
(1989) 06 CAL CK 0007

Calcutta High Court

Case No: Income-tax Reference No. 200 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Lachatoorah Tea Co. Ltd.

RESPONDENT

Date of Decision: June 26, 1989

Acts Referred:

- Income Tax Act, 1961 - Section 28

Citation: (1993) 200 ITR 391

Hon'ble Judges: Bhagabati Prasad Banerjee, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: Moitra, for the Appellant;

Judgement

Ajit K. Sengupta, J.

In this reference u/s 256(2) of the Income Tax Act, 1961, relating to the assessment years 1963-64 and 1964-65, the Tribunal has referred the following common question of law to this court :

"Whether, on the facts and in the circumstances of the case, the loss incurred in the groundnuts and masoor business could be set off against the profits of the assessee's other business of the relevant year ?"

The facts are briefly stated as hereunder :

The assessee had income both in India and East Pakistan (now Bangladesh) during the years under reference. Up to October 7, 1960, Messrs. Gillanders Arbuthnot and Co. was the managing agent of the assessee-company. From October 7, 1960, the Pakistan Commodities Ltd. became the managing agent of the assessee in East Pakistan. The managing agent, however, disclosed the carrying on of the business in groundnut and masoor on behalf of the assessee in both the years. The Income Tax Officer in Pakistan required the assessee to produce the articles of association to show that it could carry on business in the commodities but the assessee expressed

inability to furnish the same. The assessee claimed losses of Rs. 1,10,636 and Rs. 1,89,919 in this business for the two years. The Income Tax Officer in Pakistan went through the agreement between the assessee and its managing agent and noticed that the managing agent could not do any business except tea business on behalf of the assessee. He rejected the assessee's contention that the agent acted on the instructions of the assessee. He held that the business in question was not of the assessee and disallowed the assessee's claim of losses of Rs. 1,10,636 and Rs. 1,89,919 in the assessment years 1963-64 and 1964-65, respectively.

The Income Tax Officer in India went through the memorandum of association and held that the assessee could not do any business in groundnut and masoor. He observed that books of account were also not produced. He, therefore, disallowed the losses claimed by the assessee in East Pakistan in both the years under consideration.

2. The assessee preferred appeals before the Appellate Assistant Commissioner and urged that the accounts could not be produced for unavoidable reasons as it was not possible to bring the books of account from Bangladesh. It was stated that the amounts of loss were accepted by the Income Tax Officer, Pakistan, though the same were disallowed on some other ground. It was next urged that the illegality in doing the business did not justify disallowance of loss. The Appellate Assistant Commissioner, relying on the rulings mentioned by him in his order, accepted the assessee's contention and allowed the losses claimed by it for both the years.

3. The Department preferred appeals before the Tribunal and the Tribunal endorsed the view-point of the Appellate Assistant Commissioner by observing that the Income Tax Officer in East Pakistan did not dispute the correctness of the loss claimed by the assessee in both the years. In the circumstances, there is no justification for rejecting the assessee's claim in both the years for non-production of the account books. The doing of the business in groundnuts and masoor was not by itself illegal but it was illegal in so far as it was beyond the authority of the assessee to do such a business in view of the memorandum of association. There is no distinction between losses and profits of an illegal business. In this case, the business out of which loss arose was not by itself illegal but, according to the Tribunal, no distinction on the ground of the nature of illegality in the carrying on of the business can be made. The Tribunal, therefore, did not find any reason to interfere with the order of the Appellate Assistant Commissioner.

4. At the hearing, it was contended by Mr. Moitra, the learned advocate for the Revenue, that since the business was not authorised by the memorandum, it was illegal and hence no loss can be allowed. We are not, however, impressed by this contention.

5. The undisputed facts are that the assessee did not produce the account books of its Pakistan business in both the years as it could not bring the same from East

Pakistan or later on from Bangladesh. The accounts in the relevant assessment years were audited in Pakistan and the accounts in both the years were incorporated in the accounts in India. The Income Tax Officer in Pakistan did not dispute the correctness of the loss claimed by the assessee in both the years. The managing agents had no authority to do the business in groundnuts and masoor on behalf of the assessee but the assessee accepted the acts of the managing agents by incorporating the accounts of East Pakistan in its accounts in India.

6. By the terms of its memorandum of association, the assessee could not do any business in groundnuts and masoor. Carrying on of that business was not by itself illegal but was illegal in so far as it was beyond the authority of the assessee to do such a business in view of the memorandum of association of the company. It is now well settled that, even if the business is illegal, it would still be a business within the meaning of the Income Tax Act ; if any profits are derived from such business, the same are assessable and there cannot be any distinction between the losses and profits of the illegal business. In our view, whether the transaction is or is not within the powers of a company has no bearing upon the nature of the transaction or on the question whether the profits arising from the transactions are assessable as revenue profits or not. Reference may be made to the decision of this court in the case of [COMMISSIONER OF Income Tax, CALCUTTA Vs. J. K. EASTERN INDUSTRIES \(PRIVATE\) LIMITED.](#) . In that case also, the assessee-company, who were the managing agents of a flour mill and who were not regular dealers in twills or hessians, carried on certain speculative purchases and sales on a large scale of twills and hessians and incurred losses. The claim was disallowed by the Income Tax Officer on the ground that the transactions were outside the scope of the powers of the company under the memorandum of association and also on the ground that the transactions were not in the nature of trade. The Tribunal held that the sales and purchases were adventures in the nature of trade and allowed the losses as business losses. The decision of the Tribunal was upheld by this court and the loss was allowed even though such business was not within the scope of the powers of the company under the memorandum of association. Reference may also be made to the decisions of the Supreme Court in [Commissioner of Income Tax, Madras Vs. P.K.N. Co. Ltd.](#), and [Kishan Prasad and Co. Ltd. Vs. Commissioner of Income Tax, Punjab](#), . Reference may also be made to the decisions of the Supreme Court in [Commissioner of Wealth-tax, Gujarat Vs. S.C. Kothari](#), and [Commissioner of Income Tax, Patiala Vs. Piara Singh](#), , where the Supreme Court observed that the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as profits. We may also add that the carrying of the business in groundnuts and masoor is not by itself illegal. It was not prohibited under any law. It was beyond the power of the company. The transactions may be void vis-a-vis the company and the purchasers. But this has nothing to do with the assessment of the income derived from such business. If the income of such business is taxable, the loss suffered in such

business is necessarily allowable.

7. We are, therefore, of the view that, in the circumstances of this case, the Tribunal has come to a correct conclusion. We, therefore, answer the question in this reference in the affirmative and in favour of the assessee and against the Revenue.

8. There will be no order as to costs.

Bhagabati Prasad Banerjee, J.

9. I agree.