Commissioner of Income-Tax, West Bengal

Vs

Calcutta Discont Co. Ltd.

(K. S. Hegde, H. R. Khanna JJ)

10.04.1973

JUDGMENT

HEGDE J. –

This is anappeal by certificate. It arises from the decision of the Calcutta High Court in a reference under section 66 (1) of the Indian Income-tax Act, 1922 (to be hereinafter referred to as "the Act"). There questions of law were referred tothe High Court for ascertaining its opinion. Those question are :

> " (1) Whether, the view of the fact that the Tribunal's order dated 22nd July, 1964, was an interlocutory order, the Tribunal was competent to entertain an application purported to be under section 66 (1) of the Indian Income-tax Act, 1922, in respect ofsuch order ?
>
> (2) If the answer toquestion No. 1 above be in the affirmative, whether, on the facts and in the circumstances of the case, the Tribunal exercised its discretion judicially in not allowing the applicants's petition for raising the additional grounds ?
>
> (3) Whether, on the facts and in the circumstances of the case, the Tribunal erred in dismissing the appeal summarily on the grounds stated in its appellate order dzted September 3, 1964 ?"

The High Court answered the first question inb favour of the assessee and came to the conclusion that it was unnecessary to answer the remaining two questions. Mr. Manchanda, learned counsel for the revenue, did not seek to get any answer from us on question Nos. 1 and 2. His arguments were confined to question No.1.

The materials facts of the case as could be gathered from the case stated nu the Tribunal are as follows :

> Herein we are concerned with teh assessement of the assessed for the assessment year 1947-48, relevant accounting year being the financial year 1946-47. The assessee-company floated a subsidiary company named Messers. Clive Row Investment (Holding) Co. Ltd. during the relevant previous year and transferred to that subsidary company various shares held by it. In return the subsidiary company transferred to the assessee-company its shares of the value of Rs. 1,38,81,173. The book value of the shares transferred by the assessee-company to its subsidary was Rs. 1,66,69,391. Thus the assessee-company sustained a loss of Rs. 27,02,398 but it did not claim that loss in the return made on the ground that the transfer in question was made to its

own subsidiary. The Income-tax Officer valued the shares transferred by the assessee-company to its subsidiary at the market rate and on that basis came to the conclusion tht the assessee-company must be deemed to have made a profit of Rs. 1,02,40,346. The Income-tax Officer Aggrieved by the decision of the Income-tax Officer the assessee went up in appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner opined that the basis adopted by the Income-tax Officer was unsustainable and hence set asidethe order of the Income-tax Officer and remitted the case back to that officer for finding out whether the assessed had really made any profits in the transaction in question. AS against that order the Income-tax Officer went up in appeal to the Income-tax Appeallate Tribunal. In the appeal memo. the Income-tax Officer took only three grounds, namely :

" (1) For that on the facts adn in the circumsatances of the case the learned Appeallate Assistant Commissioner of Income-tax should have held that the shares transferred by the assessee-company to its subsidiary during the year of account should be valued, for the purposes of assessment under the Indian Income-tax Act, 1922, at their market price.

(2) For that the learned Appellate Assistant Commissioner of Income-tax misappreciated the facts of the present case and wrongly applied the decision of the Madras High Court in 28 IT. R. 952. [(1) Sri Ramalinga Choodambikai Mills Ltd. v. Commissioner ofIncome-tax.]

(3) For that the learned Appellate Assistant Commissioner ignored the principle that in the cases of the present type the sum to be taken for the disposal of the stock-in-trade of the assessee is not what the assessee has chosen to treat as his receipt but what he would normally have received for it in the due course of trade."

He did not plead tht the order of the Appellate Assistant Commissioner was incorrect in law and, therefore, should be set aside. It appears that at the hearing the counsel for the assessee took the plea that, as the Income-tax Officer had not taken the ground that the order of the Appellate Assistant Commissioner was not in accordance with law and consequently it should be set aside, the Tribunal could not grant the relief asked for the the Income-tax Officer. As that stage, as seen from the records, theIncome-tax Officer applied for amending his appeal memo. but that prayer was rejected by the Income-tax Appellate Tribunal. Ultimately, the Tribunal dismissed the appealof the Income-tax Officer summarily on the ground that necessary pleas have not been taken. Thereafter, at the instance of the revenue, the questions set out earlier were referred to the High Court.

The procedure adopted by the Tribunal appears to us to be somewhat strange. The Tribunal, instead of dealing with the substance of the matter, appears to have been unduly influenced by procedural technicalities. We are also not impressed with the conclusion of the Tribunal that the appeal meme. was not in accordance with law. No specific formula is necessary for seeking relief at the hands of any court or Tribunal if the necessary grounds are taken in the appeal memo.

Had we come to the conclusion that the decision of the Income-tax Appellate Commissioner was wrong in law we would have had no hesitation in answering the three questions formulated above in favour of the revenue and directing the Tribunal to reconsider the matter. But, in the view that we are taking, the answeres to those questions would become purely academic.

The Appellate Assistant Commissioner came to the conclusion that the assessee and its subsidiary were two different legal enbtitites. This conclusion was not and could not be challenged. All the authorities under the Act have come to the conclusion that the transaction between the assessee and its subsidiary company was a bona fide transaction and the assessee had not made any secret profits out of the transaction in question. It may be that the assessee had transferred its valuable shares at cost price to its subsidiary in order to so arrange its affairs as to reduce its tax burden. The question whether such an arrangement is permissible or not, we shall presently examine.

As seen earlier, the Appellate Assistant Commissioner came to the conclusion that, unless the Income-tax Officer on the basis of material before him is able to come to the conclusion that the assessee had really made profits in the transaction, it is notpermissible for him to add back to the assessee's return any fictional income. In our opinion, that conclusion is fully in accordance with law.

The question that, when an assessee transfers some of his stock-in-trade to another person at a price less than the market price, whether that assessee can be considered to have made any profit merely because he has transferred some of his stock-in-tradenot at the market price but at a lesser price, came up for consideration before the High Court of Madras in Sri Ramalinga Choodambikai Mills Ltd. v. Commissioner of Income-tax (1) [1955] 28 I. T. R. 952 (Mad.). The facts of that case as set out in the head-note are : a limited company sold certain goods showed in its stock-in-trade to its managing agency firm and to another firm in which one of its directors was interested. The sales in question were held to be bona fide sales. At the same time it was held that the goods were sold at a concessional rate. The Income-tax Officer sought to tax the assessee therein after computing the profits earned by that firm on the basis of the market price of the goods sold and not the actual price at which those goods were

A somewhat similar question came up for consideration before this court in Commissioner of Income-tax v. A. Raman & Co. (2) [1968] 67 I. T. R. 11; [1968] 1 S. C. R. 10 (S. C.). It is unnecessary so set out the facts of that case and it is sufficient to refer to the relevant observations in the judgement. Shah J. (as he then was), speaking for the court, stated the law at page 17 of the report, thus :

> "The plea raised by the Income-tax Officer is that income which could have been earned by the assessee was not earned, and a part of that income was earned by the Hindu undivided families. That according to the Income-tax Officer was brought about by 'a subterfuge or contrivance' Counsel for the Commissioner contended that if by resorting to a 'device or contrivance' income which would normally have been earned by the assessee is divided between the assessees and another person, the Income-tax Officer would be entitled to bring the entire income to tax as if it had been earned by him. But the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accures to a trader is taxable in his hands : income which he could have, but has not earned, is not made taxable as income accured to him. By adopting a device, if it is made to appear that income which belonged to the assessee had been earned by some other person, that income may be brought to tax in the h

It is well accepted principle of law taht an assessee can so arrange his affairs as to minimise his tax burden. Hence, if the assessee in this case has arranged its affairs in such a manner as to reduce its tax liability by starting a subsidiary company and transferring its shares to that subsidiary company

and thus forgoing part of its own profits and at the same time enabling its subsidary to earn profits, such a couse is not impermissible under law.

Mr. Manchanda contended that a person should not be allowed to adopt a device by which he gives up something through the right hand and receives the same through the left hand. According to him, there is no difference between the assessee and its subsidiary and, therefore, when the assessee tried to make profits through it subsidiary, we must presume that the profits were made by the assessee itself. In support of that contention he souhgt to place reliance on the decision of the House of Lords in Sharkey(Inspector of Taxes) v. Wernher (1) [1956] A. C. 58; 29 I. T. R. 962 (H. L.). Therein, the assessee was a breeder of horses. She also had racing stables. She transfereed some horses from her stud to the stables. In so doing she debited in her accounts only the cost of breeding the horses and not their market price. The question arose whether in computing the market price of those houses or merely the cost of breeding them should be taken into consideration. The House of Lords upheld the contention of there

For the reasons mentioned above, we are of the opinion that the conclusion reached by the Appellate Assistant Commissioner is in accordance with law and it would be an exercise in futility to answer the third question set out above in favour of the revenue and remit the case back to the Tribunal. In this view of the matter we do not propose to answer that question.

In the result this appeal fails and the same is dismissed with no order as to costs.

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