

distributed or paid by Petitioner by way of dividend does not fall under the category of income, profits or gains derived or any amount received by Petitioner and no exemption from tax under Section 115-O of the Income Tax Act, 1961 (hereinafter referred to as the said Act) is available to Petitioner. The principal ground of challenge is based on Section 50 of the Small Industries Developments Bank of India Act, 1989 (hereinafter referred to as the SIDBI Act), which exempts Petitioner from payment of income tax on any income, profits or gains derived or any amount received by Petitioner.

2. Petitioner is a financial institution established under the SIDBI Act. On 7/6/1997, the Finance Act 1997 amended the Income Tax Act and provided tax payment on distributed profits. Petitioner had transferred a sum of Rs.54 crore to IDBI, in accordance with the provisions of Section 29(2) of the SIDBI Act out of the profits for the year ended 31/03/1997 and without prejudice to its rights deposited a sum of Rs.5.4 crore on 29/06/1997. Petitioner for the year ended 31/03/1998 transferred a sum of Rs.67,50,00,000/- to the IDBI as per Section 29(2) of the SIDBI Act. Petitioner without prejudice paid a sum of Rs.6.75 crore on 08/06/1998 and Rs.7.425 crore on 10/06/1999 under Section 115-O of the said Act.

3. Petitioner's Board of Directors recommended a declaration of dividend at the rate of 15% on the share capital for the year ended 31/03/2000. Accordingly, a sum of Rs.67.5 crore was provided for in the accounts for the year ended 31/03/2000 to meet such liability. Thus, Petitioner, on 12/05/2000, paid tax of an amount of Rs.6,88,50,000/- without prejudice.

4. Since the liability of Petitioner to pay additional income tax as per Section 115-O of the said Act was not clear, Petitioner was in consultation with its advisers. Petitioner had also applied with respondent No.1 seeking clarification about Petitioner's liability to pay additional income tax as per Section 115-O of the said Act in the light of Section 50 of the SIDBI Act. Petitioner on 17/3/2003 received communication from respondent No.1 stating that any amount declared or distributed or paid by Petitioner by way of dividend is liable for additional income tax under Section 115-O of the said Act.

5. Petitioner has therefore filed the present petition challenging communication dated 17/2/2003 and further directions seeking a refund of income tax paid under Section 115-O of the said Act. This court on 21/10/2004 issued a Rule after hearing both sides. Respondents have not

filed their reply in the present petition.

6. We have heard Mr. P. J. Pardiwalla, Senior Advocate for Petitioner and Mr. Ashok Kotangale for Respondents.

7. Mr. Pardiwalla, Senior Advocate for Petitioner, submitted that Section 50 of the SIDBI Act exempted Petitioner from payment of any income tax or any other tax regarding any income, profits or gains derived or any amount received by Petitioner. He submitted that tax on payment of dividend as per Section 115-O of the said Act is exempted by virtue of Section 50 of the SIDBI Act. Therefore Petitioner is not liable to pay any tax on its income, profits or gains and is entitled to refund of income tax paid under protest. He invited our attention to Section 115R of the said Act, a provision to impose a tax on distributed income of unit-holders in respect of Section 32 of the Unit Trust of India Act 1963, a provision similar to Section 50 of the SIDBI Act. He submitted that whenever there is an intention to impose a tax on distributed income of unit-holders, a special provision is made in the Income Tax Act. Such provision consists of *non-obstante* clause having an overriding effect on provisions under the other Acts that exempt persons from payment of income tax. He places reliance on the judgment of this Court in *Godrej and Boyce Mfg. Co. Ltd. vs. Deputy*

Commissioner of Income-Tax and Another¹. He submitted that this court in *Godrej and Boyce case (supra)* held that the charge under sub-section(1) of Section 115-O of the said Act is on the profits of the domestic company and more specifically on that part of the profits which is declared and distributed by way of dividend. Therefore, he submitted that Petitioner is entitled to refund of the tax amount paid under protest by Petitioner. This judgment in *Godrej Boyce (supra)* has been overruled in *Godrej & Boyce Mfg. Co. Ltd. vs. CIT*².

8. Per contra, Mr. Ashok Kotangale submitted that any amount distributed or paid by the company by way of dividend is not covered by Section 50 of the SIDBI Act. Therefore Petitioner was liable to pay additional tax on the amount distributed by way of dividend.

9. At this juncture, it would be necessary to extract the provision of Section 50 of the SIDBI Act, regarding which the submissions were canvassed. Section 50 of the SIDBI Act reads as under:

"Notwithstanding anything to the contrary contained in the Income-tax Act, 1961 or in any other enactment for the time being in force relating to income-tax or any other tax on income, profits or gains, the Small Industries Bank shall not be liable to pay income-tax or any other tax in respect of:-
(a) any income, profits or gains accruing or arising to the Small

1 (2010) 328 ITR 81 (Bom)

2 (2017) 7 SCC 421

Industries Development Assistance and or any amount received in that Fund, and
b) any income, profits or gains derived or any amount received by the Small Industries Bank."

10. Section 50 of the SIDBI Act contains *non-obstante* clause giving overriding effect over provisions of Income Tax Act in respect of any income, profits, gains derived or any amount received by the company. It is well settled that a provision beginning with *non-obstante clause* must be enforced and implemented by giving effect to the provisions of the Act and by limiting the provisions of other laws. A *non-obstante* clause is generally appended to a Section with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the *non-obstante* clause. It is equivalent to saying that despite the provisions of the Act mentioned in the *non-obstante* clause, the provision following it will have its full operation or the provisions embraced in the *non-obstante* clause will not be an impediment for the operation of the enactment of the provision in which the *non-obstante* clause occurs. But, the same principle cannot be applied, *ipso facto*, when one comes across two or more enactments containing similar *non-obstante* clauses operating in the same or similar direction.

11. The Supreme Court in *Central Bank of India v. State of*

Kerala,³ observed thus:—

“103. A non-obstante clause is generally incorporated in a statute to give overriding effect to a particular section of the statute as a whole. While interpreting non-obstante clause, the court is required to find out the extent to which the legislature intended to do so and the context in which the non-obstante clause is used. This Rule of interpretation has been applied in several decisions.”

For interpreting *non-obstante* clause, the statute in which it appears would have to be borne in mind. The subject of the statute, its object and purpose, the context in which the legal fiction is created all have an important bearing and a role in applying the legal fiction in all circumstances and cases contemplated by the statute. The object of the SIDBI Act is to establish the Small Industries Development Bank of India as the principal financial institution for the promotion, financing and development of industry in the small-scale sector and to co-ordinate the functions of the institutions engaged in the promotion, financing or developing industry in the small-scale sector and for matters connected therewith or incidental thereto. Grant of exemption from payment of income tax was to provide an impetus to achieve aforesaid objects in the formative years.

12. For proper appreciation of the effect of *the non-obstante* clause in Section 50 of SIDBI Act, it is necessary to set out Section 115R of the

³(2009) 4 SCC 94

said Act, which reads as under:

115R (1) Notwithstanding anything contained in any other provisions of this Act and section 32 of the Unit Trust of India Act, 1963 (any amount of income distributed on or before the 31st day of March, 2002 by the Unit Trust of India to its unit-holders) shall be chargeable to tax and the Unit Trust of India shall be liable to pay additional income-tax on such distributed income at the rate of ten per cent:

Provided that nothing contained in this sub-section shall apply in respect of any income distributed to a unit-holder of open-ended equity-oriented funds in respect of any distribution made from such Fund for a period of three years commencing from the 1st day of April, 1999."

Finance Act 1999 inserted chapter XXI-E to levy tax on the amount distributed by the Unit Trust of India by introducing Section 115R(1) of the said Act, which contains *non-obstante* clause giving overriding effect over Section 32 of the Unit Trust of India Act, 1963. It needs to be noted that Section 32 of the Unit Trust of India Act, 1963 is similar to Section 50 of the SIDBI Act. Introduction of Section 115R (1) of the said Act indicates that whenever legislature wants to give overriding effect over exemption from payment of tax under any Act, specific provision is inserted in the Income Tax Act giving overriding effect over said Act which provides for an exemption from payment of income tax. The absence of provision like Section 115R of the said Act in relation to Section 50 of SIDBI Act indicates that at the relevant time, the legislature did not intend to impose tax on companies like Petitioner.

13. At this stage, it is necessary to consider Section 115-O of the said Act, which reads as under:

"115-O tax on distributed profits of domestic companies- (1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividend(whether interim or otherwise) on or after the 1st day of June, 1997, whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of ten per cent.

2) Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on distributed profits under sub-section (1) shall be payable by such company."

Reading of Section 115-O of the said Act makes it clear that it imposes a tax on the company on the amount of dividend declared, distributed or paid. The liability to pay additional tax as per Section 115-O of said Act is irrespective of whether the recipient has received dividend as income, which is chargeable to tax or not. It is an indicator that the said charge is on the company paying dividend. Reading of Section 115-O of the said Act clarifies that the tax under it is an additional income tax levied on the company's total income with reference to the dividend distributed. The *non-obstante* provision in Section 115-O(1A) of the said Act has a limited operation. It applies if a total income of a company is computed in accordance with the provisions of the said Act. In the case of Petitioner, no total

income is computed at all under the said Act, in view of the overall overriding effect of Section 50 of the SIDBI Act. The use of the expression *no income-tax is payable* in Section 115-O(1A) of the said Act also presupposes that the subject company is indeed chargeable to income-tax on its total under Section 4 of the said Act. Section 115-O(1A) of the said Act applies only to a case where the subject company is chargeable to income-tax u/s.4 of the said Act. Section 115-O(1A) of the said Act does not apply to a case where the subject company is not chargeable to income-tax due to an overriding *non-obstante* provision contained in Section 50 of the SIDBI Act.

14. Dividend is defined in Section 2(22) of the IT Act to, *inter alia*, include any distribution by a company of accumulated profits, which entails releasing any assets by the company to its shareholders. In terms of Explanation 2 to Section 2(22) of the said Act, the expression accumulated profits includes all company profits up to the date of distribution or payment thereof. It appears that the transfer of profits of Petitioner to IDBI in terms of Section 29(2) of SIDBI Act entails payment by Petitioner to IDBI. This payment or distribution of Petitioner's liquid assets constitutes dividend distributed by Petitioner out of its accumulated profits as envisaged under Section 2(22)(a) of the IT Act. It needs to be noted that the charge under sub-section (1) of Section 115-O of the said Act is on the

company's profits, more specifically on that part of the profits which is declared, distributed or paid by way of dividend. The charge under sub-section (1) of Section 115-O of the said Act is not on income by way of dividend in the shareholder's hands. Therefore, the additional income-tax payable on profits of a domestic company under Section 115-O of the said Act is not a tax on dividend. In our considered opinion, the amount distributed or paid by way of dividend falls in the category of income, profit or gains derived.

15. Once it is held that the amount distributed or paid by Petitioner by way of dividend falls in the category of profits under Section 50 of the SIDBI Act, on any income, profits, gains derived or any amount received, Petitioner shall not be liable to pay income tax or any other tax in the relevant years. Therefore Petitioner was not liable to pay additional income tax under Section 115-O of the said Act. In the circumstances, Petitioner's payments under protest need to be refunded to the Petitioner.

16. We, therefore, pass following order:

i) Rule is made absolute in terms of prayer clauses (a), (b) and (c), which read as under:

a) That this Hon'ble Court may be pleased to issue a writ of

certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of Petitioner's case and after examining the legality and validity thereof to quash and set aside the impugned order dated 17th February 2003.

b) That this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondent No.1 to issue necessary instruction to refund the tax of Rs.5,40,00,000/- paid for assessment year 1997-98, Rs.6,75,00,000/- paid for assessment year 1998-99, Rs. 7,42,50,000/- paid for assessment year 1999-2000 and Rs.7,42,50,000/- paid for assessment year 2000-2001.

c) That this Hon'ble Court may be pleased to declare that in view of the specific provisions of Section 50 of the SIDBI Act as then existing the Petitioner was not liable to pay a tax under Section 115-O on the amounts of profits transferred to IDBI in terms of Section 29(2) of the SIDBI Act for the assessment year 1997-98 to 1999-2000 and on the dividend paid to its shareholders for the assessment year 2000-01.

(AMIT B. BORKAR, J)

(K. R. SHRIRAM, J.)