

PETITIONER:
COMMISSIONER OF INCOME-TAX, WEST BENGAL

Vs.

RESPONDENT:
MESSRS. JEEWANLAL LTD.

DATE OF JUDGMENT:
08/10/1953

BENCH:
DAS, SUDHI RANJAN
BENCH:
DAS, SUDHI RANJAN
SASTRI, M. PATANJALI (CJ)
BOSE, VIVIAN
HASAN, GHULAM
BHAGWATI, NATWARLAL H.

CITATION:
1953 AIR 473 1954 SCR 0

ACT:
Excess Profits Tax Act (XV of 1940), s.2(11)-Director controlled company -Definition-Directors authorised by another-Company holding majority of shares to vote in respect of the shares-- Company, whether director controlled.

HEADNOTE:
Ordinarily a company will be a, "company, the directors whereof have a controlling interest therein" for the purposes of the Excess Profits Tax Act, 1940, only if the directors thereof hold, and are entered in the share register as holders of, a majority of the vote-carrying shares of the company. It is not necessary that they must have a beneficial interest in such shares, but the mere fact that one of the directors of the company has been authorised by another company which held a majority of shares in the former company, to vote on its behalf in respect of the shares held by it, will not make the former company a director controlled company.

Glasgow Expanded Metal Co. Ltd. v. Commissioners of Inland Revenue (12 Tax Cas. 573), Commissioners of Inland Revenue v. B. W. Noble (12 Tax Cas. 911), Inland Revenue commissioners v. T. Bibby and Sons Ltd. (14 I.T.R. Suppl-7, 29 Tax Cas. 167), Commissioner of Income-tax v. Bipin, Silk Mills Ltd. (14 I.T.R. 344) and Commissioners of -Inland Revenue v. Hodgkinson (Salford) Ltd. (29 Tax Cas. 395) relied on. British American Tobacco Co. Ltd. v. Commissioners of Inland Revenue ([1943] A.C. 335) and New Shorrock Spinning and Manufacturing Co. Ltd. v. Commissioner of -Incometax, Bombay (18 I.T.R. 712) distinguished.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 78 of 1952.
Appeal from the Judgment and Order dated the 17th January, 1951, of the High Court of Judicature at Calcutta (Harries C.J. and Banerjee J.) in its Special Jurisdiction (Income-tax) in Income-tax Reference No. 50 of 1950.

C.K. Daphtary, Solicitor-General for India (G. N. Joshi, with him) for the appellant,

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N. C. Chatterjee (S. C. Majumdar, with him) for the respondent.

1953. October 8. The Judgment of the Court was delivered by DAS J.-This is an appeal from the judgment and order of a Bench of the Calcutta High Court delivered on a reference made by the Income-tax Appellate Tribunal under section 21 of the Excess Profits Tax Act, 1940, read with section 66(1) of the Indian Income-tax Act, whereby the High Court answered in the affirmative the question of law referred to it. The question referred was:

"Whether in the facts and circumstances of these cases, the Income-tax Appellate Tribunal was right in holding that the directors of the respondent company had a controlling interest in it as contemplated by section 2 (21) of the Excess Profits Tax Act."

The controversy arose between the parties during proceedings for assessment of excess profits tax for five chargeable accounting periods ending on the 31st December of each of the years 1939 to 1943.

The relevant facts which are not in dispute are these: The respondent company is a company incorporated in what was then British India having a capital of Rs. 3,600,000 divided into 360,000 shares of Rs. 10 each. The Aluminium Limited, a company incorporated in Canada, held 359,790 shares in the chargeable accounting periods ending on December 31, 1939, and December 31, 1940, and 359,600 shares in the chargeable accounting periods ending on December 31, 1941, December 31, 1942, and December 31, 1943. In exercise of the power given to it by article 105 of the articles of association of the respondent company, the Aluminium Ltd. appointed three permanent directors on the board of directors of the respondent company. Two of these directors eventually retired and only one, namely, Mr. L. G. Bash continued to be a director of the respondent company nominated by the Aluminium Ltd. Mr. L. G. Bash and the other directors had between them during the chargeable

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accounting periods ending on December 31, 1939, and December 31, 1940, only 210 shares and in the chargeable accounting periods ending on December 31, 1941, December 31, 1942, and December 31, 1943, 400 shares, Mr. L. G. Bash not having a single share during these last mentioned chargeable accounting periods. By a resolution passed by the directors of the Aluminium Ltd., Mr. L. G. Bash was appointed to vote and/or from time to time to appoint a special or general proxy to vote for and on behalf of the Aluminium Ltd. in respect of the shares held by it in the respondent company at all ordinary or extraordinary general meetings of the shareholders of the respondent company. Article 90 of the articles of association of the respondent company provides:-

"90. Where a company registered under the provisions of the Indian Companies Act or not is a member of this company a person duly appointed to represent such company at a meeting of this company in accordance with the provisions of section 80 of the Indian Companies Act, 1913, shall not be deemed to be a proxy but shall be entitled to vote for such company on a show of hands -and to exercise the same power on behalf of the company which he represents as if he were an individual member of this company including the power to appoint a proxy whether special or general and the production at the meeting of a company of such resolution appointing such

representative duly signed by one director of such company and by the secretary (if any) and certified by them or him as being a true copy of the resolution shall on production at the meeting be accepted by this company as sufficient evidence of the validity of his appointment."

Mr. L. G. Bash has at all material times been exercising the powers conferred by the above article as the representative of the Aluminium Ltd.

The claim of the respondent company was that it should be regarded as a company the directors whereof had a controlling interest therein, inasmuch as Mr. L. G. Bash, one of the directors, had the authority to exercise the voting power of the Aluminium Ltd. and,

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as such, could control the affairs of the respondent company and that in computing the standard profits the statutory percentage should be taken at 10 per cent. per annum and not at 8 per cent per annum. This contention was rejected by the Excess Profits Tax Officer. On appeal by the respondent company the Appellate Assistant Commissioner of Excess Profits Tax upheld the decision of the Excess Profits Tax Officer. The respondent company thereupon appealed to the Income-tax Appellate Tribunal "which reversed the decision of the Appellate Assistant Commissioner observing that in view of the power of attorney that was given to Mr. L. G. Bash by the Aluminium Ltd. there was no room for doubt that the respondent company, which was then the appellant before the Tribunal, was a director-controlled company. On the application of the Commissioner of Income-tax, the Appellate Tribunal referred the question of law herein before set out. By its judgment dated the 11th January, 1951, the High Court of Calcutta has answered the question in the affirmative. The Commissioner of Excess Profits Tax, West Bengal, has now come up on appeal to this court with a certificate under section 66-A (2) of the Indian Income-tax Act.

In common parlance a person is said to have "a controlling interest" in a company when such a person acquires, by purchase or otherwise, the majority of the vote-carrying shares in that company, for the control of the company resides in the voting powers of its shareholders. In this sense, the directors of a company may well be regarded as having "a controlling interest" in the company when they hold and are entered in the share register as holders of the majority of the shares which, under the articles of association of the company, carry the right to vote. [See Glasgow Expanded Metal Co., Ltd. v. Commissioners of Inland Revenue (1) and Commissioners of Inland Revenue v. B. W. Noble(2)]. It is not, however, necessary that in order to have "a Controlling interest" the person or persons who hold the majority of the vote-carrying shares must have a beneficial interest in the

(1) (1923) 12 Tax Cas. 573.

(2) (1926) 12 Tax Cas. 911.

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shares held by them. These persons may hold the shares as trustees and may even be accountable to their beneficiaries and may be brought to book for exercising their votes in breach of trust, nevertheless, as between them as shareholders and the company, they are the shareholders, and as such, have "a controlling interest" in the company. [See Inland Revenue Commissioners v. J. Bibby & Sons Ltd.(1) and Commissioner of Income-tax v. Bipin Silk Mills Ltd. (2)]. According to the facts found in the statement of the case the directors of the respondent company do not themselves hold the majority of shares which, on the contrary, are

registered in the name of the Aluminium Ltd. and, therefore, according to the principles discussed above, they cannot be said to have "a controlling interest" in the respondent company.

Learned counsel for the respondent company, however, contends, on the analogy of the reasonings adopted by the House of Lords in British American Tobacco Co. Ltd. v. Commissioners of Inland Revenue⁽³⁾ that although Mr. L. G. Bash does not hold the majority of shares and has no beneficial interest in the shares held by the Aluminium Ltd. in the respondent company and although he may be bound to cast the votes according to the directions of his principals, the Aluminium Ltd., and may be answerable to the latter if he acts in breach of his duty, nevertheless, as long as his authority is not revoked, as far as the respondent company is concerned, the majority of its vote-carrying shares are subject, directly or indirectly, to his will and ordering and, therefore, the directors of the respondent company in fact control its affairs at general meetings and as such have "a controlling interest" therein, no matter by what machinery or means that result has been effected. This line of argument found favour with the Appellate Tribunal and the High Court. We are unable, with all respect, to accept this argument as sound, for this argument appears to us to oversimplify the position. Assuming, but without, expressing any final opinion as

(1) [1946] 14 I.T.R. (Suppl.) 7; [1945] 1 All E.R. 667; 29 Tax Cas. 167,

(2) A.I.R. 1947 Bom. 45; 14 I.T.R. 344.

(3) [1943] A.C. 335; 11 I.T.R. (Suppl.) 29; 29 Tax Cas. 49, 194

to, the correctness of the decision in the last mentioned case, we have no doubt that the analogy is inapt, for the principle of that decision can have no application to the case before us. In the case of directors, who hold the majority of shares as trustees they, so far as the company is concerned, are the registered shareholders and the right to vote is vested in them, although as between them and their beneficiaries the beneficial interest is -vested in the latter. They are the registered holders of the shares and the votes they cast are their own votes. That case is entirely different from the case of directors who are only the agents of the holders of the majority of shares. When a shareholder holding the majority of shares authorises an agent to vote for him in respect of the shares so held by him, the agent acquires no interest, legal or beneficial, in the shares. The title in the shares remains vested in the shareholder. The shareholder may revoke the authority of the agent at any time. In spite of the appointment of the agent the shareholder may himself appear at the meeting and cast his votes personally. Therefore, the shares being always subject to his will and ordering, the controlling interest which the holder of the majority of shares has never passes to the agent. Let us take the facts of the present case. Under article 90, when Mr. L.G. Bash as agent of the Aluminium Ltd. attends a general meeting of the respondent company he has to produce the resolution of his principals authorising him to cast the votes of his principals. The votes he casts are not his votes but are the votes of the Aluminium Ltd. In such a situation, in the eye of the law, the controlling interest remains vested in the Aluminium Ltd. and is at no time vested in Mr. L. G. Bash. The shares in question which give the controlling interest are neither held by Mr. L. G. Bash nor are they subject, directly or indirectly, to his will and ordering,

and, therefore, he cannot, applying either of the tests mentioned above, be said to have a controlling interest. The decision of the Court of Appeal in Commissioners of Inland Revenue v. James Hodgkinson (Salford) Ltd.(1) (1) (1949) 29 Tax Cas. 395.

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appears to us to be apposite. It is unfortunate that the last mentioned case was not brought to the notice of the High Court before the judgment under appeal was delivered.

Dissent has been expressed in the judgment under appeal from the recent decision of the Bombay High Court in New Shorrock Spinning and Manufacturing Co. Ltd. v. Commissioner of Income-tax, Bombay(1). The facts of that case are entirely different from the facts of the case before us and that decision has no manner of application to the present case. It is, therefore, unnecessary for us to discuss or express any opinion as to whether the observations to be found in the judgment in that case are or are not well-founded.

For reasons stated above, we accept this appeal and hold that the answer to the question referred by the Appellate Tribunal to the High Court should be in the negative. The respondent company must pay the costs of the appellant in this court as well as in the High Court.

Appeal allowed. Agent for the appellant: G. H. Rajadhyaksha. Agent for the respondent: S. C. Banerjee.