

(1989) 06 CAL CK 0027

Calcutta High Court

Case No: Income-tax Reference No. 104 of 1981

COMMISSIONER OF Income Tax

APPELLANT

Vs

ASHOKA MARKETING LTD.

RESPONDENT

Date of Decision: June 7, 1989**Acts Referred:**

- Income Tax Act, 1922 - Section 23A

Citation: (1990) 183 ITR 580 : (1990) 52 TAXMAN 410**Hon'ble Judges:** Bhagabati Prasad Banerjee, J; Ajit K Sengupta, J**Bench:** Full Bench

Judgement

AJIT K SENGUPTA J. - In this reference u/s 256(2) of the Income Tax Act, 1961, the following questions of law have been referred to this court for the assessment years 1955-56 and 1956-57:

1. Assessment year 1955-56

"Whether, on the facts and in the circumstances of the case, the Tribunal ignored relevant material or relied on irrelevant material to hold that there was no shortfall for the assessment year 1955-56 and was justified in that view in canceling the order u/s 23A passed by the Income Tax officer?"

2. Assessment year 1956-57

"Whether, on the facts and in the circumstances of the case, the Tribunal ignored relevant material or relied on irrelevant material to hold that there was no amount available for distribution as dividend for the assessment year 1956-57 and was justified in that view in cancelling the order u/s 23A passed by the Income Tax Officer?"

The dispute relates to the legality of the order of the Income Tax Officer u/s 23A. The Income Tax Officer observed that less than 50% of the capital was held by the

members of the public limited company. The further contention of the assessee was that after deducting sales tax, the amount available would not justify declaration of a higher dividend. The Income Tax Officer, however, observed that the company itself had treated sales tax payment in the immediate future. Consequently, the dividend declared was not adequate. He, accordingly, levied super-tax at 37% amounting to Rs. 2,13,765.20 and Rs. 2,70,963.47, respectively, for the two years in question.

The assessee went up in appeal to the Appellate Assistant Commissioner who, vide his consolidated order dated December 17, 1971 directed that the Income Tax Officer shall levy super-tax at 25% of the undistributed balance as reduced on appeal without allowing any deduction for sales tax liability as shown in para 14 of his order.

Thereafter, the assessee came up in second appeal before the Tribunal which, vide its consolidated order for both the years in question, held that there was no shortfall in the assessment year 1955-56. Regarding the assessment order for the year 1956-57, there was no amount available for distribution as dividend. Therefore, the provisions of section 23A were not applicable at all.

Before the Tribunal, the Departmental representative contended that the so-called outgoings and expenses are of personal nature and do not have the character of business outgoings. He, therefore, urged that the Departmental authorities were correctly justified in not deducting the so-called outgoings in determining the commercial profits available for distribution of dividends. He also reiterated that the actual tax assessed on the basis of the assessment orders should not be taken into account but the tax on the revised income after giving effect to the appellate order should alone be taken into account.

So far as the assessment year 1955-56 is concerned, the Tribunal, found that the amount available for distribution of dividends for the assessment year 1955-56 was only Rs. 34,456 whereas the assessee had already declared a dividend of Rs. 60,000 and as such there was no shortfall in the assessment year 1955-56.

So far as the assessment year 1956-57 is concerned, the Tribunal found that there would be no amount available for distribution of dividend whereas the assessee has declared a dividend of Rs. 90,000. Accordingly, the Tribunal set aside the order of the authorities below holding that the provisions of section 23A are not applicable on the facts of the case.

Mr. Moitra, learned counsel appearing for the Revenue, has reiterated the same contentions before us. We are, however, not impressed by the submissions made by learned counsel for the Revenue.

The question before the Tribunal was whether the outgoings, expenses and taxes were to be deducted in arriving at the commercial profit. It was contended by the

Departmental representative that the outgoings and expenses were of personal nature and did not have the character of business outgoing. It was also argued that the actual taxes assessed on the basis of the assessment order should not be taken into account but the tax on revised income after giving effect to the appellate order should only be taken into the account. The Tribunal felt that the tax liability, the outgoings and expenses should have been deducted. The findings of the Tribunal is as follows:

"So far as the assessment year 1955-56 is concerned, the income assessed by the Income Tax Officer is Rs. 10,68,177 out of which the outgoings and expenses are to the tune of Rs. 5,30,386. It may be mentioned here that the commission of Rs. 1,78,965 and loss in jute transactions amounting to Rs. 2,53,275, which two amounts are included in the outgoings and expense of Rs. 5,30,386, have been accepted by the Tribunal. Thus, the commercial profits for the assessment year 1955-56 would be Rs. 5,37,791 out of which the sales tax liability of Rs. 72,902 which has been deducted by the Appellate Assistant Commissioner himself, and the tax assessed by the Income Tax Officer amounting to Rs. 4,30,433 aggregating to Rs. 5,03,335, had to be deducted. Thus, the amount available for distribution of dividends for the assessment year 1955-56 was only Rs. 34,456 whereas the assessee has already declared a dividend of Rs. 60,000 and as such there was no shortfall in the assessment year 1955-56.

So far as the assessment year 1956-57 is concerned, out of the assessed income of Rs. 14,60,473, the outgoings and expenses amounting to Rs. 3,36,618 and the relief of Rs. 5,527 given by the Appellate Assistant Commissioner have to be deducted. The commercial profit thus amounts to Rs. 11,18,328. Out of the said amount, Rs. 5,46,574 being the sales tax liability which has already been deducted by the Appellate Assistant Commissioner and the tax assessed by the Income Tax Officer amounting to Rs. 6,38,142, aggregating to Rs. 11,84,716, have to be deducted. Thus it would be seen that there would be no amount available for distribution of dividend whereas the assessee has declared a dividend of Rs. 90,000."

Before the Appellate Commissioner, the assessee argued that the company has declared more than the statutory percentage of dividend to be compulsorily distributed u/s 23A and the figures mentioned by the Appellate Assistant Commissioners are as under:

1955-56		1956-57	
Rs.	Rs.	Rs.	Rs.
Profit as per profit and loss account		5,57,267	9,50,968

Less:

Assessed tax as per Income Tax Officers order	4,02,567		5,99,619	
Sales tax liability	72,902	4,75,469	5,46,574	11,46,193
Profit available for distribution		81,798		Nil
60% thereof		49,078		
Dividend declared		60,000		90,000

It is now well-settled that the assessed profits are not really the commercial profits. In deciding the reasonableness or otherwise of the distribution of dividend for the purpose of section 23A, the commercial profits have to be taken into account.

The factual position that emerges on the findings of the Appellate Assistant Commissioner and the Tribunal will be evident from the following chart:

Assessment year 1955-56:

Rs.

Assessed Income	10,68,177	
Profit as per profit and loss account (commercial profit)	5,57,367	
Assessed tax	4,30,033	
Sales tax liability		72,000
Actual outgoings like salaries, commission and expenses (which have not been allowed)		5,30,386
		10,32,419

Assessment year 1956-57:

	Rs.
Assessed income	14,60,473
Profit as per profit and loss account (commercial profit)	9,50,968
Assessed tax	6,38,142
Sales tax liability	5,46,574
Actual outgoings like salaries, commission and expenses (which have not been allowed)	3,36,618
Other reliefs	5,527
	15,26,861

It would thus be evident that, for the assessment year 1955-56, there was no profit available for distribution out of commercial profit. Even then, the assessee has distributed dividend of Rs. 60,000. Similarly, for the assessment year 1956-57, no profit was available for distribution out of the commercial profit, but the assessee had distributed dividends of Rs. 90,000. We are of the view that the provisions of section 23A are not applicable in any of the two years under consideration.

Our attention has been drawn to a decision of the Bombay High court in the case of [Favre-leuba and Co. Ltd. Vs. Commissioner of Income Tax, Bombay City-I](#). There, the Bombay High Court held that the total income in section 23A(1) has the same meaning as in section 23. The total income, therefore, determined u/s 23(3) must be the starting point for the proceedings u/s 23A. The total income cannot be independently determined for the purpose of section 23A. It was also held that the tax which the assessee is liable to pay on the total income shall only be deducted from total income in determining the distributable surplus. This case does not advance the contention of the Revenue.

In [Commissioner of Income Tax, West Bengal Vs. Gangadhar Banerjee and Co. \(Private\) Ltd.](#), the Supreme Court has held that the words "smallness of profits" in section 23A refer to actual accounting profits and not the assessable profits of year. In arriving at the assessable profits, the Income Tax Officer may disallow many expenses actually incurred by the assessee and in computing his income, he may include many items on national basis, but the commercial or accounting profits are the actual profits earned by the assessee calculated on commercial principles. The commercial or accounting profits, in the instant case, as disclosed by the profit and loss account reproduced earlier did not warrant any further distribution of dividend higher than what was declared.

Having regard to the facts and circumstances of the case, we are of the view that the Tribunal came to a correct conclusion on the facts of this case.

For the reasons foresaid, we answer both the questions in this reference in the negative and favour of the assessee.

There will be no order as to costs.

Leave is given to file vakalatnama within two weeks from date.

BHAGABATI PRASAD BANERJEE J. - I agree.