PETITIONER:
COMMISSIONER OF INCOME TAX, GUJARAT

Vs.

RESPONDENT:
DISTRIBUTORS (BARODA) (P) LTD.

DATE OF JUDGMENT16/09/1971

BENCH:
HEGDE, K.S.
BENCH:
HEGDE, K.S.
GROVER, A.N.

CITATION:
1972 AIR 288 1972 SCR (1) 726
CITATOR INFO :
RF 1977 SC 153 (14)

ACT:
Indian Income-tax Act, 1922, s. 23A--"In the case of a company whose business consists wholly or mainly in the dealing in or holding of investment", meaning of-Whether holding share of only two companies of which it is the Managing Agent is an 'investment company' within the scope of the section.

HEADNOTE:
The assessee is a private limited company and was the Managing Agent of two other companies. All the shares held by the assessee company as its investments were the shares of those two companies. The Income-tax authorities held that the assessee company was an 'investment company' within the scope of s. 23A of the Act and ordered the company to pay super tax as provided under s. 23A(1). The High Court in reference held in favour of the assessee. Dismissing the appeals,
HELD : (1) In the facts and circumstances of the present case, the assessee company cannot be said to be an 'investment company' coming within the scope of s. 23A of the Act.
The meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" both in the main s. 23A and in the Explanation concerns itself with a company whose business consists "wholly or mainly in the dealing in or holding of investments". The word "mainly" must necessarily take its colour from the word "wholly" preceding that word., In other words the company which comes within the scope of those provisions must be a company whose primary business is in the dealing in or holding of investments and only in such cases, s. 23A applies. And the expression 'business of holding of investments' in the said section refers to a real, substantial and systematic or organised course of activity of investment carried on by an assesses for a set purpose such as earning profits. [730 H, 731 D]
All the shares held by the assessee company as its investments were the shares of the two companies of which it was the Managing Agent. These investments were made for a collateral purpose viz., to have a firm grip over its

Managing Agency business. The investments made by the assessee company in the shares of the managed companies are essentially linked with its Managing Agencies and not with the dealing of that company in shares of other companies. The company's total income from dividend income of the shares of the managed companies and the Managing Agency commission together is much more than the income earned by the company from its share dealings. Further the assets of the company used in its share dealings are not more that its other assets. Therefore, it cannot be said that the assessee company's business consisted wholly or mainly in the dealing in investments. [7.33 F]

Bengal Assam Investors Ltd. v. C.I.T., West Bengal, 54 I.T.R. 547 and Narain Swadesh. Weaving Mills v. Commissioner of Excess Profits Tax, 26 I.T.R. 765, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2350 to 2353 of 1968 and 1313 to 1316 of 1971.

727

Appeals by certificate from the judgment and order dated July 7, 1967 of the Gujarat High Court in Income-tax Reference No.. 22 of 1965.

S. C. Manchanda, R. N. Sachthey and B. D. Sharma, for the appellant (in all the appeals).

S. T. Desai and I. N. Shroff, for the respondent (in all the: appeals).

The Judgment of the Court was delivered by

Hegde, J. These are some of the appeals where the appellant unfortunately had to file two different appeals in respect of the same matter. Civil Appeals Nos. 2350-2353 of 1968 were brought on the strength of the certificates granted by the High Court of Gujarat. No reasons were given in support of those, certificates. Hence those certificates must be considered as having not been properly granted. The resulting position was that the appeals brought on the strength of those certificates became unsustainable. To get over that difficulty, the Commissioner of Income-tax, Gujarat. invoked our jurisdiction under Art. 136 of the Constitution to appeal against the judgment of the High Court. Civil Appeals Nos. 1313-1316 of 1971.

The assessee is a Private Limited Company and the concerned assessment years are 1957-58, 1959-60, 1960-61 and 1961-62. The only question for decision in these appeals is whether the assessee company comes within the scope of s. 23-A of the Indian Income-tax Act, 1922 (to be hereinafter referred to as the Act) ?

The assessee company was incorporated on October 11, 1941 The object clause in the memorandum of association contains the usual string of objects. 'Confining ourselves to the objects relevant for our present purpose. we get in Clause (3) of the memorandum power "to acquire and hold shares, stocks, debentures, debenture stocks, bonds, obligations and securities issued or guaranteed by any company constituted or carrying on business in British India". Sub-cl. (p) of that Clause empowers the company "to take part in the formation, management, supervision or control of the business or operation of any company or undertaking and for that purpose to appoint and remunerate any directors. accountants or other experts or agents". Clause (q) provides power to carry on all or any of the following businesses :

"Agents, Chief agents or licensed agents of any company....."
We are not concerned with the other objects mentioned in the memorandum.
728
In July 1942, the assessee company promoted a company known as New India Industries Ltd. By an agreement dated July 24, 1942, the assessee company was appointed as managing agents of the said New India Industries Ltd. In 1956, the said managing agency was renewed for a period of five years in view ,of the provisions of the Companies Act, 1956.
The group of persons who had floated the assessee company had earlier in the year 1940 floated a company called the Cotton Fabrics Private Ltd. By an agreement dated April 22, 1943, the assessee company was appointed the managing agent of the said Cotton Fabrics Private Ltd. In 1956, the said managing agency agreement was also renewed for a period of five years for the very reason referred to earlier.
We have already noted that the assessee company is a Private Company. As such it is not a company in which the public is substantially interested.
The Income-tax Officer was of the opinion that as during the company's income from its business activity "in the dealing in or holding of investments" was very much more than that its income from its managing agencies and further as it had used a very large portion of its assets in the former activity, it must be considered as an "investment company" -an expression not found in the Act. Basing himself on that finding, he reasoned thus :
Statutory percentage of profits to be declared as dividends by such a company under s. 23A was 100 per cent in the first two assessment years and 90 per cent in the remaining two assessment .years. The dividends declared by the assesssee company fell much below that percentage. Hence it was liable under S. 23A to pay super tax at the rate of 50 per cent on the undistributed balance of the total income reduced as provided in s. 23A (1) accordingly. In appeal this decision was affirmed by the Assistant Appellate Commissioner excepting in regard to certain deductions with which we are not concerned.
Aggrieved by the order of the Assistant Appellate Commissioner, the assessee took up the matter in second appeal to the Income-tax Appellate Tribunal. The Tribunal agreed with the ,conclusions reached by the Assistant Appellate Commissioner. 'Thereafter at the instance of the assessee, the following two questions were referred to the High Court under S. 66(1) of the Act.

> "1. Whether on the facts and circumstances of the case the Tribunal was justified in holding that the assessee company is an investment company for purposes of section 23A of the Income-tax Act, 1922 ?
> 729
> 2. Whether the Tribunal was justified in law in holding that while determining the undistributed balance of the total income for charging super-tax under the provisions of S. 23A of the Act no deduction can be allowed in respect of the expenses actually incurred by the assessee company but disallowed for the purposes of computing its assessable income ?"

Before the High Court, Counsel for the assessee did not press an answer to the second question. Hence the High Court did consider that question. Nor are we called upon to consider at question. The High Court reframed the first

question thus

> "Whether on the facts and circumstances of the case the Tribunal was justified in holding that the assessee company is a company whose business consists mainly in dealing in or holding of investments within the meaning of clause (i) of the second Explanation to section 23A of the Income Tax Act, 1922 ?"

The High Court answered that question in the negative and in favour of the assessee. It is the correctness of that decision that is in issue before us.

We have now to consider whether the High Court was right in concluding that the assessee company did not come within the scope of s. 23A. In arriving at its conclusion the High Court had approached the question before it from three different angles viz (1) the objects of the company as mentioned in its memorandum of association; (2) the profits earned the company during the relevant previous years from its various activities and (3) the assets used by the company in those years for the purpose of holding the shares of the managed companies, dealing with the shares of other companies and in collection with its other business activities.

Section 23A to the extent relevant for our present purpose reads :

> " (1) 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 total income of the company of that previous year as reduced by--
> (a).....
> (b).....
> (c).....
> 730
> The Income-tax Officer shall, unless he is satisfied 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 would be unreasonable, 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 23, be liable to pay super-tax at the rate of fifty per cent. In the case of a company whose business consists wholly or mainly in the dealing in or holding of investments and at the rate of thirtyseven percent, 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 as reduced by the amounts, if any referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any....."
> Explanation 2, to that section says:
> "For the purposes of this section, statutory percentage means:
> (i) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments 100 % ..... "

We have now to see what exactly is the meaning of the

expression "in the case of a company whose business "consists wholly or mainly in the dealing in or holding of investments" in the main s. 23A and the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in cl. (i) of Explanation 2 to s. 23A. The Act contains many mind-twisting formulaes but s. 23A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income-tax Act which has taken the place of old s. 23A of the Act is more understandable and less abstruse. But in these appeals we are left with s.23A of the Act.

Clause (i) of Explanation 2 to s. 23A concerns itself with a company whose business consists "wholy or mainly in the dealing in or holding of investments". The word "mainly" in that clause as well as in the main section 23A must necessarily take its colour from-the word "wholly" preceding that word in those provisions. In other words the company which comes within the scope of those provisions must be one whose primary business must be "in the dealing in or holding of investments". If a company engages itself in two or more equally or nearly equally important business

731

activities, then it cannot be said that the company's business consists "wholly or mainly" in dealing in a particular thing. Further even in cases where a company has more than one business activity and one of its activity is more substantial than the others, unless that activity is the primary activity of the company, it cannot be said that that company is engaged in "wholly or mainly" in any one of its business activities. Section 23A in our opinion applies only to cases where the primary activity of tile company is in 'the dealing in or holding of investments'. We shall presently see whether on the facts found by the Tribunal, it can be said that the assessee company's business in the relevant years consisted "of mainly in the dealing in or holding of investments" as it was not the case of the Revenue that it was wholly engaged in that business.

We next come across with another expression which is far more difficult to comprehend than the one that we were considering till now. Section 23A speaks of the business of "holding of investments". Here comes the enigma. It is easier to understand when the section speaks of a company having the business of dealing in investments, though to say that the company is dealing in investments may at first sight look somewhat incongruous. When the legislature spoke of dealings in investments, it meant dealing in shares, stocks and securities etc. But when a person invests. in the share of some of the companies, it is difficult to say that his business is one of investing. In commercial circles investing is not considered as business. An investor may feel perplexed if he is called a businessman.

This Court in Bengal and Assam Investors Ltd. v. Commissioner of Income-tax, West Bengal(1); came to the conclusion that an individual who merely invests in shares for the purpose of earning dividend, does not carry on a business and that the only way he can come under S. 10 of the Act is by converting the shares acquired by him into stock-in-trade i.e. by carrying on the business of dealing in stocks and shares. In that case this Court was considering whether the dividend income of the assessee company therein could be considered as business income under S. 10 of the Act. Therein this Court was not considering the scope of S. 23A. But all the same in that case this Court proceeded on the basis that no one can make a business of investing. But then S. 23A speaks of the business of "holding of

investments". We were told by the Counsel for the assessee that that expression is an incongruous one and that we should, following the decision of this Court in Bengal and Assam Investors Ltd.(1) hold that there is nothing like a business of "holding of investments". We feel unable to accede to that contention. We cannot say that the

(1) 59 I.T.R. 547.

732

legislature did not know its own mind when it used that expression in s. 23A. We must give some reasonable meaning to that expression. No part of a provision of a statute can be just ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby. The expression "'business" is a well known expression in income-tax law. It means as observed by this Court in Narain Swadesh Weaving Mills v. Commissioner of Excess Profits Tax (1) :

" some real, substantial and-systematic or organised course of activity or conduct with a set purpose".

This. is also the meaning given to that expression in the earlier decisions of the High Courts and the Judicial Committee. We must, therefore, proceed on the basis that the legislature was aware of the meaning given by courts to that expression when it incorporated s. 23A into the Act in 1957. Hence we must hold that when the legislature speaks of the business of 'holding of investments', it refers to real, substantial and systematic or organised course of activity of investment carried on by an assessee for a ,set purpose such as earning profits.

Now let us leave s. 23A and proceed to examine the facts of the case to find out whether the assessee company can be held to ,,come within the scope of s. 23A in the light of our interpretation of that provision.

We have earlier referred to the objects clause in the memo-randum of association. The memorandum permits the assessee company to take up the management of the other companies, to invest in the shares of the other companies, and to deal in the shares of the companies. Therefore it cannot be said that the assessee company was incorporated primarily with the object of carrying on the business of the "dealing in or holding of investments". The objects of the assessee company are many fold. The object of carrying on the business of "dealing in or holding of investments" is only one of them. Hence the memorandum of association does not assist us in deciding whether the business of the assessee company "consists of wholly or mainly in the dealing in or holding of investments."

We shall now take up the question of the profits earned by the assessee company during the relevant previous years. The High Court has in its judgment set out a statement showing the profits I earned by the assessee company through its various activities. It would be convenient to set out-the same now

(1) 26 I.T.R. 765.

733

	ASSESSMENT YEAR			
	1957-58	1959-60	1960.61	1961.62
	Rs.	Rs.	Rs.	Rs.
1. Managing Agency	2,09,999	2,56,315	2,41,705	1,96,384
2. Dividend on shares of managed companies	1,95,179	2,58,511	3,21,746	3,12,251
3. Income from shares held as stock-in-trade				
(i) interest on debentures	369	342	309	312'
(ii) Dividends	3,40,695	4,68,775	5,48,325	5,53,999

(iii) Dealing in shares 23,86716,75528,32922,100
(iv) Share transfer fee 10 10 10 10
Total of Nos. (i) to (iv)3,64,941 4,85,8825,76,9735,76,421
4. Income from interest 4,5953,35815,27623,617
In order to find out the implications of this statement we have to first decide whether the assessee company can be said to be a company engaged in the business activity of "holding of investments." The finding of the Tribunal on this point is stated thus

> "We agree with the assessee that the shares in the managed companies were acquired with a view to safely hold the managing agencies, but we do not agree that for that reason only those shares cannot be taken into account for the purpose of a business of dealing in or hold ing of investments".

All the shares held by the assessee company as its investments were the shares of the two company which it was managing agent. It invested in no other shares. The Tribunal has found that the managed company's shares were acquired by the assessee company for the purpose of safeguarding its managing agency business. Therefore it is quite clear that those investments were made not in the course of any business of investment but for the purpose of securing its managing agencies. Those investments were made for a collateral purpose viz. to have a firm grip over its managing agency business. If we are correct in this, finding--Jr we think, we are-then it follows that the dividend income from shares of the managed companies cannot be taken into consideration in finding out whether the assessee company's business "consisted wholly or mainly in the dealing in or holding of investments". The investments made by the assessee company in the shares of the managed companies are essentially linked with its 'I managing agencies and not with the dealing of that company in shares of the other companies. In other words those investments form part of the assessee company's managing agency business
734
activity. If we add the dividend income of the shares of the managed companies, to the managing agency commission, the total income from those two sources is much more than the income earned by the assessee company from its share dealings, in each one of the assessment years. Hence viewed from the point of view of profits earned by the assessee company, it cannot be said that in the relevant previous years the assessee company's business consisted wholly or mainly in the dealing in or holding of investments".
Now let us look at the question from the point of view of the assets employed by the assessee company. Here again we can take assistance from the schedule given in the judgment of the High Court setting out in details the assets used by the assessee company in its several business activities. That Schedule reads thus :
SHARES OF MANAGED COMPANIES
Treated by the Income Tax Department as investments not forming part of the business of dealing in shares.
1. New India Indus-tries 6,91,084 6,96,883 6,96,883 6,96,883
2.Cotton Fabrics Ltd.
(i) Ordinary shares 3,69,285 3,69,2853,69,2853,69,275
(ii) Preference shares 88,46388,46390,48390,483
Total 11,48,83211,54,63111,56,65111,56,651
Shares of other companies

Treated by the Income-tax Department as held for dealing in shares (stock-in-trade)...25,07,96930,13,51829,88,94636,07,063
Total investment as per balance sheet 36,56,80141,68,14941,45,59747,63,714"

It is true that the assets used by the assessee company in its share dealing are far more than that used by it for investment in the shares of the managed company. But then we have to bear in mind that we do not exhaust the total assets of the company by merely referring to the tangible assets used by it. In addition, we have to take into consideration the value of the managing agencies held by the assessee company. Looked that way, it cannot be said that the assets of the company, used in its share dealings are far more than its other assets. At any rate on the basis of the assets used, it cannot be concluded that the assessee's business consisted "wholly or mainly" in the dealing in investments.

735

It follows from the conclusions reached by us earlier, that our answer to the question before us must be the same as that given by the High Court. We not only agree with the conclusions reached by the High Court but also with premises on the basis of which those conclusions were reached.

In the result Civil Appeals Nos. 1313 to 1316 of 1971 are dismissed on merits with costs--one set of fees and Civil Appeals Nos. 2350-2353 of 1968 are dismissed as being not maintainable but without any order as to costs.

S. C. Appeals dismissed.

736