
Jayshree Tea and Industries Ltd. Vs Union of India

Writ Petition No. 1707 of 2000

Court: Calcutta High Court

Date of Decision: Sept. 20, 2001

Acts Referred:

Constitution of India, 1950 " Article 14, 246(3), 366(1)#Income Tax Act, 1961 " Section 10, 10(33), 115O, 115O(1), 115O(3)

Citation: (2002) 121 TAXMAN 386

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Debi Prosad Pal, for the Appellant; Agarwal, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

The writ petitioner No. 1 being the tea company has filed this writ petition challenging the vires of sections 115-

O(1) and 115-O(3) of the income tax Act, 1961, insofar as it relates to levy of additional income tax on the profits which are distributed as

dividend amongst the shareholders to the extent the same represents agricultural income of the petitioner and also refund of the tax already levied

and realised as above with interest at the prevailing rate from the respective dates of payment up to the date of refund and further to withdraw

and/or rescind and/or cancel all the levies of additional income tax for the financial years 1996-97, 1997-98, 1998-99 and 1999-2000. So, it is

clear that in the event first relief is granted to the writ petitioner then other reliefs prayed for therein are automatically to be granted by the Court.

Thus, the controversy in this case is as to whether the aforesaid sections 115-O(1) and 115-O(3) are partially ultra vires the Constitution as

questioned by the writ petitioner or not.

It appears that the writ petitioner No. 1 has been carrying on business of growing tea leaves by its agricultural process and manufacturing black tea

out of the same and selling the same, and also manufacturing and selling chemicals and fertilizers, plywood, etc. This apart, petitioner No. 1 has

also business of warehousing and real estate development. The petitioner-company is limited by shares. Therefore, the shareholders of the

petitioner-company are paid dividend out of the profits earned by the petitioner No. 1.

Dr. Debi Prosad Pal, the learned senior advocate, appearing in support of the writ petition, submits that in the case of a tea company whose

income is derived from sale of tea grown and manufactured it is not the entirety of the profits or income which is liable to income tax, and by virtue

of rule 8 of the income tax Rules, 1962, the income derived from sale of tea grown and manufactured by the seller is computed as if it is income

derived from business and of the income so computed 40 per cent is to be deemed as non-agricultural income (business) liable to income tax and

the balance 60 per cent of the income so computed is to be treated as agricultural income in respect of which the State Legislature has power to

enact suitable legislation for imposition and realisation of tax on agricultural income under Entry No. 46 of List II, read with article 246(3) of the

Constitution of India. In this context, he relies on a decision in Tata Tea Ltd. and Another Vs. State of West Bengal and Others,

He contends that the term "agricultural income" in article 366(1) of the Constitution has been defined to mean agricultural income as defined for the

purposes of the enactments relating to the Indian income tax. Therefore, "agricultural income" has the same meaning as attributed to it for the

purpose of enactments relating to the Indian income tax. The income derived from sale of tea grown and manufactured by the seller is not solely

derived from agriculture. It is an income which is derived partially from agricultural operations and partially from manufacturing processes. It

becomes necessary to determine the proportion of two incomes in the entire income. In support of his contention, he has relied on a decision of the

Supreme Court in The Karimtharuvu Tea Estates Ltd., Kottayam and Another Vs. State of Kerala and Others, .

He contends that presently under rule 8, the extent of the non-agricultural income is to be computed out of the combined income of the tea

manufacturing company for the purpose of taxability of such income. The balance 60 per cent of the combined income should be left for

assessment to agricultural income tax and this can be levied under the State Legislature. He contends that the Parliament has no legislative

competence to levy any tax on the agricultural income.

He submits further that the dividend, which is paid by a tea company, is from its profits which are partly agricultural income and partly non-

agricultural income. An additional income tax has been imposed by the said section on the entirety of the profit which is distributed by way of

dividend thereby imposing an additional income tax even on the portion of the composite income which represents agricultural income and which

also is to be made available for the distribution of dividend. Section 115-O, therefore, transgresses the limits of the legislative power which has

been conferred under the Constitution not upon the Parliament, and trenches upon the legislative field which is exclusively within the jurisdiction of

the State Legislature.

He submits that it is well-settled principle that where the business of a company has two sources of income, one subjected to tax and the other not,

one is entitled to assume and deem that the company has paid the money which it ought to pay according to the most businesslike way of

appropriating expenses. Even though it had not been done, in fact by any separate allocation of money, one still was entitled to treat the money as

having been paid out of the fund which was favourable to the company. In support of this submission, he has relied on the following decisions:

(i) Commissioner of Income Tax, Central I Vs. Ashoka Charity Trust,

(ii) Indian Explosives Ltd. Vs. Commissioner of Income Tax,

(iii) Commissioner of Income Tax, Central-I Vs. Jayashree Charity Trust, ;

(iv) M/s. East India Pharmaceutical Works Ltd. Vs. Commissioner of Income Tax, West Bengal, ; and

(v) Commissioner of Income Tax Vs. Silk and Art Silk Mills Association Ltd., .

Dr. Pal further contends that the provision of section 115-O is applicable in general but applicability thereof in the case of tea growers and

manufacturers is unconstitutional in view of incompetency of the Parliament to legislate on this subject, however, under the law the same can be

struck down either in its entirety or partially.

He submits that it is a settled principle of law that if the valid and invalid provisions are so inextricably mixed up that they cannot be separated from

one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and

separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld

notwithstanding that the rest has become unenforceable. Even when the provisions which are valid, are distinct and separate from those which are

invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure

of the whole. In support of his submission, he has relied on a decision of the Supreme Court in R.M.D. Chamarbaugwalla Vs. The Union of India

(UOI), .

He further contends that compliance with the provision of section 115-O(3) by the tea company like the petitioner is absolutely impossible until and

unless the computation of non-agricultural income is complete under rule 8, the same cannot be paid. It is not possible within 14 days of the date of

declaration or from the date of payment of dividend to pay additional income tax.

He submits that the provision is unreasonable, unfair and unjust, as such it is violative of article 14 of the Constitution and is liable to be struck

down. In support of his submission, he has relied on two decisions of the Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and

Another, and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*,

He contends that the payment of additional income tax u/s 115-O results in payment of double tax and the same is also contrary to the wishes and

intention of the Legislature. By the Finance Act, 1997, the Parliament wanted to remove the vice of double taxation and inserted section 10(33) of

the Act and thereby exempted from payment of any tax on dividend receivable by the shareholders of a company. He wants to persuade me that

the additional income tax imposed u/s 115-O is not really on the dividend income of the shareholders. The incidence of tax under the aforesaid

section is actually on the profits of the company, which the company distributes by way of dividends. He submits that merely because the levy

attaches on the happening of a subsequent event, the nature and character of the levy does not change. Therefore, he submits that the liability to

pay tax u/s 115-O arises only at the time when a company declares or distributes dividend to its shareholders; the nature and character of the tax,

namely, that the same is imposed on the profits of the company, does not change or get altered in any manner. In support of his submission, he has

relied on a decision of the Supreme Court in *Hotel Balaji v. State of Andhra Pradesh* AIR 1993 SC 1048.

2. Mr. Agarwal, the learned advocate appearing for the revenue, submits that section 115-O is intra vires and the same is to be applied just after

ascertaining the profit of the business but before the application of rule 8. He contends that additional income tax has been levied not on any

income derived from the agricultural operation but it is on the dividend which is payable out of the profits to the shareholders. The source to

receive dividend is the share capital and under the contractual obligation the company is bound to pay such profit by way of dividend. Therefore,

there is wide difference between the agricultural income and the dividend. In support of his submission, he has relied on the following decisions:

(i) 91 ITR 38 (sic);

(ii) *Commissioner of Income Tax, Uttar Pradesh Vs. Kunwar Trivikram Narian Singh*, ; and

(iii) *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*,

3. Having heard the respective contentions of the learned advocates, in this case, the contention of the writ petitioner is as to whether section 115-

O is ultra vires the Constitution on the ground of legislative incompetency so far as its applicability to tea growers and manufacturers is concerned.

Therefore, I feel it necessary to reproduce section 115-O:--

115-O. Tax on distributed profits of domestic companies. --(1) Notwithstanding anything contained in any other provision of this Act and subject

to the provisions of this section, in addition to the income tax chargeable in respect of the total income of a domestic company for any assessment

year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of

June, 1997, whether out of current or accumulated profits shall be charged to additional income tax (hereafter referred to as tax on distributed

profits) at the rate of ten per cent.

(2) Notwithstanding that no income tax is payable by a domestic company on its total income computed in accordance with the provisions of this

Act, the tax on distributed profits under sub-section (1) shall be payable by such company.

(3) The principal officer of the domestic company and the company shall be liable to pay the tax on distributed profits to the credit of the Central

Government within fourteen days from the date of--

(a) declaration of any dividend; or

(b) distribution of any dividend; or

(c) payment of any dividend,

whichever is earliest.

(4) The tax on distributed profits so paid by the company shall be treated as the final payment of tax in respect of the amount declared, distributed

or paid as dividends and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid.

(5) No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the amount which has been

charged to tax under sub-section (1) or the tax thereon.

It will appear from a plain reading of the aforesaid section that by the aforesaid law additional income tax is sought to be imposed on any amount

declared, distributed or paid by a domestic company by way of dividends out of current or accumulated profits. I do not think there can be any

controversy as regards payment of tax from and out of the income of tea growers and manufacturers after computation of the income in the manner

of rule 8. It has now become settled law that the entire income of the tea growers and manufacturers is not taxable under the Act, rather 40 per

cent of the total income derived by this assessee is taxable under the Act and the balance 60 per cent thereof is treated under the law as being

agricultural income. Therefore, any Central law providing for payment of tax out of the agricultural income is unconstitutional as the same cannot be

subject under Union List of the Seventh Schedule to the Constitution of India. In other words, agricultural income is absolutely exempt from the

income tax net under the Act. However, sometimes it so happens the income of any assessee may be mixed up with other income which is

otherwise chargeable under the Act, and in contemplation of the problem of possible evasion of tax, rule 8 has been provided to isolate the

agricultural income from non-agricultural income. Rule 8 provides as follows:

8. Income from the manufacture of tea. - (1) Income derived from the sale of tea grown and manufactured by the seller in India shall be computed

as if it were income derived from business, and forty per cent of such income shall be deemed to be income liable to tax.

(2) In computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or

become permanently useless in an area already planted, if such area has not previously been abandoned, and for the purpose of determining such

cost, no deduction shall be made in respect of the amount of any subsidy which, under the provisions of clause (30) of section 10, is not includible

in the total income.

The Supreme Court is of the consistent view of the aforesaid principle of law as has been rightly argued by Dr. Pal. The decisions cited by him in

Karimtharuvi Tea Estates Ltd.'s case (supra); Tata Tea Ltd.'s case (supra) and Singhai Rakesh Kumar Vs. Union of India and Others, are

applicable in this case. Even, Mr. Agarwal does not dispute the aforesaid proposition.

4. In this case by the impugned section additional income tax is sought to be levied on the payment of any amount by way of dividend out of profit

derived from business of tea growing and manufacturing. The writ petitioner has already paid the income tax to the extent of 40 per cent of the

income. The question arises whether the payment and realisation under the aforesaid provision of additional income tax on the payment of dividend

is constitutionally valid or not. Upon a plain reading of the said section it cannot be held that imposition of additional tax on payment of dividend is

ultra vires, but, of course, if it is found upon scrutiny that such dividend under law is in disguise part of the income of the tea grower and/or

manufacturer, then the position will be different, as it will tantamount to realisation of tax on agricultural income to the extent of 60 per cent thereof.

5. Dr. Pal wants me to accept that there is no difference between the head of the source of income, viz., between the dividend and the income of

the petitioner, as the profit is being distributed out of the income of the writ petitioner which is essentially agricultural income to the extent of 60 per

cent, so it is not chargeable or taxable under the Act as the Parliament cannot legislate under the Constitution for realisation of tax out of the

agricultural income to the extent as above in the case of composite one.

I cannot accept the argument of Dr. Pal on this score. In my view the dividend stands on a different footing from that of the income of the tea

company so far as taxability is concerned. The dividend is payable to the shareholders under the Companies Act, 1956 as well as contractual

relationship between the company and the shareholders. The source of payment of dividend is the share capital investment primarily. However, the

source of payment of the dividend may be secondarily the profit which in its turn arises out of the income of the company. In the case of Bacha F.

Guzdar (supra), the Supreme Court has held amongst others as follows:

. . . Agricultural income as defined in the Act is obviously intended to refer to the revenue received by direct association with the land which is used

for agricultural purposes and not by indirectly extending it to cases where that revenue or part thereof changes hands either by way of distribution

of dividends or otherwise. In fact and truth dividend is derived from the investment made in the shares of the company and the foundation of it rests

on the contractual relations between the company and the shareholder. Dividend is not derived by a shareholder by his direct relationship with the

land. There can be no doubt that the initial source which has produced the revenue is land used for agricultural purposes but to give to the words

"revenue derived from land" the unrestricted meaning apart from its direct association or relation with the land, would be quite unwarranted. . . . (p.

4)

It has been further held by the aforesaid judgment that:

. . . There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the

company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor

becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the articles

of association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. . . . (p. 6)

6. In the case of Kunwar Trivikram Narain Singh (supra), the Supreme Court relying on the aforesaid case of Mrs. Bacha F. Guzdar (supra) has

held that the payment of pension in lieu of acquisition of the Zamindari was held not to be agricultural income though such payment was relatable to

the land revenue. It would be better to quote the language of the learned judges of the aforesaid decision which is as follows:

It follows from the decisions of the Privy Council and the judgments of this Court cited above that if it is held in this case that the source of the

allowance or pension is the arrangement arrived at in 1837, then the income cannot be held to be derived from land within the meaning of the

definition in section 2(1)(a) of the Act. It seems to us that in this case the source of income is clearly the arrangement arrived at in 1837, and,

therefore, it is not agricultural income as defined in the Act. (p. 34)

7. In this case going by the words of section 115-O, it cannot be held that the said section is ultra vires on the ground of incompetence of the

Legislature, yet while making an in depth enquiry if it is found that the dividend payable or paid out of the profit of the tea growing and

manufacturing company is an agricultural income, then certainly this section has to be held ultra vires so far as it relates to 60 per cent of the profit

of the company. It would be apposite here to reproduce the definition of "agricultural income" in the Act.

2. (1A) "agricultural income" means--

(a) any rent or revenue derived from land which is situated in India and is used for agricultural purposes;

(b) any income derived from such land by--

(i) agriculture; or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to

render the produce raised or received by him fit to be taken to market; or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed

other than a process of the nature described in paragraph (ii) of this sub-clause;

(c) any income derived from any building owned and occupied by the receiver of the rent of revenue of any such land, or occupied by the

cultivator or the receiver of rent-in-kind, of any land with respect to which, or the produce of which, any process mentioned in paragraphs (ii) and

(iii) of sub-clause (b) is carried on :

It is clear from the above definition that one has to have direct beneficial interest in land to derive rent and revenue, or to earn by agricultural

process from the land. Dividend is earned by the shareholders from and out of the profit of the limited company. There cannot be income by way

of dividend unless there is a declaration of profit.

8. Relying on the aforesaid two Supreme Court's decisions, I am of the view that the profit of the petitioner cannot be termed to be an agricultural

income. So, 60 per cent of the profit cannot be held to be an agricultural income because of the reason that profit partakes of the character of

different income and it changes the character from the agricultural income to the income of the business. More so, in this case I find from the

avermments of the petitioner that the business activity of the petitioner is not confined to tea growing or manufacturing only but it has got other

business too, viz., manufacturing and selling chemicals and fertilizers, plywood and also warehousing and real estate development. So the profit has

to be computed from income of all sources of the business of the petitioner.

9. In the Supreme Court's judgment as above in Mrs. Bacha F. Guzdar's case (supra), it is observed that while making an enquiry into the true

genealogy of the source, the first immediate source is available, then it has to be accepted as a source. In this case, the investment of the share

capital is the source for payment of the dividend not the agricultural income. If I am to accept the argument of Dr. Pal that the source of payment of

dividend is the income from tea growing and manufacturing which in its turn is an agricultural income to the extent of 40 per cent thereof, then the

salaries payable and paid to the employees of the petitioner's company cannot be brought under the income tax liability net. Such an analogy is

not only far-fetched but revolting also.

10. The decision of the Supreme Court in Hotel Balaji's case (supra) does not apply in this case. In this Supreme Court's decision it was sought to

establish that purchase tax imposed under the concerned Sales-tax Act was not sales tax, so the State Legislature is not competent to impose

purchase tax and in this context the Supreme Court held that because the levy attaches on the happening of a subsequent event, the nature and

character of the levy does not change. Under such circumstances, I cannot accept the argument of Dr. Pal. All judgments cited by him are of no

use at all.

11. The decision in Ashoka Charity Trust's case (supra), relied on by Dr. Pal is not applicable in this case. In that case a certain expenditure

incurred by a charitable trust which enjoyed exemption from payment of tax received from charity, out of the composite income comprising

contribution received from both charitable and non-charitable institution, was allowed deduction, holding the same being met from the income

derived from property held by the assessee under the trust. In that it was observed by the Supreme Court that there was no clear provision to the

theory of apportioning the expenditure in accordance with the proportionate income. In the case here, under the statute there is express provision

for apportionment of agricultural income and business income.

12. Similarly, in the decision in Jayashree Charity Trust's case (supra), the Division Bench of this Court held amongst others that there is no

principle of law by which apportionment can be introduced in the case of heads of income derived by the test of charitable and religious purposes.

It cannot be said, as a matter of law that the assessee must be taken to have made payments for the purposes of charity, proportionately or at all

out of the dividend income. This decision is also of no help to Dr. Pal as it is wholly distinguishable for the same reason as observed above.

13. The next portion of the argument of Dr. Pal is that the aforesaid provision has frustrated the object of the Legislature to exempt the

shareholders from payment of the dividend, is also not acceptable to me. Since, the Legislature thought it fit to give some concession to some

section of the citizens it is not for the Court to question the same. I am of the opinion that by this incorporation such object is not at all frustrated.

Before insertion of section 10(33), the income from the dividend of the shareholder was chargeable to tax. But this time now in view of

incorporation of the aforesaid section 10(33) this has been excluded. The intention of the Legislature was to give relief to the shareholder investors

in order to encourage more investment in the industry. By incorporating section 115-O by the Finance Act, 1997, the loss of revenue resulting

from the aforesaid concession given to the investor shareholders, has been sought to be realised, in this case from the writ petitioner being the

payer of the dividend and this provision has been made applicable to all companies irrespective of description and classification.

14. I hold, therefore, on the foregoing discussions and findings that challenge against the said section in this writ petition must fail and the said

section is constitutionally valid. Accordingly, the writ petition is dismissed. There will be no order as to costs. Interim order passed hereunder

stands vacated. Dr. Pal, appearing for the petitioner, contends that the operation of the judgment and order should be stayed. Having considered

his prayer. I am of the view that there are points which are to be considered by the higher up. So, the interim order already granted will continue

for a period of three weeks from date.