
(1955) 10 KL CK 0007
In the High Court Of Kerala
Case No : O.P. No. 75 of 1955

Asok Textiles Ltd.

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 31-10-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 226
Finance Act, 1952 — Section 2
Income Tax Act, 1922 — Section 15, 18(3D), 18(3E), 18A(3), 18A(8)

Citation : AIR 1955 Ker 124

Hon'ble Judges : N. Varadaraja Iyengar, J; Joseph Vithayathil, J

Bench : Division Bench

Advocate : P. Govindan Nair, G.B. Pal, K.V.R. Shetoi and P.K. Kurien, for the Appellant; G. Rama Iyer, for the Respondent

Judgement

Varadaraja Iyengar, J.—This petition has come before us under an order of reference which runs as follows:

This petition is filed under Article 226 of the Constitution by the Asok Textiles Ltd., Alwaye. It calls in question certain rectification Proceedings purported to be taken u/s 35, Indian Income Tax Act by Respondent 1 who is the Income Tax Officer, Alwaye. Respondent 2 is the Commissioner of Income Tax for the region who confirmed the orders of Respondent 1.

"2. The Petitioner is a public limited Company carrying on the business of spinning yarn in their mill at Alwaye. They started business in January 1951 and we are concerned with their first assessment year 1952-53 in respect of the accounting period ended with 31-12-1951. The assessment order is dated 22-2-1953 and is filed as Ex: A.

The net assessable Income was fixed at Rs. 1,43,083. There were two rectifications of this order, one on 25-1-1954 and the other on 13-8- 1954. The first rectification was on the basis that additional Income Tax on "excess

dividends" as contemplated in the schedule to the Indian Finance Act of 1952 was omitted to be levied. The excess dividend was in the result fixed at Rs. 4,68,001 and the additional Income Tax levied thereon at the rate of 1 anna in the rupee amounted to Rs. 29,250-1-0.

The second rectification proceeded on the basis that the additional Income Tax should have been levied at the rate of 5 annas in the rupee instead of 1 anna. The second rectification also took in the levy of penal interest u/s 18A(8). The net result of the rectification orders was the enhancement of income - tax levied on the Petitioner by an amount of Rs. 1,46,250-5-0.

"3. The question is raised in these proceedings that the Income Tax Officer had no jurisdiction in the circumstances whatever to invoke, and that repeatedly, the provisions of Section 35, Income Tax Act of 1922.

The contention is also raised on the merits that the question of "excess dividend" did not arise because the company had commenced business only in 1951 and there was no preceding years to its previous year in which any income could possibly have been earned and that even so the assessment at the rate of 5 annas in the rupee was totally unjustified.

4. The question turns upon the proper interpretation of the provisions in para B part I, Schedule I, Indian Finance Act of 1951 which have been made to apply for 1952 and also the applicability of Section 35, Income Tax Act to circumstances of the case.

These are difficult and interesting questions which seem to have arisen here for the first time. It is desirable therefore that the matter is heard and disposed of by a Bench. I, therefore, refer the petition herein to a Division Bench.

2. To appreciate the questions involved the following further facts may also be stated. The Petitioner company filed its return in connection with its assessment to Income Tax by the Income Tax Officer, Alwaye District, for the year 1952-53 declaring an income of Rs. 3,21,284. The assessment order however computed its total income at Rs. 10,61,511 and arrived at the net income of Rs. 3,26,101 after deduction of depreciation ordinary and extra and allowed under law.

The net assessable income was then ascertained as Rs. 1,47,083 after deducting an allowance u/s 15(c) of six per cent on the computed capital of Rs. 29,83,687. The total tax payable by way of Income Tax, super charge and corporation tax was then fixed at Rs. 63,889-3-0. An amount of Rs. 5,000 already paid as per Section 23(b) assessment was given credit to and the balance of Rs. 58,839-3-0 was directed to be paid on or before 26-2-1953. This assessment order is dated 22-2-1953 and is filed in the case as Ex. A.

3. The first rectification u/s 35, Income Tax Act was made by the succeeding Income Tax Officer, Respondent 1 herein by Ex. B order dated 25-1-1954 on the basis that additional Income Tax on "excess dividend" which was contemplated in the Schedule to the Indian Finance Act 1952 had been omitted to be levied.

Such excess dividend was found on calculation to come to Rs. 4,68,001 being the major portion of the total of Rs. 4,72,415 declared as dividend. Additional Income Tax at 1 anna in the rupee amounting to Rs. 29,250-1-0 was thereupon levied and directed to be paid on or before 20-2-1954.

4. The second rectification took place under Ex. C order passed by Respondent 1 on 13-8-1954. That order proceeded on the basis that in the rectification Proceedings carried out under Ex. B the tax was by mistake levied at the rate of one anna instead of five annas in the rupee. The excess tax duo was calculated as Rs. 1,17,000-4-0.

Occasion was also taken during these proceedings to levy penal interest u/s 18A(8) on Rs. 1,68,111-6-0 being the 80 per cent of the total amount of Income Tax as worked out by the two rectifications aforementioned, calculated at 4 per cent and for the period 1-4-1952 to 22-2-1953 i.e., the date of the original assessment. This penal interest amounted to Rs. 6068-8-0. The total demand newly levied thus came to Rs. 1,23,060-12-0 and this amount was directed to be paid on or before 20-9-1954.

5. As the rectification had the effect of enhancing the tax Payable by the Assessee notice had been issued calling upon the Assessee to show cause. The objection then raised by the company was on a two-fold basis, one in law, that Section 35 of the Act was being improperly invoked and the other on facts that the Department had no case on the merits.

On this latter aspect it was contended that the provisions in the Finance Act clearly pre-supposed the existence of undistributed profits of one or more years immediately preceding the previous year and in the absence of any business or even the existence of the concern during the year or years preceding the previous year there was no scope for the application of the provision for enhancement of tax based upon the so-called excess dividend.

The alleged declaration of dividend to the extent of Rs. 4,72,415 was also disputed. As regards the levy of penal interest it was pointed out that the profits during 1951 did not arise as a result of the normal working of the mill but it was a case of unexpected profits which could not be anticipated and any advance tax paid for. But these objections were over-ruled when the rectifications were effected.

6. The Assessee subsequently took up the matter in revision before Respondent 2 - Commissioner of the Income Tax but the Commissioner by his orders dated 12-1-1955 filed as Exs. F and G refused to interfere and hence this petition. The same grounds as were urged before the Income Tax authorities are relied on in the affidavit filed in this Court in support of the petition.

7. Respondent 1 Income Tax officer in his counter-affidavit before this Court has questioned the allegation of fact made in the Petitioner's affidavit that dividend had not really been declared by the company. It is averred on the other hand, on

the authority of the directors" report that the total amount mentioned in the order had been in fact declared as dividend and that in consequence the proceedings taken by way of rectification were perfectly justified. It was also claimed that the orders impugned were not vitiated by any irregularity or want of jurisdiction.

8. Mr. Govindan Nair learned Counsel for the Petitioner in opening the case did not question the averment of fact made in the counter- affidavit of the Income Tax Officer as to the declaration of dividend by the company to the extent of Rs. 4,72,415 as per the directors report, but he said there were other questions of fact which were not admitted but which were required to be ascertained for the proper application of the relevant provisions of the Finance Act and further that the interpretation placed upon those provisions of the Finance Act by the Assessee was the correct one.

He pressed that this Court was not called upon to decide finally one way or the other either as to the exact factual setting or the real scope or the relevant provisions in the Finance Act but only to decide whether Section 35 was properly invoked by Respondent 1, Income Tax authority, in the circumstances and at that stage.

9. We will now proceed to examine the provisions of the Finance Act relied on by the Department for the exercise of their jurisdiction u/s 35, Income Tax Act. The Finance Act 29 of 1952 which governed the instant assessment did not bring about any change in the financial structure that existed in the previous year.

We have therefore to refer to the provisions of the Finance Act 23 of 1951 as suitably modified with reference to Section 2 of Act 29 of 1952. Part I, Schedule I to Act 23 of 1951 may be taken therefore to have provided for the rate of Income Tax which was to be charged as per Section 2 of the Act 29 of 1952. Item B of this Part dealt with the case of companies. The normal rate of Income Tax was fixed as 4 annas in the rupee on the whole of the income.

Then followed a "proviso dealing with special case of companies which, in respect of their profits liable to tax under the Income Tax Act for the year ending the financial year in question, had made the prescribed arrangements for the declaration and payment of the dividends payable out of such profits and had deducted super-tax from the dividends in accordance with the provisions of Sub-section (3-D) or (3-E) of Section 18 of that Act. Two differentiated categories in the matter of such declaration and payment of the dividends were classified as follows:

(i) where the total income, as reduced by seven annas in the rupee and by the amount, if 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 year ending on, 31-3-1952, and no order has been made under Sub-section (1) of Section 23-A, Income Tax Act, a rebate shall be allowed, at the rate of one anna per rupee on the amount

of such excess;

(ii) where the amount of dividends referred to in Clause (1) above exceeds the total income as reduced by seven annas in the rupee and by the amount, if any, exempt from Income Tax, there shall be charged on the total income an additional Income Tax equal to the sum, if any by which the aggregate amount of Income Tax actually borne by such excess (hereinafter referred, to as (the excess dividend")) falls short of the amount calculated at the rate of five annas per rupee on the excess dividend.

The expression "dividend" was then defined for the purpose of the proviso and then followed at detailed provision as to the determination of the aggregate amount of Income Tax actually borne by the excess dividend for the purpose of category (ii) as above classified. This provision consisted of two sub-clauses as follows:

(i) the excess dividend shall be deemed to be out of the whole or such portion of the undistributed profits of one or more years immediately preceding the previous year as would be just sufficient to cover the amount of the excess dividend and as have not likewise been, taken into account to cover an excess dividend of a preceding year;

(ii) such portion of the excess dividend as is deemed to be out of the undistributed profits, of each of the said years shall be deemed to have borne tax,-

(a) if an order has been made under Sub-section (1) of Section 23-A, Income Tax Act, in respect, of the undistributed profits of that year, at the rate of five annas in the rupee, and

(b) in respect of any other year, at the rate applicable to the total income of the company for that year reduced by the rate at which rebate if any, was allowed on the undistributed profits.

10. The proviso in item B of Part I, Schedule I, Finance Act referred to above, is certainly not quite simple. But it seems clear that the Legislature was anxious that companies should not act in any spendthrift manner and should plough back their profits into the industry. Therefore an incentive as it were, was held out to the companies not to distribute all the profits they had made to the shareholders and such incentive took the form of rebate as provided for in category (1) above.

But if the dividends declared exceeded particular ceiling fixed, then additional tax was to be levied and special provision was made as to the basis of the rate to be adopted in such cases. For our present purpose it is necessary and perhaps enough to note that the application of the proviso depends upon the fulfillment of an essential preliminary, that is to say, there must be a declaration of dividends payable, not out of any profits, but out of the specific profits referred to in the first part of the proviso viz., profits liable to tax under the Income Tax Act for the

year ended 31-3-1953.

11. In this case the dividend declared amounted to Rs. 4,72,415. The question is whether this came out of the profits liable to tax under the Income Tax Act for the year in question within the meaning of the above condition. The profits liable under the assessment order came to Rs. 1,47,083 only and could, at best account for part only of the dividend declared.

One could not also be certain whether this net assessable income of Rs. 1,47,083 did account at all for the payment of the dividend, for the allowances granted to the company by way of depreciation and further by way of allowance u/s 15(c) could by themselves fully account for the entire dividend.

That is to say, it is impossible to say definitely whether the "excess dividend" as declared was paid out of the taxable profits of the year of, assessment or, to put it in Anr. way, whether an essential preliminary to the applicability of the proviso has been fulfilled at all in the case on hand. The imposition of additional tax on the footing that there was "excess dividend" declared and paid was therefore without legal Justification.

This conclusion, appears prima facie to follow from our reading of one relevant provision in the Finance Act. Indeed it is unnecessary for us to pronounce definitely on the full scope of the proviso in question seeing that the only question is whether there was an undoubted case apparent on the face of the record for purpose of the Income Tax Officer to exercise jurisdiction within the meaning of Section 35, Income Tax Act.

12. Section 35, Income Tax Act, it should be remembered, provides for the rectification of what are only mistakes apparent on the record. As observed in - The Commissioner of Income Tax Vs. RM. M. SM. SV. Sevugan alias Manickavasagam Chettiar, , the section has only a limited application and cannot enable the Income Tax authorities to revise or review an order generally.

The mistake to be rectified should be one which is apparent from the record so much so, an error in law or a wrong procedure adopted in the assessment proceedings would not be a mistake, within the meaning of the section. The clear analogy to this section is the provision in Order 47, Rule 1, CPC for grant of review on ground of "mistake or error apparent on the face of the record", i.e., an evident error which does not require, any extraneous matter to show its incorrectness.

The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face Of the record. See Chitaley's Code of Civil Procedure, Vol. III, pp. 35-49-50, 5th Edn.

The applicability or otherwise of the proviso in item B of Part I of Schedule I,

Indian Finance Act, 1951, to particular sets of facts, is by itself a complex question which cannot be said to be apparent on the face of the record. In our opinion the necessary foundation had not been established in this case, by the Income Tax authorities for purpose of their exercise of powers under the proviso and therefore a "fortiori" for purpose of a resort to Section 35, Income Tax Act.

In the view we have taken it has become unnecessary for us to consider how far the existence of a preceding year to a previous year is necessary or not for the purpose of the applicability of Clause (ii) of the proviso, It has also become unnecessary for us to say whether the second rectification order to the extent it increased the rate already adopted was unjustified either on the ground that it was a second attempt at rectification or on the ground that the excess rate adopted was arbitrary.

13. The levy of penal interest u/s 18-A(8) for failure to pay advance tax u/s 18-A(3), at the second rectification stage is in our judgment, also unsustainable. Section 18-A(3) provided that if a person had not been previously assessed at all, he must, without beings served with any order of the Income Tax Officer make advance payment of tax where his totals income assessable for the next financial year was likely to exceed Rs. 6000.

The question depended therefore upon a question of fact viz., whether it was possible for the Assessee in the circumstances to anticipate the accrual of an assessable income within particular time. Now the assessment order itself mentions that in certain transactions the company was able to make some unexpected profits, the staple fibre purchased by them at Rs. 1-12-0 per pound being sold, due to a sudden increase in price at Rs. 4-12-0.

The order also mentions that the business of spinning yarn so far as the Assessee's mill was concerned commenced in July 1951 and the accounting year in question closed in December 1951 leaving only a period of 5 months from the commencement. The existence of an expectation in the mind of an Assessee is without doubt a question of fact though in particular cases it may be difficult to ascertain.

Such an ascertainment which is necessary for the purpose of the application of Section 18-A(3) cannot in our judgment be said to be a matter arising in the exercise of a jurisdiction u/s 35 at least in the case in question. It is difficult in any event to appreciate the stand taken by the Department that the anticipation of the Assessee should extend to liability to pay tax on "excess dividends" within the meaning of the proviso to the Finance Act, a matter which the learned officer was himself unable to Judge at the first blush even after full scrutiny of all the records.

It seems to us that the excess taxation by way of penalty resorted to at the second stage in the rectification proceedings was a total abuse of process and not justifiable to any the least extent.

14. We are clear that the proceedings for rectification taken by the first Respondent In- come-tax Officer and filed in the case as Exs. B and O are lacking in jurisdiction and cannot stand. The orders in revision passed by Respondent 2 filled in the case as Exs. F and G confirming the rectification orders as above are also unsustainable. We therefore grant a writ of certiorari quashing the abovesaid proceedings as prayed for. The Petitioner will get his costs from the Respondents. Advocate's fee Rs. 150/-.