E. D. Sassoon & Co. LTD.

Vs

Commissioner of Income-Tax, Bombay. (and vice versa)

Civil Appeals Nos. 26 and 162 of 1969

(H. R. Khanna, K. S. Hedge, P. Jagmohan Reddy JJ)

29.08.1972

JUDGMENT

P. JAGANMOHAN REDDY J. -

1. These two appeals are by certificate against the judgment of the High Court of Bombay, answering four out of the five questions referred to it in favour of the assessee and one question in favour of the revenue.

A partnership firm (hereinafter referred to as the firm) comprising of some of the members of the Sassoon family was carrying on business under the name and style of E. D. Sassoon & Co. for a number of years prior to 1920 at Bombay, Calcutta, Karachi, Hongkong, Shanghai, London, Manchester, Basra and the Persian Gulf. The business which it was carrying on was that of bankers, commission agents, agents of joint stock companies, dealers in shares and securities, foreign exchange, etc. In the accounting year 1919 the firm incurred net loss of Rs. 12,37,413-12-2, but in 1920 it seems to have made large profits mostly "in London Exchange Account". It, however, claimed depreciation in shares and securities amounting to Rs. 9,26,730-5-8 shown under the head depreciation in shares and securities. On 8th September, 1920, and 4th December, 1920, two companies were incorporated in Bombay, the former was known as the Bombay Trust Corporation Ltd. and the latter as E. D. Sassoon & Co. Ltd. (hereinafter called the "assessee- company"). The Bombay Trust Corporation carried on business in Bombay which comprised mainly the business of dealers in shares, securities and foreign exchange. This company (B.T.C.) had by the end of December, 1920, investments in shares and securities to the extent of Rs. 3,23,78.494. By the end of 1921, investments in shares and securities had risen to Rs. 4,31,32,212 and by the end of December, 1922, these investments had risen to Rs. 10,43,78,511. Though these facts have been given in the statement of the case, as we shall presently show, they are not germane for the determination of the questions before us.

The assessee-company was incorporated with several objects, one of which was :

> "To acquire and take over as a going concern the business now carried on at Bombay, Calcutta, Karachi, Hongkong, Shanghai, London Manchester, Basra and Bagdad and all or any of the assets and liabilities of the proprietors of that business in connection therewith, and with a view thereto, enter into the Agreement referred to in clause 4 of the company's Articles of Association and to carry the same into effect with or without modification."

Clause 4 of the articles of association of the company provided that the assessee-company shall

forthwith enter into the agreement mentioned in clause 3 of the memorandum of association with such modifications, if any, as the directors shall approve. On June 30, 1961, the agreement referred to was finally executed by the assessee- company. The said agreement provided, inter alia, for purchase of the business of the said firm and its assets including shares, and debentures for valuable consideration herein set out at the market price prevailing on 31st December, 1920, which purchase was to be completed on or before that date. It appears that pursuant to the said agreement, the company took over the business of the said firm and also purchased shares and securities worth Rs. 1,93,79,521-3-1 at market value as on 31st December, 1920. It further purchased between 1st January, 1921, to 31st January, 1921, from the market further shares and securities worth Rs. 4,28,05,627 in the ordinary course of its business.

According to the Income-tax Officer, in the accounting year 1921, there was no dealing in shares and securities. At the end of the year 1921, as was done by the predecessor firm in the year 1920, the assessee-company valued the securities and shares at the prevailing rates which showed an appreciation of Rs. 9,26,713 on its valuation at the market rate. The appreciation of Rs. 9,26,730-5-8 was, however, not taxed because it is alleged that the assessee-company had contended that this appreciation should be deleted from the computation of income. At the relevant time during the course of the assessments the assessee-company's accounts were examined by the examiner of accounts who made the following note on 12th October, 1922 :

> "With regard to the second item it would be seen from the last year's 'B' form put up herewith that the company is a habitual dealer of shares and it was allowed Rs. 9,26,730-5-3 as a set off against the profits of 1920, the loss on shares and securities (depreciation). Hence, appreciation of Rs. 9,27,708.67 will have to be taxed this year."

On the above report the Income-tax Officer endorsed on the 23rd December, 1922, as follows :

> "Note : - Shares and securities of Rs. 6,55,895 and Rs. 3,28,112.... book entry. Securities being valued at the end of the year and appreciation or depreciation brought into the accounts. These securities are being taken over by the new company, B.T.C. Ltd., Bombay. Show this on instructions from their London House only and these items may therefore be disregarded for income-tax purposes."

It may be mentioned that the firm was being assessed for the year 1921-22 under the. Income-tax Act, 1918, on the income of the accounting year 1921 and for the assessment years 1922-23 to 1948-49 the assessee-company was being assessed under the Act of 1922. In the year of assessment 1949-50 the assessee-company discontinued its business and claimed exemption on Rs. 33,40,057 under section 25(3) of the Act. This claim was rejected by the Income-tax Officer on the ground (1) that in the year 1921 the assessee claimed and obtained a deduction in respect of appreciation in shares and securities amounting to Rs. 9,26,708, and (2) it had discontinued one of the business which the firm was doing, namely, dealing in stocks and shares.

The assessee-company appealed and the Appellate Assistant Commissioner held that on the evidence it was clear that the business which was discontinued in the year of assessment was not charged to tax under the Act of 1918 on the income from share dealings either for the accounting years 1918, 1919 or 1920 or for the accounting year 1921. As the assessment to tax on the share dealings was a basic requirement for exemption under section 25(3) and that not having been established the question of granting any relief under the said provision did not arise. The Tribunal in

appeal, though it held that the firm was assessed to tax under the Act of 1918, nevertheless negatived the relief on the ground that the assessee-company did not intend to do the business of dealing in securities acquired from the old firm. On an application by the assessee-company for reference under section 66(1) the following five questions were referred to the High Court :

> "(1) Whether, on the facts and in the circumstances of the case, the assessee-company is entitled to claim exemption under section 25(2) of the Act ?
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> (2) Whether, on the facts and in the circumstances of the case, the loss suffered on the sale of property in Shanghai was allowable as a revenue deduction out of profits of the year ?
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> (3) Whether, on the facts and in the circumstances of the case, the assessee-company is entitled to deduct Rs. 3,70,943, the amount transferred to the Superannuation Fund against income of the year ?
>
> (4) Whether, on the facts and in the circumstances of the case, the assessee-company is entitled to claim a sum of Rs. 2,92,672 transferred after the liquidation of the company as against the profits of the company ?
>
> (5) Whether, on the facts and in the circumstances of the case, the assessee-company is entitled to set off the loss Rs. 3,28.825 suffered in 1948 as against profit of 1949-50 ?"

Except for the second question, the High Court answered the other four questions against the revenue, the appellant in Civil Appeal No. 162 (NT) of 1969. On the second question its answer was in favour of the revenue and against the assesee-company in respect of which it has filed Civil Appeal No. 26 of 1969.

On behalf of the revenue it is submitted that question No. 1 is the crucial question in that the determination of what is meant by "discontinuance of business, profession or vocation" for purposes of section 25(3) would also furnish the answers to the other questions in the appeal. No arguments were addressed to us on those questions.

Sub-section (3) of section 25, under which the relief is being claimed, is as follows :

> "(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, then, unless has been a succession by virtue of which provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

This provision has been enacted to give relief to a taxpayer upon who extra burden had been

imposed due to a change in the basis of assessment as a result of the Act of 1922. Under the 1918 Act the tax liability was imposed on the income accruing or arising in the year of assessment while under the 1922 Act the liability was in respect of income accruing or arising in the previous year. Thus when the Act came into force in 1922 it entailed two assessments in respect of the income or the same year, that is, the income of the year 1921-22, which had been assessed during the currency of that year under 1918 Act was subjected to tax once again under Act as the income of the previous year for the assessment year 1922-23. In view of this hardship, sub-section (3) provided that in the case of discontinuance of any business, profession or vocation which was at any time charged under the 1918 Act, no tax is payable in respect of the period between the end of the previous year and the date of discontinuance. An assessee to obtain relief under the above sub-section has to satisfy three conditions. Firstly, that the business, profession or vocation must be one on which tax was at any time charged under the 1918 Act. Secondly, the case must be one where there has not been a succession after the 1st April, 1939, attracting the application of sub-section (4). Thirdly, the business must be "discontinued", such discontinuance amounting to a complete cessation of business and not merely a succession or change of ownership. In the case of Commissioner of Income-tax v. P. E. Polson, which was also referred to by Patanjali Sastri J. in Executors of Estate of J. K. Dubash v. Commissioner of Income-tax, the Privy Council had pointed out that the purpose and effect of sub-section (3) was clearly to give relief to a taxpayer who but for it would in the aggregate be charged with tax once in respect of every year's income and twice in respect of one year's income. There is no dispute in this case that the assessee-company had discontinued its business from the 28th December, 1948, when it went into liquidation. The only dispute is, whether the assessee-company carried on the business of the firm which was assessed to tax under the 1918 Act and whether the firm was charged to tax under the 1918 Act. It may be mentioned that in sub-section (3) there is a clear reference to the business and not to the assessee and, therefore, that sub-section applies even if the person claiming the relief was not himself charged under the 1918 Act but his predecessor-in-interest was so charged. It is contended on behalf of the revenue that the assessee-company did not carry on the same business as that carried on by the firm in that the business in dealing in shares and stocks which the firm was carrying on was not carried on by the company which merely held those shares as investment and did not deal in them. It has been noticed earlier that the firm was carrying on several business one of which was dealing in shares and stocks and when the assessee-company took over the assets and liabilities of business, it is said, relying on the observations of the Tribunal, that all those business except the business of dealing in shares and stocks was taken over and that the shares and stocks which it held were held for and on behalf of the B.T.C. It is accordingly contended that the assessee- company was not carrying on the same business.

It may be mentioned that one of the principal objects of the assessee- company as indicated in the memorandum of association was to acquire and take over as a going concern the business carried on by the firm, E. D. Sassoon & Co. The assets of the firm were taken over even prior to the agreement which was entered into on the 30th June, 1921. The Income-tax Officer thought that the assessee's treatment of its profit and loss arising out of the business of dealing in shares have not been uniform. He also concluded that in respect of the successive years at least up to 1938 the department has been treating the transactions on its merits, but thereafter the assessee-company was treated as a regular dealer in shares and security; that only a portion of the shares and security represent stock-in trade; that there was no uniform valuation of the stocks and investments; that in the year 1921 the deletion of the item of appreciation of shares and security amounting to Rs. 9,76,708 which it was alleged was agreed to clearly on the assessee's contention that it was only an investor; and that the business of dealing in shares and security of the assessee- company had not in the aggregate been

charged to income-tax in respect of every year's income and twice in respect of one year's income inasmuch as the number of assessments made on this business was far less than the number of assessments made during its life. That apart, this business, according to the Income-tax Officer, was not in existence at all in 1921 as the assessee-company was not dealing in shares and it was not at all charged to tax under the Act of 1918.

The conclusions of the Appellate Assistant Commissioner in respect of the accounting years 1918, 1919 and 1920, during which period the firm was in existence and during the year 1921 the assessee-company was functioning, are given as follows :

> "1918 : There is no evidence that any assessment was made on the firm and the appellant has failed to prove that any income of the firm was charged to tax.
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> 1919 : This was a year of huge loss and no tax was charged.
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> 1920 : There was no positive income from shares or share-dealings.
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> It is also not necessary to consider tax payments by the firm during these years because the entire stock-in-trade of the business in share-dealings and securities belonging to the firm was taken over by another limited company, the B.T.C. Ltd., assessed separately and the appellant did not succeed to that business at all.
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> 1921 : No income-tax was charged on the company at all, there being a net loss of more than Rs. 12 lakhs."

It may be mentioned that the statement that no tax was charged for the year 1918 is contrary to the material on record nor was the Assistant Appellate Commissioner justified in holding that the entire stock-in trade of business in share-dealings and security belonging to the firm was taken over by another limited company, the B.T.C. Limited, because the Appellate Tribunal on both these points has not confirmed those findings. The Tribunal summarised its conclusions as follows :

> "(i) For the assessment year 1918 E. D. Sassoon & Co., a firm, was assessed to tax under the act of 1918;
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> (ii) For the year 1919 as there was huge loss no tax was charged;
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> (iii) In 1919 however the said firm had included in the profit and loss account, profit and loss on securities and shares;
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> (iv) For the year 1920 there was huge profit and the shares and securities were transferred to the assessee-company at the then market value of the shares and securities;
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> (v) Over Rs. 9,00,000 of losses were claimed by the said firm as a result of revaluation and allowed by the income-tax authorities in the assessment of the said firm for the year 1920;
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> (vi) The said firm was being held by the department to be a dealer in shares and securities and the profit was brought to tax;

(vii) The application-company neither intended originally to do the business, nor took over the business of dealing in securities from the old firm."

From the findings of the Tribunal given in (ii), (iii), (iv) and (v), it is apparent that it did not accept the findings of the Appellate Assistant Commissioner that the tax was not charged under the Act of 1918 on the income from the dealings and shares for the accounting year 1919 and 1920. It, none the less, as noticed earlier, affirmed the order of the tax authorities on the ground that the business the company took over from the firm, was not the same business which the firm was doing; at any rate, in the year in which the assessee-company took it over inasmuch as the assessee-company neither intended originally to do the business, nor took over the business of dealing in securities from the old firm. The only question is whether the Tribunal was justified in holding that the assessee-company was not continuing the business which the firm was doing prior to the sale of its business to the assessee-company.

The conclusions in item (vii) of the above summary seems to be some- what conflicting with those in item (iv), but this apparent contradiction is sought to be reconciled by limiting the conclusion in clause (iv) to only the transfer of shares and securities to the assessee-company after which the assessee-company did not intend to do any business of dealing in shares and stocks. But this attempt to reconcile and explain the aforesaid two findings in unconvincing for not only does the Tribunal not find that after the transfer of shares and stocks to the assessee-company by the firm that it did not hold these shares and stocks but also it did not hold that the assessee was not dealing in the business of stocks and shares. On the other hand, the Appellate Assistant Commissioner, while considering the claim of loss in respect of Shanghai property sold by the assessee-company, observed :

"Ever since the incorporation of the company on December 4, 1920, as a private limited company and till it went into liquidation on December 29, 1948, the assessee's business activities consisted of : ..... (v) dealings in shares and securities."

The High Court has taken into consideration the assessment orders for the years 1921-22 and 1922-23 dated the 10th January, 1923, for the conclusion that the assessee-company was taxed on profits on dealings in shares and stocks in respect of those years which in its view showed beyond doubt that the company was trading in shares and securities for the year 1921 immediately after it took over from the firm. Even otherwise also, there is sufficient material on the record to hold that the entire business of the firm which included dealing in shares and stocks was taken over by the assessee-company as a going concern, that large holdings of stocks and shares were transferred to the assessee-company and that there is no evidence to show that for the years 1920-21, 1921-22 and also for subsequent years, the assessee-company was not dealing in shares. On the other hand, the statement of the case clearly discloses, as stated earlier, that the assessee company purchased in the market during the period 1st January, 1921, to 31st December, 1921, shares and stocks worth Rs. 4,28,05,627 in the ordinary course of its business. The logical inference which arises from the above circumstances is that the assessee-company was carrying on the same business as that of the firm including dealing in shares and stocks. There is also no material on record which would justify the income-tax authorities or the Tribunal in coming to the conclusion that the shares and stocks which were transferred to the assessee-company were only intended to be held as investments.

It was again contended on behalf of the revenue that the records of assessments for the accounting year 1921 not only showed that the appreciation in shares and stocks of Rs. 9,76,708 was excluded but income from dividend and securities amounting to Rs. 12,85,408 was not taken into account,

and was assessed in the hands of B.T.C. Limited. This is based on the order of the Income-tax Officer notwithstanding the fact that the examiner of accounts had pointed out that the company is a habitual dealer in shares and stocks and that the appreciation will have to be taxed. On behalf of the assessee it is contended that the question pertaining to this aspect was sought to be raised in the application under section 66(1) and when it was not referred an application was made before the High Court for framing a question dealing with this aspect. The High Court, however, in the view it took, did not think that that question need be framed. There is no doubt that the Income-tax Officer had omitted for some reason to include Rs. 9,76,708 being the appreciation of shares and stocks for the accounting year 1921 for which the assessment year is 1922-23, but that is not to say that the assessee-company did not deal in shares and stocks in that year, nor is there any basis for the Income-tax Officer and the Appellate Assistant Commissioner in holding that B.T.C. Ltd. took over the shareholding from the firm and not the assessee-company The Tribunal on the other hand held that the shares were transferred to the assessee-company. There is no mention in its order that these shares were transferred to B.T.C. and not to the assessee-company. The shares and securities were only transferred to the B.T.C. Ltd. in 1922.

In any case, irrespective of the question whether the assessee-company was dealing in shares after it had taken over the business from the firm, it is clear that the assessee-company was carrying on several other business which it had taken over from the firm as a going concern. Even where one or two business activities are discontinued after the assessee-company took over, none the less it would not justify us in holding that the business of the firm which was taken over has been discontinued, because under section 25(3) there is no restriction to the applicability of the exemption only to income on which the tax was payable under any particular head. This is what was held by this court in Commissioner of Income-tax v. Chugandas & Co. Shah J., after noticing that what is to be regarded as income, profits and gains of business, profession or vocation within the meaning of section 25(3) for which exemption may be obtained on discontinuance had given rise to difficulties, observed at page 22 :

> "Now clause (3) of section 25 expressly provides that income of a business, profession or vocation which was charged at any time under Act 7 of 1918 to tax is, on discontinuance of that business, profession or vocation, exempt from liability to tax under Act 11 of 1922 for the period between the end of the previous year and the date of such discontinuance.... When, therefore, section 25(3) enacted that tax was charged at any time on any business, it is intended that the was at any time charged on the owner of any business. If that condition be fulfilled in respect of the income of the business, under the Act of 1918, the owner or his successor-in-interest qua the business, will be entitled to get the benefit of the exemption under it if the business is discontinued. The section in terms refers to tax charged on any business, i.e., tax charged on any person in respect of income earned by carrying on the business. Undoubtedly, it is not all income earned by a person who conducted any business, which is exempt under sub-section (3) of section 25 : Non-business income will certainly not qualify for the privilege. But, there is no reason to restrict the condition of the applicability of the exemption only to income on which the tax was payable under the head 'profits and gains of business, profession or vocation'. The legislature has made no such express reservation and there is no warrant for reading into sub-section (3) such a restricted meaning. Sub-section (3) it may be noticed does not refer to chargeability of income to tax under a particular head as a condition of obtaining the benefit of the exemption.... But the exemption under section 25(3) is general; it is not restricted to income chargeable under section 10 of the Act."

This case was referred to and followed in the case of O.RM.M.SP.SV. Firm v. Commissioner of Income-tax.

It appears to us that in any view of the matter the assessee-company was entitled to relief under section 25(3); as such, the judgment of the High Court has to be confirmed. The learned advocate for the assessee, has indicated that he does not press the Civil Appeal No. 26 (NT) of 1969 which deals with the second question.

In the result, both these appeals fail and are dismissed with costs.

Appeals dismissed.

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