

Commissioner of Income Tax (General), Calcutta

Vs

Ashoka Marketing Limited, Calcutta

Civil Appeal No. 792 of 1971

(A.C. Gupta, Jaswant Singh JJ)

19.03.1976

JUDGMENT

GUPTA, J. -

1. The respondent, a limited company, acts as selling agent of various companies and also carries on business in shares, jute and speculation. During the previous year ending on August 31, 1951 relevant to the assessment year 1952-53, the respondent had transactions in jute which resulted in a profit of Rs. 59,91,721. The respondent claimed that this sum comprised of Rs. 40,05,825 which was the profit earned by and paid to M/s. Dalmia Jain & Co. Ltd. (hereinafter referred to as D.J.C. for the sake of brevity) and Rs. 14,30,561 paid to M/s. Dalmia Cement and Paper Marketing Co. Ltd. (hereinafter referred to as D.C.P.M.) being the profit earned by them. The Income-tax Officer rejected the respondent's claim holding that these two sums were really profit that accrued to the respondent. On appeal before the Appellate Assistant Commissioner the respondent did not press its claim in respect of RS. 40,05,825 and confined its objection to the inclusion of Rs. 14,30,561 in its total income. The Appellate Assistant Commissioner having overruled this objection the respondent preferred an appeal to the tribunal which also was dismissed. The respondent then sought a reference under Section 66(1) of the Income Tax Act, 1922 of the question.

Whether in the facts and circumstances of the case the tribunal was right in holding that the profit of Rs. 14,30,561 on jute transactions were the profits of the assessee company liable to be included in its total income.

The Patna High Court by its judgment and order dated January 27, 1966 answered the question in the negative, in favour of the respondent and against the department, on the view that the material on recorded did not justify the rejection of the respondent's claim that the sum of Rs. 14,30,561 was not its income but that of D.C.P.M.

2. In the meantime, the Income-tax Officer had by his order dated March 29, 1964 levied a penalty of Rs. 20 lakhs under Section 28(1)(c) of the Act for concealment of income to the extent of Rs. 54,36,386 composed of the two sums mentioned above. On appeal by the respondent against the order imposing penalty, the Appellate Assistant Commissioner, Calcutta, took note of the decision of the Patna High Court excluding Rs. 14,30,561 from the respondent's total income and reduced the penalty to Rs. 15 lakhs which, it was found, was attributable to the sum of RS. 40,05,825. Before the Appellate Assistant Commissioner it was contended on behalf of the respondent that both the aforesaid amounts were added to the respondent's total income under similar circumstances, and as the Patna High Court had excluded Rs. 14,30,825 as being the income of D.C.P.M., the sum of Rs. 40,05,825 should also be held as the income of D.J.C. and not respondent's. It was further argued

that the respondent did not challenge the inclusion of Rs. 40,05,825 before the Appellate Assistant Commissioner in the assessment proceedings as the respondent has the proportionate tax on this amount reimbursed from D.J.C. which was an allied concern. The Appellate Assistant Commissioner was of opinion that any internal arrangement between the respondent and its allied concern was not relevant for deciding whether the sum was the respondent's income and that, as the respondent had not questioned the inclusion of this amount in its total income, the matter had become final and the respondent was not entitled at this stage to reopen the question. The Appellate Assistant Commissioner also mentioned several circumstances why the amount in question should be considered as the respondent's income.

3. On appeal by the respondent the Appellate Tribunal 'B' Bench, Calcutta, came to a different conclusion proceeding on the following steps of reasoning. Penalty proceeding being separate and distinct from the assessment proceeding the respondent was entitled to lead additional evidence to show that the sum of Rs. 40,05,825 assessed as its income was really not so. The assessability of Rs. 40,05,825 depended on the sufficiency of material justifying the assessment. The nature and procedure in regard to the transactions with D.J.C. and D.C.P.M. were identical, and as the Patna High Court had held that the material relied on for the assessment of Rs. 14,30,561 was not sufficient, it must also be held that there was no material to justify the conclusion that Rs. 40,05,825 was the respondent's income. The respondent accepted the assessment of the said sum in its hands because D.J.C. agreed to reimburse the respondent for the tax paid on its behalf and there was no valid reason for holding that this amount was the concealed income to show that the case involving Rs. 40,05,825 stood on a different footing from the other case where the material was considered inadequate to support the assessment of the sum in the respondent's hands. Accordingly the tribunal set aside the penalty of Rs. 15 lakhs. The Commissioner of Income-tax (General), Calcutta, thereupon applied under Section 66(1) of the Act for reference of the following three questions to the High Court :

1. Whether, on the facts and in the circumstances of the case, the tribunal was right in placing upon the Department the onus to prove by positive evidence that the sum of Rs. 40,05,825 represented concealed income of the assessee when the assessee itself had conceded that the said sum was its income ?
2. Whether, on the facts and in the circumstances of the case, the tribunal was right in treating the sum of Rs. 40,05,825 on the same footing as the sum of Rs. 14,30,561 and in setting aside, on that view, the penalty order passed in this case ?
3. Whether, in any event, on the facts and in the circumstances of the case, the tribunal was right in setting aside the said order of penalty ?

The tribunal rejected the application on the view that no question of law arose from the order of the tribunal. The Commissioner thereafter applied under Section 66(2) to the High Court for an order requiring the Income-tax Appellate Tribunal to draw up a statement of the case and to refer the aforesaid questions of law to the High Court for determination. On this application a rule nisi was issued on April 28, 1969. On September 16, 1969 the High Court discharged the rule and dismissed the application without however giving any reasons. The present appeal by special leave is directed against this order of the High Court.

4. Mr. Desai, learned Counsel for the appellant, submitted that the High Court having issued a rule nisi on the application under Section 66(2) was wrong in dismissing the same without a speaking

order. We agree that the High Court should have stated the reasons on which it dismissed the application, however, as we have heard the Counsel on either side on the merit of the case, we do not think it would be proper to send the matter back to the High Court only on that ground. We therefore propose to dispose of the appeal on merits.

5. It was argued before the tribunal in the penalty proceeding that merely because the respondent did not press its objection to the assessment of the sum Rs. 40,05,825 in its hands, it could not be said that it was admitted that the amount was the concealed income of the respondent. Before the tribunal the explanation offered by the respondent in respect of the aforesaid sum was :

To avoid protracted appeal proceedings, a compromise was entered into between the assess company D.J.C. Ltd., whereby the sum would be assessed in the assessee's hands and omitted from the assessment of Dalmia Jain Company Limited, the latter undertaking to meet the tax liability in respect of such inclusion "the balance of the profit being retained by the company". Such an arrangement was possible because D.J. Co. Ltd., was one of the companies in the Sahu Jain Group.

It appears, however, from the tribunal's order that it excluded the sum of Rs. 40,05,825 from the respondent's total income "only because D.J.C. agreed to reimburse the assessee for the tax liability met on its behalf". Mr. Desai pointed out that the judgment of the Patna High Court on the basis of which the tribunal in the assessment proceeding had held that the sum of Rs. 14,30,561 could not be treated as the concealed income of the respondent was later reversed by this Court. (See C. I. T., Bihar and Orissa v. Ashoka Marketing Ltd. ((1971) 80 ITR 26 : (1972) 4 SCC 71)) Mr. Desai submitted that the argument that Rs. 40,05,825 could not be assessed in the hands of the respondent for the reasons given in the aforesaid judgment of the Patna High Court no longer held good after that judgment had been set aside. Mr. Desai relied on the decision of the Madras High Court in P. M. A. P. Ayyamperumal v. C. I. T. Madras ((1974) 97 ITR 161 (Mad HC)) to contend that the materials gathered at the stage of assessment proceeding cannot be altogether overlooked in the penalty proceeding and submitted that the tribunal must therefore be held to have misdirected itself in thinking that the department had failed to bring any material to show that the amount in question was the respondent's concealed income. However, as pointed out in the order of the tribunal rejecting the application under Section 66(1), the tribunal's decision in the assessment proceeding did not rest on any legal issue but really on the explanation given by the respondent that it did not question the inclusion of Rs. 40,05,825 in its total income because of the understanding with D.J.C. to which we have referred above. Mr. Desai submitted that the alleged understanding or agreement with D.J.C. appeared only from what the assessee's Counsel stated before the tribunal, and there was no material on record in support of that statement. Assuming that the fact of agreement with D.J.C. appeared only in Counsel's statement, there is nothing on record to suggest that the department challenged the truth of the statement or question. The propriety of acting on it. The agreement with D.J.C. is a fact appearing from the order of the tribunal, and that is sufficient for the present purpose. Whether or not an assessee has concealed its income is a question to be decided on the facts of a case, and in the present case the decision is based on the respondent's agreement with D.J.C. which the tribunal accepted as true. That being so, no question of law really arises from the order of the tribunal, and the order dismissing the application under Section 66(2) cannot be said to be wrong.

6. The appeal is dismissed but in circumstances of the case without any order as to costs.

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