A

COMMISSIONER OF INCOME-TAX, BOMBAY

v.

M/S. SHREE GOVERDHAN LTD. BOMBAY

January 9, 1968.

B [J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.]

Indian Income-tax Act, 1922, ss. 2(11) and 23A—Accounting year of company ending on September 30, every year—Company a partner in a firm—Accounting periods of firm for 1951-52 A.Y. ending on November 30, 1950 and March 31, 1951—Company's annual general meeting held on May 17, 1951—Company's share of income from partnership whether to be included in its income for 1951-52 A.Y. for purpose of s. 23A.

C

The assessee—a public limited company, entered into a partnership on April 20, 1950 with another firm, and thus had two sources of income, (i) from its own business and (2) from the shares of the partnership business. The Income-tax Officer included the shares of profit of the assessee from the partnership business up to November 30, 1950 and up to March 31, 1951 in the assessment of the assessment year 1951-52. The assessee objected, contending that this income accrued after the accounting D year of the assessee which ended on September 30, 1950, and at its general meeting held on May 17, 1951, the assessee could not be expected to declare a dividend for the assessment year 1951-52 which related to the accounting year ending on September 30, 1950 out of its profits that accrued during subsequent accounting period. The Revenue maintained the assessment, which, on reference, the High Court answered in favour of the assessee. In appeal, this Court.

E HELD : The assessable income of the assessee included the share of the assessee's profits in the partnership for the purpose of application of s. 23A of the Income-tax Act, 1922 so far as the assessment year 1951-52 was concerned.

Under s. 2(11) of the Act an assessee may have different previous years in respect of different sources of income and under the scheme of the Act the income of the varying previous years from the different F sources should be lumped together to arrive at the total income of the assessee. The provisions of s. 2(11) of the Act make it clear that, except in cases where a previous year is determined by the Department under cl. (b), the varying previous years must all necessarily end with or within the financial years next preceding the assessment year. In the present case, the previous year so far as the personal business of the assessee was concerned, was the previous year ended on September 30, 1950, but with regard to the income of the partnership the previous year was the period G between November 30, 1950 and March 31, 1951 when the accounts of the partnership were made up and closed. The provisions of s. 23(1) must be construed in the context of s. 2(11) of the Act and the expression 'previous year' of the company in s. 23A(1) must be interpreted as meaning two previous years where the company carries on two different businesses with different sources of income for which there are separate accounting periods. [736 F-737 B]

H The annual general meeting of the assessee was held on May 17, 1951 after the close of the accounting year of the firm. It is true that the actual profits of the assessee from its partnership business were ascertained after the close of the accounting period *i.e.*, March 31, 1951. But the

income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on on its being ascertained. The legal position is that a liability depending upon a contingency is not a debt in *praesenti or in futuro* till the contingency happens. But if it is a debt the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount : *Debitum in praesenti, Solvendum in futuro.* [737 E-H]

Commissioner of Inland Revenue v. *Gardner Mountain & D' Ambrumenil Ltd.* 29 T.C. 69, applied.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 17 of 1967.

Appeal by special leave from the judgment and order dated September 18, 1962 of the Bombay High Court in Income-tax Reference No. 34 of 1961.

C. K. Daphtary, Attorney-General, T. A. Ramachandran and *R. N. Sachthey*, for the appellant.

Radhey Lal Aggarwal, Bishambar Lal and *H. K. Puri*, for the respondent.

The Judgment of the Court was delivered by

Ramaswami, J. This appeal is brought, by special leave, on behalf of the Commissioner of Income-tax against the judgment of the Bombay High Court dated September 18, 1962 in Income Tax Reference No. 34 of 1961 whereby the High Court held that the order passed against the respondent, hereinafter referred to as the 'assessee' under s. 23A of the Indian Income Tax Act, 1922 (hereinafter referred to as the "Act") was not justified and valid for the assessment year 1951-52.

The assessee is a public limited company registered under the Indian Companies Act. Its share capital consists of 50,000 shares subscribed and paid up. Out of these shares, 47,493 are held by Shree Raghunath Investment Trust Ltd., a company incorporated as a private company under the laws of Jammu and Kashmir (hereinafter referred to as "The Jammu Co.") and having its registered office there. Out of the remaining 2,507 shares, 2,500 shares were held by another private limited company incorporated in India and having its registered office in New Delhi and the remaining 7 shares were held by seven individuals. The shares of the assessee are not quoted on the Stock Exchange any where in India. There is nothing, however, in its Memorandum and Articles of Association placing any restriction on the free transfer of its shares. The assessee entered

A into a partnership on April 20, 1950 with a firm called 'The India Steel Syndicate'. There was a reconstitution of this firm on December 1, 1950. The shares of profit of the assessee from this firm (which was registered under s. 26-A of the Act) as up to November 30, 1950 and upto March 31, 1951 totalling B Rs. 70,895/- were included in the assessment of the assessee for the assessment year 1951-52.

During the assessment years 1950-51 and 1951-52, for which the previous years ended on September 30, 1949 and September 30, 1950, the Income Tax Officer determined the assessable income of the assessee at Rs. 60,350 and Rs. 93,884 respectively. C After deduction of the taxes payable, the balance was Rs. 35,834 in the first year and Rs. 53,103 in the second year. As the assessee had not declared any dividend at its Annual General Meetings during either of the aforesaid two years or within six months thereafter, the Income Tax Officer issued notices to the assessee to show cause why an order under s. 23-A(1) of the D Act should not be passed for the two years. The assessee, however, contended that s. 23-A was not applicable inasmuch as the public were substantially interested within the meaning of the Explanation appended to the third proviso to s. 23-A(1). Overruling this contention the Income Tax Officer made an order under s. 23-A against the assessee in respect of the undistributed profits for the said two years. E Against these orders the assessee appealed to the Appellate Assistant Commissioner. A further ground was taken in the appeal that the order under s. 23-A was unwarranted so far as assessment year 1950-51 was concerned inasmuch as the assessable profits included a sum of Rs. 70,895/- being the share of the assessee's income which arose F in its partnership with the Indian Steel Syndicate as up to November 30, 1950 and March 31, 1951, and that the income accrued after the accounting year of the assessee which ended on September 30, 1950. The Appellate Assistant Commissioner dismissed the appeals and his order was affirmed by the Appellate Tribunal on June 28, 1959 for both the assessment years. At the instance of the assessee the Appellate Tribunal stated a G case to the High Court under s. 66(1) of the Act on the following question of law :

> "Whether the order passed against the assessee for assessment years 1950-51 and 1951-52 under section 23-A are justified and valid ?"

H By its judgment dated September 18, 1962, the High Court answered the question in so far as it pertained to assessment year 1950-51 in the affirmative and in so far as it pertained to assessment year 1951-52 in the negative and against the appellant.

Section 23-A of the Act, as it stood before its amendment by the Finance Act, 1955 was to the following effect : A

"23-A. Power to assess individual members of certain companies.—(1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income : B C D E

Provided that when the reserves representing accumulations of past profits which have not been the subject of an order under this sub-section exceed the paid up capital of the company together with any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company whichever of these is greater, this section shall apply as if instead of the words 'sixty per cent' the words 'one hundred per cent' were substituted : F G

Provided further that no order under this sub-section shall be made where the company has distributed not less than fifty-five per cent of the assessable income of the company as reduced by the amount of income-tax and super-tax payable by the company in respect thereof, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make H

such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent of the assessable income of the company of the previous year concerned as reduced by the amount of income-tax and super-tax payable by the company in respect thereof :

Provided further that this sub-section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof....."

Section 2(11) of the Act states :

"2. In this Act, unless there is anything repugnant in the subject or context,—

(11)'previous year' means—

(i) in respect of any separate source of income, profits and gains—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then, at the option of the assessee, the year ending on the date to which his accounts have been so made up :

Provided that where in respect of a particular source of income, profits and gains an assessee has once been assessed, or where in respect of a business, profession or vocation newly set up an assessee has exercised the option under sub-clause (c), he shall not, in respect of that source or, as the case may be, business, profession or vocation, exercise the option given by this sub-clause so as to vary the meaning of the expression 'previous year' as then applicable to him except with the consent of the Income-tax Officer and upon such conditions as the Income-tax Officer may think fit to impose; or

....

(ii) in respect of the share of the income, profits and gains of a firm where the assessee is a partner in the firm and the firm has been assessed as such, the

period as determined for the assessment of the income, profits and gains of the firm;" A

On behalf of the appellant the Attorney-General put forward the argument that the High Court was in error in holding that the sum of Rs. 70,895 which was the assessee's share of income in its partnership with the Indian Steel Syndicate B should be left out of consideration so far as the assessment year 1951-52 was concerned. It was pointed out that the assessee had two different sources of income: (1) from its own business, and (2) from the share of the partnership business with the Indian Steel Syndicate and that under s. 2(11) of the Act the assessee must be deemed to have two previous years with regard C to two different sources of income. It was therefore argued that the High Court was in error in holding that the income from the partnership could not be included in the assessment income of the assessee for the assessment year 1951-52. On behalf of the assessee the contrary view-point was put forward by Mr. Radhey Lal Aggarwal. It was submitted that the sum of D Rs. 70,895 related to the share of the profits of the assessee from out of the partnership for the period between November 30, 1950 to March 31, 1951 and this period was after the accounting year of the assessee which ended on September 30, 1950. It was contended that at its general meeting held on May 17, 1951 the assessee could not be expected to declare a dividend for the assessment year 1951-52 which related to the accounting E year ending on September 30, 1950 out of its profits that accrued during the subsequent accounting period. In our opinion, the argument put forward by the Attorney-General on behalf of the appellant is well-founded and must be accepted as correct. It is true that the assessee had prepared a balance sheet on the basis that its accounting year ended on September 30, 1950. It is, F however, admitted that the assessee had two sources of income: (1) from its own business, and (2) from the share of the partnership business with Indian Steel Syndicate. Under s. 2(11) of the Act an assessee may have different previous years in respect of different sources of income and under the scheme of the Act the income of the varying previous years from the different G sources should be lumped together to arrive at the total income of the assessee. The provisions of s. 2(11) of the Act make it clear that, except in cases where a previous year is determined by the Department under cl. (b), the varying previous years must all necessarily end with or within the financial year next preceding the assessment year. In the present case, the previous H year so far as the personal business of the assessee was concerned, was the previous year ended on September 30, 1950, but with regard to the income of the partnership the previous year was

A the period between November 30, 1950 and March 31, 1951 when the accounts of the partnership were made up and closed. In our opinion, the provisions of s. 23A(1) must be construed in the context of s. 2(11) of the Act and the expression 'previous year' of the company in s. 23A(1) must be interpreted as meaning two previous years where the company carries on two B different businesses with two different sources of income for which there are separate accounting periods. It follows therefore in the present case that the Income Tax Officer was right in holding that the assessable income of the company included the share of the assessee's profits in its partnership with the Indian Steel Syndicate for the purpose of application of s. 23A of the C Act so far as the assessment year 1951-52 was concerend.

The argument was, however, stressed on behalf of the respondent that in any event the share of the profit of the assessee from the partnership business for the period from October 1, 1950 to March 31, 1951 was not known to the assessee before its annual general meeting on May 17, 1951. It was pointed D out that for the first time the Income Tax Officer was intimated on August 11, 1953 that the share of the profit of the assessee in the partnership was to the extent of Rs. 70,895 and should be included in its assessment. After receipt of the intimation the Income Tax Officer rectified the original assessment made on February 29, 1952 and included the said amount of Rs. 70,895. E In our opinion, there is no warrant for the argument put forward on behalf of the respondent. It is conceded in this case that the annual general meeting of the assessee was held on May 17, 1951 after the close of the accounting year of the Indian Steel Syndicate. It is true that the actual profits of the assessee from its partnership business were ascertained after the F close of the accounting period, *i.e.*, March 31, 1951. It is, however, well-established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on on its being ascertained. The legal position is that a liability G depending upon a contingency is not a debt *in praesenti or in futuro* till the contingency happens. But if it is a debt the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount : *debitum in praesenti, solvendum in futuro*. Reference may be made in this connection to the decision in *Commissioners of Inland Revenue* v. *Gardner Moun-* H *tain & D' Ambrumenil, Ltd.*(1) The assessee in that case carried on the business of under-writing agents, and entered into agree-

(1) 29 T.C. 69.

ments with certain underwriters at Lloyds under which it was entitled to receive as remuneration for its services in conducting the agency, commissions on the net profits of each year's underwriting. The agreements provided that "accounts should be kept for the period ending 31st December in each year and that each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the company shall be calculated and paid thereon." The accounts for the underwriting done in the calendar year 1936 were made up at the end of 1938 and the question that arose was whether the assessee was liable to additional assessment in respect of the commission on underwriters' profits from the policies underwritten in calendar year 1936 in the year in which the policies were underwritten or in the year when the accounts were thus made up. The assessee contended that the contracts into which it entered were executory contracts under which its services were not completed or paid for, as regards commission, until the conclusion of the relevant account; the profit in the form of commission was not ascertainable or earned, and did not arise, until that time and the additional assessment which was made in the year in which the policies were underwritten should accordingly be discharged. The Special Commissioners allowed the assessee's contention and discharged the additional assessment. The decision of the Special Commissioners was confirmed on appeal by Macnaghten, J. in the King's Bench Division of the High Court. The Court of Appeal however reversed this decision and a further appeal was taken by the assessee to the House of Lords. The House of Lords held that on the true construction of the agreements, the commissions in question were earned by the assessee in the year in which the policies were underwritten, and must be brought into account accordingly and confirmed the decision of the Court of Appeal. At page 96 of the Report Lord Wright observed :

> "I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned, though the profits resulting from the insurance cannot be then ascertained, but in practice are not ascertained until the end of two years beyond the date of underwriting. The right is vested, though its valuation is postponed, and is not merely postponed but depends on all the contingencies

A which are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance, and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and under-
B standing. But the delays and difficulties which there may be in any particular case, however they may affect the profit do not affect the right for what it eventually proves to be worth."

Lord Simonds also stated at page 110 of the Report as follows :

C "It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not accrue for Income Tax purposes in that same year, though it was not ascertainable until later."

D

It is admitted in the present case that the Indian Steel Syndicate closed the accounts of the partnership for the first time for the first set of partners on November 30, 1950 and for the other set of partners on March 31, 1951 and the assessee as a partner was therefore entitled to the share of the profits as on the last day
E of the accounting period of the partnership *i.e.*, March 31, 1951.

For these reasons we hold that the Income Tax Officer was right in holding that the amount of Rs. 70,895/- which was the share of the assessee's income from its partnership with Indian Steel Syndicate for the period ending March 31, 1951 should
F be included in the assessable profits of the company for the assessment year 1951-52 and should be treated as part of the distributable profits of the company for the purpose of s. 23-A (1) of the Act. In other words, the order made by the Income Tax Officer against the assessee under s. 23-A of the Act for the assessment year 1951-52 must be held to be justified and valid
G and the question of law referred by the Appellate Tribunal must be answered against the assessee and in favour of the Income Tax Department for the year 1951-52 also. We accordingly set aside the judgment of the Bombay High Court dated September 18, 1962 so far as the assessment year 1951-52 is
H concerned and allow this appeal with costs.

Y.P. *Appeal allowed.*