

---

**(2001) 09 CAL CK 0045**

**Calcutta High Court**

**Case No:** Income-tax Reference No. 29 of 1994

Commissioner of Income Tax

APPELLANT

Vs

Britannia Industries Ltd.

RESPONDENT

---

**Date of Decision:** Sept. 26, 2001

**Acts Referred:**

- Income Tax Act, 1961 - Section 73

**Citation:** (2002) 177 CTR 424 : (2002) 257 ITR 225 : (2003) 132 TAXMAN 16

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

**Bench:** Division Bench

**Advocate:** Mullick, for the Appellant; Pal, for the Respondent

---

### **Judgement**

1. On an application u/s 256(2) of the Income Tax Act, 1961, this court has directed the Tribunal to refer the following question set out at the statement of the case for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding the view that the loss of Rs. 11,79,420 was a short-term capital loss ?"

2. In compliance with our direction the aforesaid question has been referred for the opinion of this court.

3. During the course of assessment, the Assessing Officer noticed that the assessee has claimed the short-term capital loss on account of share transactions. He rejected that claim. According to him, in the absence of the balance-sheets of the companies for which the loss could not be ascertained. In appeal before the Commissioner of Income Tax (Appeals), the Commissioner of Income Tax (Appeals) vide his order dated June 1, 1983, in paragraph 11 has stated that the mere fact of non-filing of the balance-sheets of the companies, the shares of which were sold cannot be made a ground for rejection of the short-term capital loss and the order of the Assessing

Officer was set aside and sent back with a direction to the Assessing Officer that the appellant should be given reasonable opportunity to produce necessary evidence, such as broker's notes, quotations in the stock exchange and balance-sheets of the companies concerned. In compliance with the direction of the Commissioner of Income Tax (Appeals), the Assessing Officer instead of considering the materials produced, disallowed the claim of short-term capital loss invoking the Explanation to Section 73 of the Act. In appeal before the Commissioner of Income Tax (Appeals) in the second round, the Commissioner of Income Tax (Appeals) vide his order dated December 20, 1988, allowed the claim of the assessee following the view taken by the Commissioner of Income Tax (Appeals) in the case of this assessee in the assessment year 1980-81. In appeal before the Tribunal, the Tribunal has also confirmed the view taken by the Commissioner of Income Tax (Appeals) in the order dated December 20, 1988.

4. Heard learned counsel for the parties.

5. Mr. MuIlick, learned counsel for the Revenue, submits that, in spite of the direction, the balance-sheets of the companies are not produced by the assessee before the Assessing Officer in the second round. Similarly, the broker's note was also not produced. Therefore, when the directions were not complied with in the second round, the Commissioner of Income Tax (Appeals) as well as the Tribunal should not allow the claim of short-term capital loss in share transactions.

6. Dr. Pal, learned counsel for the assessee, submits that the assessee-company is not an investment company and whether Explanation to Section 73 of the Act has any application has been considered by the Commissioner of Income Tax (Appeals), in the assessment year 1980-81 in the case of this very assessee and found that the Explanation to Section 73 has no application in the case of this assessee.

7. That order dated December 20, 1988, for the assessment year 1980-81 of the Commissioner of Income Tax (Appeals) has been accepted by the Department. He further submits the shares are quoted in the stock exchange. Therefore, when the details are given, no broker's note is needed. He further submits that when the balance-sheet of the assessee has been filed the balance-sheets of the concerned companies need not be filed. When the full address of purchasers and sellers has been given, the Assessing Officer could verify the genuineness of the transactions. That has not been done. Even otherwise also, in the first round, the Commissioner of Income Tax (Appeals) itself has considered and was of the view that the claim of the assessee cannot be rejected only on the ground that the balance-sheets of the concerned companies are not filed. Therefore, it is immaterial that the balance-sheets of the concerned companies are not filed.

8. The admitted facts that the claim of the assessee was rejected by the Assessing Officer only on the ground that the assessee has failed to submit the balance-sheets of the concerned companies from whom the shares were purchased. That has been

considered by the Commissioner of Income Tax (Appeals) in paragraph 11 of his order dated June 1, 1983, wherein the Commissioner of Income Tax (Appeals) himself expressed his opinion that non-filing of the balance-sheets of the concerned companies, the shares of which were sold, cannot be made a ground for rejection of the short-term capital loss. Once that view has been taken, the claim of the assessee cannot be denied on that very ground in the second round. That has not been done so also by the Commissioner of Income Tax (Appeals).

9. In consequence of the direction of the Commissioner of Income Tax (Appeals) in the order dated June 1, 1983, the Assessing Officer instead of complying with those directions and considering the materials referred to in the order dated June 1, 1983, he rejected the claim of the assessee only on taking into account the Explanation to Section 73 of the Act. The Commissioner of Income Tax (Appeals) has considered this issue and the Commissioner of Income Tax (Appeals) found that in the facts and circumstances, the Explanation to Section 73 has no application, as the assessee is not an investment company. That order of the Commissioner of Income Tax (Appeals) in the assessment year 1980-81 has not been challenged by the Department. Once the order has been accepted and when the facts are more or less similar in the assessment year in hand, i.e., 1979-80, there is no reason to disagree with the view taken by the Tribunal in the assessment year 1979-80.

10. Learned counsel for the Revenue has not shown any provision of law that in the absence of the balance-sheets of the companies concerned, the claim of the assessee should not be allowed.

11. Considering the facts referred to above, we find no infirmity in the order of the Tribunal.

12. In the result, we answer the question in the affirmative, i.e., in favour of the assessee and against the Revenue.

13. The reference so made stands disposed of.

14. All parties are to act on a signed xerox copy of this dictated order on the usual undertaking.