

Commissioner Of Income-Tax, West ... vs Jalan Investment P. Ltd. on 4 May, 1967

Equivalent citations: [1968]68ITR217(SC), AIRONLINE 1967 SC 27, (1968) 68 ITR 217

Bench: J.C. Shah, S.M. Sikri

JUDGMENT

Sikri, J.

1. This appeal by special leave is directed against the judgment of the High Court refusing to direct the Income-tax Appellate Tribunal to state a case under section 66(2) of the Indian Income-tax Act, 1922, hereinafter referred to as "the Act". The only question which falls for consideration is whether a referable question of law arises or not out of the order of the Appellate Tribunal, B-Bench, Calcutta, dated May 21, 1962.

2. It may be mentioned that the only order of the High Court which appears on record is a formal order containing no reasons for dismissing the petition of the Commissioner of Income-tax under section 66(2) of the Act.

3. The facts, in brief, are as follows :

4. M/s. Jalan Investment (Pvt.) Ltd., Calcutta, hereinafter referred to as "the assessee", is an investment company and its accounting year is the calendar year, and it keeps its account on the mercantile system. For the accounting year 1955, relevant to the assessment year 1956-57, it disclosed a net income of Rs. 2,05,840 in the balance-sheet. The assessment was completed on October 15, 1957. The general meeting of the assessee was held on December 29, 1956, but no dividend was declared. The Income-tax Officer addressed a letter on November 1, 1957, requesting the assessee to give reasons why the provisions of section 23A should not be applied to it. The assessee in its letter dated January 15, 1958, stated that :

(1) The credit balance of their profits and loss account after adjustment of tax payable would be reduced to Rs. 99,736;

(2) That their profits was computed after taking into account a sum of Rs. 3,21,813 as dividend receivable. This dividend did not reach the hands of the company and when distributed was appropriated by the creditors of the company;

(3) That this is the first year when the company made appreciable profits.

On these grounds the company claimed that it was inadvisable, if not impossible, for them to declare any dividend.

5. The Income-tax Officer, having considered all the facts, rejected the second contention of the assessee thus :

"It will be pertinent to note that this appropriation was by M/s. Jalan Industries Ltd., which happens to be company with the same group. Apart from the question of such an appropriation being made with the specific purpose of defeating the application of section 23A, it must be stated that the appropriation of the income of the Co. by the company itself or its creditors is a fact in the nature of application of such income. It is not, therefore, open for an assessee to say that as the entire income has been applied towards the liquidation of some liabilities the provision of section 23A do not therefore have any application. Once profits have been made it is immaterial how they have been applied or appropriated by the company or its creditors."

6. The assessee filed an appeal before the Appellate Assistant Commissioner but without any success. He held that the submission of the assessee that it "did not receive the dividend of Rs. 2,75,840 in this accounting year and secondly, it did not receive the dividend at all since it was appropriated by the company erstwhile managing agent and creditors" were entirely irrelevant to section 23A.

7. The assessee then took the matter to the Income-tax Appellate Tribunal. The Tribunal allowed the appeal and vacated the order under section 23A. The Appellate Tribunal, after setting out the facts, observed :

"The question, therefore, is as we have stated above, as to whether the fictional or notional receipts could be taken into account for passing order under section 23A on the company."

8. The Appellate Tribunal apparently treated the dividend of Rs. 2,75,840 declared as being fictional or notional receipt. The Tribunal then considered the decisions of this court in Commissioner of Income-tax v. Bipinchandra Maganlal & Co., Indra Singh & Sons Ltd. v. Commissioner of Income-tax and George N. Houry v. Commissioner of Income-tax. Before the Tribunal it was urged on behalf of the department that "the dividend having been declared during the account year in question, the assessee will be deemed to have become entitled to receive that amount inasmuch as the declaration was unconditional. The assessee could even sue the company for realisation of the dividend declared. In that view of the matter. . . since a declaration is made, the dividend no more remains a deemed income but becomes an actuality. " The Appellate Tribunal repelled these arguments by observing :

"We will dismiss it in one word by saying that such dividend as is the one in the case in question has been treated as deemed or fictional income under the Income-tax Act itself and therefore the submission by the department representative, in our opinion,

goes against the Act itself, which certainly cannot be permitted."

9. The Tribunal finally concluded thus :

"A mere declaration of dividend, in our opinion, does not stand the test inasmuch as although a declaration might have been made still it might not be the property of the trader to be included in the calculation of its commercial profits. We will only add that in saying so we have not taken into consideration the fact that a major portion of the declared dividend in the assessee's favour had been appropriated at source by the assessee's creditors."

10. The Commissioner of Income-tax, West Bengal, then applied under section 66(1) of the Act and prayed that a statement of the case be drawn up and the following question referred to the High Court :

"Whether, on the facts and in the circumstances of the case, the amount of dividend declared in favour of the assessee was rightly taken into consideration by the Income-tax Officer before passing order against the assessee under section 23A of the Indian Income-tax Act, 1922, as it stood at the material time ?"

11. The Appellate Tribunal dismissed the application on the ground that although the question presented before it was no doubt a question of law, but since the same had been decided by this court in the case of Commissioner of Income-tax v. Bipinchandra Maganlal & Co. Ltd., the question was merely academic and could not, therefore, be made the subject-matter of reference under section 66(1) of the Act. In paragraph 2 of its order rejecting the application, it observed :

"A sum of Rs. 2,75,840 was deemed to be the assessee's income from dividend by reason of an order passed under section 23A on the company in which the assessee had invested in shares."

12. These observations we find difficult to appreciate because it does not seem to be anybody's case that any order under section 23A was passed in respect of the company in which the assessee had invested in shares. Be that as it may, the Appellate Tribunal held that the point at issue had been set at rest by this court in Commissioner of Income- tax v. Bipinchandra Maganlal & Co. Ltd.

13. The Commissioner then applied to the High Court under section 66(2) of the Act but the High Court dismissed the petition. As stated above, apparently the High Court gave no reason for dismissing the petition.

14. The learned counsel for the appellant contends that the point has not been settled in the decision of this court in Commissioner of Income- tax v. Bipinchandra Maganlal & Co. In our view, with respect, the Appellate Tribunal has not appreciated the judgment of this court in the above case. This court laid down the principles which the Income- tax Officers should observe in passing an order section 23A of the Act. Nowhere does it deal with the question at issue in the present case,

namely, whether dividends distributed by a company in which the assessee held shares was fictional or notional income or whether the assessee, on the facts of the case, should be deemed to have become entitled to receive the amount of dividend as soon as the declaration was made or later. In our opinion, the question suggested by the Commissioner arises out of the order of the Appellate Tribunal and accordingly we accept the appeal, set aside the judgment of the High Court and direct the Appellate Tribunal to state the case and refer the question mentioned above to the High Court. The costs in this appeal will be costs in the cause.

15. Appeal allowed.