**BOMBAY HIGH COURT**

Commissioner of Income-Tax

Vs

Ramnarain Sons Ltd

(Chagla, C.J. Tendolkar, J.)

02.08.1956

**JUDGMENT**

**Chagla, C.J.**

1. On the 1st of October, 1946, the assessee company acquired the managing agency of the Dawn Mills Co., Ltd. Prior to this, Messrs. Sassoon J. David and Co. Ltd. were the managing agents. Part of the agreement to transfer the managing agency was that the assessee company had to purchase from Messrs. Sassoon J. David and Co. Ltd., 2,507 shares of the mills for a total consideration of Rs. 50,00,000. The market price of these shares at the relevant date was Rs. 1,610 per share. Fifteen hundred and seven of these shares were transferred to the company at the price of Rs. 2,321-8-0 and the balance of 1,000 were transferred to the directors at Rs. 1,500 per share. Two months after this transaction, the assessee company sold 400 shares, and the result of this transaction was that they suffered a loss of Rs. 1,78,438. This loss was claimed by the company as a revenue loss and this claim was allowed by the Tribunal and the Commissioner has come on this reference.

2. Now, in the first place, let us recite the facts which are either admitted or have been found by the Tribunal. The assessee company was a dealer in shares and also did the business of acquiring managing agencies. As a matter of fact, it had already acquired two managing agencies one of Bradbury Mills on the 7th of April, 1934, and of the Phoenix Mills was to acquire the managing agency and, to use the language of the Income-tax Officer which the Tribunal has adopted in the statement of the case, "the purchase of the shares was a part and parcel of the taking over of the managing agency." The Tribunal has also found as a fact that the shares which were purchased by the assessee company, although it was a dealer in shares, did not become its stock-in-trade. On these facts the question arises as to whether the loss caused to the assessee company on the sale of these shares constituted a revenue or a capital loss. Now, the view taken by the Tribunal is that the acquisition of the managing agency was in the nature of a business carried on by the

assessee company. That undoubtedly is true. It may be conceded that the assessee company did not acquire this managing agency as a hobby or a pastime. It had acquired it because it was its business to be managing agents of different mills and it was in the course of its business that this managing agency was acquired. But it is difficult to understand how from this fact it was competent, with respect to the Tribunal, to draw the inference that the shares which were purchased and which were purchased for the purpose of acquiring this managing agency and which were not the stock-in-trade of the assessee company could be debited to the revenue account. Surely, even in the course of a business, a capital asset may be acquired, and the acquisition of the managing agency, merely because it was in the course of business, does not necessarily lead to the inference that the managing agency could not be a capital asset. Whether the managing agency was a capital asset or not must be decided independently of the question as to whether it was acquired in the course of the business. If the managing agency was an asset of an enduring character, then it would be a capital asset and if it was a capital asset, then if the shares were purchased for the purpose of acquiring the capital asset, then the shares also would form part of the capital of the company and any loss in these shares would be debited to the capital account and not to the revenue account. That the managing agency is an asset of an enduring character is beyond dispute, and the Supreme Court in a recent judgment in Kishan Prasad and Co. Ltd. v. Commissioner of Income-tax, Punjab, dealing with the transaction of an acquisition of the managing agency says :

> "It seems that the object of the assessee company in buying shares was purely to obtain the managing agency of the third mill which no doubt would have been an asset of an enduring nature and would have brought them profits but there was from the inception no intention whatever on the part of the assessee company to re-sell the shares either at a profit or otherwise deal in them."

3. On these the Supreme Court, differing from the Punjab High Court, came to the conclusion that the profits earned by the assessee on the sale of these shares constituted a capital appreciation and was not a revenue profit. The decision of the Tribunal could only have been justified if it had held that the assessee company dealt in managing agencies. Then the managing agency would be as if it were the stock-in-trade of the assessee company. But that is not, and that could not be, the finding of the Tribunal. It is one thing to say that a company acquires managing agencies in order to do the working of managing agents and earn commission; it is an entirely different thing to say that a company deals in managing agencies in the sense that it buys managing agencies and sells them. It is nobody's case that the assessee company's business falls in the latter category. Therefore, if the shares were purchased for the purpose of acquiring this capital asset, in view of the Supreme Court judgment any loss or any profit resulting from the sale of these shares must be debited or credited to the capital account and not to the revenue

account. The purchase of the shares must be looked upon as an investment by the assessee company. It is quite possible that having purchased these shares, the assessee company could have treated them as its stock-in-trade. It would have been easier for the company to do so, because in this case the company was a dealer in shares and Mr. Palkhivala is right that in the Supreme Court case the company was not a dealer in shares. But whether the company converted these shares into its stock-in-trade is a question of fact and that fact has been answered by the Tribunal against the assessee.

4. Now, the whole attempt of Mr. Palkhivala in this reference has been to persuade us that this finding of fact was arrived at without any evidence or without any materials and that the assessees have taken out a notice of motion to ask us to direct the Tribunal to refer the question as to whether the Tribunal acted without any evidence or misdirected itself in law in rejecting the assessees' contention that the shares of the Dawn Mills Co. Ltd. constituted stock-in-trade and whether the Tribunal's finding that they did not was contrary to all evidence on the record. Mr. Palkhivala has relied on various circumstances which, according to him, clearly go to show that the assessee company treated these shares as stock-in-trade. In the first place, he says that 400 shares of the 1,500 shares were sold within two months of their acquisition. He then points out that the shares were purchased by borrowing money, and, according to him, it is difficult to believe that the assessees would invest monies in shares by borrowing money on interest. It is also pointed out that at the end of the year the assessees valued these shares on the basis of the shares being stock-in-trade, because the valuation was on the well known principle of market or cost price whichever is lower. Further, attention is drawn to the fact that in the subsequent years these shares were sold from time to time. Now, if the finding that the shares did not constitute the stock-in-trade of the assessee company is a finding of fact, then clearly it is not for us to reappreciate the evidence. Even assuming that the circumstances to which Mr. Palkhivala has drawn attention are strong circumstances in favour of his clients, the only question that we have to consider is whether there was evidence or materials to justify the finding of the Tribunal. We have laid down in a very recent decision reported in Rajputana Textile (Agencies) Ltd. v. Commissioner of Income-tax, Bombay City as follows :

> "The question whether a transaction is an adventure in the nature of trade is essentially a question of fact and that fact has to be ascertained from all the circumstances in the case. The question of law that can only arise when a Tribunal has ascertained the fact is whether there was evidence to justify the finding of fact. If there was evidence, no question of law arises, but if the Court can be satisfied that the Tribunal came to that conclusion of fact on no evidence or on inferences which are entirely unreasonable, then the Court would interfere and the interference would be limited to this that the evidence disclosed in the record was not such as could possible warrant the inference drawn by the

> Tribunal. The High Court is not concerned with the quality or the adequacy of the evidence led before the Tribunal. Whether the evidence was sufficient or not is again for the Tribunal to decide."

5. Our attention has been drawn to a very recent decision of the House of Lords and we are happy to find, with respect, that the House of Lords on this question has taken the same view, and the judgment is reported in Edwards (Inspector of Taxes) v. Bairstow. Viscount Simonds lays down the principle as follows :

> "The finding that the transaction was not an adventure in the nature of trade is an inference of fact but can be set aside because it appears that the commissioners have acted without any evidence or on a view of the facts which could not reasonably be entertained. In Making that inference they are to be assumed to have been rightly directed in law as to the characteristics which distinguish an adventure."

6. And Lord Radcliffe puts it a little strongly when he says :

> "Without any misconception of law appearing on the face of the case stated, the facts found may be such that no person acting judicially and properly instructed as to the relevant law could have come to the determination reached; the Court may then intervene, having no option but to assume that some misconception of law is responsible for the decision."

7. Now, applying these tests here, could it be said that the inference drawn by the Tribunal was an entirely unreasonable one or that, to use the language of Lord Radcliffe, no person acting judicially and properly instructed as to the relevant law could have come to this conclusion. There are two very strong circumstances which could reasonably lead any Tribunal to the conclusion that the shares were not treated as stock-in-trade. First, admittedly the shares were purchased at a loaded price. A dealer in shares purchases shares in order to sell them at a profit, and it is difficult to believe that a dealer in shares would purchase them at price very much higher than the market price, so that the chances of his making a profit would be very meagre. Mr. Palkhivala says that a large block of shares was acquired and it may be that because of it the assessees had to pay this higher price. A dealer in shares may succeed in getting a large number of shares at a price less than the market price if the seller is in difficulties and wants to get rid of his shares and to get liquid assets. But we have not heard of a dealer in shares purchasing a large number of shares at a higher value than the market value. The other circumstance which is equally strong in this case is that the shares were purchased for the acquisition of the managing agency. Therefore the real object of the assessee company was not to do business in these shares, not to make profit out of these shares, but to acquire a capital asset out of which it would earn

managing agency commission and make profits. Therefore it cannot be said in this case that there was no evidence or no circumstance which could reasonably lead the Tribunal to the conclusion that the shares were not the stock-in-trade of the assessee company. We therefore cannot accede to the application of the assessee that we should ask the Tribunal to frame a question as suggested by the assessees. In our opinion, once the Tribunal came to the conclusion that the shares were not the stock-in-trade of the assessee company, only one inference in law was possible and that inference was that the loss in respect of these shares was a loss of a capital nature and not of a revenue nature. In view of the fact that we are not allowing the notice of motion taken out by the assessees, the notice of motion taken out by the Commissioner, which is only consequential upon the finding of the Tribunal that the shares are the stock-in-trade of the assessee company, does not survive.

8. The result is that we must answer the question submitted to us as follows :

(1) Acquisition of the managing agency was an acquisition of a capital asset.

(2) The loss in respect of the 400 shares was of a capital nature.

9. The assessee to pay the costs.

10. The notice of motion taken out by the assessee dismissed with costs.

11. The notice of motion taken out by the commissioner dismissed. No order as to costs.

12. Reference answered accordingly.