Commissioner Of Income-Tax, Bombay ... vs Afco (Private) Ltd. on 25 October, 1962

Equivalent citations: [1963]48ITR76(SC)

JUDGMENT

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 Appellate 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 section 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 section 23A of the Income-tax Act could not be made applicable. In appeal, the Income-tax Appellate Tribunal, Bombay, reserved 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 the Finance Act (15 of 1955) must be read in conjunction with section 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 section 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 companys 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 First Schedule to the Finance Act of 1955 ?"

By the Finance Act (15 of 1955) Schedule I, item, B, read with section 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 rate specified in the preceding 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 (3D) of section 18 of that Act -

(i) where the total income, as reduced by seven annas in the rupee and by the amount, it 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 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 shall be allowed at the rate of one anna per rupee on the amount of such excess;....."

By section 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 investment, and at the rate of four annas 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 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 section 23A, clause (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-section (9) of section 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 purpose of this section, a company shall be deemed to be a company in which the public are substantially interested - ...
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> (b) if it is not a private company as defined in the Indian Companies Act, 1913 (VII of 1913), and...."

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 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 provision in section 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 distributed at the date of the general meeting. By the Finance Act (15 of 1955) section 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-section (9) of section 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 clause (b) of the first Explanation there to 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 section 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 cleared dividends so as not to attract the application of an order under section 23A. But that benefit is admissible only in favour of companies to which the provisions of section 23A of the Act cannot be made applicable.

The income-tax authorities held that the expression "company to which the provisions of section 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 section 23A of the Indian Income-tax be made, and private limited companies being companies in respect of which an order under section 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 section 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 section 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 section 23A of the Income-tax Act, the Income-tax Officer has to ascertain (i) whether the company conforms to the description in sub-section (9) of section 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 clause (9) of section 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 on which does not fall

within sub-section (9) of section 23A is a condition of making of the order. The language used by the legislature clearly indicates that it is only when an order under section 23A will not, having regard to the circumstances, be justified that the right to obtain rebate 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-section (1) of section 23A can never be made.

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 First 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 section 18(3D) and (3E), where the total income reduced by seven annas in the rupee and the amount exempt from income-tax exceed the amount of any dividends declared and no order had been made under sub-section (1) of section 23A of the Income-tax Act. The right to rebate arose under those Finance Acts if no order under section 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 section 23A, and unless an order under section 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 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. It must be noticed that even under the Finance Act of 1955 by Part II of Schedule I, item D, a rebate of three annas per rupee of the total income was to be 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-section (3D) of section 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, were 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 section 23A could not be made applicable. Under the Finance Act of 1957, rebate was admissible in favour of companies "referred to in sub-section (9) of section 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 the provisions of section 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 entitled to the rebate claimed by it. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.