

(1978) 11 CAL CK 0016

In the Calcutta High Court

Case No : Income-tax Reference No. 153 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Avery India Ltd.

RESPONDENT

Date of Decision : 20-11-1978

Acts Referred:

Companies (Profits) Surtax Act, 1964 — Rule 1

Citation : (1980) 124 ITR 856

Hon'ble Judges : Dipak Kumar Sen, J;Bimal Chandra Basak, J

Bench : Division Bench

Advocate : Ajit Sengupta and B.K. Naha, for the Appellant;Debi Pal and R.N. Dutta, for the Respondent

Judgement

Bimal Chandra Basak, J.—The following question arises for determination by this court in this reference :

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sum of Rs. 9 lakhs claimed as reserve for super profits tax was a reserve within the meaning of Rule 1 of the Second Schedule to the Companies (Profits) Surtax Act, 1964, and should be included in the computation of capital for the purpose of the said Act ? "

2. We ought to point out that this question has been referred at the instance of the revenue. There is another reference arising out of another application made by the assessee. A separate paper book has been filed in respect of the same and by our order we have directed the same to appear as a separate reference. We are concerned in this reference with only the question referred to above.

3. The facts admitted and/or not disputed are as follows : There is an Act called the Super Profits Tax Act, 1963, which received the assent of the President on the 4th May, 1963. The relevant provisions of the said Act are as follows :

Section 4 :

" Charge of tax.--Subject to the provisions contained in this Act, there shall be charged on every company for every assessment year commencing on and from the 1st day of April, 1963, a tax (in this Act referred to as the super profits tax) in respect of so much of its chargeable profits of the previous year or previous years, as the case may be, as exceed the standard deduction, at the rate or rates specified in the Third Schedule. "

Second Schedule to the Act ?

" 1. Subject to the other provisions contained in this Schedule, the capital of a company shall be the sum of the amounts, as on the first day of the previous year relevant to the assessment year, of its paid up share capital and of its reserve, if any, created under the proviso (b) to Clause (vib) of Sub-section (2) of Section 10 of the Indian Income Tax Act, 1922 (11 of 1922), or under Sub-section (3) of Section 34 of the Income Tax Act, 1961 (43 of 1961), and of its other reserves in so far as the amounts credited to such other reserves have not been allowed in computing its profits for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or the Income Tax Act, 1961 (43 of 1961), diminished by the amount by which the cost to it of the assets the income from which in accordance with Clause (iii) or Clause (vi) or Clause (vii) of Rule 1 of the First Schedule is not includible in its chargeable profits, exceeds the aggregate of-

(i) any money borrowed by it which remains outstanding ; and

(ii) the amount of any fund, any surplus and any such reserve as is not to be taken into account in computing the capital under this rule.

Explanation 1.--A paid up share capital or reserve brought into existence by creating or increasing (by revaluation or otherwise) any book asset is not capital for computing the capital of a company for the purposes of this Act.

Explanation 2.--Any premium received in cash by the company on the issue of its shares standing to the credit of the share premium account shall be regarded as forming part of its paid up share capital.

Explanation 3.--Where a company has different previous years in respect of its income, profits and gains, the computation of capital under Rule 1 and Rule 2 of this Schedule shall be made with reference to the previous year which commenced first. "

4. This Bill is dated 28th February, 1963. I ought to point out that by Section 35 of the Finance Act, 1964, which came into effect on the 28th April, 1964, there is discontinuance of the Super Profits Tax Act, 1963. On 2nd of May, the Surtax Act, 1964, received the assent of the President.

5. The relevant provisions of the 1964 Act are as follows : Section 2(5) :

" " Chargeable profits " means the total income of an assessee computed under the Income Tax Act, 1961 (43 of 1961), for any previous year or years, as the case may be, and adjusted in accordance with the provisions of the First

Schedule ;.....

(8) " statutory deduction " means an amount equal to ten per cent. of the capital of the company as computed in accordance with the provisions of the Second Schedule, or an amount of two hundred thousand rupees, whichever is greater :

Provided that where the previous year is longer or shorter than a period of twelve months, the aforesaid amount of ten per cent. or, as the case may be, of two hundred thousand rupees shall be increased or decreased proportionately :

Provided further that where a company has different previous years in respect of its income, profits and gains, the aforesaid increase or decrease, as the case may be, shall be calculated with reference to the length of the previous year of the longest duration.

Section 4 :

" Charge of tax.--Subject to the provisions contained in this Act, there shall be charged on every company for every assessment year commencing on and from the 1st day of April, 1964, a tax (in this Act referred to as the surtax) in respect of so much of its chargeable profits of the previous year or previous years, as the case may be, as exceed the statutory deduction, at the rate or rates specified in the Third Schedule,

5. Return of chargeable profits.--(1) In the case of every company whose chargeable profits assessable under this Act exceeded during the previous year the amount of statutory deduction, its principal officer, or where in the case of a non-resident company any person has been treated as its agent u/s 163 of the Income Tax Act, such person, shall furnish a return of the chargeable profits of the company during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, before the 30th day of September of the assessment year :

Provided that on an application made in this behalf, the Income Tax Officer may, in his discretion, extend the date for the furnishing of the return....."

Rule 1 :

" Subject to the other provisions contained in this Schedule, the capital of a company shall be the aggregate of the amounts, as on the first day of the previous year relevant to the assessment p1 year, of-

(i) its paid-up share capital ;

(ii) its reserves, if any, created under the proviso (b) to Clause (vib) of Sub-section (2) of Section 10 of the Indian Income Tax Act, 1922 (XI of 1922), or under Sub-section (3) of Section 34 of the Income Tax Act, 1961 (XLIII of 1961) ;

(iii) its other reserves as reduced by the amounts credited to such reserves as have been allowed as a deduction in computing the income of the company for the purposes of the Indian Income Tax Act, 1922 (XI of 1922), or the Income Tax

Act, 1961 (XLIII of 1961);

(iv) the debentures, if any, issued by it to the public I Provided that according to the terms and conditions of issue of such debentures, they are not redeemable before the expiry of a period of seven years from the date of issue thereof ; and

(v) any moneys borrowed by it from Government or the Industrial Finance Corporation of India or the Industrial Credit and Investment Corporation of India or any other financial institution which the Central Government may notify in this behalf in the Official Gazette or any banking institution (not being a financial institution notified as aforesaid) or any person in a country outside India :

Provided that such moneys are borrowed for the creation of a capital asset in India and the agreement under which such moneys are borrowed provides for the repayment thereof during a period of not less than seven years.

Explanation.--For the removal of doubts it is hereby declared that any amount standing to the credit of any account in the books of a company as on the first day of the previous year relevant to the assessment year which is of the nature of item (5) or item (6) or item (7) under the heading " RESERVES AND SURPLUS " or of any item under the heading " CURRENT LIABILITIES AND PROVISIONS " in the column relating to " LIABILITIES " in the " FORM OF BALANCE-SHEET " given in Part I of Schedule VI to the Companies Act, 1956 (1 of 1956), shall not be regarded as a reserve for the purposes of computation of the capital of a company under the provisions of this Schedule. "

6. In this particular case, the ITO excluded the reserve for super profits tax amounting to Rs. 9 lakhs from the computation of capital for the purpose of determining the statutory deduction from the chargeable profits of the assessee under this Act. The assessee appealed to the AAC. It was submitted on behalf of the revenue that the reserve for super profits tax should not have been excluded. The AAC did not agree with the aforesaid contention. He held that the above amount was in the nature of a provision and as such could not be considered for computation of capital. He, therefore, held that the ITO was justified in not including the aforesaid sum in the capital base for the purpose of determining the standard deduction under the Act.

7. The assessee appealed to the Tribunal, The Tribunal accepted the assessee's contention. From the reference, it appears that it was not denied before the Tribunal that the Super Profits. Tax Act came on the statute book after January 1, 1963. The Tribunal observed that if that was the position then it could not be said that on that day the assessee had a liability towards super profits tax though it was a different thing that the Act coming after January 1, 1963, made the profits of the calendar year 1962 taxable in a retrospective manner. In the opinion of the Tribunal that did not convert an amount otherwise to be treated as a reserve into a provision. It, therefore, directed the ITO to include the amount of Rs. 9 lakhs also in the computation of the assessee's capital as in its opinion it was actually in the nature of a reserve on the first day of the previous year relevant

to the assessment year under reference. Hence, this reference.

8. On behalf of the revenue, Mr. Sengupta has submitted that this amount cannot be treated as a reserve but it must be treated as a provision for taxation. Mr. Sengupta in this connection has placed reliance on the case of Braithwaite and Co. (India) Ltd. Vs. Commissioner of Income Tax, . The Bill was there at the relevant time. Therefore, it must be treated as a known contingent liability and a known contingent liability cannot be treated as a reserve.

9. Dr. Pal has submitted that at the time when the accounts were finalised the Bill did not receive the assent of the President and there was no Act fixing any liability. He has pointed out that the finding of the Tribunal is that the reserve for super profits tax as on January 1, 1963, was created on April 3, 1963, or a little earlier when the accounts for the accounting year 1962 were finalised and signed. Though the Bill might be introduced by that time it became the Act of this country only on May 4, 1963, when it received the assent of the President. Accordingly, he has submitted that there was no liability at the relevant point of time. He has distinguished the Braithwaite and Co. (India) Ltd. Vs. Commissioner of Income Tax, cited by Mr. Sengupta. In this connection, he has also drawn our attention to various other decisions, namely, Indian Steel and Wire Products Ltd. Vs. Commissioner of Income Tax, , Commissioner of Income Tax and Super Profits Tax Vs. Burn and Co. Ltd., and Duncan Brothers and Co. Ltd. Vs. Commissioner of Income Tax, .

10. The admitted position in this case is that if this amount cannot be treated as a reserve then this has got to be excluded for the purpose of computation of basic capital for the purpose of ascertaining the standard deduction. There is no dispute regarding this. Therefore, the only question is whether it is to be treated as a reserve. What is known as reserve has been discussed in the various decisions of this court and also the Supreme Court. In the present case, we are not in a position to accept that on the relevant date April 3, 1963, there was any known liability, whether contingent or otherwise. There was no Act at that point of time. Merely there was a Bill. A Bill might or might not be changed into an Act. We are unable to accept the contention of the revenue that the Bill must be treated as a contingent liability. A Bill introduced in Parliament cannot create any liability, contingent or otherwise. In the present case, when this amount was earmarked on April 3, 1963, or a little earlier as found by the Tribunal there was no such Act. In Braithwaite and Co. (India) Ltd. Vs. Commissioner of Income Tax, , a Division Bench of this court held as follows (p. 832) :

" It cannot be disputed that the accounts of the company may be made up for a year up to a particular date at a later point of time. A company is entitled in law to finalise later as to what was the position of its accounts up to a particular earlier date. A company can similarly finalise its appropriations for various purposes including reserves and provisions at a later date with retrospective effect. Such determination to appropriate must be related back to the day up to which the accounts are finalised and such determination including appropriations

towards reserve and provision must be treated as being effective from that date.

It appears to us that once such determination and appropriation are made the same finally determine the character of the allocation and if it relates back to an earlier point of time then it relates back effectively in all respects and retains its nature and character.

A company can take the advantage of retrospective effect of its determination of appropriations but it cannot then contend that by being retrospectively effective the nature of the appropriation will change. If the resolution of the directors to appropriate for surtax in August, 1964, is effective from the 1st January, 1964, then it is effective for all purposes and the nature of the appropriation, i.e., its character as a provision for a known liability, cannot undergo a metamorphosis and change into an appropriation of a different character. "

11. No other decision is relied on by Mr. Sengupta.

12. For the reasons indicated above, we reject the contention of Mr. Sengupta. We hold that the provision of Rs. 9 lakhs in this particular case is to be treated as a reserve for the purpose of the Surtax Act, 1964, and the Explanation to Rule 1 of the Second Schedule to the Act. In that view of the matter, we answer the question in the affirmative and in favour of the assessee. There will be no order as to costs,

Dipak Kumar Sen, J.

13. I agree.