
(1960) 09 PAT CK 0009

Patna High Court

Case No: Misc. Judicial Case No. 725 of 1958

Ashok Marketing Ltd.

APPELLANT

Vs

Commissioner of
Income Tax

RESPONDENT

Date of Decision: Sept. 16, 1960

Citation: AIR 1961 Patna 73 : (1961) 42 ITR 193

Hon'ble Judges: V. Ramaswami, C.J; Kanhaiya Singh, J

Bench: Division Bench

Advocate: S.N. Dutta, V.D. Narayan and Shiveshwar Prasad Sinha, for the Appellant; R.J. Bahadur, for the Respondent

Judgement

Ramaswami, C.J.

In this case the assessee is a public limited company with a paid-up share capital of Rs. 5,00,000/-. It deals principally in goods manufactured by the Dalmia Jain Group, namely, the Rohtas Industries Ltd., S. K. G. Sugar Mills Ltd. and Dalmia Cement Ltd. The main business of the Company is to sell commodities like cement and sugar on commission basis and also directly to the customers on its own account. In the course of the accounting year ending on the 31st August, 1949, the assessee dealt in Government securities. On the 28th February, 1949, the assessee sold securities of the face value of Rs. 62,00,000/- to the Dalmia Cement and Paper Marketing Co. Ltd.

This sale of securities was not a sale out of the Company's investments or holdings. The sale was a forward sale, and to cover it up the assessee started purchasing Government securities from other concerns. On the 3rd March, 1949, the assessee purchased Government securities of the face value of Rs. 20,00,000/- from the Bharat Bank for Rs. 20,37,062/9/-. On the 4th March, 1949, a second lot of Government securities of the face value of Rs. 2,00,000/- was purchased from the Bharat Bank for a sum of Rs. 2,03,686/8/8.

On the 7th March, 1949, the assessee again purchased Government securities of the face value of Rs. 20,00,000/- for a sum of Rs. 20,37,521-5-8, and for the fourth time the assessee purchased Government securities of the face value of Rs. 20,00,000/- from the same Bank for a sum of Rs. 20,37,635-8-4. Having made all these purchases the assessee sold Government securities of the face value of Rs. 50,00,000/- for a sum of Rs. 50,92,578-2-0. After these transactions the assessee again purchased certain securities. The details of sales and purchases have been furnished in annexure A to the statement of the case.

The assessee claimed before the Income Tax Officer that there was a loss of Rs. 30,847-14-0 as a result of these transactions in the purchase and sale of these Government securities. The claim was rejected by the Income Tax Officer and an appeal preferred by the assessee to the Appellate Assistant Commissioner was also dismissed. The assessee then took the matter in second appeal before the Appellate Tribunal.

2. It was argued before the Tribunal on behalf of the assessee that the transactions in the purchase and sale of Government securities were authorised by the Memorandum of Association. The Tribunal did not accept this argument and held that the dealings in Government securities were not authorised by the Memorandum of Association. The Tribunal also took the view that even if the dealings were intra vires of the Company, it could not be said that the transactions were performed by the assessee Company in the ordinary course of its business. Accordingly, the Tribunal disallowed the claim of the assessee for setting off the loss of Rs. 30,847-14-0 against the other income of the assessee for the accounting year.

3. At the instance of the assessee the Appellate Tribunal has submitted the following question of law for the opinion of the High Court:

"Whether on the facts and in the circumstances of the case and on a true interpretation of the Memorandum of Association of the assessee Company, the assessee Company was entitled to claim that the loss of Rs. 30,847-14-0 suffered by it in its dealings in Government securities in the assessment year 1950-51 was loss which could be set off against the other income of the assessee?"

On behalf of the assessee learned counsel put forward the argument that the sale and purchase of Government securities were intra vires of the Company and the transactions were authorised by Articles (1), (12), (13) and (37) of the Memorandum of Association, which are to the following effect:--

"(1) To buy, sell, import, export, manufacture, manipulate, treat, prepare and deal in merchandise commodities, articles, machinery and tools of all kinds, and to carry on business as traders, merchants, importers, exporters, manufacturers, representatives, dealers and agents."

12. To invest and deal with the monies of the Company upon such securities or investments and in such manner as may from time to time be determined and to realise such securities and investments as and when necessary.

13. To take, purchase, or acquire by gift, exchange Or otherwise, and to hold, issue, reissue, sell or deal in any shares (whether fully paid or partly paid) stocks, debentures, debenture stock or other securities of all kinds in or of any other company and to cause such shares, stocks, debentures securities or any of them to be invested in or held by a nominee for and on behalf, of the company or to give any guarantee or security for the payment of dividend, or interest thereon, or otherwise in relation thereto.

(37) To sell or dispose of the undertaking, assets and property of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares partly paid up, debentures, debenture stock, bonds or securities of any other company having objects altogether or in part similar to those of this company."

I do not think it is necessary to express any concluded opinion on this point. I shall assume in favour of the assesses that the transactions in sale and purchase of Government securities were authorised by the Memorandum of Association. The point is not really relevant for deciding the question of law which is presented for determination in this case. Even assuming that the transactions were intra vires, it does not necessarily follow that the transactions were performed in the normal course of business of the Company.

Every act which is intra vires of the company is not necessarily done in the course of business of the Company. The question at issue in this case is whether the transactions of sale and purchase of Government securities had any pertinent connection with the normal business of the Company and whether they were so related or bound up with the business of the Company that it can be considered to have been performed in the normal course of business. This view is borne out by a decision of the Scottish Court of Session in *Commissioner of Inland Revenue v. Scottish Automobile and General Insurance Co., Ltd.* (1932) 16 Tax Cas 381.

In that case the respondent Company, which carried on insurance business of various kinds, other than life assurance, had, under its Memorandum and articles of association, wide powers with regard to the investment and management of its surplus funds. Those funds were, in fact, invested only in British. Government securities, the holdings of which, were varied from time to time. During the years 1921 to 1923 profits arising to the Company on the sale of investments were carried, to investment reserve account. After 1924 the investment reserve account became merged in a general reserve account; profits from sales of investments were carried to revenue account, and allocations out of revenue account exceeding the profits on realisation of investments were made to the general reserve account,

The Company appealed to the General Commissioners against the inclusion in an assessment to Income Tax, under case I of Schedule D, for the year 1929-30, of the net profit arising from realisations of investments in 1928. The Commissioners held that the profit in question was not a trading profit. It was held by the Court of Session that there was evidence upon which the Commissioners could arrive at the conclusion of fact that the profit was not a profit of trading. At page 390 of the report Lord Sands has observed as follows:--

"The Respondents are an insurance company. As is now the almost invariable practice, powers of a very wide, kind in regard to the business that might be carried on were taken ob majorem cautelam in the memorandum and articles, in considering such a question as has here arisen it is quite legitimate to point to the taking of these powers as indicative of a class of business which, at the inception of the Company, was contemplated as possibly to be undertaken. But, in my view, it is not legitimate to treat every object specified in the preliminary documents as indicative of an intention to carry on a Certain class of business as one of the purposes for which the Company was formed. A Company formed to construct a bridge over the Water of Leith at Balerno will probably take powers wide enough to cover the bridging of the Bosphorus."

A similar view has been expressed by Chagla, C. J. in [Seksaria Biswan Sugar Factory Ltd. Vs. Commissioner of Income Tax](#). In that case the assessee Company, which was incorporated for the manufacture and sale of sugar, advanced on a demand promissory note a sum of Rs. 5,00,000/- to a firm in which its managing agents were partners. One of the objects of the assessee Company as stated in its memorandum of association was "to lend money, with or without security". The Tribunal held that the business of the assessee company was not money-lending business and therefore the advance made by it was not in the course of its business and was not a debt contemplated by Rule 1(1) (b) of Schedule II to the Excess Profits Tax Act, 1940. It was held by Chagla, C. J. that the conclusion of the Tribunal was really a finding of fact arrived at On the evidence before it, and even assuming that the question was a question of law, the Tribunal was right in coming to the conclusion that it did on the facts and circumstances of the case.

4. In my opinion, the ratio of these two decisions applies to the present case, and, therefore, the question at issue is whether the transactions of sale and purchase of Government securities had any connection with the normal business of the Company and whether they were so related or incidental to the business of the Company that they can be considered to have been performed in the ordinary course of its business. The appellate Tribunal has examined the evidence given by the assessee and other circumstances of the case and he reached the finding that the transactions were not performed by the assessee Company in the normal course of its business.

This finding of the appellate Tribunal is a finding of fact, and in a case of this description it is well established that the finding should not be disturbed by the High Court unless it is apparent that the Appellate Tribunal has misdirected itself in law or that it has applied a

wrong legal principle or that there is no evidence which would justify a reasonable man in drawing the inference which the Appellate Tribunal has drawn. The matter has been very clearly put by Lord Stendale M.R. in *Curie v. Commissioners of Inland Revenue* (1921) 12 Tax Cas 245, as follows:--

"The first question that has been debated before us is this: Is the question whether a man is carrying on a profession or not, a matter of law or a matter of fact? I do not know that it is possible to give a positive answer to that question. because it must depend upon the circumstances in Which the Court is dealing. There may be circumstances in which nobody could arrive at any other finding than that what the man was doing was carrying on a profession; and therefore, taking it from the point of view of a judge directing a jury, or any other tribunal which has to find the facts, the judge would be bound to direct them that on the facts they could only find that he was carrying on a pro Session. That reduces it to a question of law. On the other hand, there might be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where it becomes a question of degree, it is then undoubtedly, in my opinion, a question of fact, and if the Commissioners come to a conclusion of fact without having applied any wrong principle then their decision is final upon the matter."

5. I consider that there is proper material in the present case to justify the finding of the Tribunal that the sale and purchase of the Government securities were not connected with the normal business of the Company. In the first place, the Appellate Tribunal has referred to the circumstance that the assesses did not produce the Minute Book to show that there was a resolution of the Board of Directors sanctioning the sale and purchase of securities.

In the second place, the Appellate Tribunal relied upon the fact that the sale and purchase of securities took place between allied concerns in which the Dalmia Jain group has the controlling interests and the transactions, therefore, seem more like domestic transactions rather than transactions entered into in the ordinary course of the Company"s business. The Appellate Tribunal also took into account the circumstance that the paid up share capital of the Company was Rs. 5,00,000/-but the total amount covered by the transactions was over one crore of rupees, and also the circumstances that the sale of Rs. 50,00,000/- on the 31st March, 1949, remained uncovered for nearly three months, "a procedure most unusual in a business of this nature."

In my opinion the finding of the Appellate Tribunal is supported by proper evidence and it is also not shown on behalf of the assessee that the Tribunal has misdirected itself in law in reaching this finding. For these reasons I hold in the facts and circumstances of the case the assessee Company was not entitled to claim that the loss of Rs. 30,847/14/- suffered by it in its dealings in Government securities in the assessment year 1950-51 was loss which could be set off against other income of the assessee.

6. I would accordingly answer the question of law referred by the Appellate Tribunal against the assessee find in favour of the Income Tax Department. The assessee must pay the costs of this reference. Hearing fee Rs. 250/-.

Kanhaiya Singh, J.

7. I agree.