Dalmia Cement Limited

Vs

The Commissioner of Income Tax, New Delhi

Civil Appeal No. 1437 of 1971

(CJI A.N. Ray, M.H. Beg, P.N. Shinghal JJ)

10.09.1976

JUDGMENT

SHINGHAL, J. -

1. This appeal by special leave is directed against the judgment of the Delhi High Court dated April 28, 1970 in a reference made by the Income-tax Appellate Tribunal (Delhi Bench A) under Section 66(1) of the Income-tax Act, 1922, hereinafter referred to as the Act, in respect of the following question :

> Whether on the facts and circumstances of the case the sum of Rs. 7 lakhs received from M/s. Orissa Cement Ltd. was pursuant to an adventure in the nature of trade and as such taxable under the Indian Income-tax Act, 1922 ?

The High Court has answered the question in the affirmative.

2. We shall refer to the facts giving rise to the controversy in some detail when we state them in a chronological order. It may be mentioned, meanwhile, that the Dalmia Cement Ltd., hereinafter called the appellant, owned certain cement factories and it placed an order for the supply of four complete units of cement manufacturing machinery with M/s. F. L. Smidth and Co. Copenhagen, on February 7, 1946, to increase the production in the following factories :

> #1. Shantinagar2. Dandot3. Dalmianagar4. Dalmiapuram##

Since the factory in Dandot fell within the territory of Pakistan on its constitution with effect from August 15, 1947, the appellant transferred the machinery which was meant for the Dandot factory (hereinafter referred as the Dandot machinery), to a new company known as Orissa Cement Ltd. sometime in 1950-51, and charged only the invoice price which it had paid to M/s. F. L. Smidth and Co. The appellant thereafter asked for a higher price and after some negotiations the Orissa Cement Ltd. agreed on December 4, 1951, to pay a further sum of Rs. 7 lakhs, in lieu of which 70,000 fully paid-up ordinary shares of Rs. 10 each were given to the appellant in that company. The Income-tax Officer treated that amount as income earned by the appellant pursuant to an adventure in the nature of trade in 1952-53 assessment year, and taxed it as such. On appeal, the Assistant Appellate Commissioner also held in his order dated September 16, 1958 that the transfer of the Dandot machinery was an adventure in the nature of trade and the payment of Rs. 7 lakhs was a revenue receipt which was rightly taxed by the Income-tax Officer. The matter went up in appeal to the Income-tax Appellate Tribunal (Delhi Bench) which remanded the case to the Income-tax Officer by its order dated September 13, 1960, for report on certain specific points. On receipt of the Income-

tax Officer's report, the Tribunal held that the transaction in question was "certainly an adventure in the nature of trade" and dismissed the appeal. It however drew up a statement of the case, and that is how the aforesaid question of law was referred to the High Court under Section 66(1) of the Act. The High Court held that by the time the appellant placed the dispatch order with M/s. Smidth & Co., "its intention was to purchase it with an idea to resell" and that the fact that it was a single and isolated transaction did not materially affect the case. In reaching that conclusion the High Court took the subsequent developments into consideration, and rejected the contention that the machinery was purchased by way of an "investment". The present appeal has been filed against that judgment of the High Court dated April 28, 1970.

3. Under Section 10 of the Act, income-tax is payable by an assessee under the head "Profits and gains of business, profession or vocation", inter alia, in respect of the profits and gains of any "business" carried on by him, and the controversy in this case is whether the receipt of the additional sum of Rs. 7 lakhs, over and above the cost of the Dandot machinery, could be said to arise out of any "business" of the appellant. The term "business" has been defined as follows in clause (4) of Section 2 of the Act :

> (4) "business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.

The question in this case is whether the transaction was an "adventure" in the "nature of trade" within the meaning of the definition ? Some decisions have been rendered by this Court on the point, and our attention has been invited to the decisions in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax (26 ITR 765 : (1955) 1 SCR 952 : AIR 1955 SC 176); Kishan Prasad and Co. Ltd. v. C.I.T., Punjab (27 ITR 49 : AIR 1955 SC 252); G. Venkataswami Naidu & Co. v. C.I.T.(1959 Supp 1 SCR 646 : AIR 1959 SC 359 : 35 ITR 594); Saroj Kumar Mazumdar v. C.I.T., West Bengal, Calcutta and Janki Ram Bahadur Ram v. C.I.T., Calcutta ((1965) 3 SCR 604 : AIR 1965 SC 1898 : 57 ITR 21). Even so, no general principle can, for obvious reasons, be laid down to cover all cases of this kind because of their varied nature, so that each case has to be decided on the basis of its own facts and circumstances. It is however well settled that even a single and isolated transaction can be held to be capable of falling within the definition if it bears clear indicia of trade [vide Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax; G. Venkataswami Naidu & Co. v. C.I.T. and Saroj Kumar Mazumdar v. C.I.T., West Bengal, Calcutta, (supra)]. It is equally well settled that the fact that the transaction is not in the way of business of the assessee does not in any way alter the character of the transaction [vide G. Venkataswami Naidu & Co. v. C.I.T. and Saroj Kumar Mazumdar v. C.I.T., West Bengal, Calcutta (supra)]. It would not therefore help the appellant's case merely to urge either of these points for the answer to the question will depend on a consideration of all the facts and circumstances.

4. The question under consideration is essentially a mixed question of fact and law. It will therefore be desirable, in the first instance, to restate the relevant facts in a chronological order.

5. As has been stated, the appellant owned some cement factories in various parts of India including the one in Dandot. It placed an order with M/s. Smidth & Co., Copenhagen, for the supply of four complete units of machinery for the manufacture of cement, to increase the production of its factory at Dandot and three other factories. A firm order for all the four units was placed on February 7, 1946. It was confirmed by M/s. F. L. Smidth & Company on August 6, 1947, and the appellant was informed that the supply of the Dandot machinery would be made in various months from February, 1948 to October 1948. India was partitioned, and Pakistan came into existence on August 15, 1947.

Dandot fell in the territory of Pakistan. The appellant, which was an Indian company, did not however cancel the order in respect of the Dandot machinery. On the other hand, a Director of the appellant informed the Orissa Government in his letter dated November 25, 1947 that it had "got a cement plant for which it had placed order a couple of years back", of which early delivery was expected, and that it would be willing to put it in Orissa on "suitable terms". The appellant's General Manager held discussions with the Orissa Government on January 8, 1948 for the setting up of a cement factory in Orissa. It was recorded in the note of the proceedings of that meeting that the appellant had ordered machinery for replacing its cement plant, the said machinery was expected to be shipped at an early date and parts of it would start arriving in March, 1949. It was further stated that the complete supply of the plant was estimated to take about six months, and if the negotiations were fruitful the first lot of cement would be produced by the beginning of 1950. The appellant's representative insisted that a final decision might be taken at an early date so that the machinery which has to be shipped from abroad could be diverted, depending upon the decision, to the Calcutta or Bombay port. The appellant thereafter wrote a letter to M/s. F. L. Smidth and Co. (Bombay) Ltd. on September 9, 1948 directing that the plant meant for the Dandot works might be diverted to Orissa. It was specially stated in the letter as follows :

> There are certain equipments in the specifications of the plants for extension Nos. 3 and 4, which were peculiar to the layout and design for the extension at Dandot and Shantinagar and they will not now fit in exactly in the same manner in our proposed new factories. As such, it is essential that the whole specifications are carefully scrutinised and manufacture of the items which are peculiar to the lay out of Dandot and Shantinagar Works only should be kept in abeyance in order to suit the local conditions.

The plants were expected to arrive from March 1949 onwards, but this would not have been possible without an import licence. The appellant obtained the licence from the Government of India and intimated to M/s. F. L. Smidth and Co. in its letter dated August 2, 1948 that it had been permitted to import in the Indian Dominion the two plants meant for Dandot and Shantinagar. The suppliers were accordingly requested to intimate the dates upto which extension was required for the import of the machinery. A formal agreement was made between the appellant and the Orissa Government on December 23, 1948. The Dandot machinery arrived in due course. It was delivered by the appellant to Orissa Cement Ltd. and its actual cost was debited to it. Quite some time thereafter, on April 7, 1950, a director of the appellant wrote a letter to the Industries Minister of the Orissa Government that the machinery supplied to the Orissa Cement Ltd. should be revalued and the appellant allowed a higher price than the invoice price due to a rise in the cost of the cement plant at the time of supply as compared with the price at the time when it was originally ordered by the appellant. The name of one B. B. Mogensen was suggested for revaluation of the machinery. This was agreed to by the State Government on June 4, 1950. Mogensen reported that the Orissa Cement Ltd. had benefited to the extent of almost Rs. 21 lakhs in the bargain. The Orissa Government passed a resolution dated December 4, 1951 allowing a further sum of Rs. 7 lakhs to the appellant and, in lieu of cash payment, allotted 70,000 fully paid up ordinary shares of Rs. 10 each of the Orissa Cement Ltd. to the appellant.

6. The above facts clearly establish that :

> (i) Even though the appellant initially placed an order on February 7, 1946 for the purchase of the Dandot machinery for improving the production in the Dandot factory, and the supply was not to commence until February, 1948, it did not make

any effort to cancel that order even after Dandot was included in the territory of Pakistan with effect from August 15, 1947.

(ii) On the other hand, in pursuance of an enquiry by the Government of Orissa whether the appellant would be interested in putting up a cement plant in the State, one of the appellant's Directors informed the State Government on November 25, 1947 that it had got a cement plant for which it had placed an order a couple of years ago and that it could be put up in Orissa on suitable terms. The appellant's General Manager in fact met the State Government authorities in January, 1948 where it was reiterated that the machinery ordered by the appellant was expected to start arriving in March, 1949 and could be diverted to Calcutta and that if the appellant's negotiation with the State Government were successful, the first lot of cement could be supplied by the beginning of 1950.

(iii) The negotiations with the Orissa Government proved successful and the appellant wrote a letter to M/s. F. L. Smidth and Co. on August 2, 1948 informing it that it had obtained the permission of the Government of India to import the Dandot machinery in India. The appellant also informed the suppliers on September 9, 1948 that it should divert the Dandot machinery to Orissa and supply the same according to the revised specification to suit the local conditions.

(iv) A formal agreement was executed by the appellant and the Orissa Government on December 23, 1948 for the setting up of a cement factory in Orissa.

(v) The Dandot machinery arrived and was supplied by the appellant to the Orissa factory against cost price, which was debited to the Orissa Cement Company.

7. It would thus appear that, long before the Dandot machinery was due, the appellant knew that it could not be used in Dandot. It has been found that after the partition of the country the appellant could have cancelled the order for the import of the machinery but it did not do so and decided to import it with a view to supplying it to Orissa on suitable terms. It therefore resold it to the Orissa factory in accordance with the terms and conditions of its negotiation with the State Government. The intention of resale was therefore there almost from the beginning, and was really the dominant intention in importing the machinery after the partition of the country. It is also quite clear that the appellant was not inclined to make it a gratuitous sale, but agreed to it only when it was able to secure a suitable agreement with the State Government for the setting up of a factory in Orissa. It was in fact the appellant's own case that the price of the Dandot machinery had gone up substantially. Even so, the appellant did not care to utilise it for any of its own plants, but sold it to Orissa Cement Ltd. The appellant therefore did not only have the dominant intention of selling the Dandot machinery to its own advantage but, in doing so, it acted with the set purpose of taking an advantage of its position as the owner of the imported machinery of which the price had, on the appellant's own showing gone up much higher. It was therefore a real transaction by way of an adventure in the nature of trade and was as such a business transaction within the meaning of Section 2(4) of the Act. It does not matter if the appellant did not earn a profit immediately on delivering the machinery, and sold it without any profit in the first instance, for there can be no denying the fact that even if the appellant had not earned any profit whatsoever at the time of the sale or even thereafter, the transaction, in the facts and circumstances of this case, would nonetheless have been an adventure in the "nature of trade" and no other. We are fortified in this view by the decisions in Narain Swadeshi Weaving Mills v. Commissioner, Excess Profits Tax

(supra) and G. Venkataswami Naidu and Co. v. C.I.T. (supra).

8. It is true that the question of asking for payment in excess of the cost price was raised by the appellant some time later, but its subsequent course of conduct in bringing about a substantial profit is a clear pointer to the real intention behind the sale. It was for that reason that the appellant's director addressed a letter to the Minister of Industries of the Orissa Government on April 7, 1950 stating that the Dandot machinery should be revalued and the appellant allowed a higher price due to the rise in its price at the time of the supply. The entire correspondence in that respect had not been placed on record by the appellant, but it appears that the appellant was able to secure a further sum of Rs. 7 lakhs, under an agreement dated December 4, 1951, in lieu of which it was able to secure 70,000 fully paid-up shares of Rs. 10. The appellant succeeded in doing so merely because it was able to substantiate its claim for a higher price, or profit, on the sole ground that it was entitled to it because of the increase in the price at the time of the sales. There is therefore nothing wrong in the view which has prevailed with the High Court that it was an adventure in the nature of trade.

9. It has been argued by Mr. V. S. Desai for the appellant that as it was single and isolated transaction of purchase and sale, the onus of proving that it was a transaction in the nature of trade lay on the department. This is a correct proposition of law and, as would appear from what has been stated above, we have examined the controversy on the assumption that the burden of proving that the transaction was an adventure in the nature of trade lay on the department. The ancillary argument of Mr. V. S. Desai that a question like the present has to be examined with reference to the indicia or characteristics of the trade, is also quite correct, but counsel has not been able to contend, in the face of the facts and circumstances mentioned above, which indicia or characteristics could be said to be lacking to take it out of the category of an adventure in the nature of trade.

10. All that Mr. V. S. Desai has pointed out is that there was no intention to make a profit when the Dandot machinery was sold to the Orissa Cement Ltd. and it has been urged that that would be sufficient to take it out of the category of an adventure in the nature of trade. Reference in this connection has been made to the decisions in Kishan Prasad & Co. Ltd. v. C.I.T., Punjab (supra), G. Venkataswami Naidu and Co. v. C.I.T. (supra), Saroj Kumar Mazumdar v. C.I.T., West Bengal, Calcutta (supra), and Ajax Products Ltd. v. C.I.T., Madras ((1961) 43 ITR 297 (Mad)). We have given our reasons for the contrary view that the transaction would be an adventure in the nature of trade even if the question of profit was left out of consideration, and that the appellant in fact acted with the set purpose of reselling the Dandot machinery to its advantage and not by way of a favour or a gratuitous act. We have also shown how the appellant ultimately claimed and succeeded in securing a higher price merely on the ground that there was an appreciable increase in the price after the purchase of the Dandot machinery.

11. Lastly, it has been argued by Mr. V. S. Desai that in purchasing the machinery the appellant made a capital investment so that it was merely a capital asset. This argument is also futile for, as has been shown, the appellant made the purchase with the dominant intention of reselling the machinery to advantage and made the resale only when it was able to enter into an agreement with the Orissa Government for the setting up of a cement factory in that State on terms and conditions which were suitable from its point of view. It may also be stated that even in its own profit and loss account and balance-sheet, the appellant treated the sale price as a revenue receipt and not as a capital investment. It was therefore an afterthought to claim that the initial purchase was by way of an investment and was a capital asset.

12. The facts of Kishan Prasad and Co. Ltd. v. C. I. T., Punjab (supra), Saroj Kumar Mazumdar v.

C. I. T., West Bengal, Calcutta (supra) and Janki Ram Bahadur Ram v. C. I. T., Calcutta (supra) referred to by Mr. V. S. Desai were different. In the case of Kishan Prasad and Co. Ltd. there was agreement to give the managing agency to the assessee on the erection of the mill because it had subscribed to shares worth Rs. 2 lakhs. The mill was not erected and the assessee sold the shares. There was therefore justification for holding that the purchase of the shares was an investment to acquire the managing agency and was not an adventure in the nature of trade. In Saroj Kumar Mazumdar's case there was a single transaction of sale of rights for the purchase of land measuring 3/4 acres by the assessee who was an engineer by profession. His construction activities declined and that was why he sold his rights in the land for Rs. 74,000 odd in excess of the amount paid by him. The income-tax department however failed to prove that the assessee's dominant intention was to embark on a venture in the nature of trade as distinguished from capital investment. That was also therefore a different case. In the case of Janki Ram Bahadur Ram the assessee was a dealer in iron scrap and hardware. He agreed to purchase all rights of a company in a jute-pressing factory, but sold it at a profit. It was held that as the property purchased by the assessee was not such that an inference that a venture in the nature of trade must have been intended could be raised, the profit was not liable to tax. It was held that a person purchasing a jute press might intend to start his own business or he might let it out on favourable terms. The property was in fact let out by the earlier owner before the date of sale. That was also therefore quite a different case and cannot avail the appellant. In the remaining case of Ajax Products Ltd. it was held that on the facts the assessee company having acquired the sick mill to open a new line of business, the purchase was really in the nature of an investment and the purchase and sale did not amount to an adventure in the nature of trade. That was therefore also quite a different case.

13. It would thus appear that in spite of the fact that the appellant withheld some of the correspondence bearing on the controversy, the Department has succeeded in proving that the transaction of sale in question was an adventure in the nature of trade and fell within the definition of "business" in clause (4) of Section 2 of the Act. The High Court has rightly answered the question in the affirmatives, and as we find no merit in this appeal, it is dismissed with costs.

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