

PETITIONER:
THE COMMISSIONER OF INCOME-TAX

Vs.

RESPONDENT:
M/S. MYSODET (P) LTD., BANGALORE

DATE OF JUDGMENT: 17/03/1999

BENCH:
N.Santosh Hedge, S.P.Bharucha

JUDGMENT:

SANTOSH HEGDE, J.

This appeal arises from the judgment and order of the High Court of Karnataka dated 13.12.1989 made in I.T.R.C. No.21/82. The following question was referred to the High Court for its opinion under Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') :

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the provision of Section 104 of the Income-tax Act, 1961 was applicable to the instant case for the assessment year 1975-76?"

The facts leading to the abovesaid reference are as follows :

The respondent-Company is a trading company in which the public are not substantially interested. The assessing authority assessed the income of the Company for the assessment year 1975-76 at Rs.6,27,430/- holding that the Company did not distribute any dividend to its shareholders. The Income Tax Officer initiated proceedings under Section 104 of the Act, demanding additional income-tax of Rs.31,434/-.

Against the said assessment order, the respondent-Company preferred an appeal before the Appellate Assistant Commissioner. Having failed before the said Authority, a further appeal was preferred before the Appellate Tribunal which, in turn, rejected the said appeal and on a prayer made by the Company, the Tribunal referred the abovenoted question for opinion of the High Court.

Before the High Court, the assessee relied upon a judgment of the Calcutta High Court in Moore Avenue Properties (P) Ltd. v. C.I.T. (1966) 59 ITR 466 which took the view that in view of the deemed definition given in Section 2(22)(e) of the Act, any loan advanced to a shareholder out of the accumulated profits of the Company in which public do not have a substantial interest, would amount to payment of dividend. Hence, Section 104 of the

Act would not be attracted.

Per contra, the Revenue relied upon a judgment of the Gujarat High Court in the case of CIT v. Bombay Mineral Supply Co. (P) Ltd. (1978) 192 ITR 577 wherein it was held that payment of a loan which is deemed as a dividend cannot be construed as distribution of dividend within the meaning of Section 23A of the 1922 Act (equivalent to Section 104 of the Act). The Karnataka High Court preferred to rely upon the Calcutta High Court judgment and allowed the reference, holding in favour of the assessee. Now the Revenue is in appeal before us.

It was contended on behalf of the Revenue in this appeal that even if it is to be held that payment of a loan by a Company is to be deemed to be a dividend, such payment cannot be treated as distribution of dividend as contemplated in Section 104 of the Act for avoiding the levy of super-tax. The stand of the Revenue before us is that for the purpose of avoiding the levy under Section 104 of the Act, there should be in fact distribution of dividend as such in favour of all the shareholders and a deemed payment of dividend is not what is contemplated under the said Section. It was also contended before us that the view taken by the Calcutta High Court (supra) does not lay down the correct position in law and, on the contrary, the view taken by the Gujarat High Court (supra) should be accepted.

In the instant case, during the year under reference, the company had paid a sum of Rs.1,23,053/- to its Managing Director as a loan and the balance amount left with the company was admittedly not sufficient to distribute as dividend among other shareholders. Therefore, the company had contended that in view of the fact that under Section 2(22)(e) of the Income Tax Act, 1961, payment of any advance or loan to a shareholder being a deemed payment of dividend, there was no case for invoking the provision of Section 104 of the Act. As stated above, this contention did not find favour with the assessing and other authorities except the High Court.

The question, therefore, is whether the company concerned has for the relevant year, distributed its surplus income or not, so as to attract or not to attract the rigour of Section 104 of the Act. Section 2(22)(e) of the 1961 Act reads as under :

"(22)(e) "dividend" includes -

any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder, being a person who has a substantial interest in the company, or any payment by such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;"

A perusal of this Section shows that for the purpose of the Act, any payment made by a company of any sum of money by way of advance or loan to its shareholders is deemed to be a dividend. Since the Act has not provided for any other definition of the word "dividend" except the ones

enumerated in Section 2(22) of the Act, it should be construed that this definition would be applicable to all provisions which contain the term "dividend" in the Act.

Section 104 of the Act reads as under :

"104. Income-tax on undistributed income of certain companies. - (1) Subject to the provisions of this section and of sections 105, 106 107 and 107A, where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the distributable income of the company of that previous year, the Income-tax Officer shall make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 143 or section 144, be liable to pay income-tax at the rate of -

(a) fifty per cent., in the case of an investment company, (b) thirty-seven per cent., in the case of a trading company, and (c) twenty-five per cent., in the case of any other company, within India.)

on the distributable income as reduced by the amount of dividends actually distributed, if any, within the said period of twelve months.

(2) The Income Tax Officer shall not make an order under sub-section (1) if he is satisfied -

(i) that, having regard to the 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 within the period of twelve months referred to in sub-section (1) would be unreasonable; or (ii) that the payment of a dividend or a larger dividend than that declared within the period of twelve months referred to in sub-section (1) would not have resulted in a benefit to the revenue; or (iii) that at least seventy-five per cent. of the share capital of the company is throughout the previous year beneficially held by an institution or fund established in India for a charitable purpose the income from dividend whereof is exempt under section 11.

(3) If the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette and subject to such conditions as may be specified therein, exempt any class of companies to which the provisions of this section apply from the operation of this section. (4) Without prejudice to the provisions of section 108, nothing contained in this section shall apply to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India."

As per this Section, an Income Tax Officer, if

satisfied that a company in respect of any previous year has not distributed, as required by the statute, dividends from out of its profits and gains, shall make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under Section 143 or 144, be also liable to pay income-tax at the rate provided in that Section. The Calcutta High Court in the case cited above held that loans and advances to the shareholders should be deemed to be dividend under section 2(6A)(e) of the 1922 Act (equivalent to Section 2(22)(e) of the 1961 Act). Hence, in its opinion, the provision of Section 23A(1) (equivalent to Section 104 of the 1961 Act) is not attracted. Per contra, the Gujarat High Court in the case referred to above, held that the definition of the word "dividend" as found in Section 2(6A)(e) of the Act will not be applicable for the dividend to be paid under Section 23A(1) of the Act inasmuch as the latter Section contemplates an actual distribution of dividend and not payment of any sum of money which can be termed as "dividend" by a legal fiction. In the said view of the matter, the Gujarat High Court was of the opinion that even if the company concerned had made any advance or payment which under the Act could be deemed to be a dividend, the same cannot be used as a defence in the proceedings under Section 23A of the Act unless the dividend, as such, has been paid to all the shareholders.

With respect, we are unable to agree with the reasoning of the Gujarat High Court. The object of the Legislature in enacting Section 2(22)(e) and Section 104 of the 1961 Act is one and the same, namely, to prevent the escapement of super-tax by some shareholder and/or companies. While under Section 2(22)(e) of the Act, by a deeming provision, the Legislature has made payment of any advance or loan to a shareholder a deemed dividend so as to subject such payments to the levy of super-tax in the hands of the receiver of the said amount, Section 104 of the Act provides for levy of super-tax on companies which attempt to avoid payment of super-tax by its shareholders by not distributing its surplus profits and income. In either case, the object of the Act is to see that evasion of super-tax is prevented. Thus it is clear that the Act did not contemplate the levying of super-tax twice, namely, once in the hands of the shareholder who has received it as a deemed dividend and again in the hands of the Company which, according to the assessing authority, has failed to declare the dividend.

The main ground on which the Gujarat High Court based its decision is the difference in the language used in Sections 2(6A) and 23A of the Act. According to the High Court, while in Section 2(6A) the Legislature has used the expression "any payment", in Section 23A it has used the words "gains distributed". In view of such use of two different expressions in these two Sections, the High Court came to the conclusion that the deeming provision in Section 2(6A) is not available while invoking Section 23A of the Act. This conclusion of the High Court also, in our view, is not correct. It is true that the two Sections referred to above have used two different verbs but that by itself, in our opinion, would not take away the effect of the deeming provision found in the definition clause. If actually the Legislature wanted the deeming clause not to be made applicable to the provisions of Section 104 of the 1961 Act then it would have said so in categorical terms in the

Statute, in the absence of which the statutory definition given under Sections 2(22)(e) of 1961 Act, in our view, will have to be applied to the word "dividend" as found in Section 104 also. The Gujarat High Court had also placed reliance on a judgment of this Court in the case of *Navnit Lal C Javeri v. K K Sen* (1965) 56 ITR 198. In our view, the ratio laid down in the said judgment could not, in any way, support the ultimate conclusion of the High Court. This Court in the said case was dealing with the constitutionality of Section 23A of the 1922 Act, and was not dealing with the interpretation of Sections 2(6A) and 23A of the said Act. This Court in that case did not have occasion to decide the question that has arisen before us. Hence, the Gujarat High Court could not have got any assistance from the said judgment.

In view of the above discussion, we are of the opinion that the view taken by the Calcutta High Court in the case referred to above lays down the correct law and the view taken by the Gujarat High Court does not lay down the correct law. Therefore, the judgment of the High Court under appeal has to be sustained. Consequently, this appeal fails and is hereby dismissed. No costs.