

---

**(1989) 02 CAL CK 0012**

**Calcutta High Court**

**Case No:** IT Reference No. 341 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Tea Estate India (P.) Ltd.

RESPONDENT

---

**Date of Decision:** Feb. 23, 1989

**Acts Referred:**

- Companies (Profits) Surtax Act, 1964 - Section 13
- Income Tax Act, 1961 - Section 256(2), 6(2)

**Citation:** (1989) 45 TAXMAN 180

**Hon'ble Judges:** Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J

**Bench:** Division Bench

**Advocate:** S.K. Mitra and B.C. Prosad, for the Appellant; D. Pal and Miss M. Seal, for the Respondent

---

**Judgement**

Suhas Chandra Sen, J.

The Tribunal has referred the following two questions of law u/s 256(2) of the income tax Act, 1961 ("the Act") to this Court:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified to hold the order dated 17-10-1977 u/s 13 of the Companies (Profits) Surtax Act, 1964 rectifying the assessment was of doubtful validity?
2. If the answer to question No. 1 is in the negative, whether the Tribunal was justified to uphold the decision of the Commissioner (Appeals) in cancelling the order dated 17-10-1977 u/s 13 of the Companies (Profits) Surtax Act, 1964 for the assessment year 1972-73?

The relevant assessment year is the assessment year 1972-73, the accounting period ends on 30th June.

2. The ITO originally completed the assessment on 18-7-1975 u/s 6(2) of the Act. Later purporting to act u/s 13 of the Companies (Profits) Surtax Act, 1964, he

recomputed the capital on 17-10-1977 withdrawing from the capital base a sum of Rs. 16,50,000, being the amount set apart for dividends out of the general reserves. The previous year of the assessee commenced on 1-7-1970 and ended on 30-6-1971. The assessee-company had general reserves of Rs. 32,99,920. A dividend of Rs. 16,50,000 was declared on 16-11-1970 for the year ended 30-6-1970. The ITO held:

....that the declaration of dividend on 16th November, 1970 dated back to the first day of the relevant previous year, namely 1st July, 1970 and accordingly, the said sum of Rs. 16,50,000 was not a part of the reserves and hence not includible in the capital base.

3. In appeal, the Commissioner (Appeals) held that rule 1A introduced by the Finance Act, 1976 had no application to the present case and, hence, the rectification was not called for.

4. The department preferred an appeal before the Tribunal and the Tribunal held as follows:

We have heard both sides at length. Whether the proposed dividend, out of the general reserve became a liability and thus went out of reserves or not is a highly debatable question. There are conflicting decisions on the point. Whether the income tax Officer was ultimately right in excluding the dividend out of the general reserves is an altogether different question. But the matter in which the result has been brought about by rectifying the assessment u/s 13 is of doubtful validity. We, therefore, agree with the decision of the learned Commissioner (Appeals) and dismiss the departmental appeal.

5. At the time when the case was heard by the Tribunal, the question whether the dividend out of the general reserves became a liability and thus went out of the reserves or not, was a debatable question of law. That question was concluded in the case of [Vazir Sultan Tobacco Co. Ltd., Hyderabad and Others Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad](#), . A question of law was involved, a certificate of fitness to appeal to the Supreme Court was granted and the Supreme Court had gone into that question. Therefore, it cannot be said that two views were not possible in this case, at the point of time when rectification was sought to be made. Following the principles laid down by the Supreme Court in the case of [T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay](#), , question No. 1 is answered in the affirmative and in favour of the assessee. Question No. 2, therefore, need not be answered and is returned unanswered.

There will be no order as to costs.

Bhagabati Prasad Banerjee, J.

I agree.