(1979) 02 BOM CK 0050

Bombay High Court

Case No: Income-tax Reference No. 163 of 1970

Commissioner of Income Tax, Bombay City-I — APPELLANT

Vs

Geigy International Ltd. — RESPONDENT

Date of Decision: Feb. 12, 1979

Acts Referred:

- Income Tax Act, 1961 - Section 104, 84, 99(1)
- Income Tax Rules, 1962 - Rule 1, 2

Citation: (1979) 13 CTR 71 : (1980) 124 ITR 138 : (1979) 2 TAXMAN 251

Hon'ble Judges: S.K. Desai, J; M.N. Chandurkar, J

Bench: Division Bench

Advocate: R.J. Joshi, for the Appellant; B.A. Palkhivala, for the Respondent

Judgement

Chandurkar, J.

The question referred in this reference relates to the construction of rules in the Fifth Schedule to the I.T. Act, 1961, as they were in force and relevant for the assessment proceedings in the assessment year 1963-64. The assessee-company purchased the shares of an Indian company, Suhrid Geigy Ltd., which was engaged in an industry for the manufacture and production of dye-stuff. In assessment proceedings the assessee-company exemption from super-tax in respect of dividends received from the said Suhrid Geigy Ltd. (hereinafter referred to as the "Indian company"). These shares were purchased by the assessee some time in April, 1962, when the Indian company raised fresh capital and issued fresh shares. The claim of the assessee for exemption under s. 99(1)(iv) of the I.T. Act, 1961, as it stood at the material time, was rejected by the ITO on the ground that the condition in r. 2 of the Fifth Schedule in respect of fresh capital by public subscription has not been satisfied by the Indian company from which the assessee got the dividends. He further held that the fresh capital of the Indian company did not come by public subscription and, therefore, the company was not entitled to any exemption in view of r. 2 of the Fifth Schedule. This view of the ITO having been confirmed by the AAC, the assessee-company filed an appeal before the Income Tax Appellate Tribunal. The Tribunal took the view that rr. 1 and 2 of the Fifth Schedule were independent of each other and while r. 1 took care of the companies that were formed after March 31, 1952, r. 2 took care of existing companies. The Tribunal further took the view that r. 2 could apply only to public companies as the necessary requisite was fresh issue of capital by public subscription. The Tribunal, therefore took the view that r. 1 alone was applicable to the case of the assessee company and the assessee-company was entitled to exemption in respect of the dividend received on fresh shares issued by the Indian company. Out of this order of the Tribunal, the Question which has been referred at the instance of the revenue is as follows :

"Whether, on the facts and in the circumstances of the case, the assessee-company was rightly entitled to exemption from super-tax u/s 99(1)(iv) read with Fifth Schedule to the Income Tax Act, 1961, as it stood at the relevant time ?"

2. Mr. Joshi appearing on behalf of the revenue tried to support the construction placed on the rules in the Fifth Schedule by the ITO and the AAC, but a bare reading of the two rules is sufficient, in our view, to indicate that the view of the ITO and the AAC was patently contrary to the requirements contemplated by the rules. Clause (iv) of s. 99(1) at the material time read as follows :

"Super-tax shall not be payable by an assessee in respect of the following amounts which are included in his total income - .....

(iv) if the assessee is a company, any dividend received by it from an Indian company subject to the provisions contained in the Fifth Schedule."

3. Rules 1 and 2 of the Fifth Schedule as they were at the material time read as follows :

"1. Super-tax shall not be payable by a company in respect of any dividend which is assessable for the assessment year commencing on the April 1, 1962, and for the subsequent assessment years, and which is declared -

(a) by an Indian company formed and registered after the March 31, 1952, and before the April 1, 1967, where -

(1) the Central Government is satisfied that the Indian company is wholly or mainly engaged in an industry for the manufacture or production of any one or more of the articles specified in any of the items in part A of this Schedule; and

(2) the income of the Indian company would have been exempt under the provisions of section 84 if the provisions of that section had been applicable thereto; or

(b) by an Indian company formed and registered after the March 31, 1961, and before the April 1, 1967, where -

(1) the Central Government is satisfied that the Indian company is wholly or mainly engaged in an industry for the manufacture or production of any one or more of the articles specified in any of the items in Part B of this Schedule; and

(2) the income of the Indian company would have been exempt under the provisions of section 84, if the provisions of that section had been applicable thereto.

2. Super-tax shall not be payable by a company in respect of any dividend which is assessable for the assessment year commencing on the April 1, 1962, and for the subsequent assessment years and which is payable to it in respect of any fresh capital raised by an Indian company by public subscription -

(a) after the February 28, 1953, and before the April 1, 1967, for the purpose of increasing the production of, or starting a separate unit for the manufacture of production of, any one or more of the articles specified in any of the items in Part A of this Schedule; and

(b) after the March 31, 1961, and before the April 1, 1967, for the purpose of increasing the production of, or starting a separate unit for the manufacture or production of, any one or more of the articles specified in any of the items in Part B of this Schedule."

4. The scheme of the Rules reproduced above is extremely simple. Rule 1 provides that super-tax shall not be payable by a company in respect of dividend from a certain category of Indian companies which is assessable for the assessment year commencing on April 1, 1962, and for the subsequent years. The Indian company whose dividend is contemplated by the rule is specified in cls. (a) and (b) of r. 1. The categorisation in cls. (a) and (b) is made on the basis of the articles manufactured by the Indian company, that is, whether it manufactures any articles specified in any of the items in part A or Part B of the Fifth Schedule. Clause (a) deals with an Indian company formed or registered after March 31, 1952, and before April 1, 1967. There are certain conditions which are required to be satisfied before exemption is claimed in respect of dividend declared by the Indian companies referred to in cls. (a) and (b) or r. 1. In respect of a company which is formed and registered after March 31, 1952, and before April 1, 1967, the Central Government has to be satisfied that the company is wholly or mainly engaged in an industry for the manufacture of production of any one or more of the articles specified in any of the items in Part A of the Schedule and the further condition is that the income of the Indian company would have been exempt under the provision of s. 84 if the provisions of that section had been applicable thereto. Under clause (b) also the satisfaction of the Central Government with regard to the fact that the company is wholly or mainly engaged in an industry for the manufacture or production of certain articles is necessary, but the articles for the purposes of clause (b) are specified in Part B of the Schedule. The condition with regard to the applicability of s. 84 is also to be satisfied. Rule 2 specifically refers to dividend payable in respect of any fresh capital

raised by an Indian company by public subscription. In respect of a company engaged in the manufacture or production of items specified in Part A of the Schedule, fresh capital should be raised after February 28, 1953, and before April 1, 1967, and in respect of a company engaged in the manufacture or production of articles specified in Part B of the Schedule, fresh capital must be raised after March 31, 1961, and before April 1, 1967. No doubt, rr. 1 and 2 both deal with exemption from super-tax, but the companies, dividends from which are exempted, are of a different category. What is necessary under r. 2 is that the Indian company must have raised fresh capital by public subscription. Under s. 3 of the Companies Act, in the case of a private company, there is a positive prohibition against the private company issuing an invitation to the public to subscribe for any shares in, or debentures of, the said company. It is obvious, therefore, that so far as a private company is concerned, applicability of r. 2 will be completely out of question and, in such a case, r. 1 alone will apply. It is immaterial for the purposes of r. 1 as to whether the shares purchased by the assessee-company were issued initially or they were for raising additional capital. It is difficult to comprehend how r. 2 can apply at all to a private company. In our view, there is hardly any scope for any argument that in the case of a private company, the proper provision to apply will be r. 1 and not r. 2. In our view, the Tribunal was, therefore, right when it took the view that, so far as the assessee was concerned, its claim for exemption would be governed by r. 1 and not by r. 2.

5. In this view of the matter, the question referred to us must be answered in the affirmative and in favour of the assessee. Revenue to pay costs of this reference.