

(2009) 07 P&H CK 0229

High Court Of Punjab And Haryana At Chandigarh

Case No: Income Tax R. No. 261 of 1995

Thakur Devi Investments (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision: July 8, 2009

Acts Referred:

- Income Tax Act, 1961 - Section 104, 104(1), 104(2), 105, 106

Citation: (2010) 326 ITR 396

Hon'ble Judges: Daya Chaudhary, J; A.K. Goel, J

Bench: Division Bench

Advocate: Akshay Bhan, for the Appellant; Krishan Mehta, for the Respondent

Judgement

Adarsh Kumar Goel, J.

The income tax Appellate Tribunal, Chandigarh Bench, Chandigarh, has referred the following questions of law for opinion of this court u/s 256(1) of the income tax Act, 1961 (for short, "the Act), arising out of its order dated October 28, 1994, in I.T.A. No. 1407/Chandi/89 relating to the assessment year 1984-85:

1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the provisions of section 104 of the income tax Act were applicable even to a company which had not declared any dividend?
2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding, in spite of the commitments of the company, that the profits of the assessee-company for the assessment year 1984-85 were not small within the meaning of "smallness of profits" in section 104(2) of the income tax Act and declaration of dividend by the company would have been reasonable?

The Assessing Officer resorted to the provision of section 104(1) of the Act and applied the statutory rate of tax stipulated thereunder on the ground that the assessee did not declare the dividend, as required. Justification put forth by the

assessee for not declaring the dividend was found not acceptable. The explanation of the assessee that it required funds for repayment of unsecured loans; that the assessee had purchased land and on that account there was no liquidity of funds and that certain investments were required to be made in future and, therefore, the dividend could not be declared, was rejected. The view taken by the Assessing Officer was upheld on appeal by the Commissioner of income tax (Appeals) as well as the Tribunal.

2. The finding recorded by the Tribunal is as under:

We have considered the rival contentions and we find that the plea taken by the assessee regarding adjustment of past losses has no legs to stand because the plea of losses was not accepted in the preceding year and the assessment was made at a positive income. As regards the plea that the assessee was required to retain funds for the repayment of secured loans. We again notice that the plea has no sound basis. It is seen that in the balance-sheet for the assessment year 1984-85 (page 5 of the compilation) unsecured loans have been shown at Rs. 3,50,380 as on March 31, 1984, as against the sum of Rs. 4,07,667 as on March 31, 1983. On the assets side, current assets, loans and advances have been shown at Rs. 12,30,498. It is thus clear that the assessee had not only to repay certain loans but also had to receive back the repayments of certain advances. Therefore, looking to the nature of unsecured loans as well as loans and advances shown on the assets side of the balance-sheet, it does not appear to be a sufficient ground for not declaring dividend. It is also not clear as to when loans were required to be repaid. As regards the plea that the profit left with the assessee was very small, we do not find any substance therein because, as we have seen, net profit carried to the profit and loss appropriation account amounted to Rs. 3,07,952, which cannot be said to be a meagre amount for the purposes of declaring dividend.

3. We have heard learned counsel for the parties and perused the record.

4. Section 104 of the Act is reproduced below:

104. (1) Subject to the provisions of this section and of sections 105, 106, 107 and 107A, where the income tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the distributable income of the company of that previous year, the income tax Officer shall make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment u/s 143 or 144, be liable to pay income tax at the rate of--

(a) fifty percent. in the case of an investment company,

(b) thirty-seven percent. in the case of a trading company, and

(c) twenty-five percent. in the case of any other company,

on the distributable income as reduced by the amount of dividends actually distributed, if any, within the said period of twelve months.

(2) The income tax shall not make an order under sub-section (1), if he is satisfied-

(i) that, having regard to the losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared within the period of twelve months referred to in sub-section (1) would be unreasonable; or

(ii) that the payment of a dividend or a larger dividend than that declared within the period of twelve months referred to in sub-section (1) would not have resulted in a benefit to the Revenue; or

(iii) that at least seventy-five percent of the share capital of the company is throughout the previous year beneficially held by an institution or fund established in India for a charitable purpose the income from dividend whereof is exempt u/s 11.

5. A perusal of the above shows that once satisfaction is arrived at that the profits distributed as dividend were less than the statutory profit, statutory rate of tax could be invoked, except in a case, which falls in one of the three clauses of sub-section (2). The Tribunal having held, on the facts, that the case of the assessee did not fall under sub-section (2) of section 104 of the Act and that the assessee failed to declare dividend in terms of sub-section (1), the invocation of statutory rate could not be held to be beyond the provisions of section 104 of the Act.

6. In view of the above, the questions referred have to be answered against the assessee and in favour of Revenue. Reference is disposed of accordingly.