

CALCUTTA HIGH COURT

Budge Budge Investment Co. Ltd

Vs

Commissioner of Income-Tax

(Sankar Prasad Mitra and K Roy , JJ.)

18.06.1968

JUDGMENT

Sankar Prasad Mitra, J.

1. This is a reference under Section 66(1) of the Indian Income-tax Act, 1922. The assessment year is 1959-60. The corresponding accounting year was the year ended on the 31st May, 1958. The assessee is Messrs. Budge Budge Investment Co. Ltd., which, inter alia, deals in jute and hessian. In the course of its dealings in jute and hessian during the relevant accounting year the assessee sustained a loss of Rs. 75,609. The Income-tax Officer refused to treat this loss as a business loss. He found that in no case delivery of the goods was given or taken. He, therefore, treated the loss as a speculative loss.

2. Before the Appellate Assistant Commissioner it was contended on behalf of the assessee that contracts for each transaction of purchase and sale were in the form prescribed by the Indian Jute Mills Association and these contracts were settled in each case by giving and taking delivery of pucca delivery orders. The Appellate Assistant Commissioner held that, as in each case delivery was given and taken by exchange of pucca delivery orders, though the entire amount of purchases and sales were paid and received in full in cash, in the absence of actual delivery of the goods, the contracts were speculative contracts and dismissed the appeal.

3. The Tribunal followed the decision of this court in *D.M. Wadhwana v. Commissioner of Income-tax*¹, , and dismissed the appeal.

4. The following question of law has been referred to this court for its opinion :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the loss of Rs. 75,609 suffered by the transfer or delivery of pucca delivery orders was speculation loss under the second Explanation to the proviso to Section 24(1) of the Indian Income-tax Act, 1922 ?"

5. Now, the relevant provisions of Section 24(1) of the Indian Income-tax Act, 1922, are as follows:

"24. Set off of loss in computing aggregate income.--(1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year:

Provided that in computing the profits and gains chargeable under the head ' profits and gains of business, profession or vocation ', any loss sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions . . .

Explanation 1.--Where the speculative transactions carried on are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business.

Explanation 2.--A speculative transaction means a transaction in which a contract for purchase and sale of any commodity including stocks and shares is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips..."

6. The section clearly stipulates that, in order to be a speculative transaction, the contract must be either periodically or ultimately settled. Secondly, the settlement so effected must be otherwise than by actual delivery or transfer.

7. Mr. Debi Pal, learned counsel for the assessee, contends that, on the facts of this case, the Tribunal should not have followed the decision in Wadhwana's case. In that case, under certain contracts, the assessee had to sell to, and purchase from, the same party the same quantity of the

specified commodity of which delivery had to be effected by both on the same day. The parties to these contracts exchanged pucca delivery orders which authorised the assessee and the other party respectively to take delivery of the stipulated number of bales from the mills concerned and drew bills on each other pursuant to the contracts. Debit and credit entries for the entire amount in respect of the pucca delivery orders were found in the account books and the bank pass-book of the assessee. The question was whether the net loss incurred by the assessee in these transactions could be set off against the other business income of the assessee under Section 24(1) of the Income-tax Act, 1922. The court held that, as the exchange of pucca delivery orders amounted only to notional and not real delivery of the goods as contemplated by Explanation 2 to Section 24(1), the transactions were speculative transactions and the loss incurred by the assessee could not be set off against the other business income under Section 24(1). According to this court, the word "actual" in Explanation 2 to Section 24(1) means "real" as opposed to "theoretical or probable". This court held further that there was nothing in Explanation 2 to Section 24(1) to show that it was intended to apply only to transactions in which there was no actual delivery of goods even at the ultimate stage in a series of chain transactions. The judgment was delivered by G.K. Mitter J. sitting with Masud J.

8. Mr. Debi Pal says that in Wadhwana's case the contracts for purchase and sale were between the same parties deliverable on the same day; but, in the instant case, the contracts were between the assessee, on the one hand, and different parties, on the other. Secondly, says Mr. Pal, Wadhwana's case proceeded on the footing that the contracts were settled and the only question to be decided by the court was whether, by exchange of pucca delivery orders, there was actual delivery within the meaning of Explanation 2 to Section 24(1). Mr. Pal contends that, in the instant reference, he does concede that the assessee had "settled" the contracts. Learned counsel contends further that the principles that should be applied to the facts of the present case are those enunciated by A.N. Ray J. with whom D. Basu J. *concurred in Commissioner of Income-tax v. Ram Chandra Gupta & Co*².,

9. We shall discuss the judgment of A.N. Ray J. in *Commissioner of Income-tax v. Ram Chandra Gupta & Co.* a little later. At the moment let us try to appreciate when a contract can be said to have been settled. To our minds, a contract can only be settled if there is something outstanding under the contract. Where, for instance, under the original contract there is an obligation to deliver and delivery is not effected but the contract is brought to an end by some method other than delivery, the transaction amounts to a speculative transaction within the meaning of Section 24(1) of the Indian Income-tax Act, 1922. In the instant case, the findings of the tax authorities are (a) that the assessee deals in jute and hessian; (b) that in the course of its dealings in jute and hessian during the relevant accounting year the assessee sustained a loss; and (c) that, in each

case, delivery was given and taken by exchange of pucca delivery orders. In other words, the contracts were for purchase and sale of jute or hessian and, instead of actual delivery, that is to say, real or physical delivery of goods, the contracts were concluded by delivery of pucca delivery orders. These transactions, on the findings of the tax authorities, are clearly transactions which were settled otherwise than by actual delivery and, as such, they were speculative transactions.

10. We cannot overlook that the words used in the section are "actual delivery", Now, delivery, it is well known, may be actual or constructive. Delivery is constructive when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. Delivery by attornment may take place in three classes of cases: first, the seller may be in possession of the goods, but, after sale, he may attorn to the buyer, and continue to hold the goods as his bailee; secondly, the goods may be in the possession of the buyer before sale, but, after sale, he may hold them on his own account; thirdly, the goods may be in the possession of a third person as bailee for the seller and, after sale, such third person may attorn to the buyer and continue to hold them as his bailee ; Chalmers' Sale of Goods Act, 1893, 15th edition, page 195. From this point of view when "actual" delivery of goods is intended, delivery by pucca delivery orders appears to be constructive or symbolic delivery as opposed to "actual" delivery.

11. The point we are considering has been discussed by the Supreme Court to a certain extent in Bayyana Bhimayya v. Government of Andhra Pradesh, Hidayatullah J. (as he then was), speaking for the court, observes: " A delivery order is a document of title to goods (vide Section 2(4) of the Sale of Goods Act), and the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the mills to third parties, there were, in effect, two deliveries, one by the mills to the appellants, represented, in so far as the mills were concerned, by the appellants' agents, the third parties, and the other, by the appellants to third parties as buyers from the appellants. These two deliveries might synchronise in point of time, but were separate, in point of fact and in the eye of law."

12. The Supreme Court reaffirmed this view in State of Andhra Pradesh v. Kolla Sree Ramamurthy, . These two judgments of their Lordships of the Supreme Court indicate that "actual delivery", in cases covered by the passing of delivery orders, takes place when the goods are delivered to the ultimate endorsee. It seems to us, in these premises, that a delivery of a pucca delivery order cannot be "actual delivery" within the meaning of Explanation 2 to Section 24(1).

13. Learned counsel for the assessee, as we have seen, strongly relies on this court's judgment in

Commissioner of Income-tax v. Ram Chandra Gupta & Co. We are of the view that this decision is not applicable to the facts of the instant reference. In the case. Commissioner of Income-tax v. Ram Chandra Gupta & Co., the Tribunal found that the assessee was an intermediary in respect of sale of jute goods and "had entered into transactions in gunny bags entailing purchase and sale of delivery orders". In our case the finding is that the assessee was a dealer in jute and hessian; but it gave and took delivery by exchange of pucca delivery orders. Secondly, at page 260 it is stated:

"In the present case there is no finding that there was any settlement of the contracts of purchase and sale and, therefore, one of the vital limbs of Explanation 2 to Section 24(1) of the Indian Income-tax Act is not found as a fact in order to bring the transaction within the mischief of a speculative transaction".

14. In our case the Appellate Assistant Commissioner says :

"In the accounts of this year also there were both purchases and sales of jute and hessian. Some of the transactions were completed without taking or giving actual delivery of goods" (vide pages 8 to 9 of the paper-book).

15. On this finding we cannot but hold that some of the assessee's transactions for sale or purchase of jute and hessian were "settled" by delivery of pucca delivery orders and these settlements come within the purview of Explanation 2 to Section 24(1).

16. Before I conclude, there is another Bench decision of our court which should be referred to in this connection. In *Murlidhar Jhunjunwalla v. Commissioner of Income-tax*³, my learned brother (Banerjee J. concurring) has held that there must be actual delivery or transfer of the commodity itself in order to take a transaction out of the definition of speculative transaction in Explanation 2 to Section 24(1). The word "settled" has been held to mean "determined" or "concluded" or "disposed of". According to my Lord, a contract for sale and purchase of jute may be "concluded" and/ or "determined" by delivery of pucca delivery orders; but it would be a case of a contract "concluded" and/or "determined" without actual delivery of the commodity and would be a speculative transaction within the meaning of Explanation 2 to Section 24(1). To my mind, these principles should be applied to the facts of the present reference.

17. The answer to the question, therefore, is in the affirmative. The applicant will pay to the respondent the costs of this reference.

K.L. Roy, J.

18. I agree.

Cases Referred.

1[1966] 61 I.T.R. 154

2[1968] 69 I.T.R. 254; 72 C.W.N. 274

3[1969] 73 I.T.R. (Appendix) 727