

(1993) 02 BOM CK 0122

Bombay High Court

Case No: Income-tax References No"s. 158 of 1980 and 531 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Madhusudan Brothers Ltd.

RESPONDENT

Date of Decision: Feb. 5, 1993

Acts Referred:

- Income Tax Act, 1961 - Section 2, 2(18)

Citation: (1993) 95 BOMLR 921 : (1993) 204 ITR 74

Hon'ble Judges: U.T. Shah, J; B.P. Saraf, J

Bench: Division Bench

Advocate: G.S. Jetly, S.J. Mehta, for the Appellant;

Judgement

U.T. Shah, J.

These two reference involving a common issue are disposed of together for the sake of convenience.

2. The assessment years involved are 1968-69 to 1971-72 and 1975-76.

3. The common questions raised in these reference read as under :

Income Tax Reference No. 158 of 1980 :

"(i) On the facts and in the circumstances of the case, whether the shares beneficially held be charitable trusts could be said to be held by the "public" ?

(ii) On the facts and in the circumstances of the case whether the shares held by a nominee, being a public limited company, could be excluded in terms of Explanation 1 to section 2(18) when the nominee did not beneficially own the said shares ?

(iii) On the facts and in the circumstances of the case, whether the assessee-company could be said to be one in which "the public were substantially interested" within the meaning of section 2(18) of the Income Tax Act, 1961 ?"

4. Learned counsel for the assessee, at the outset, stated that the issue involved in these reference is to be considered in two groups, i.e., one pertaining to the assessment years 1968-69 and 1969-70 and the other pertaining to the assessment years 1970-71, 1971-72 and 1975-76. Inviting our attention to the relevant provisions of the Act, viz., section 2(18) of the Income Tax Act, 1961 (for short, "the Act"), as it stood in each of the years under reference, he pointed out that, for the assessment years 1968-69 and 1969-70, the answer to the question raised has to be given in favour of the Revenue in view of the decision of this Court in the case of [Commissioner of Income Tax, Bombay City-I Vs. Indian Hotels Co. Ltd.](#). It may be mentioned that, in the said reported case, this Court had interpreted the word "public" appearing in section 2(18)(b)(i)(d) to mean that the charitable trust, both public or private, cannot be treated as "public" for determining whether a company is company in which the public are substantially interested or not. However, as regards the other years under reference, he invited our attention to the changes made with effect from April 1, 1970, more particularly in sub-clause (b) of clause (18) of section 2 of the Act. The said sub-clause (b) of clause (18) of section 2 was substituted with effect from April 1, 1970. The relevant portion of the said Sub-clause reads as under :

"(b) if it is a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) are fulfilled, namely :-

(A) shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognised stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made there-under;

(B) (i) shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than fifty per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and were throughout the relevant previous year beneficially held by -....."

5. Learned counsel for the assessee submitted that company would be a company in which the public are substantially interested, if it fulfills the conditions either of (A) or (B) mentioned above. In this connection, he stated that, since on the last date of relevant previous year of the assessment years 1970-71, 1971-72 and 1975-76, the shares of the company were listed on a recognised stock exchange, the assessee should be treated as a company in which the public are substantially interested. Inviting our attention to the last sentence of paragraphs 11 of the order of the Tribunal under reference, learned counsel for the assessee highlighted the fact that it was not in dispute that the shares of the assessee-company were quoted in the stock exchange and were freely transferable. In this view of the matter, he

submitted that, in respect of these three years, we should uphold the order of the Income Tax Act Appellate Tribunal.

6. Learned Counsel for the Revenue, on the other hand, strongly relied on the aforesaid decision of this Court and urged that the Tribunal was not justified in accepting the assessee's stand that it should be treated as a company in which the public are substantially interested.

7. On due consideration of the submissions made by the parties and after going through the aforesaid decision of this Court, we agree with the stand taken on behalf of the Revenue that the Tribunal was not justified in holding the assessee as a company in which the public are substantially interested in respect of the assessment years 1968-69 and 1969-70. In fact, as indicated above, learned counsel for the assessee had not disputed this fact. In this view of the matter, we answer all the three questions for these two years in favour of the Revenue and against the assessee.

8. As regards the assessment years 1970-71, 1971-72 and 1975-76, we are of the opinion that, in view of the substitution of sub-clause (b) of clause (18) of section 2 of the Act, with effect from April 1, 1970, coupled with the clear finding of the Tribunal referred to above, viz., that the shares of the assessee-company were listed on the stock exchange and were freely transferable, the stand taken by the assessee is unassailable. In this view of the matter, we answer all the three questions for these three years in favour of the assessee and against the Revenue. We make no order as to costs.