

**(2001) 08 CAL CK 0040**

**Calcutta High Court**

**Case No:** IT Appeal No. 446 of 2000 29 August 2001

Duncans Industries Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

**Date of Decision:** Aug. 29, 2001

**Acts Referred:**

- Income Tax Act, 1961 - Section 133(6)

**Citation:** (2001) 119 TAXMAN 515

**Hon'ble Judges:** Y.R. Meena, J; Meena, J; Arun Kumar Mitra, J

**Bench:** Full Bench

### **Judgement**

Meena, J.

This appeal is directed against the judgment and order of the Tribunal dated 28-7-2000. The appeal has been admitted in terms of the following question :

"Whether there was any material before the Tribunal to hold that the loss claimed by the assessee was an artificial one or an attempt to reduce tax liability and the Tribunal's suppositions that the affairs of the assessee were not real or genuine or were sham and make believe or a colourable device or that the assessee had resorted to any dubious method or subterfuge, are based on any material and whether such conclusion is otherwise unreasonable and perverse ?"

2. The petitioner is a public limited company within the meaning of the Companies Act, 1956. The relevant assessment year is 1991-92 for which the year ending is 31-3-1991. The system of accounting is mercantile. The assessee is an investment company and used to carry on the business, inter alia, of financing and dealing in shares sector. During the financial year 1985-86, this company took up a building construction project as a business venture. The company purchased a plot of land together with the building thereon at premises No. 42A and B, Ballygunge Circular Road, Calcutta, for a price of Rs. 12 lakhs.

3. The said property was then in the occupation and possession of the petitioner known as Duncan Agro Industries Limited as a tenant. The petitioner agreed with the said company to give vacant possession of the building in consideration of the said company providing to it one flat of the new building free of cost. The construction was started in the financial year 1986-87 and completed on 1991-92, that is, year under consideration. Total 17 flats were constructed in new building. Out of 17,15 were sold for consideration of Rs. 89,62,200.

4. The agreements to sell these flats were entered into between the periods 1986-88. In those agreements there was no clause for escalation due to subsequent rise in the price of the materials or otherwise. Due to escalation of the price, assessee suffered loss of Rs. 12,35,740 in the said building construction project and claim it before the assessing officer. He rejected the claim of the assessee. According to him, the loss is artificial and the assessee might have recovered the loss from the buyers of the flats on one pretext or the other. He further stated that the matter has already been referred to the Valuation Officer u/s 133(6) of the Income Tax Act, 1961 but that report has not been received so far till the date of the assessment. He ignored the loss and further took the view that loss or profit shall be further subject to reassessment after receipt of the valuation report.

5. In appeal before the Commissioner (Appeals), the Commissioner (Appeals) has allowed the loss claimed by the assessee. In appeal before the Tribunal, the Tribunal has reversed the view taken by the Commissioner (Appeals).

6. From the perusal of record, it appears that the assessee has incur the expenditure on the construction as under :

	Rs.
"1, Cost of land	12,00,000.00
2. Registration charges	2,34,694.95
3. Expenses on construction of the project	
(i) Financial year 1986-87	22,53,141.07
(ii) Financial year 1987-88	30,35,317.38
(iii) Financial year 1988-89	31,53,498.68
(iv) Financial year 1989-90	4,87,417.36
(v) Financial year 1990-91	3,54,425.75

7. Thereafter considering various aspects, the Commissioner (Appeals) has considered fact that whether there is any defect in the accounts maintained by the assessee and whether the book results shown by the assessee can be rejected invoking the provisions of section 145 of the Act. He found that no defect has been pointed out in the accounts by the assessing officer nor any material is on record to show that the entries in the accounts are wrong or whether the loss claimed is contrary to the provisions of law. The relevant discussion of the Commissioner (Appeals), in his order reads as under :

"I have considered the submission of the A.R. and I find that from the accounts submitted, the appellant had taken up the construction and sale of flat as a business activity. Accordingly, the flats, which have been constructed, have to be considered as "stock-in-trades" of the company and the same for Income Tax purposes in the same manner. The assessing officer has nowhere stated in the case of rejecting the accounts of the appellant that the appellant has neither inflated the expenses relating to the execution of the project, on the one hand, and on the other, the appellant has under-stated or suppressed the sale value of the flats inasmuch as this is the basic requirement of applying section 145 when it has been established that the accounts have been prepared in such a manner that they cannot be relied upon.

There is no material or evidence shown in the assessment order or brought on record to prove that the accounts are not reliable or they suffer from some defects. Further, it has not been proved by the assessing officer that the method of accounting adopted by the appellant is one from which he is unable to deduce the correct taxable income of the appellant. On the contrary, the accounts would clearly show that the appellant has adopted the "recognized method of accounting and its taxable income can, accordingly, be deduced by application of such method. Therefore, in fact, the assessing officer while applying the provisions of section 145 in rejecting the accounts, has not brought any evidence in support thereof. On this ground also, the action of the assessing officer in disallowing the loss of Rs. 12,35,740 cannot be sustained.

In view of my observations in the foregoing paragraphs and considering the facts and the circumstances of the case and considering that all evidence and documents were produced before the assessing officer, non-admission of the loss arising out of the said project is contrary to the provisions of tax laws and the assessing officer is, accordingly, directed to allow the loss claimed by the appellant."

8. The Tribunal has considered the facts that the developers of the building earned a lot of profit and they can charge the money on one pretext and other from the

prospective buyers. There is no question of loss in this line of business.

9. Mr. Mallick placed reliance heavily on the decision of this court in case of Mahmudabad Properties (P.) Ltd. Vs. Commissioner of Income Tax, wherein this court has considered the issue whether capital gain can be estimated and judicial notice of rising price can be taken. This court has taken the judicial notice of the rises in the price and held that the Tribunal was fully justified in coming to the conclusion of the fact that there was a rise in the price of landed properties that was a cogent piece of evidence which the Tribunal was entitled to consider in arriving at its own estimate of capital gains of the Russa Road Property.

10. The capital gains firstly is not a issue before us, secondly this issue has been concluded by the Supreme Court in case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, wherein their Lordships have taken the view that for assessing the capital gains, consideration disclosed on transfer of the assets should be accepted. If the department wants to estimate the higher consideration, on transfer, received by the assessee, the burden to prove is on the department that there was under-hand dealing and assessee has received more than disclosed amount. After that judgment, the judgment of this court referred above is no more treated as good law.

11. The learned counsel for the assessee, Dr. Pal also brought to our notice that the matter was referred to the Valuation Officer though the valuation report was not available at the time of the completion of assessment but that valuation report has been received when the matter was pending before the Tribunal and as per that valuation report, the cost of construction comes to Rs. 94,96,168 and assessee has disclosed the cost at Rs. 91,12,529, that is, less than the cost estimated by the valuer though that report has not been relied upon by the department.

12. Dr. Pal further submits that as the assessee is following mercantile system and out of 17 flats, 15 flats were sold. As per agreement, one flat has been given to the tenant free of cost, who was in occupation of the building at the time of purchase of land including the structure on that plot of land. One flat, which was remained to be sold that has been sold in next year, that is, 1992-93 and profit on the sale of that flat has been shown in the next year, that is, 1992-93.

13. Considering the facts that no defect has been pointed out in the books of account and accounts are fully supported by the bills and vouchers there is no material on record that on sale of 15 flats the assessee has received more consideration than the consideration disclosed as per the agreement as entered into by the assessee and the buyers. Out of 17 flats one has been given to the tenant who occupied the plot of land at the time of purchase of land free of cost as per agreement and one flat has been sold in the subsequent year and profit earned on the sale of that flat has been shown for tax purpose in the subsequent year, that is, in the assessment year 1992-93.

14. In view of the aforesaid facts, we are of the view that there is no justification to reverse the finding of the Commissioner (Appeals). Loss claimed by the assessee is genuine.

15. The appeal is, consequently, allowed.