSIONER OF INCOME-TAX, MADRAS

April 25, 1967

[J. C. SHAH AND V. RAMASWAMI, JJ.]

Income-tax Act, 1922 (11 *of* 1922), *ss.* 34(1)(*b*), 66—*Finance Act,* 1956, *proviso* 2, *Paragraph D—Notice to reopen assessment on the ground of "excessive relief" but reduction of rebate on super tax on the ground "assessed at too low a rate"—Duty to enquire whether proceedings validly initiated—"Rate" in s.* 34(1) *if means fraction of total income—Reference—Duty to decide all aspects of the question of law referred even though not specifically argued before the Tribunal.*

The Income-tax Officer issued a notice to the assessee for reopening the assessment for the year 1956-57 on the ground that "excessive relief" within the meaning of s. 34(1)(b) of the Income-tax Act, 1922 had been granted to the assessee. Rejecting the contention of the assessee that the income had not been the subject of "excessive relief" and therefore the proceedings were unauthorised and that the amount deemed to have been distributed under orders under s. 23A could not be taken into consideration for the purpose of reducing the rebate of super-tax admissible under proviso 2 to paragraph D of the Finance Act, 1956, the Income-tax Officer ordered that the rebate of super-tax granted be reduced. The Appellate Assistant Commissioner held that only a part of the amount of dividend deemed to have been declared by the assessee could be taken into consideration in withdrawing the rebate of super-tax. On appeal by the Commissioner, the Tribunal held that the case of the assessee did not fall within any of the situations contemplated by s. 34(1)(b), but confirmed the order of the Appellant Assistant Commissioner. On the question "whether the setting aside of the assessment under s. 34(1)(b) was correct in law" the High Court was of the opinion that the claim of the department to initiate proceedings under s. 34(1)(b) on the ground that excessive relief was allowed could not be sustained, but held that the proceedings under the section could be initiated on the ground that the income profits and gains of the assessee were "assessed at too low a rate". The High Court did not record its decision on the plea of the assessee that in a proceeding to re-assess income initiated on a notice that income had been subject to "excessive relief", the Income-tax Officer was incompetent to re-assess income on the footing that income was assessed at too low a rate. In appeal to this Court the assessee contended that (i) the High Court was in error in enlarging the scope of the enquiry and entering upon a question never mooted before the Tribunal and (ii) by the use of the expression "assessed at too low a rate" it was intended that the jurisdiction of the Income-tax Officer would be attracted only when the wrong fraction had been applied in the determination of super-tax and not when the computation of tax depended on other factors.

HELD : (i) The case must be remanded to the High Court to determine whether the proceedings were validly initiated on the notice issued against the assessee. [807B]

A The scope of the enquiry arising out of the arguments before the Tribunal was not whether the assessment was proper, but, whether the Income-tax Officer was in the circumstances of the case competent to initiate the proceeding under s. 34(1)(b) of the Income-tax Act for bringing to tax the excessive rebate granted to the assessee. The question referred to the High Court had to be reframed accordingly. The question, as framed by the Tribunal, though defective, included that B enquiry. The High Court was, therefore, bound to decide all aspects of that question and it was wrong in making the assumption that because a particular aspect of the question of law raised was not specifically argued before the Tribunal the High Court could not deal with it. [802D-E; 806F-H; 807A-B]

P. S. Subramanyan, Income-tax Officer, Companies Circle I (1) *and Anr.* v. *Simplex Mills Ltd.* 48 I.T.R. 182 (S.C.), referred to.

C

(ii) The High Court was right in holding that the rebate of tax and the reduction of such rebate were essentially matters of measure or standards of rate. The expression rate in s. 34(1) does not mean a fraction of total income; it is often used in the sense of standard or measure. Provided the tax is computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may D be said that the tax is computed at a certain rate. The aim and object of the Finance Act, 1956, is to prescribe the standard or measure of income-tax or super-tax, and an assessee escaping some of its provisions and failing to pay the full measure of tax is "assessed at too low a rate". [806B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2453 of E 1966.

Appeal from the judgment and order dated August 9, 1963 of the Madras High Court in T.C. No. 152 of 1961.

R. Venkatram and *R. Ganapathy Iyer*, for the appellant.

F

B. Sen and *R. N. Sachthey*, for the respondent.

The Judgment of the Court was delivered by

Shah, J. In Sundaram & Company (Private) Ltd.—hereinafter called "the Company"—the public are not substantially G interested within the meaning of s. 23A of the Indian Income-tax Act, 1922. In dealing with the assessment of income of the Company for the assessment years 1946-47 to 1951-52, the Income-tax Officer, Central Circle, Madras, passed orders under s. 23A of the Income-tax Act, 1922, and directed that the total income of the Company as determined in the years of assessment H less tax payable be deemed to have been distributed amongst the shareholders of the Company as on the relevant dates of the General Body Meetings. The following table sets out the relevant details :

Assessment year.	Amount of dividend deemed to have been declared.	Date of order passed under s. 23A deeming dividend to have been declared.
1946-47	46,563	March 18, 1952
1947-48	43,959	—do—
1948-49	47,829	—do—
1949-50	97,875	—do—
1950-51	92,591	—do—
1951-52	25,899	March 30, 1955
	3,54,716	

On July 7, 1955 the Company in a general meeting resolved that the amount of Rs. 3,54,716/- which was under the orders of the Income-tax Officer deemed to have been distributed as dividend amongst the shareholders pursuant to orders under s. 23A of the Income-tax Act, be distributed as dividend to the shareholders, and in pursuance of that resolution proportionate part of the dividend due to each shareholder was credited to his account.

The Income-tax Officer completed the assessment of the Company for the year 1956-57 and determined Rs. 5,69,396/- as its total income. The Income-tax Officer computed the super-tax payable by the Company under the Finance Act, 1956, at the rate of six annas and nine pies in the rupee of the total income and granted a rebate at the rate of four annas in the rupee in accordance with the provisions of Cl. D proviso (i)(b) & (ii) of the Schedule to that Act. Sometime thereafter the Income-tax Officer being of the opinion that excessive relief had been granted to the Company within the meaning of s. 34(1)(b) of the Income-tax Act, issued a notice on January 31, 1959 for reopening the assessment for the year 1956-57. The Company filed its return of income in compliance with the notice and contended that the proceedings commenced by the Income-tax Officer were unauthorised, because the income of the Company had not been the subject of "excessive relief" within the meaning of s. 34(1)(b), and that actual distribution of dividends already deemed to have been distributed in accordance with the orders passed under s. 23A cannot be taken into consideration for the purpose of reducing the rebate of super-tax admissible under the proviso 2 to Paragraph D of the Finance Act, 1956. The Income-tax Officer rejected the contentions and ordered that the rebate of super-tax to the extent of Rs. 80,978/- be withdrawn.

In appeal to the Appellate Assistant Commissioner it was held that in the circumstances of the case, assessment could be re-opened under s. 34(1)(b) on the ground that the income had been made the subject of "excessive relief", but only Rs. 77,600/- and not the whole amount of Rs. 3,54,716/- which was deemed to be distributed under orders under s. 23A could be taken into

A consideration as dividend distributed by the Company during the previous year relevant to the assessment year 1956-57.

The Commissioner of Income-tax appealed to the Income-tax Appellate Tribunal. He contended that in the circumstances of the case the amount of Rs. 3,54,716/- was liable to be taken into consideration for the purpose of withdrawing the rebate of super-
B tax admissible under the Finance Act, 1956. The Tribunal held that the case of the Company "did not fall within any of the situations contemplated by s. 34(1)(b)" and the Company's income had not been the subject of excessive relief as the rebate of super-tax originally granted was out of the tax otherwise computable and not from the assessed income. But the Tribunal
C confirmed the order of the Appellate Assistant Commissioner directing that Rs. 77,600/- be taken into account in withdrawing rebate of super-tax.

The Tribunal then referred three questions to the High Court of Judicature at Madras :

D "1. Whether the Tribunal was justified in disposing of the appeal as it did ?

2. Whether the Tribunal was right in law in entertaining the assessee's contention relating to the applicability of s. 34(1)(b) under Rule 27 of the Appellate Tribunal Rules ?

E 3. Whether the setting aside of the assessment under s. 34(1)(b) was correct in law ?"

The High Court decided in favour of the Company on the first two questions. In considering the third question the High Court observed that the plea of the Company that re-assessment proceed-
F ings under s. 34(1)(b), on the ground of "excessive relief cannot be initiated, must be accepted. The Court then proceeded to consider whether allowance of rebate to which the assessee was not entitled, did not amount to assessing income at too low a rate, and observed that "there can be no question that the rebate of tax rate and a reduction of such rebate is essentially the arithmetic of rate. Reading however the provisions of the Finance Act,
G 1956, as a whole in the perspective that its chief aim and object is to prescribe the rate of income-tax and super-tax, it seems to us that an assessee escaping some of its provisions and failing to pay the full measure of tax is assessed at too low a rate". The High Court accordingly held that proceedings under s. 34(1)(b) could be initiated when rebate in the payment of super-tax was
H granted to the assessee without reducing it in the circumstances set out in the second proviso to Part II of the First Schedule Paragraph D in the Finance Act, 1956, on the ground that the income, profits and gains of the Company were assessed to tax

at too low a rate. The High Court answered the third question in favour of the Commissioner. Against the order passed by the High Court on the third question, this appeal is preferred by the Company. The Commissioner of Income-tax has not challenged the correctness of the decisions on Questions 1 & 2.

We are unable to agree with counsel for the assessee that the first question raised an enquiry not only as to the correctness of the procedure followed by the Tribunal, but also to the right of the Income-tax Officer to initiate a proceeding under s. 34(1)(b) to bring to tax rebate which was not reduced. In terms, the first question relates to a matter of procedure: and in the answer recorded to that question it is not implied that the Income-tax Officer had no power to initiate the proceeding under s. 34(1)(b).

The third question raised by the Tribunal was defective. The true scope of the enquiry arising out of the argument before the Tribunal was not whether the order of assessment was proper, but whether the proceeding for re-assessment was properly initiated under s. 34(1)(b). That is how the High Court also understood the question. We therefore re-frame the question as follows:

> "Whether the Income-tax Officer was in the circumstances of the case competent to initiate the proceeding under s. 34(1)(b) of the Indian Income-tax Act for bringing to tax the excessive rebate granted to the assessee?"

Section 34(1)(b) of the Indian Income-tax Act, as it stood at the relevant time, provided:

> "If—
>
> (a) . . . . . .
>
> (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act or that excessive loss or depreciation has been computed,
>
> he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer

A thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the B notice were a notice issued under that sub-section :

. . . . . "

It was held by the High Court of Bombay in *P. S. Subramanyan, Income-tax Officer, Companies Circle I* (1) *Bombay and Another* v. *Simplex Mills Ltd.*(1) that "the relief referred to in C s. 34(1)(b) of the Income-tax Act, 1922, can only be such relief as is granted to the assessee by reason of his income, profits and gains being chargeable to tax. It is, therefore, referable to the various kinds of relief afforded to the assessee under the Act in respect of his income, profits and gains, such, for instance, as are granted under ss. 15A, 15C, 49A, 49B, 49C, 49D and 60 of the Act." This Court affirmed the judgment of the Bombay High D Court in *P. S. Subramanyan, Income-tax Officer, Companies Circle I* (1) *and Another* v. *Simplex Mills Ltd.*(2). In *Simplex Mills'*(2) case advance tax paid by the assessee for the assessment year 1952-53 was found refundable and the Income-tax Officer allowed interest on the tax paid under s. 18A(5) of the Income-tax Act, 1922, as it then stood. The Act was amended by the E Income-tax (Amendment) Act, 1953, with retrospective effect from April 1, 1952, and it was found that interest allowed to the Company was excessive. The Income-tax Officer then initiated a proceeding under s. 34(1)(b) to reassess the tax on the ground that income for that year had been under-assessed and had been made the subject of excessive relief. The Bombay High Court F rejected the claim of the Income-tax Officer, and this Court held that the original assessment could not be reopened under s. 34, because it could not be said either that there was under-assessment of the income, or that excessive relief was granted. In the light of that judgment, the High Court opined that the claim of the Department to initiate a proceeding under s. 34(1)(b) on the ground that excessive relief was allowed could not be sustained. G But the High Court held that a proceeding for reassessment could be initiated on the ground that income had been assessed at too low a rate. Counsel for the Company contends that the High Court was in error in proceeding to enlarge the scope of the enquiry and in entering upon a question which was never mooted before the Tribunal.

H Section 2 of the Finance Act, 1956, provides insofar as it is material, that :

(1) 48 I.T.R. 980. (2) 48 I.T.R. 182 (S. C.)

"Subject to the provisions of sub-sections (2), (3), (4) and (5), for the year beginning on the 1st day of April, 1956,—

(a) income-tax shall be charged at the rates specified in Part I of the First Schedule . . . . .

(b) rates of super-tax shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922) . . ., be those specified in Part II of the First Schedule....."

Part II of the First Schedule specifies the rates of super-tax. Clause D provides :

"In the case of every company—

on the whole of total income	Rate
	Six annas and nine pies in the rupee.

Provided that—

(i) . . . . . .

(ii) a rebate at the rate of four annas per rupee of the total income shall be allowed in the case of any company which satisfies condition (a), but not condition (b) of the preceding clause; and

(iii) . . . . . .

Provided further that—

(i) the amount of the rebate under clause (i) or clause (ii), as the case may be, of the preceding proviso shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts, as the case may be, computed as hereunder :—

(a) on the amount representing the face value of any bonus shares or the amount of any bonus issued to its share-holders during the previous year with a view to increasing the paid-up capital, except to the extent to which such bonus shares or bonus have been issued out of premiums received in cash on the issue of its shares; and	.. ..	at the rate of two annas per rupee.

A (b) in addition, in the case of a Company referred to in clause (ii) of the preceding proviso which has distributed to its shareholders during the previous year dividends in excess of six per cent of its paid-up capital, not being dividends payable at a fixed rate—

B

on that part of the said dividends which exceeds 6 per cent. but does not exceed 10 per cent. of the paid-up capital;	.. at the rate of two annas per rupee.
on that part of the said dividends which exceeds 10 per cent of the paid-up capital;	.. at the rate of three annas per rupee.

C

. . . . . ."

D Paragraph-D read with s. 2(b) of the Finance Act, 1956 fixes the rate of super-tax payable by Companies for the purpose of s. 55 of the Indian Income-tax Act. From the super-tax declared payable, in certain conditions rebate is granted, and that rebate is also related to the total income of the assessee. By the second proviso, part of the rebate may be withdrawn, if the Company has E in the previous year issued bonus shares or bonus or has distributed dividend in excess of six per cent. of its paid-up capital. The super-tax and the rebate admissible are both related to the total income, whereas the reduction of rebate is related to the face value of the bonus shares or of the value of bonus or the amount of dividends distributed. Super-tax payable by a Company is F therefore determined as a fraction of the total income, reduced by a percentage of the value of the bonus shares or bonus or dividends distributed.

Counsel for the Company contends that the expression "too low a rate" used in s. 34(1)(b) must, having regard to the context in which the expression is used and in the scheme of the G Indian Income-tax Act, be regarded merely as the fraction which determines tax liability of the assessee, but when in computing super-tax liability, the Income-tax Officer has after determining the amount by applying the fraction to reduce the resultant by reference to a factor unrelated to total income, it cannot be said that tax is charged at a certain rate. Counsel says that the H Legislature has not used the expression "assessed at too low an amount" but the expression used is "assessed at too low a rate" : therefore says counsel for the Company the jurisdiction of the Income-tax Officer will be attracted only when the wrong fraction

has been applied in the determination of super-tax, and not when the computation of tax depends on other factors. A

We are unable to accept this contention. The assumption that the expression "rate" has been used in s. 34(1) as meaning a fraction of total income is, in our judgment, not warranted. By the use of the expression "rate" in the context in which it occurs, undoubtedly a relation between the taxable income and the tax charged is intended, but the relation need not be of the nature of proportion or fraction. The expression "rate" is often used in the sense of a standard or measure. Provided the tax is computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may be called tax computed at a certain rate. We agree with the High Court that the rebate of tax and the reduction of such rebate are essentially matters of measure or standards of rate. The chief aim and object of the Finance Act, 1956, is to prescribe the standard or measure of income-tax and super-tax and it seems that an assessee escaping some of its provisions, and failing to pay the full measure of tax is assessed at too low a rate. B C D

But the view we have taken is not sufficient to dispose of the appeal. It may be recalled that the question arising out of the order of the Tribunal was about the competence of the Income-tax Officer to initiate proceedings under s. 34(1)(b). It is true that it was not argued before the Tribunal on behalf of the Company that on the notice served by the Income-tax Officer proceedings for reassessment could only be initiated on the ground that income had been the subject of excessive relief, and not on any other ground. But the Company did contend that the initiation of the reassessment proceeding was invalid, and the plea, that the initiation was invalid because the notice was defective was only an aspect of the plea raised by the Company. The question as originally raised by the Tribunal, and as reframed by us, includes that enquiry. E F

Counsel for the Company did argue before the High Court that in a proceeding to reassess income initiated on a notice that income has been subject to excessive relief, the Income-tax Officer was incompetent to reassess income on the footing that income was assessed at too low a rate, but the High Court did not record their decision on that plea : they merely suggested that it will be open to the Company to raise the question when the matter is again taken up for consideration. If however the question arising out of the order of the Tribunal was, as correctly pointed out by the High Court, one about the "validity of initiation of proceeding under s. 34(1)(b)", the High Court was bound to decide all aspects of that question raised before them. before recording an answer : if they did not, the Tribunal would G H

A be powerless to enter upon an enquiry of any other aspect of the question after answer to the question is recorded by the High Court. We are unable to agree with the assumption made by the High Court that because a particular aspect of the question of law raised was not specifically argued before the Tribunal, the High Court cannot deal with that aspect.

B We are, in the state of the record before us, unable to record an answer to the question, and the case must be remanded to the High Court to determine whether the proceedings were validly initiated on the notice issued against the Company. The notice which was served upon the Company is not included in the paper book prepared for use in this Court. The notice must of neces-
C sity be part of the record of the Income-tax Officer, even if it be not on the record of the Tribunal. It will be open to the High Court, in determining the contention raised by the Company, to call for a supplementary statement of the case relating to the form and contents of the notice and the validity thereof from the Tribunal. After receiving the supplementary state-
D ment, if any, the High Court will proceed to dispose of the third question in the light of the reasons set out by us in this judgment. Costs of this appeal will be costs in the High Court.

Y.P. *Appeal remanded.*