
(1989) 04 CAL CK 0019

In the Calcutta High Court

Case No : Income-tax Reference No. 131 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Britannia Biscuit Co. Ltd.

RESPONDENT

Date of Decision : 10-04-1989

Acts Referred:

Companies (Profits) Surtax Act, 1964 — Rule 4
Income Tax Act, 1961 — Section 10, 80J

Citation : (1990) 182 ITR 113 : (1990) 51 TAXMAN 456

Hon'ble Judges : Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : Pal and M. Seal, for the Appellant;Moitra, for the Respondent

Judgement

Ajit K. Sengupta, J.—At the instance of the Commissioner of Income Tax, the following question of law has been referred to this court u/s 256(1) of the Income Tax Act, 1961, for the assessment years 1968-69 and 1969-70:

"Whether, on the facts and in the circumstances of the case and on a correct interpretation of Rule 4 of the Second Schedule to the Companies (Profits) Surtax Act, 1964, the Tribunal was correct in holding that a diminution of the capital in proportion to the deduction allowed u/s 80J of the Income Tax Act, 1961, in computing the total income of the assessee under the said Act was not permissible ?"

2. The only question which calls for determination in this case is whether Rule 4 of the Second Schedule to the Companies (Profits) Surtax Act, 1964, was attracted in the facts and circumstances of the case.

3. The Second Schedule lays down the rules for computing the capital of a company for the purpose of surtax and Rule 4 thereof reads as follows :

"Where a part of the income, profits and gains of a company is not includible in its total income as computed under the Income Tax Act, its capital shall be the sum ascertained in accordance with Rules 1, 2 and 3, diminished by an amount

which bears to that sum the same proportion as the amount of the aforesaid income, profits and gains bears to the total amount of its income, profits and gains."

4. The assessee had, in its Income Tax assessments for the two years under consideration, obtained relief u/s 80J of the Income Tax Act, 1961, in respect of a part of its profits. The Income Tax Officer held that, by virtue thereof, the capital for surtax purposes required to be reduced in accordance with the aforesaid Rule 4. In the appeal, the Appellate Assistant Commissioner held that the Income Tax Officer was justified in diminishing the income in terms of Rule 4. The Tribunal, however, rejected the contention referring to the judgment of the Karnataka High Court in the case of Stumpp, Schuele and Somappa Pvt. Ltd. Vs. Second Income Tax Officer, Company Circle, Bangalore and Others, . This said decision of the learned single judge has been affirmed by a Division Bench of that court which is reported in Second Income Tax Officer, Company Circle, Bangalore and Another Vs. Stumpp, Schuele and Somappa Private Ltd. First Income Tax Officer, Company Circle, Bangalore and Another, .

5. This identical question came up for consideration before this court in Commissioner of Income Tax, Central-II Vs. Schrader Scovill Duncan Ltd., . There, the Division Bench held that if a certain income is not capable of being included in the total income, it is only in respect of that income that the capital which can be diminished under Rule 4 of the Second Schedule to the Surtax Act. There, the court considered whether the deductions allowable under Sections 80-I and 80J of the Income Tax Act, 1961, are incomes not capable of being included in the total income of the assessee. The Division Bench rejected the contention of the Revenue that these incomes were not capable of being included in the total income. In our view, this decision will be applicable to the facts of this case and will govern the present reference. But Mr. Moitra, learned counsel appearing for the Revenue, has sought to contend that in view of the decision of the Supreme Court in the case of Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, , the above decision requires reconsideration. He has derived inspiration from the fact that the Division Bench in Commissioner of Income Tax, Central-II Vs. Schrader Scovill Duncan Ltd., has also relied on the decision of the Supreme Court in Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I, . The contention of Mr. Moitra is that inasmuch as the Supreme Court in Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, has overturned the decision of the Supreme Court in Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I, , the decision rendered by this court in Commissioner of Income Tax, Central-II Vs. Schrader Scovill Duncan Ltd., has to be reconsidered. He contended that the decision in Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, will have an impact on the interpretation of Rule 4 of the said Rules.

6. In short, Mr. Moitra's contention is that, in computing the total income, several deductions are allowed. These deductions are not includible in the total

income and, accordingly, Rule 4 has to be applied. In our view, this contention has no substance at all. The question of deduction arises only when income is includible or included in the total income. The relief is granted by way of deduction from such income. Where the Legislature has intended that the income will not form part of the total income at all, it has taken care of such expression as will be evident from Section 10 of the Act. The only question at this stage which calls for our determination is whether the decision in *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, has made any change or in any way affected the interpretation by this court and other courts, uniformly of Rule 4 of the said Rules.

7. In our view, Rule 4 will be applicable only in those cases where a part of the income is not includible in the total income and not in any other case. If it is not includible at all, then only diminution of the amount in accordance with Rule 4 has to be made. In *Cambay Electric Supply Industrial Co. Ltd. Vs. The Commissioner of Income Tax, Gujarat-II, Ahmedabad*, , which is also relied on by Mr. Moitra, the question was how the computation of the total income has to be made, There is no dispute that, for the purpose of Income Tax assessment, the income has to be computed in accordance with the relevant provisions of the Act and, thereafter, deduction has to be allowed only from that part of the income included in the total income and eligible for deduction and/or reliefs. But, while considering the scope of Rule 4 of the Surtax Act, this concept of computation of the income under the Income Tax Act will have no application at all. The query is limited only to the question whether the incomes in question are includible in the total income or not. Deductions contemplated under Chapter VI-A cannot be described as income "not includible in the total income." In *Commissioner of Income Tax, Central-II Vs. Schrader Scovill Duncan Ltd.*, , this court considered the judgment in *Cloth Traders (P) Ltd. Vs. Additional Commissioner of Income Tax , Gujarat-I*, to emphasise how the scheme of Chapter VIA was explained by the Supreme Court in *Cloth Traders*" case. Thus, the Supreme Court held that if the gross total income includes the particular category of income, the assessee would be eligible for deduction of the whole or part of such income, as the case may be. Therefore, before deduction, there must have been inclusion. The expression "deduction" stipulates that a part is taken away, e.g., deductions made from gross income in arriving at net income for tax purposes. Without something being included earlier, there cannot be any exclusion from such income. There can be subtraction from something which is already included and not otherwise. We are of the view that the decision of the Supreme Court in *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, has not in any way affected the interpretation of Rule 4 in the aforesaid judgment rendered by this court in *Commissioner of Income Tax, Central-II Vs. Schrader Scovill Duncan Ltd.*, .

8. *Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others*, , has only emphasised that relief from the dividend from a domestic company will be allowed after such dividend is computed in accordance with the provisions of the

Act. But there is no dispute that the net dividend is includible in the total income and from such dividend relief will be allowed by way of deduction.

9. For the reasons aforesaid, we answer this question in this reference in the affirmative and in favour of the assessee.

10. There will be no order as to costs.

11. It is stated by Miss. M. Seal that the name of the company has since been changed to Britannia Industries Ltd. Let this change be recorded and amendment be effected in the statement of case and in the paper book accordingly on a signed copy of the minutes of this order.

12. Let the Department act on the signed copy of the minutes of this order.

Bhagabati Prasad Banerjee, J.

13. I agree.