assessed the amount required for repairs and necessary fresh constructions. The Courts below accepted the report of the Local Commissioner, who assessed the damages at Rs. 3,510. He had, however, deducted a sum of Rs. 1,001 as, according to him, it was the cost of the material to be reused. We find no justification for such a deduction. In our opinion, the report should have been accepted as a whole and the total amount of Rs. 3,510 awarded as damages.

(17) For the foregoing reasons, Regular Second Appeal No. 458 of 1965 is partly allowed to the extent that the amount of damages as payable to the plaintiff-appellant is enhanced from Rs. 2,509 to Rs. 3,510, whereas Regular Second Appeal No. 215 of 1965 stands dismissed. There is no order as to costs in both these appeals.

N. K. S.

INCOME TAX REFERENCE

Before D. K. Mahajan and H. R. Sodhi, JJ.

THE COMMISSIONER OF INCOME-TAX, HARYANA, HIMACHAL PRADESH AND DELHI-III, NEW DELHI,—*Applicant.*

versus

M/S. KRISHAN PARSHAD & CO., PVT. LTD., AMBALA CITY.—*Respondent.*

Income Tax Reference No. 13 of 1971.

September 20, 1971.

Income-tax Act (XLIII of 1961)—Section 104—Provisions of—When attracted—Entire arrears of tax due—Whether can be taken into account for determining the profits of a particular year for the purposes of the section—Provision prescribing period of limitation in section 104(1)—Whether mandatory—Such period of limitation—Whether can be enlarged on the ground of sufficient cause.

Held, that burden lies upon the Revenue to prove that all the conditions laid down in section 104 of Income-tax Act, 1961 are satisfied before an order can be made thereunder. What has to be ascertained in the first place under this section is the commercial profits of the company and their quantum. These profits have to be worked out by the Income-tax Officer

not from the stand point of the tax collector but from that of a businessman. The yardstick is that of a prudent businessman. The Income-tax Officer must take an overall picture of the financial position of the business by putting himself in the position of a prudent businessman or the director of a company with his sympathetic and objective approach to the difficult problem that arises in each case. He can take into consideration any circumstances other than losses and smallness of profits. The next step is to distribute those profits so as not to attract the applicability of section 104(1) of the Act. The position that may emerge can be that either there are no profits, or if there are profits, they are so small that a larger dividend cannot be declared. In this situation, section 104(1) of the Act will not come into play. It will only come into play if there are sufficient profits to warrant the declaration of a larger dividend and that dividend has not been declared within the prescribed period.

(Paras 12, 13 & 15)

Held, that the entire arrears of tax due can be taken into account for determining the profits of a particular year for the purposes of deciding the applicability or otherwise of the provisions of section 104 of the Act. It is not a correct proposition that only the taxes of the year in which profits have been earned can alone be taken into account to determine whether a dividend should or should not have been declared.

(Para 17)

Held, that the provision of section 104(1) of the Act prescribing the period of limitation of twelve months is mandatory in character. When there is no commercial profit or the same is small, section 104(1) will not come into play but in case the commercial profits are such that a larger dividend should have been declared and it is not declared whereby liability under section 104(1) is incurred, there is no escape from the period of limitation prescribed in the said sub-section. There is no provision in the Act permitting the enlargement of the said period on any considerations of sufficient cause.

(Para 14)

Reference under Section 256(1) *of the Income-tax Act*, 1961, *made by the Income-Tax Appellate Tribunal, Chandigarh Bench*,—vide *his order dated 9th February*, 1970, *to this Hon'ble Court for deciding an important question of law in R.A. No.* 61 *of* 1970-71 *arising out of I.T.A. No.* 2130 *of* 1968-69 *regarding the assessment year* 1963-64.

"*Whether in the circumstances of the case, Section* 104 *was attracted?*"

D. N. Awasthy, and B. S. Gupta, Advocates, *for the applicant.*

Assa Ram Aggarwal, R. N. Mittal and D. K. Gupta, Advocates, *for the respondent.*

The Commissioner of Income-tax, Haryana, Himachal Pradesh and Delhi-III, New Delhi *v.* M/s Krishan Parshad & Co. Pvt. Ltd. Ambala City (Mahajan, J.)

JUDGMENT

Judgment of this Court was delivered by :—

MAHAJAN, J.—In this reference under section 256(1) of the Income-tax Act, 1961, the only question that requires determination is whether in the circumstances of the case section 104 is attracted ?

(2) The assessee-company derives its income from interest on securities, dividends and hire-purchase business. The dispute in this case relates to the assessment year 1963-64, accounting year ending 30th September, 1962. The total income of the assessee-company in the year ending 30th September, 1962 was Rs. 58,336. Initially, the assessment was completed under section 143(3) on 28th November, 1963, and the income assessed was at Rs. 58,037. It was enhanced to Rs. 58,336 by an order under section 154, dated 13th September, 1967. A notice under section 105(1) of the Income-tax Act, 1961, was issued to the company on 17th June, 1965, requiring it to show cause why penal super-tax be not levied for non-distribution of the prescribed percentage of the distributable profits as dividends.

(3) The stand taken by the assessee company in reply to the said notice was as follows :—

> "In the accounting year ending 30th September, 1962 (assessment year 1963-64) there was a profit of Rs. 58,798. Out of this a sum of Rs. 30,000 was provided for the payment of income-tax for this very year and a further sum of Rs. 36,838.98 had to be paid as income-tax for the previous years over and above the provisions already made for those years. The deficiency of about Rs. 10,000 was met from the 'contingency fund'. There was, thus, no payment of profit left in the hands of the company to pay any dividend.
>
> The Company has shown losses during the assessment years 1957-58, 1958-59 and 1959-60 on account of huge amounts of 'Bad Debts' written off by the company in those years. The learned Income-tax Officer disallowed these 'bad debts' along with other items like 'carry forward' in the

vehicle account and 'loss in the sale of securities'. This resulted in the payment of heavy amount of income-tax by the company for which no provision was made or anticipated. A sum of Rs. 36,838.98 was paid from out of the profits of the year in question and the balance of about Rs. 77,000 had to be met from out of the profits of the succeeding years. Therefore, there was no question of payment of dividend to the shareholders during the year mentioned above."

(4) This stand was not accepted by the Income-tax Officer and he passed an order imposing penal super-tax at the rate of 37 per cent of Rs. 29,168 amounting to Rs. 10,792. The reasons given by the Income-tax Officer for rejecting the stand taken by the assessee were :—

(a) "The assessee had a 'contingency reserve' of Rs. 7,50,000 as on 1st October, 1961 and a further provision of Rs. 26,838.98 was made during the year under consideration out of profits for the year ending 30th September, 1962 as 'provision for contingency'. This shows that the financial position of the assessee was very sound and as such it was incumbent upon the assessee to declare the dividends. If the deficiency of Rs. 10,000 for payment of income-tax could be met out of the contingency fund, the dividends as well could be paid from the same source which is nothing else but the accumulated undistributed profits in the hands of the company."

(b) "No doubt the assessee suffered business loss in 1957-58 on account of bad debts, but this old loss was finally adjusted in the year 1962-63 and after that the assessee has been earning good income. Even in the earlier years the assessee had good income from sources other than business. The company had sufficient liquid assets from which the dividends could have been easily paid."

(5) Against this decision, an appeal was taken to the Appellate Assistant Commissioner of Income-tax. The Appellate Assistant Commissioner rejected the appeal for the following reasons :—

"The first argument urged by the learned counsel for the company is that the distribution as per resolution, dated 30th November, 1963 should be taken into account in

deciding whether the statutory percentage of profit was distributed. It is argued that the Income-tax Officer has to consider the revenue effect as on the date of passing the order. Since on the date of passing the order under section 104(1) the company had already declared the dividend it is urged that distribution of the dividend under the provisions of the section would not have resulted in gain to revenue. This argument is unacceptable as what the company has to show in this connection under section 104(2) (ii) is that a distribution within the period of twelve months would not have resulted in benefit to the revenue, and not that the distribution having been made subsequently there would not be any further gain to revenue. Otherwise the time limit of 12 months laid down in the section has no meaning.

The second argument advanced is that the provisions of section 105(1) lend support to the appellant's argument discussed above as they contemplate that distribution can be made later on receipt of notice from the Income-tax Officer. This is also not a valid plea as the said provisions applied only to the fractional shortfall in distribution referred to therein and not to cases in which no dividend has been declared.

Thirdly, it is urged that though the period of 12 months is mentioned in the section the Income-tax Officer has power to condone delay if distribution is made later. This plea is unacceptable as learned counsel for the company is unable to cite any authority or legal provision in support of this view.

Fourthly, it is argued that the non-declaration of dividend is justified by the smallness of the profits within the meaning of section 104(2)(i). It is stated that the entire profit of this year has been wiped out by payment of taxes of this year and arrears of tax for earlier years amounting to Rs. 37,839. This argument is untenable as the tax payable for this year has been taken into account while considering the distributable surplus while the taxes for earlier years were fully covered by the provision for

Income-tax which stood at Rs. 1,78,938 as at the beginning of the previous year (exclusive of the provision of Rs. 30,000 of the previous year). Apart from the provision for taxation the company had a General Reserve of Rs. 7,82,000 as at the end of the year after the payment of arrears of tax amounting to Rs. 37,839. The profits of this year cannot, therefore, be considered small on this ground.

Next, it is argued that non-declaration of the dividend was also due to loss of earlier years. This is also not a valid reason as the past losses had been wiped out by subsequent profits in the accounts of the company and a substantial general reserve mentioned above had been created.

It is further argued that as per balance sheet there were bad and doubtful debts of Rs. 1,52,350 and some provision was necessary in respect of bad debts. It is admitted that there were no bad debts even up to the assessment year 1968-69. If the company considered any provision necessary in this connection it would undoubtedly have made it in the accounts. Since this was not done and no bad debts were in fact incurred even in the subsequent five years and the company had ample general reserves, this is not a valid reason for non-declaration of dividend.

Lastly, it is urged that under section 205 of the Companies Act dividends can be paid only out of profits of the year. This argument does not help the appellant as there were sufficient profits available for the year out of which the required dividend could be declared."

(6) Against the order of the Appellate Assistant Commissioner, a further appeal was taken to the Income-tax Appellate Tribunal. The Tribunal, while allowing the appeal observed as under :—

"It is now well known that section 104 (old section 23A) was an anti-avoidance section. The purpose of this section was to see that a rich person with larger incomes should not evade super-tax by the simple expedient of not declaring dividends. The *raison d'etre* was to check and plug this loophole. It is, therefore, laid out in section 104(2) that this section should not be invoked unless there was

a loss of revenue by non-declaration. In this case, there was a further reasoning inasmuch as the assessee had to pay and had paid more than 2½ lakhs of income-tax of which the details have been given. We, therefore, consider that there was a reasonable cause for the assessee not to declare a larger dividend than it did. We also see that the main purpose of the section, viz., to force the private companies to declare appropriate dividends was also duly served. We, therefore, see no reason to support the order under section 104 which is hereby annulled."

However, the Tribunal observed in the last paragraph of its order that in their opinion the assessee had reasonable cause for not declaring a larger dividend before the expiry of 12 months because of the taxes falling due and which were paid during the year.

(7) An application was made by the Department under section 256(1) of the Income-tax Act, 1961, and in pursuance of that application, the following question of law has been referred to this Court for our opinion :—

"Whether in the circumstances of the case, section 104 was attracted ?"

Mr. Awasthy, learned counsel for the Department, contended that the decision of the Tribunal that there was sufficient cause for explaining the delay in declaring the dividend cannot be supported either on principle or authority. According to the learned counsel, there is no provision in the Income-tax Act which enables the Income-tax Officer to extend the period fixed by section 104(1) within which the dividend has to be declared.

(8) It is also maintained by the learned counsel that on the facts and in the circumstances of the present case the decision of the Income-tax Officer and the Appellate Assistant Commissioner was correct and the Tribunal has gone wrong in holding that there was reasonable cause for the assessee not to declare a larger dividend than it did. The learned counsel maintains that it is no reason to hold that the dividend was declared. According to him, the dividend had to be declared in terms of section 104. In other words, it had to be declared within twelve months immediately following the

expiry of the previous year, i.e., before the 30th September, 1963. There is no question of extending this period for any reasonable cause.

(9) On the other hand, it is contended by the learned counsel for the assessee that the mere fact that there were reserves with the company is no ground that the dividend should be declared out of those reserves. The dividend had to be declared out of the profits of that year and as the position as to profits was precarious the dividend could not be declared. A clear position emerged after the period specified in section 104(1) had expired when the order allowing refund of income-tax was passed and as soon as it was passed the company declared the dividend. It is maintained that it is not a case where an attempt has been made to circumvent the provisions of section 104. On the other hand, the conduct of the company shows that there was a keen desire on their part to comply with the aforesaid provision. It is also maintained that the approach of the authorities is wrong because they have gone on the basis that the bad debts had been previously adjusted. This is no ground in law as not to accept the explanation offered by the assessee.

(10) Before we proceed to examine the contentions of the learned counsel for the assessee, it will be appropriate to set out section 23A of the Income-tax Act, 1922 and section 104 of the Income-tax Act, 1961. These provisions are reproduced side-by-side for facility of reference :—

23A. (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 within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the company of that previous years as reduced by—	104. (1) Subject to the provisions of sub-section (2) and of sections 105, 106 and 107, where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the distributable income of the company of that previous year, the Income-tax Officer shall make an order in
(a) the amount of income-tax and super-tax payable	

by the company in respect of its total income, but excluding the amount of any super-tax payable under this section;

(b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount if any, which has been allowed in computing the total income; and

(c) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949 (10 of 1949);

the Income-tax Officer shall, unless he is satisfied—

(i) that having regard to the losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable; or

writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 143 or section 144, be liable to pay super-tax at the rate of—

(a) fifty per cent, in the case of an investment company; and

(b) thirty-seven per cent, in the case of any other company, on the distributable income as reduced by—

(i) the amount of dividends actually distributed; and

(ii) any expenditure actually incurred bona fide for the purposes of the business, but not deducted in computing the income chargeable under the head "Profits and gains of business or profession" being—

(a) a bonus or gratuity paid to an employee,

(b) legal charges;

(c) any such expenditure as is referred to in clause (c) of section 40;

(ii) that the payment of dividend or a larger dividend than that declared would not have resulted in a benefit to the revenue;

make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of fifty per cent in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments, and at the rate of thirty-seven per cent in the case of any other company on the undistributed balance of the total income of the previous year, that is to say, on the total income as reduced by the amounts if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed if any.

(2) No order under sub-section (1) shall be made,—

(i) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments which has distributed not less than ninety per cent of its total income as reduced by the amounts, if any, referred to in clause (a), clause

(d) any expenditure claimed as a revenue expenditure but not allowed to be deducted as such and not resulting in the creation of an asset or enhancement in the value of an existing asset.

(2) The Income-tax Officer shall not make an order under sub-sectoin (1) if he is satisfied—

(i) that, having regard to the losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable; or

(ii) that the payment of a dividend or a larger dividend than that declared would not have resulted in a benefit to the revenue; or

(iii) that at least seventy-five per cent of the share capital of the company is throughout the previous year beneficially held by an institution or fund established in India for a

(b) or clause (c) of sub-section (1); or

(ii) in the case of any other company whose distribution falls short of the statutory percentage by not more than five per cent of its total income reduced by the amounts, if any, aforesaid; or

(iii) in any case where according to the return made by a company under section 22 it has distributed not less than the statutory percentage of its total income as reduced by the amounts, if any aforesaid, but in the assessment made by the Income-tax Officer under section 23 a higher total income is arrived at and the difference in the total income does not arise out of the application of the proviso to section 13 or sub-section (4) of section 23 or the omission by the company to disclose its income fully and truly;

unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make

charitable purpose the income from dividend whereof is exempt under section 11.

such 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 the statutory percentage of the total income of the company as reduced by the amounts, if any, aforesaid.

(11) It is common ground that the provisions of both these sections are more or less identical. The decisions under section 23-A of the 1922 Act hold good so far as section 104 of the 1961 Act is concerned.

(12) The ambit and scope of section 23-A of the 1922 Act was considered in *Commissioner of Income-tax, West Bengal* v. *Gangadhar Banerjee and Co. (Private) Ltd.* (1). The relevant observations are at pages 181-82 and are quoted below :—

> "The section is in three parts : the first part defines the scope of the jurisdiction of the Income-tax Officer to act under section 23-A of the Act, the second part provides for the exercise of the jurisdiction in the manner prescribed thereunder; and the third part provides for the assessment of the statutory dividends in the hands of the shareholders. This section was introduced to prevent exploitation of juristic personality of a private company by the members thereof for the purpose of evading higher taxation. To act under this section the Income-tax Officer has to be satisfied that the dividends distributed by the company during the prescribed period are less than the statutory percentage, i.e., 60 per cent of the assessable income of the company of the previous year less the amount of income-tax and super-tax payable by the company in respect thereof. Unless there is a deficiency in the statutory percentage, the Income-tax Officer has no jurisdiction to take further action thereunder. If that condition is complied with, he shall make an order declaring that the undistributed portion of the assessable

(1) 57 I.T.R. 176.

income less the said taxes shall be deemed to have been distributed as dividends amongst the shareholders. But before doing so, a duty is cast on him to satisfy himself that, having regard to the losses incurred by the company in earlier years or 'the smallness of the profit made', the payment of a dividend or a larger dividend than that declared would be reasonable. The argument mainly centred on this part of the section. Would the satisfaction of the Income-tax Officer depend only on the two circumstances, namely, losses and smallness of profit ? Can he take into consideration other relevant circumstances ? What does the expression 'profit' mean ? Does it mean only the assessable income or does it mean commercial or accounting profits? If the scope of the section is properly appreciated the answer to the said question would be apparent. The Income-tax Officer, acting under this section, is not assessing any income to tax : that will be assessed in the hands of the shareholder. He only does what the directors should have done. He puts himself in the place of the directors. Though the object of the section is to prevent evasion of tax, the provision must be worked not from the standpoint of the tax collector but from that of a businessman. The yardstick is that of a prudent businessman. The reasonableness or the unreasonableness of the amount distributed as dividends is judged by business consideration, such as the previous losses, the present profits, the availability of surplus money and the reasonable requirements of the future and similar others. He must take an overall picture of the financial position of the business. It is neither possible nor advisable to lay down any decisive tests for the guidance of the Income-tax Officer. It depends upon the facts of each case. The only guidance is his capacity to put himself in the position of a prudent businessman or the director of a company and his sympathetic and objective approach to the difficult problem that arises in each case. We find it difficult to accept the argument that the Income-tax Officer cannot take into consideration any circumstances other than losses and smallness of profits. This argument

ignores the expression 'having regard to' that precedes the said words."

(13) It is also settled law that the burden lies upon the revenue to prove that all the conditions laid down in section 23-A are satisfied, before an order can be made thereunder. See in this connection *Gobald Motor Service (P) Ltd.* v. *Commissioner of Income-tax, Madras,* (2) and *Gangadhar Banerjee's case* (1).

(14) It was also urged by the learned counsel for the assessee that the period of limitation of twelve months prescribed in section 104(1) is not mandatory. We do not agree. In *M. M. Sugar Mills Private Ltd.* v. *Income-tax Officer, Gonda, and others* (3), it was held that the period of limitation prescribed is mandatory. We are in respectful agreement with the *ratio* of this decision. If there is no commercial profit or the same is small, section 104(1) will not come into play. But in case the commercial profits are such that a larger dividend should have been declared and it is not declared whereby liability under section 104(1) is incurred, there will be no escape from the period of limitation prescribed in the said sub-section. There is no provision permitting the enlargement of the said period on any considerations of sufficient cause, like section 5 in the Limitation Act.

(15) What has to be ascertained in the first place is the commercial profits and their quantum. The profits have to be worked out keeping in view the test laid down in *Gangadhar Banerjee's case* (1). The next step is to distribute those profits so as not to attract the applicability of section 104(1). All this pre-supposes that during the account year there are enough profits or to put in terms of section 104(2) "having regard to the smallness of the profits made in the previous year, the payment of dividend or a larger dividend than that declared would be unreasonable", so as to attract section 104(1). The position, therefore, can be that either there are no profits, or if there are profits they are so small that a larger dividend cannot be declared. In this situation, section 104(1) will not come into play. It will only come into play if there are sufficient profits to warrant the declaration of a larger dividend and that dividend has not been declared within the prescribed period.

(2) 60 I.T.R. 417.

(3) 56 I.T.R. 322.

(16) There is no dispute that the refund of income-tax was made in November, 1963, whereas the period of three years prescribed in section 104(1) expired in September, 1963. As we understand the finding of the Tribunal, the liabilities to tax during the year were to the tune of Rs. 2,50,000. Of course, they were not the liabilities of that very year and were the liabilities of the previous years. But the fact still remains that the total liability to tax during the year was 2,50,000 and this is the reason adopted by the Tribunal in coming to the conclusion that "there was a reasonable cause for the assessee not to declare a larger dividend than it did". The so-called larger dividend could have been declared if only the profits of that year and the tax liability of that year had been kept in view. If that was so, the Tribunal would not be driven to the conclusion that there was a reasonable cause for the assessee not to declare a larger dividend than it did. The fact that there was tax liability was accepted even by the Appellate Assistant Commissioner. But he took the view that as the company had a general reserve of Rs. 7,82,000 at the end of the year, after the payment of arrears of tax amounting to Rs. 37,839, the profit of the said year could not be said to be small. The position during the year, apart from arrears of tax or losses, is as follows :—

Income-tax assessed on 13th September, 1967	...	Rs. 58,336
Deduct :		
Taxes payable	...	Rs. 29,168
Balance :		
Distributable surplus	...	Rs. 29,168

If the arrears of tax, amounting to Rs. 37,839 are taken into account, it will appear that there was no surplus left with the company out of its income for the year so as to enable it to declare a dividend. The dividend was declared in November, 1963, only because during that month the company obtained a sizeable amount as refund of income-tax. It appears to us that the decision of the Tribunal may appear to be erroneous if examined superficially, but is none—the less correct in as much as the Tribunal proceeded on the admitted

facts in coming to the conclusion that there was sufficient cause for not declaring the dividend during the year. What in fact it wanted to convey was that there were no funds available during the year to enable the company to declare the dividend within the time prescribed. The funds came into the hands of the company after the prescribed period and as soon as it got the funds, it declared the dividend. It is true that it would have been better if the Tribunal had directly approached the problem and had given a direct decision. In the statement of the case it is clearly stated that "having regard to the past losses and the circumstances of the case the assessee had a reasonable cause for not declaring a larger dividend before the expiry of twelve months because of the tax falling due and which were paid "during the year". The concept of 'reasonable cause' entered the mind of the Tribunal because there were past losses and arrears of tax due.

(17) On the question whether the arrears of tax cannot be taken into account to determine the profits of a particular year, there is a conflict of judicial opinion. The Madras High Court in *Gobald Motor Service Ltd.* v. *Commissioner of Income-tax, Madras* (4), and *Commissioner of Income-tax, Madras* v. *Associated Drug Co. (P) Ltd.* (5), has taken the view that it can be done, whereas a contrary view has been taken by the Patna High Court on *Commissioner of Income-tax* v. *R. N. Bagchi and Brothers,* (6). In our opinion, keeping in view the test laid down in *Gangadhar Banerjee's case* (1), the Madras view appears to be correct and we have no hesitation in following it. With utmost respect to the learned Judges of the Patna High Court, we record our dissent to the proposition that only the taxes of the year in which profits have been earned can alone be taken into account to determine whether a dividend should or should not be declared.

(18) We, however, do not agree with the view of the Tribunal that the period of limitation fixed in section 104(1) can be enlarged for a sufficient cause. If we had come to the conclusion that in fact there was sufficient profit after taking into account the losses as well as the arrears of tax, we would have had no hesitation in answering the question in favour of the Revenue. As already

(4) 47 I.T.R. 734.
(5) 58 I.T.R. 306.
(6) 72 I.T.R. 645.

observed, the true *ratio* of the Tribunal's decision is that the profits were not enough to warrant declaration of the dividend. But we do not agree with the following observations of the Tribunal :—

> "Before closing, we might recall one aspect of the case; section 23-A of the Income-tax Act, 1922, was one of the most controversial section of the Act of 1922 because it worked against the economic interest of the country. It was brought on the statute book only as an anti-avoidance measure and, therefore, great caution was needed in its application. There have been difficulties in its application and it has been improved gradually and in the section 104 of the new Act of 1961 several new features have been incorporated whereby all the undesirable features have been removed. The revenue should study the changes brought about in the scheme carefully before applying this section. It is true that there is a technical default of two months in declaring the dividends and perhaps, therefore, it could be argued that the section was technically attracted. However, it cannot be forgotten that the main purpose of the section itself was served and the company distributed the required amount of dividend though late. We, therefore, feel that this was not a fit case for the application of section 104. To put it in legal language, in our opinion, the assessee had reasonable cause for not declaring a larger dividend before the expiry of 12 months because of the taxes falling due and which were paid during the year."

The aforesaid reasoning proceeds on the basis that it had the power to enlarge the time fixed in section 104(1) for a sufficient cause. To this view, we take exception. The period fixed in section 104(1) cannot be enlarged and we have already dealt with that matter in detail earlier.

(19) For the reasons recorded above, we answer the question referred to us in the negative, that is, in favour of the assessee and against the Department. There will be no order as to costs.

B. S. G.