Lachminarayan Madan Lal

Vs

Commissioner of Income-Tax, West Bengal

Civil Appeal No. 20 of 1969

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

13.09.1972

JUDGMENT

HEGDE J. -

1. Aggrieved by the order of the High Court, declining to call upon the Income-tax Appellate Tribunal, "A" Bench, Calcutta, to state a case as desired by it, the assessee has brought this appeal by special leave. The question for decision is whether any question of law arose from the order of the Tribunal which required the Tribunal to state the case for the opinion of the High Court.

The assessee is a registered firm of three partners, Madanlal Bagaria, Bajranglal Bagaria and Sohanlal Bagaria, each having a 1/3rd share in the partnership. The partners are brothers. Its business is that of manufacture and sale of aluminium utensils. Up to the assessment year 1962-63, the firm was making its sales direct to the customers. In the assessment year 1963-64 (the relevant previous year being 2012 R.N. April 13, 1963, to April 1, 1964), the assessee claimed to have paid Rs. 31,684 to Messrs. Eastern Sales Corpn. as selling agency commission and claimed deduction of the same under section 37 of the Income-tax Act, 1961 (to be hereinafter referred to as "the Act"), as an item of expenditure laid out or expended wholly and exclusively for the purpose of the business. The Income-tax Officer rejected that claim. But the Appellate Assistant Commissioner in appeal allowed the same. The Appellate Assistant Commissioner after summarising the conclusions reached by the Income-tax Officer and setting out the arguments advanced on either side, concluded by observing :

> "On a careful consideration of the facts and circumstances, I am inclined to take the view that the discount should be allowed as a deduction, as having been laid out wholly and exclusively for the purpose of the appellant's business. The facts narrated above clearly indicate that there has been a phenomenal increase in the sales of the appellant, after the appointment of the selling agents. The mere fact of the partners of the selling agents being closely related to the partners of the appellant-firm is of little consequence, in the absence of proof of collusion between the two concerns. Instead of the payment being made to total strangers, the discount in the present case has been paid to a firm, constituted by the near relations of the partners of the appellant and, what is more, the payment was against actual service rendered. The depositions, recorded by the Income-tax Officer referred to above, clearly bring out that the selling agency firm contacted the customers and thereby improved the sales of the appellant."

Aggrieved by the decisions of the Appellate Assistant Commissioner, the department took up the

matter in appeal to the Income-tax Appellate Tribunal. The Tribunal reversed the order of the Appellate Assistant Commissioner and restored that of the Income-tax Officer. It came to the conclusion that the so-called selling agency agreement between the assessee firm and the selling agency firm was only a make- believe arrangement. It was merely a device to minimise the tax liability of the assessee-firm and it was not a genuine business arrangement. It arrived at that conclusion on the basis of the following facts :

The selling agency firm had four major partners. Two minors were also entitled to share in the benefits or that partnership. One of the major partners was Shiva Kumari Bagaria, wife of Madan Lal Bagaria, one of the partners in the assessee-firm. She had a 1/3rd share in the profits of the selling agency firm. Another partner of that firm was Triveni Devi Bagaria, wife of Bajranglal Bagaria, a partner in the assessee-firm. She had 1/9th share in the profits of the selling agency firm. Bajranglal's major son, Kanti Prasad Bagaria, was another partner in the selling agency firm. He had 1/9th share in the profits of that firm. Nandlal Bagaria, the minor son of Bajranglal Bagaria, was entitled to get 1/9th share in the profits of the selling agency firm. In effect, the wife and the children of Bajranglal were entitled to 1/3rd share in the profits of the selling agency firm. Another partner of the selling agency firm was Banarshi Devi Bagaria, wife of Sohan Lal Bagaria, one of the partners in the assessee-firm. She has 1/9th share in the profits of the selling agency firm. Shyam Sunder Bagaria, minor son of Sohanlal, was entitled to get 1/6th share in the profits of the selling agency firm. This shows that the wife and son of Sohanlal were entitled to 1/3rd share in the profits of the selling agency firm. From these facts, the Tribunal inferred that the selling agency firm is nothing but another manifestation of the assessee-firm. The Tribunal further came to the conclusion that on the day the selling agency agreement was entered into, viz., on March 26, 1962, the selling agency firm had not even come into existence. It came in to existence for the first time on April 13, 1962. The partnership agreement clearly shows that the partnership came into existence only on April 13, 1962. This discrepancy between the two documents was emphasised by the Tribunal in support of its conclusion that the agreement in question was a mere make-believe document. The Tribunal also took into consideration that, out of the partners, two were minors who could not haves rendered any assistance in the matter of selling the products of the assessee-firm; three of the partners of the firm were ladies who had no prior business experience and, consequently, they would have been of little assistance in carrying on the activities of the selling agency firm. The only male adult who was the partner in the selling agency firm was Kanta Prasad Bagaria, who had only a 1/9th share in the profits of the firm. Further, Kanta Prasad was a partner in another manufacturing concern situate at a place quite distant from the place where the selling agency business was said to have been carried on. The Tribunal further took note of the fact that the business address of the selling agency firm was the same as that of the assessee-firm. The selling agency firm had no godown of its own nor any transport vehicles. On the basis of these findings, it reached the conclusion that the selling agency firm had no genuine existence. Prima facie, all these are findings of fact.

Mr. M. C. Setalvad, appearing for the assessee, challenged the finding reached by the Tribunal on two grounds, viz., (1) that the Tribunal misconstrued or misunderstood the two documents, viz., the selling agency agreement dated March 26, 1962, and the partnership deed dated April 13, 1962, and (2) the Tribunal ignored the oral evidence and the same has vitiated its conclusions. On the basis of those contentions he urged that the facts found and the conclusions reached by the Tribunal are vitiated.

Mr. Setalvad is not right in his contention that there is no discrepancy between the agreement dated March 26, 1962, and the partnership deed dated April 13, 1962. The selling agency agreement

proceeds on the basis that the partnership is already in existence. The assessee could have entered into an agreement only with an existing firm, It is true as contended by Mr. Setalvad that a partnership arrangement may be oral, but the question here is whether the selling agency firm was in existence on March 26, 1962. For finding out when that firm came into existence, we have to refer to the partnership deed dated April 13, 1962. That document in clear terms says that it has come into existence on that day. It is true, as is contended by Mr. Setalvad, that the selling agency agreement says that the same will come into force on April 13, 1962. But, that is not the question before us. We are here concerned with the question whether the selling agency firm existed on March 26, 1962. On that question the Tribunal's conclusion is not open to challenge. There is a discrepancy between the two documents.

It was next urged by Mr. Setalvad that the Tribunal has ignored the oral evidence and as such its findings cannot be accepted. We are unable to accept this contention as well. It is true that the Tribunal has not elaborately discussed the oral evidence. But it is not correct to say that the oral evidence has been ignored. In paragraph 6 of the Tribunal's order, it notices the reliance placed by the assessee on the oral evidence. But it declined to place any reliance on the same. In paragraph 9 of its order, the Tribunal observed :

> "If the matter had to be decided only on the basis of the agreement, the partnership deed of the selling agency firm and the statements of the customers and of the partners of the selling agency firm and we have to take them at their face value, we would not have been inclined to interfere with the decision of the Appellate Assistant Commissioner that the selling agency commission was incurred wholly and exclusively for the purpose of the business; but we are obliged to hold that the so-called selling agency arrangement was only a make-believe arrangement, as a device for minimising the tax liability of the assessee-firm and that it is not a genuine business arrangement."

After saying so, it proceeded to give reasons in support of that conclusion. In other words, the Tribunal though that it is unable to accept the oral evidence at its face value in view of the surrounding circumstances of the case. It was open to the Tribunal to do so. We may also notice at this stage the reference in the Tribunal's order to the fact that the selling agency firm had no transport vehicles of its own is base on the oral evidence in the case. The Tribunal also did not believe the oral evidence led on behalf of the assessee that the darwan of the selling agency firm went in the lorry for delivering the goods sold.

Mr. Setalvad took us through the oral evidence recorded by the Income- tax Officer with a view to satisfy us that the Tribunal has ignored important pieces of evidence. After going through the same, we are unable to disagree with the conclusion reached by the Tribunal that not much value can be attached to that evidence. It was open to the Tribunal to reject the oral evidence in the light of the surrounding circumstances of the case.

It is true that the Appellate Assistant Commissioner did observe that :

> "The depositions recorded by the Income-tax Officer, referred to above, clearly bring out that the selling agency firm contacted the customers and thereby improved sales of the appellant."

This was merely an ipse dixit. No reasons were given in support of that conclusion. The Appellate

Assistant Commissioner has not examined the evidence before him. He has not considered whether that evidence was believable or not. On the other hand, the Tribunal for the reasons it has stated was not able to place reliance on it.

Mr. Setalvad invited our attention to a number of decisions in support of his contention that the Tribunal's order is a prima facie perverse order. We shall now consider those decisions.

In Dhirajlal Girdharilal v. Commissioner of Income-tax this court ruled that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. In this case, we have not been able to accept Mr. Setalvad's contention that any part of the evidence relied on by the Tribunal was either irrelevant or inadmissible. Hence, this decision has no bearing on the point in issue in this case.

In Commissioner of Income-tax v. Rajasthan Mines Ltd., this court held that it is open to the parties to challenge a conclusion of fact drawn by the Tribunal on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not rationally possible. If such a plea is established, the court has to consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is not possible to say, on the facts and in the circumstances of this case, that the conclusion of fact drawn by the Tribunal is not supported by any legal evidence or that the same could not be rationally arrived at.

In Commissioner of Income-tax v. A. Raman & Co. this court restated the well-accepted proposition that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands but income which he could have, but has not earned, is not made taxable as income accrued to him. Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality but on the operation of the Income-tax Act. But, this court in the same case further observed that by adopting a device, if it is made to appear that the income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the hands of the assessee.

According to the findings given by the Tribunal this case belongs to the latter category, namely, that the assessee by adopting a device had made to appear that the income which belonged to it had been earned by some other person.

Mr. Setalvad placed considerable reliance on the decision of this court in Commissioner of Income-tax v. Indian Woollen Textile Mills. Therein this court observed that in that case the Tribunal assumed the only fact on which its conclusion was founded and had ignored other relevant matters on which the Appellate Assistant Commissioner had relied in support of its conclusion. Consequently, the Tribunal must be held to have misdirected itself in law in arriving at its finding. We hare earlier considered the contention of Mr. Setalvad that the Tribunal have misdirected itself but we have not been able to accept the same. Hence, the ratio of this decision is of no assistance to the appellant.

Reference was also made to the decision of this court in Commissioner of Income-tax v. Durga Prasad More. We fail to see how this decision can lend any assistance to the appellant's case. In that

case this court, reversing the decision of the High Court, held that it could not be said that the finding of the Tribunal as to the unreality of the trust put forward was not based on evidence or was otherwise vitiated.

In our opinion, the facts of this case come within the rule laid down by this court in Swadeshi Cotton Mills Co. Ltd. v. Commissioner of Income-tax. The question whether an amount claimed as an expenditure was laid out or expended wholly and exclusively for the purpose of the business has to be decided on the facts and in the light of the circumstances in each case. The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income- tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made, it is still open to the Income-tax Officer to consider the relevant factors and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under section 37 of the Act.

For the reasons mentioned above, we are of opinion that the Tribunal was justified in not stating a case for the opinion of the High Court under section 256(1) of the Act and the High Court was justified in not calling for a statement of case under sub-section (2) of section 256.

In the result, this appeal fails and the same is dismissed with costs.

Appeal dismissed.

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