The Malegaon Electricity Co. (P) Ltd.

Vs

The Commissioner of Income-Tax, Bombay

Civil Appeal No. 1345 of 1967

(J. C. Shah, K. S. Hegde, A. N. Grover JJ)

11.08.1970

JUDGMENT

HEGDE, J. -

1. This is an appeal by certificate under Section 66-A (2) of the Indian Income-tax Act, 1922 (to be hereinafter referred to as the 'Act'). The assessee is a Private Limited Co. The assessment year with which we are concerned in this case is 1952-53, the relevant accounting year ending on March 31, 1952. The assessment for that year was completed by the Income-tax Officer on August 4, 1953. He determined the assessee's business profits of the year ended on March 31. 1952 at Rs. 33.096/- subject to the assessee's claim of unabsored depreciation brought forward to the extent of Rs. 42,000/- and odd. After setting off the unabsored depreciation to the extent of Rs. 33,096, he determined the assessee's total income for the assessment year 1952-53 at 'Nil'. In the course of the assessment proceedings, the assessee company informed the Income-tax Officer by its letter of July 2, 1953 about sale of the assessee company to the Amalgamated Electricity Co. (Belgaum) Ltd. (to be hereinafter referred to as the 'Belgaum Co.'). It also brought to the notice of the Income-tax Officer, the following documents :

> (a) appropriate extract from the minutes of the meeting of the Board of Directors of the Belgaum Company held on 16-4-1951 agreeing to purchase the assets of the assessee company;
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> (b) resolution passed on 19-9-1951 by the Board of Directors for the assessee company deciding to sell the concern to the Belgaum Company;
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> (c) agreement, dated 19-9-1951 between the said two companies.

2. Later on in response to a letter from the Income-tax Officer, the assessee company informed him the manner in which the sale price of Rs. 9,35,246/15/8 was determined. It also submitted a statement of unabsorbed depreciation. That statement set out the depreciation accrued as well as that allowed. The entire consideration for the sale was paid in cash on October 4, 1951 and the profits earned by the assessee for the period of six months ended on September 30, 1951 were paid over to the Belgaum Company. In completing the original assessment, the Income-tax Officer observed :

> "On going through these documents and the copies of the Resolution passed by the shareholders of the Amalgamated Electricity Co., it is seen that no adjustment is necessary in the matter. The position of the company's total income is determined as under ....."

3. We may mention at this stage that the consideration received by the assessee company for the sale of its assets was much more than their written down value. Yet the assessee company did not show in its return any profits under Section 10(2)(vii) of the Act nor did it show the price received in excess of the written down value of the assets sold in Part I of Section 'D' of the Return.

4. Sometime later the Income-tax Officer found out that the profits deemed to have been earned by the assessee company under Section 10(2)(vii) had not been assessed. Hence after obtaining the sanction of the Commissioner, he commenced proceedings under Section 34(1)(a). After hearing the assessee, the Income-tax Office re-assessed the assessee on August 26, 1957, determining its total income for the assessment year in question at Rs. 4,48,893/- on the basis that the profits earned by the assessee under Section 10(2)(vii) were Rs. 4,88,386/-. He rejected the contention of the assessee that the notice issued by him under Section 34(1)(a) was invalid inasmuch as it had placed before him all the primary facts necessary for the assessment. The assessee unsuccessfully contended that there was no basis for his conclusion that there was any failure on its part to disclose fully and truly all material facts necessary for its assessment. The Income-tax Officer opined that the failure of the assessee to disclose its profits under Section 10(2)(vii) brought the case within the scope of Section 34(1)(a). In appeal the Appellate Assistant Commissioner concurred with the view taken by the Income-tax Officer. He held that the assessee had a statutory duty to submit a return showing all profits including the deemed profits under Section 10(2)(vii).

5. On a further appeal to the tribunal, the impugned assessment was challenged on various grounds. It was urged before the tribunal, on behalf of the assessee that no portion of the price realised by the sale of its assets came within the scope of Section 10(2)(vii) and further even if any portion of that price can be considered as deemed profits under Section 10(2)(vii), it was impermissible for the Income-tax Officer to initiate proceedings under Section 34(1)(a) as the assessee had placed all the primary facts before the Income-tax Officer and therefore it cannot be said that it had not fully and truly disclosed all material facts. On behalf of the Revenue, it was urged before the tribunal that the part of the price realised by the sale of the assets should be deemed as profits under Section 10(2)(vii); those profits had not been included in the return of the assessee nor has the assessee placed all the material facts necessary for determining its tax liability; therefore the Income-tax Officer was justified in initiating proceedings under Section 34(1)(a) and at any rate the impugned assessment can be justified under Section 34 (1)(b). The tribunal did not go into the question whether any part of the sale proceeds can be considered as deemed profits under Section 10(2)(vii) but it held that the assessee had placed before the Income-tax Officer, all the primary facts necessary for its assessment and therefore it cannot be said that it had failed to disclose fully and truly all material facts. It observed :

> "There can be no manner of doubt that all primary facts regarding the transaction of the sale of assessee's assets were placed by the assessee before the Income-tax Officer at the time of the original assessment. The then Income-tax Officer appears to have applied his mind to the facts of the case and after doing so he arrived at the finding that no adjustment in regard to the surplus arising out of the sale of the assets was necessary. Whether or not there was any profit under Section 10(2) (vii) and, if so, whether it was taxable was an inference to be drawn from the facts which were fully placed before the Income-tax Officer. The mere omission of the sale transaction from Section D of Part I of the return of income would not enable the Department authorities to hold that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. In view of the fact that all the relevant facts were available to the Income-tax Officer who made the original assessment, the present

> assessment on those very facts amounts to merely a change of opinion by the Income-tax Officer. There has been no suppression of any material information at the time of the original assessment and as such the action under Section 34(1)(a) cannot be sustained."

6. It rejected the contention of the Revenue that the impugned assessment can be justified under Section 34(1)(b) as according to it the facts proved in the case do not bring the case within that provisions and further the Income-tax Officer did not proceed under that provision.

7. At the instance of the Commissioner of Income-tax the tribunal submitted the following questions for the opinion of the High Court of Bombay :

> "(1) Whether in the circumstances of this case it can be held that in the course of original assessment proceedings for the assessment year 1952-53, the assessee company omitted or failed to disclose fully and truly all the material facts necessary for its assessment for that assessment year ?
>
> (2) Whether, where as a matter of fact, action for reassessment proceedings had been initiated on the belief that the provisions of Section 34(1)(a) were properly applicable to the facts of the case Department was precluded from sustaining the validity of the re-assessment made on the grounds that the reassessment fell as well within the scope of Section 34(1)(b) ?"

The High Court answered both these questions in favour of the Revenue Hence this appeal.

8. In our judgment the tribunal erred in declining to decide the question whether any portion of the sale price came within the scope of Section 10(2)(vii). That question should have been examined at the very outset for the purpose of considering whether the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of its assessment. If it is found that any portion of that sale price are profits then in our opinion the High Court was right in holding that the assessee had failed to place before the Income-tax Officer during the original assessment truly and fully all material facts necessary for the purpose of assessment. Admittedly the price realised at the sale in excess of the written down value of the assets sold, had been included as profits in the returns submitted by the assessee. It had also not shown the same in Section 'D' of Part I of the return. It may also be noted that the assessee had not shown either in its return or in any of the documents submitted to the Income-tax Officer, the written down value of the assets sold. Hence not only the Income-tax Officer was not told that the assessee had earned any profits under Section 10(2)(vii) nor even the essential fact, viz., the written down value of the assets sold was supplied to him so as to enable him to find out the prior in excess of the written down value realised by the assessee. It is true that if the Income-tax Officer had made some investigation particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value raised by the assessee. It can be said that the Income-tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment of that year'. Further, Explanation to Section 34(1) says :

> "Production before the Income-tax Officer of account-books or order evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this Section."

9. If the assessee had disclosed to the Income-tax Officer, the surplus price realised by it over and above the written down value of the assets sold or in the alternative if it had informed the Income-tax Officer the price realised as well as the written down value of the assets sold, then it could have been said that the assessee had done its duty and it was for the Income-tax Officer to draw any inference on the facts placed before him. But the failure of the assessee to disclose to the Income-tax Office the fact that the price realised by it by sale of its assets was more than the written down value of those assets or at least the written down value of those assets amounts, in our opinion, to a failure on its part to disclose fully and truly the material tax Officer in the original assessment order that "no adjustment is necessary" the tribunal was not justified in drawing the inference that the Income-tax Officer had considered all the relevant facts.

10. In support of his contention that the disclosure made by the assessee was true and full in all material particulars and hence no proceedings could have been taken under Section 34 (1)(a) Mr. A. K. Sen, learned Counsel for the assessee relied on the decision of this Court in V. D. M. RM. M. RM. Muthiah Chettiar v. Commissioner of Income-tax, Madras. (1969 (1) SCC 675 : 74 ITR 183) In that case the question that arose for decision was whether the assessee's failure to include in his return the income of his wife and his minor sons admitted to the partnership of which he was a partner assessable in his hands under Section 16(3)(a)(ii) can be considered as a failure to disclose truly and fully all facts material for the assessment. This Court came to the conclusion that the omission in question did not come within the scope of Section 34(1) (a). Therein this Court observed that in the form of return prescribed under Rule 19, of the Indian Income-tax Rules, 1922, framed under Section 59 of the Act, there was no clause which required disclosure of the income of any person other than the income of the assessee, which was liable to be included in his total income. Nor was the assessee required under Section 22(5) of the Act, in making a return, to disclose that any income was received by his wife or minor child admitted to the benefits of partnership in a firm of which he was a partner. Hence by not showing the income of his wife and minor children, the assessee cannot be deemed to have failed to disclose fully and truly all material facts necessary for his assessment within the meaning of Section 34(1)(a) of the Act. Therein this Court further observed that Section 16(3) of the Act imposed an obligation upon the Income-tax Officer to compute the total income of an individual for the purposes of assessment by including the items of income set out in clauses (i) to (iv) and (b) but thereby no obligation is imposed upon the tax-prayer to disclose the income liable to be included in his assessment under Section 16(3). For failing or omitting to disclose that income proceedings for reassessment cannot therefore be commenced under Section 34(1)(a). The ratio of the above decision is inapplicable to the facts of the present case. If any part of the price with which we are concerned in this case can be considered as deemed profits under Section 10(2) (vii), then the assessee had a duty to include it in his return. His failure to do so brings his case within the scope of Section 34(1)(a). Mr. Sen next relied on the decision of this Court in Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies Distt. I. Calcutta and Another. (41 ITR 191 at p. 201) Therein this Court had observed :

> "Once all the primary facts are before the assessing authority he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what

> inferences whether of facts or law, should be drawn. Indeed when it is remembered that people of ten differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences-whether of facts or law-he would draw from the primary facts."

11. In that case the question for consideration was whether the assessee had a duty to inform the Income-tax Officer with what intention the shares concerned in that case were sold. We do not think that the decision in question is of any assistance to the assessee.

12. For the reasons mentioned above, we are of the opinion, that the High Court should not have and we in our turn will not answer the question referred under Section 66(1) of the Act because in our opinion those questions cannot be answered without first deciding whether the part of the sale price received by the assessee amounts to profits under Section 10(2)(vii). The tribunal must first decide that question and thereafter decide the other questions of law arising for decision on the basis of its decision whether there was any profits falling within Section 10(2)(vii).

13. In the result we allow this appeal and in place of the answers given by the High Court we enter a decision to decline to answer those questions. It is for the tribunal to decide the appeal before it in the light of this decision. In the circumstances of the case we make no order as to costs.

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