

(1985) 05 CAL CK 0025

Calcutta High Court

Case No: IT Reference No. 479 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Devenport and Co. (P.) Ltd.

RESPONDENT

Date of Decision: May 15, 1985**Acts Referred:**

- Income Tax Act, 1961 - Section 235, 235(b), 256(2)

Citation: (1986) 27 TAXMAN 567**Hon'ble Judges:** Dipak Kumar Sen, J; Ajit K. Sengupta, J**Bench:** Division Bench**Advocate:** B.K. Naha, for the Appellant;

Judgement

Ajit K. Sengupta, J.

This is a reference u/s 256(2) of the income tax Act, 1961 ("the Act") for the assessment year 1962-63. The assessee-company was doing business in tea and gunnies. It had also started business of purchase and sale of shares during the previous year. It was also having income from managing agency commission and allowances, dividend, etc. The ITO apportioned the expenses totalling Rs. 3,26,963, under the various sources of income in the same proportion as the gross income from those sources. In this way Rs. 92,726 were allocated against the dividend income amounting to Rs. 2,10,455. The dividend income was, thus, reduced to Rs. 1,17,729 and the rebate u/s 235 of the Act was worked out on the basis of the gross dividend income less proportionate expenses deducted therefrom. The assessee was aggrieved by the assessment order of the ITO and, therefore, went up in appeal before the AAC in which among other grievances raised was the grievance against the action of the ITO in deducting proportionate expenses against the dividend income and determining the rebate u/s 235 on the basis of gross dividend less proportionate expenses deducted therefrom. The AAC, however, on both of these points agreed with the ITO and refused to interfere.

2. The assessee went on appeal before the Tribunal. Following the various decisions of the Supreme Court and the Calcutta High Court the Tribunal held that there was no justification for deduction from the gross amount of the dividend proportionate expenses for arriving at the dividend income. Accordingly, the Tribunal held that the rebate u/s 235 would be available on the gross amount of the dividend without deducting therefrom the proportionate expenses.

3. On the aforesaid facts the following questions of law have been referred to this Court:

1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the income tax Officer was not justified in apportioning the total expenditure incurred by the assessee as between the several heads of income and treating appropriate portion thereof as expenditure against the dividend income ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that for the purpose of relief u/s 235 of the income tax Act, 1961 the gross amount of dividend has to be taken into account without any deduction for proportionate expenses ?

4. At the hearing before us it has been contended by Mr. Naha the learned advocate on behalf of the Commissioner that the Tribunal did not find out the necessary facts whether all the shares were held as business assets or not. The Tribunal erred in deciding the controversy without ascertaining the basic and primary fact. He has also submitted that in the event some shares are held as investment, the expenses have to be apportioned and, accordingly, the relief u/s 235 would not be allowable on the gross dividend.

5. We are, however, unable to accept the contentions of Mr. Naha. During this year the assessee started purchasing shares and selling the same. These transactions have been done through stock brokers. The assessee-company was managing certain other companies from which it received managing agency commission and allowances. The ITO found as follows:

On scrutiny of the profit and loss account it is seen that the assessee has received dividend also which is from the shares that remained at the end of the year out of the business in shares. These shares have been pledged with the various banks from which amounts are drawn and these are either advanced to the managed companies or utilised in the business of tea and gunnies. In such circumstances the expenses claimed are incurred for earning the business income in the form of agency commission, interest income from tea and gunnies and dividend income.

6. The AAC confirmed the order of the ITO holding as follows:

From the particulars of other investments I find that the opening balance of investments was Its. 12,17,800. Shares worth Rs. 14,26,000 were purchased during the year leaving closing balance of Rs. 17,64,339. Thus, there is a considerable

activity throughout the whole year regarding the change in investments and addition of investment. The company is a partly investment company and partly a trading company. Considering the business activities as well as the investment activities during the accounting year, the ITO has correctly apportioned the various allowable expenses on the basis of gross business and gross dividend receipt.

7. The Tribunal, however, held as follows:

We consider that there is no justification for deducting from the dividend income proportionate expenses relating thereto. In regard to the contention of the revenue that the shares other than the shares of managed companies that were acquired in earlier years were shares for investment and not for the business we are to observe that the assessee has apparently made no distinction between such shares acquired earlier and the shares purchased in the previous year. The department has not made out a case that the shares acquired earlier formed a separate block of investment and were not part of the stock-in-trade in the business in dealing in shares started in the year. No doubt, in the balance sheet all the shares are shown under the head "Investments", but evidently that is so in order to comply with the requirements of the Companies Act, 1956, In any case, there is nothing to show that the earlier investments were not converted into stock-in-trade in the previous year and further it has not been shown as to what was the amount of expenditure that could be specifically related to the acquisition of shares acquired and held as investments and not stock-in-trade.

8. This Court in the case of [Commissioner of Income Tax Vs. New India Investment Corporation Ltd.](#), held that where an assessee was holding shares and securities as its stock-in-trade and dividend was received by the assessee from such stock-in-trade and none of the holdings of the assessee were held by way of investment only and the assessee had incurred expenditure to earn its income, then the dividend earned by the assessee, though assessable under a particular head, i.e., "Income from other sources", was really the "business income" of the assessee and the expenditure incurred by the assessee should be allowed under that head and cannot be apportioned against income arising under two different heads, i.e., "Profits and gains of business or profession" and "Income from other sources". Even if the income of the assessee was solely referable to dividend, there cannot be any apportionment, as the entire expenditure would then be allowable against the dividend earned.

9. We have already referred to the findings of the Tribunal which have not been challenged before us. On the facts found by the Tribunal we do not find any justification for apportionment of the expenses under different heads. Although the total income has not been affected by such proportionate allocation of the expenditure, but if dividend income is reduced by proportionate expenses in that event the relief available to the assessee u/s 235 would also be reduced. In view of the findings of the Tribunal we are unable to accept the contention of Mr. Naha that

the Tribunal did not find out the basic or primary fact. In any event the first question would be purely academic in view of our answer to the second question. We, therefore, answer the first question in the affirmative and in favour of the assessee.

10. The second question relates to relief u/s 235. Section 235 which had been omitted by the Finance (No. 2) Act, 1971, corresponding to section 49B of the Indian income tax Act, 1922 ("the 1922 Act") excepting the percentage of relief mentioned in section 235(b).

11. Section 49B came up for consideration before this Court in the case of CIT v. Clive Row Investment Holding Co. Ltd. [1976] 1 Cal. LJ 314. In that case the assessee-company claimed relief u/s 49B on the gross dividend. The assessee-company had received Rs. 5,07,603 as dividend (agricultural) from another company in which the assessee-company was a shareholder. The gross income of the assessee-company in that year was Rs. 19,30,326. The total expenses incurred for earning the said sum of Rs. 19,30,326 was Rs. 2,02,149. The ITO worked out the proportionate expenditure relating to the said dividend income of Rs. 5,07,503 at Rs. 53,147 and, accordingly, granted the relief to the assessee-company u/s 49B(b)(ii) at 20 per cent on Rs. 4,54,356.

12. This Court held thus:

The submission of Mr. Pal, in his own words, is as follows : The words "any dividend", used in section 49B refer to gross dividend paid by the dividend-paying company and, therefore, by using the expression "on that portion of the dividend" in the latter part of the section the Legislature must have intended not the whole of that gross dividend but only that portion of the gross dividend which has suffered tax under this Act and, hence, the relief of 20 per cent must be worked out in the manner in which it has been done by the Tax Officer. But the expression "that portion of the dividend" used in the latter part of the section refers to the words "attributable to the profits of the company assessed to agricultural income tax" and the construction suggested by Mr. Pal is not permissible or possible.

This section gives relief to all shareholders who receive dividends from the company, paying such dividend out of the profits and gains where such profits and gains have been assessed to the agricultural income tax in hands of the dividend-paying company. The quantum of relief is also specified in the section itself. "Our above view is also supported by the decision of the Kerala High Court in the case of [Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd. and Another](#), at page 347 and, hence, we overrule the above sub-mission of Mr. Pal". Accordingly, this Court held that the assessee was entitled to relief u/s 49B on the total amount of the dividend.

13. In [Commissioner of Income Tax Vs. A.V. Thomas and Co. Ltd. and Another](#), the Kerala High Court held that first part of section 235 relates to the amount of the dividend paid by the company to its shareholder. That is the entire dividend paid to

the shareholder out of the profits and gains which is assessed to agricultural income tax by the State Government. Section 235 warrants the calculation of the relief based on the entire dividend attributable to the agricultural profits. The assessee is, therefore, entitled to get relief on that basis. The Court in Clive Row Investment Holding Co. Ltd.'s case (supra) in construing the provisions of section 49B adopted the same reasoning. In our opinion section 235 refers to the "amount of dividend". Accordingly, relief is to be calculated on the amount of the dividend paid to a shareholder and brought to tax in the assessment of that shareholder. The relief u/s 235 cannot be given only on that part of the dividend which is reckoned in computing the total income of the shareholder.

14. In that view of the matter, we answer the second question in the affirmative and in favour of the assessee. There will be no order as to costs.

Dipak Kumar Sen, J.

I agree.