
(1964) 01 MAD CK 0017

In the Madras High Court

Case No : Tax Cases No's. 47 and 66 of 1962

Cement Distributors Private Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-01-1964

Acts Referred:

Income Tax Act, 1961 — Section 28(1)(c), 28(11)(c), 66(1), 66(2)

Citation : (1964) ILR (Mad) 449 : (1966) 60 ITR 586

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

Srinivasan, J.—The assessee, Messrs. Cement Distributors Private Limited, disclosed the total profits for the account year ended 31st of

October, 1953, relevant to the assessment year 1954-55 as Rs. 2,10,941. The directors declared a dividend of Rs. 81,150. At the time of

assessment, however, the Income Tax Officer determined the income to be Rs. 3,91,143. This increase was due to the disallowance of a claim to

an alleged trading loss of Rs. 2,12,691. This loss was held to be not genuine. Against this disallowance there was an appeal to the Appellate

Assistant Commissioner and a further appeal to the Tribunal both of whom held that the transaction leading to the alleged loss were unreal and had

been recorded with an ulterior motive. An application to make a reference u/s 66(1) of the Act was dismissed. When the matter came before this

court u/s 66(2) of the Act, this court to be served that the transactions had been found to be bogus ones and, consequently, the loss claimed as a

result of these transactions would equally be a sham one. In so far as the disallowance was concerned, there the matter ended.

2. At the time of making the assessment, the Income Tax Officer issued a notice

u/s 28(11)(c) of the Income Tax Act. After hearing the assessee the Income Tax Officer held that by the device indicated, the assessee had deliberately understated the real income. He accordingly imposed a penalty of Rs. 40,000 as against the maximum penalty that could be imposed under the section of Rs. 1,28,000 and odd. Against this order, an appeal was taken to the Appellate Assistant Commissioner and again a further appeal to the Tribunal, but the levy of the penalty was confirmed.

3. In connection with the imposition of the penalty, the following question stands referred to us :

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that section 28(1)(c) of the Act is attracted ?

4. On the determination of the true income of the assessee at a much higher figure than that returned, the Income Tax Officer found that on the application of section 23A to the case, there had been a lower declaration of dividend than what the provisions of the Act required. He computed that a sum of Rs. 2,29,923 should have been declared as dividend and deducting the sum of Rs. 81,150 already declared, he held that the sum of Rs. 1,48,773 should be deemed to have been distributed among the shareholders as dividend. This order of the Income Tax Officer was confirmed in successive appeals, and finally, on the application of the assessee, the Appellate Tribunal refereed the following question for the determination of this court :

Whether the sum of Rs. 2,12,691 held as sham or bogus loss or, in the alternative, capital loss, should have been excluded from the assessee-

company's profits for the purpose of determining whether the payment of a larger dividends other than that declared by it would be unreasonable ?

5. It seems to so that on the facts as stated, and in view of the earlier proceedings in which the question of the alleged trading loss was examined by the department, the Tribunal and this court, the contention of the assessee that it did not deliberately understate its income can hardly be accepted. Though the question whether the transactions leading to this alleged loss were genuine has already been dealt with in the earlier proceedings, it is perhaps desirable to set out the substance of these transactions for the purpose of the present reference. The assessee-company had purchased a large number of shares of the face value of Rs. 10 each of the

Patiala Biscuit Manufacturer Limited, Patiala. These purchases were in the years 1951, 1952 and 1953. In July, 1953, well over 26,000 of these shares were sold at the cost price of Rs. 10 per share to certain companies. Within three months after the last of such sales, the assessee sold 21,505 shares to Delhi Glass Works Limited, Delhi, at one anna per share, and it is the loss resulting from this transaction that was claimed as a trading loss. In dealing with the appeal arising from the claim to trading loss, the Appellate Tribunal examined the balance-sheet of the Patiala Biscuit Manufacturers. It found that that company was a losing concern, that it was virtually on the rocks and that its shares were not even being quoted on the stock exchange. It was somewhat surprising therefore that the company should have at all purchased these shares in those circumstances. It was also noticed that, even after the purchase, there was not transfer of the shares in the assessee's name. When the company had been making such heavy investments in these shares, the circumstances in which these shares depreciated so much in value from Rs. 10 to one anna per share were not satisfactorily explained. It was found that the alleged sales by the assessee-company were to certain allied concerns, and that no one unconnected with the assessee-company belonged was a party to this sale transaction. It was found that one of the purchasers, Messrs. Vishnu Agencies, to whom the assessee-company sold 21,000 shares on June 30, 1953, at Rs. 10 per share, itself purported to dispose of those very shares at one anna per share to Delhi Glass Works Limited, practically on or about the same date as the date on which the assessee-company sold 21,505 shares to that Delhi concern at the same price of one anna per share. These and other features served to indicate that the transactions of sale were not genuine and were only engineered for the purpose of bringing to account a record of a loss in trading transactions to be set off against the profit so as to avoid payment of Income Tax, and it was this feature that was finally accepted by this court in the proceedings u/s 66(2) of the Act.

6. We are unable to see any rational basis for the contention that section 28(1) (c) does not stand attracted in the present case. This provision applies where the assessee has deliberately furnished inaccurate particulars of his income and the Income Tax Officer is so satisfied. It has been found that the assessee recorded bogus transactions in order to display its

income at a much lesser figure. That is undoubtedly a case where the assessee has deliberately furnished inaccurate particulars. The wording of the section is plain and the circumstances of the case clearly warrant the levy of penalty u/s 28(1)(c) of the Act.

7. In so far as the relevant question is concerned, it is answered in the affirmative and against the assessee.

8. The next point to be examined is the contention of the assessee that notwithstanding the consistent finding, including that of this court, that the

transactions were bogus ones and that the loss displayed was sham, that the alleged loss should still be excluded in deciding the applicability of

section 23A of the Act. We agree that it is the true commercial profits that have to be had regard to in deciding whether the assessee could have

paid a larger amount of dividend. Where the definite findings is that the sum of Rs. 2,00,000 and odd claim as the trading loss of the assessee was

not real at all, in order to arrive at the true profits, that is to say, even profits regarded in a commercial sense, this alleged loss would have to be

added back; and after making such addition, the assessing authority reached the conclusion that such profits would be very nearly Rs. 4,00,000.

The computed Income Tax and super-tax were deducted therefrom and the statutory percentage which should have been paid as the dividend was

worked out. There is no dispute before us with regards to the figures. The only question that was argued was that despite the findings against the

assessee that we have referred to, this amount must still be ignored in computing the reasonable quantum of dividends that could have been paid by

the assessee. We find ourselves unable to accept this contention.

9. Our attention has been invited to a decision of this court to which one of us was a party. It is Gobald Motor Service Ltd. v. Commissioner of

Income Tax. That was a case where an amount claimed as depreciation was disallowed and added back in ascertaining the assessable income;

certain suppressed profits were also added back. The question that this court had to consider was whether the disallowed amount so added back

could be regarded as part of the commercial profits, and whether the profits revealed by the books of account should be treated as profits for the

application of section 23A. While the distinction between the assessable income of a company and the profits made by it was held to be a real one,

this court decided that the Income Tax Officer has jurisdiction in applying section 23A of the Act to add any amount which he discovers to be

suppressed profits in order to arrive at the final figure of profits. Such suppressed profits was also distinguished for this purpose from disallowed

depreciation added back to the profits.

10. We are satisfied that the circumstances of the case fully justify the application of section 23A of the Act. This question is also answered against

the assessee. The assessee will pay the costs of the department. Counsels fee Rs. 250.