

PUNJAB PRODUCE AND TRADING CO. LTD.

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v.

C.I.T. WEST BENGAL, CALCUTTA

July 29, 1971.

[K. S. HEGDE AND A. N. GROVER, JJ.]

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Income-tax Act, 1922, s. 23A(9) Explanation (b) (iii)—Shares of company carrying more than 50% voting power held by less than six persons—Affairs of company not controlled by less than six persons—Company whether one in which public are substantially interested—Whether one condition or both conditions in cl. (b) (iii) of Explanation should be fulfilled—Limitation under s. 34(1) of Act whether applicable where additional super-tax is imposed under s. 23A.

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The assessee company was incorporated under the erstwhile Gwalior Companies Act which did not make any distinction between public and private companies. The affairs of the company were not controlled by less than six persons but shares carrying more than 50% of the total voting power were during the relevant previous year held by less than 6 persons. After the company's assessment for the assessment year 1955-56 had been completed the Income-tax Officer levied additional super-tax on the company under s. 23A of the Income-tax Act, 1922 holding that it was not a company in which the public were substantially interested within the meaning of sub-cl. (b) (iii) of the Explanation to cl. (9) of s. 23A. Under the Explanation a company is treated to be one in which the public are substantially interested if it is not a private company under the Indian Companies Act and the affairs of the company or the shares carrying more than 50% of the total voting power are at no time during the previous year controlled or held by less than six persons. The authorities under the Act as well as the High Court, in reference, held against the assessee. In appeal by special leave to this Court the assessee contended that the word 'or' in sub-cl. (b) (iii) aforesaid had been used disjunctively and therefore if either of the conditions mentioned therein did not exist the company must be deemed to be one in which the public were substantially interested. Reliance was placed on the decision of this Court in the case of the *Star Company Ltd.* in which the word 'or' used in sub-cl. (b) (ii) of the aforesaid Explanation was held to have been used disjunctively. It was also contended that on the facts and circumstances of the case the imposition of the additional super-tax under s. 23A without recourse to the provisions of s. 34(1) was not valid.

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HELD: (i) The language of sub-cls. (ii) and (iii) of cl. (b) is different. The former relates to a positive state of affairs whereas the latter lays down negative conditions. The word 'or' is often used to express an alternative of terms defined or explanation of the same thing in different words. Therefore if either of the two negative conditions which are to be found in sub-cl. (b) (iii) remains unfulfilled, the conditions laid down in the entire clause cannot be said to have been satisfied. The clear import of the word 'and' appearing there read with the negative or disqualifying conditions in sub-cl. (b) (iii) is that the assessee was bound to satisfy apart from the conditions contained in the other sub-clauses that its affairs were at no time during the previous year controlled by less than 6 persons and shares carrying more than 50% of the total voting power were during the same period not held by less than 6 persons. [982F-G]

A *Star Company Ltd. v. Commissioner of Income-tax (Central) Calcutta*, C. A. No. 1204/68 dt. 29-4-70, distinguished.

Indian Steel & Wire Products Ltd. Calcutta v. Commissioner of Income-tax, West Bengal, Calcutta, I.T.R. No. 204 of 1961, referred to.

B (ii) An order made by the Income-tax Officer directing payment of additional super-tax is not an order of assessment within the meaning of s. 34(3) of the Act and to such an order the period of limitation prescribed thereby does not apply. [983A-B]

M. M. Parikh, I.T.O., Special Investigation Circle 'B', Ahmedabad v. Navanagar Transport and Industries Ltd. & Anr., 63 I.T.R. 663, followed.

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1344 of 1967.

D Appeal from the judgment and order dated November 24, 1966 of the Calcutta High Court in Income-tax Reference No. 86 of 1962.

V. S. Desai, N. R. Khaitan, B. P. Maheshwari and Krishna Sen, for the appellant.

E *Jagadish Swarup, Solicitor-General, S. K. Aiyer and B. D. Sharma*, for the respondent.

The Judgment of the Court was delivered by

F **Grover, J.**—This is an appeal by special leave from a judgment of the Calcutta High Court in an Income tax Reference.

G The assessee is a limited company incorporated under the erstwhile Gwalior State Companies Act which did not make any distinction between a private company and a public company. The paid-up capital of the company was Rs. 25,00,000/- composed of 25,000 Ordinary shares of Rs. 100/- each. These 25,000 Ordinary shares were held by 17 share holders in all. It was also common ground that the shares carrying more than 50% of the total voting power were held by less than 6 persons during the accounting period. The assessment year was 1955-56, the accounting year being the one ending on March 31, 1955. The total income assessed for the aforesaid year was Rs. 9,54,658/- on which tax payable amounted to Rs. 4,05,492. The surplus available for distribution of dividend was Rs. 5,49,166/-. No dividend, however, was distributed although at the meeting held on June 8,

1955 the accounts which were approved showed a net profit of Rs. 6,81,298/—.

The controversy before the Income tax Officer centered on the applicability of the provisions of s. 23A of the Income tax Act 1922. According to the assessee that section was not applicable but the Income tax Officer came to the conclusion that since the shares carrying more than 50% of the total voting power were held by less than 6 persons the company was not one in which the public were substantially interested. As no justifiable reason for non-distribution of the requisite percentage of the dividend had been furnished s. 23A was applicable and 100% distribution was called for. In view of the provisions of s. 23A(1) additional super tax of Rs. 1,37,291.50 paise was imposed subsequent to the completion of the assessment.

The assessee went up in appeal to the Appellate Assistant Commissioner but the same was dismissed. The sole point that was argued before the Appellate Tribunal was whether the assessee fulfilled the conditions stated in sub-clause (b) (iii) of the Explanation to s. 23A of the Act. This argument will be considered presently. The Tribunal, however, was not persuaded to accept the contention of the assessee. On an application being filed under s. 66(1) the Tribunal referred the following question of law for the opinion of the High Court :

(1) "Whether on the facts and in the circumstances of the case, the assessee company is one in which the public are substantially interested within the meaning of the Explanation to Section 23A of the Income tax Act, as it stood at the relevant time ?

(2) Whether on the facts and in the circumstances of the case, the imposition of the additional super-tax under Section 23A without recourse to the provisions of Section 34(1) was legal and valid ?"

Section 23A of the Act confers power on the Income tax Officer to assess companies to super tax on non-distributed income in certain cases. We are concerned, in the present appeal, only with sub-s. (9) and the Explanation thereto. That sub-section provided *inter alia* that nothing contained in the section shall apply to any company in which the public are substantially interested. The text of Explanation the interpretation of which is the subject matter of dispute is as follows :—

"Explanation.—For the purposes of this section a company shall be deemed to be a company in which the public are substantially interested.

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 - (a) If it is a company owned by the Government or in which not less than forty percent of the shares are held by the Government.
 - (b) If it is not a private company as defined in the Indian Companies Act 1913 (VII of 1913) and
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 - (i) its shares (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than fifty per cent of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the previous year beneficially held by the public (not including a company to which the provisions of this section apply) :
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Provided that in the case of any such company as is referred to in sub-section (4), this sub-clause shall apply as if for the words 'not less than fifty percent' the words 'not less than forty percent,' had been substituted:
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 - (ii) the said shares were at any time during the previous year the subject of dealing in any recognised stock exchange in India or were freely transferable by the holder to other members of the public; and
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 - (iii) the affairs of the company or the shares carrying more than fifty percent of the total voting power were at no time during the previous year controlled or held by less than six persons (persons who are related to one another as husband, wife, lineal ascendant or descendant or brother or sister, as the case may be, being treated as a single person and persons who are nominees of another person together with that other person being likewise treated as a single person) :
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Provided that in the case of any such company as is referred to in sub-section (4), this clause shall apply as if for the words 'more than fifty per cent' the words 'more than sixty per cent' had been substituted.
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It is quite clear that clause (a) was not relevant and had no application. It was also not disputed that the assessee had fulfilled the conditions contained in sub-clause (b)(i) and (b)(ii) of the Explanation. The sole question which had to be decided by the Tribunal and the High Court was whether the assessee had fulfilled the conditions set out in sub-clause (b)(iii) of the Explanation. It was not found that the affairs of the company were, at any time, during the previous year controlled by less than 6 persons, the number six being arrived at according to the formula
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laid down in sub-clause. The sole finding on which the decision went against the assessee was that shares carrying more than 50% of the total voting power were during the previous year held by less than 6 persons. The argument which has throughout been pressed on behalf of the assessee is that the word "or" which is to be found between the words "the affairs of the company" and "the shares carrying more than....." had been used disjunctively and therefore if either one of the conditions did not exist the assessee would be entitled to say that the conditions laid down in sub-clause (b)(iii) had been fulfilled. In other words if it was established that the affairs of the assessee were at no time, during the previous year controlled by less than 6 persons it would be a company in which the public were substantially interested even though the shares carrying more than 50% of the total voting power had been held during the previous year by less than six persons. The Tribunal disposed of this contention in the following manner :—

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"Sub-clause (iii) is divided into two parts; the first part relates to the affairs of the company being controlled by not less 6 persons and the second part relates to holding of shares carrying more than 50% of the total voting power by not less than 6 persons. Both these parts are joined with the main part of clause (b) by the use of the conjunctive word "and" so that the proper construction of the sub-clause (iii) would be as follows :—

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- (1) If it is not a private company as defined in the Indian Companies Act, 1913 and the affairs of the company were at no time during the previous year controlled by less than six persons;
- (2) If it is not a private company as defined in the Indian Companies Act, 1913 and the shares carrying more than 50% of the total voting power were at no time during the previous year held by less than 6 persons."

According to the Tribunal sub-cl. (iii) of cl. (b) sought to impose two distinct and separate conditions, namely, (1) control of the affairs of the company and (2) requisite percentage of the voting power held by virtue of the holding of shares. In order that a company might be treated as one in which the public were substantially interested it had to show that not merely its affairs were controlled by not less than 6 persons but also that 50% of the total voting power had been held by not less than 6 persons. The High Court looked closely into the language of the Explanation and had no difficulty in coming to the conclusion that the conditions laid down in all the sub-clauses of cl. (b) had to be satisfied.

- A** The difficulty, however, was created by the language of sub-cl.(b) (iii) in which the word "or" appeared in more than one place. In a previous Bench decision of the Calcutta High Court in an Income tax Reference (*The Indian Steel & Wire Products Ltd. Calcutta v. The Commissioner of Income-tax, West Bengal, Calcutta*)⁽¹⁾ the same point had arisen and it had been held that the conditions prescribed in sub-cl. (b)(iii) would not be satisfied by mere compliance with one branch of it. Both branches namely the control of the affairs by not less than 6 persons and the holding of shares carrying the requisite percentage of the total voting power by not less than 6 persons would have to be fulfilled.

- C** On behalf of the assessee a good deal of reliance has been placed on a decision of this Court in *The Star Company Ltd. v. The Commissioner of Income-tax (Central) Calcutta*⁽²⁾. In that case sub-clause (b)(ii) came up for consideration and it was held that the two parts of the explanation contained in that sub-clause were alternative. In other words if one part was satisfied it was unnecessary to consider whether the second part was also satisfied. Thus the word "or" was treated as having been used disjunctively and not conjunctively. The same reasoning is sought to be invoked with reference to sub-clause (b)(iii).

- E** It is significant that the language of sub-clauses (ii) and (iii) of cl. (b) is different. The former relates to a positive state of affairs whereas the latter lays down negative conditions. The word "or" is often used to express an alternative of terms defined or explanation of the same thing in different words. Therefore if either of the two negative conditions which are to be found in sub-clause (b)(iii) remains unfulfilled, the conditions laid down in the entire clause cannot be said to have been satisfied. The clear import of the opening part of cl. (b) with the word "and" appearing there read with the negative or disqualifying conditions in sub-cl. (b) (iii) is that the assessee was bound to satisfy apart from the conditions contained in the other sub-clauses that its affairs were at no time during the previous year controlled by less than 6 persons and shares carrying more than 50% of the total voting power were during the same period not held by less than 6 persons. We are unable to find any infirmity in the reasoning or the conclusion of the Tribunal and the High Court so far as question No. 1 is concerned.

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(1) Income Tax Reference No. 204 of 1961.

(2) C. As. 1204 & 1205/68 dt. 29-4-70.

The second question stands concluded by the decision of this Court in *M. M. Parikh, I. T. O. Special Investigation Circle "B", Ahmedabad v. Navanagar Transport and Industries Ltd., & Another* (1) in which it was held that an order under s. 23A of the Act made by the Income tax Officer directing payment of additional Super tax was an order of assessment within the meaning of s. 34(3) of the Act and to such an order the period of limitation prescribed thereby did not apply.

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In the result this appeal fails and it is dismissed with costs.

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Appeal dismissed.

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