
(1956) 08 BOM CK 0015

Bombay High Court

Case No: Income-tax Reference No. 15 of 1956

Gustad Dinshaw Irani

APPELLANT

Vs

Commissioner of
Income Tax, Bombay
City

RESPONDENT

Date of Decision: Aug. 20, 1956

Acts Referred:

- Income Tax Act, 1922 - Section 10, 2

Citation: (1957) 31 ITR 92

Hon'ble Judges: Chagla, C.J; Tendolkar, J

Bench: Division Bench

Advocate: N.A. Palkhivala, for the Appellant; G.N. Joshi, for the Respondent

Judgement

Chagla, C.J.

The assessee is a partner in several firms doing restaurant business in Bombay and on the 6th August, 1945, he applied for a plot of land in the Worli Scheme of the Bombay Municipality. His application was granted and under the terms of the grant the assessee had to construct a building on the plot at a cost of not less than Rs. 75,000. It was also a term of the grant that he had to pay an annual rent of Rs. 3,388 in respect of this plot. When the building was constructed the Municipal Corporation was to give him a lease for 999 years. On the 30th October, 1950, the assessee assigned his right under the grant for a consideration of Rs. 32,011. To bring about this transaction he had availed himself of the services of a broker and that broker was paid commission in the sum of Rs. 1,770. Two contentions arose for the consideration of the Appellate Tribunal. One was that the sum of Rs. 32,011 was not an assessable profit in the hands of the assessee, and the second contention was with regard to the amount at which the profit should be assessed, assuming the amount realised was profit. With regard to the first contention the Tribunal held that the transaction was a single venture in the nature of trade, that its decision was a question of fact, and no question of law arose on that decision. With regard to the

second contention, a question has been submitted to us : "Whether, in assessing the profit made by the assessee on the assignment of the plot, the assessee is entitled to any deduction in respect of the ground rent and taxes paid by him in the years prior to the year of account, viz., 1950-51 ?"

2. With regard to the first contention a notice of motion has been taken out by the assessee, and perhaps it will be best to dispose of that notice of motion first. What is urged by Mr. Palkhivala before us is that the mere fact that the assessee entered into this agreement with regard to the plot and assigned his rights thereunder did not constitute the transaction a venture in the nature of trade. What is urged is that the mere intention to re-sell a property acquired does not make the transaction a business transaction; it may still be an investment; and if there is a profit made as a result of the sale the profit would be capital appreciation not liable to tax and not business profit. Now, the line that divides a transaction from being a business transaction as against a capital investment is always a very thin one and cases may fall on one side or the other side of the line. A question of law only arises when there are no materials which can justify the finding of the Tribunal. It is quite possible that one Tribunal may take one view of the matter and another may take a different view of the matter, but if the decision of the Tribunal is based on evidence, then the High Court on a reference cannot interfere, and therefore the only question that we have to consider as far as the notice of motion is concerned is whether there were materials before the Tribunal which justified their decision that the transaction in question was a venture in the nature of trade. In our opinion, there were ample materials before the Tribunal to justify their view. It is pointed out by the Tribunal in their order that when the assessee applied for the plot he must have known that building materials were not easily available, and therefore it was never the intention of the assessee to construct a building with the ultimate object of obtaining a lease for 999 years. It is further pointed out by the Tribunal that the assessee did not even have the means to construct a building on the plot at a cost of not less than Rs. 75,000. From these circumstances the Tribunal has come to the conclusion that what the assessee did in entering into this transaction was to have a venture in the nature of trade with the object of earning profit.

3. Our attention has been drawn by Mr. Palkhivala to a recent English decision reported in *Commissioners of Inland Revenue v. Reinhold*. In that case the assessee bought four houses in January, 1945, and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resale, and as a matter of fact had instructed his agents to sell whenever a suitable opportunity arose. On appeal before the General Commissioners his contention was that the profit on resale was not taxable. The General Commissioners were equally divided and they allowed the appeal. When the matter came before the House of Lords the Court held that the Commissioners were justified in treating the profit in question as not assessable to Income Tax, and Lord Carmont in his Judgment refers to the observations of Lord Buckmaster in the case of *Leeming v. Jones*

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".....an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income."

4. And he also cites the observation of Lord Dunedin in the same case at page 423 :

".....The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever."

5. Now, applying this test, Lord Carmont observes at page 393 :

"A disclosed intention not to hold what was being bought might, as Lord Dunedin said, provide an item of evidence that the buyer intended to trade, and if the commodity purchased in the single transaction was not of a kind normally used for investment but for trading and if the commodity could not produce an annual return by relation in the hands of the purchaser, then the conclusion may easily be reached that the venture was a trading one."

6. Applying this test here, the commodity in which the moneys have been invested by the assessee is not a commodity usually for the purpose of investment. One may invest in property, one may invest in shares, but one does not usually invest in an agreement to lease which has got to fructify into a lease after the building has been constructed. The second test suggested by Lord Carmont was also not satisfied in this case. There is no annual return from the property in which the investment has been made. The assessee had to pay ground rent and no question of any return arose till the property had been built. Therefore, in our opinion, the decision relied upon by Mr. Palkhivala is not of much assistance. We agree with him that the mere fact a person buying property wishes to re-sell it and realise profit by the resale is not conclusive on the question as to whether the transaction is in the nature of a trade or is in the nature of a capital investment. But, in our opinion, in this case there are other circumstances besides that one circumstance, and the Tribunal was fully justified in coming to the conclusion that it did. That disposes of the notice of motion.

7. With regard to the second question, a rather curious claim is put forward by the Taxing Department that the profits of this venture should be assessed without giving any relief to the assessee with regard to the expenses incurred in connection with this transaction prior to the year 1950-51. The sum of Rs. 1,770 that was paid for brokerage was allowed inasmuch as that amount was paid in the year of account, but the annual ground rent which the assessee paid in years previous to the year of account was disallowed on the ground that this expenditure was not incurred in the year of account and that contention was accepted by the Tribunal. In accepting this contention the Tribunal, with respect, has overlooked the nature of a single venture in the nature of trade. In the case of a single venture the profits become assessable only when that venture comes to an end and in

this case the venture in the nature of trade. In the case of a single venture the profits become assessable only when that venture comes to an end and in this case the venture came to an end in the year of account. It was only then that the profits could be ascertained and the profits subjected to tax. Therefore, the question that arose in the year of account was : What were the real profits from a commercial point of view which the assessee earned ? It is impossible to contend that the real profits were the amount actually realised by the assessee by the assignment of his right under the agreement with the Municipality without taking into consideration the expenses that he had incurred prior to this assignment. If one were to ignore the expenses, then one would not arrive at the real profits which the assessee earned. Mr. Joshi on behalf of the Department says that under the Income Tax Act only those expenses can be deducted u/s 10 which were incurred in the previous year and if any expense was not incurred in the previous year but was incurred in previous years, then that expenditure is not a legitimate deduction u/s 10. That, in our opinion, is a wrong approach to the question. What we have to consider is what are the commercial profits, the real profits, which have been earned in the year of account and which are liable to tax, and if those real profits can only be arrived at after taking into consideration the expenditure incurred in the prior year, then even though the expenditure may not strictly fall within the ambit of section 10, for the purpose of assessing the real profits credit must be given to the assessee in respect of the expenditure incurred in the prior years. Therefore, in our opinion, the Tribunal was in error when it took the view that the only expenditure to which the assessee was entitled to be given credit was expenditure incurred in the year 1950-51.

8. We will therefore answer the question submitted to us in the affirmative. The Commissioner to pay the costs of the reference. The assessee to pay the costs of the notice of motion.

9. Reference answered in the affirmative.