**(1982) 03 BOM CK 0080**

**Bombay High Court**

**Case No:** Income-tax Reference No. 275 of 1973

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| Rajasthan Construction Co. (P.) Ltd. | | APPELLANT |
| | Vs | |
| Commissioner of Income Tax | | RESPONDENT |

**Date of Decision:** March 15, 1982

**Acts Referred:**

- Income Tax Act, 1961 - Section 37

**Citation:** (1983) 36 CTR 202 : (1984) 148 ITR 61 : (1983) 13 TAXMAN 46

**Hon'ble Judges:** M.N. Chandurkar, J; Kania, J

**Bench:** Division Bench

**Judgement**

Chandurkar, J.
This is a reference under s. 256(1) of the Income Tax Act, 1961 ("the Act"), at the instance of the assessee and the two questions which have been referred to this court for opinion are as follows :

"1. Whether, on the facts and in the circumstances of the case, litigation expense of Rs. 16,050 was a permissible deduction ?

2. Whether, on the facts and in the circumstances of the case, the premium amount of Rs. 1,152 was a permissible deduction ?"

2. The facts on which the above two questions arose are within a very narrow compass. The assessment year in question is 1968-69. The assessee company entered into an agreement of sale with one Rampiaribai on February, 23, 1962, under which Rampiaribai agreed to sell land known as Virawali Estate measuring 223 acres 15 guntas situated in Virawali Village in Thana District for a sum of Rs. 1,35,000. Earnest money of Rs. 10,000 was to be deposited with the vendor"s attorneys. Admittedly, in respect of the same property, Rampiaribai had entered into an agreement with one Tulsidas J. Sharma on

May 9, 1961, and had received Rs. 5000, as earnest money from him. Under the agreement with the assessee the attorneys were required to refund Rs. 5,000 to Tulsidas Sharma out of the earnest money of Rs. 10,000 paid by the assessee-company. The balance of the purchase price of Rs. 1,25,000 was to be paid on completion of the purchase against execution of a deed of conveyance and/or assignment of the said estate by Rampiaribai in favour of the assessee-company or its nominee.

3. Admittedly, on the date on which the assessee entered into the agreement of sale, three suits in respect of the same property were already pending in this High Court. The first suit was filed by Mahal Pictures (P.) Ltd., against the owner Mrs. Rose Wilson & Others, being Civil Suit No. 88 of 1959. Rampiaribai had herself filed another suit against the vendors, Mrs. Rose Wilson & Others, being Suit No. 135 of 1961, for specific performance of an agreement of sale executed by Mrs. Rose Wilson & others in favour of Rampiaribai. A third suit was filed by one Gopaldas Mohta against Mrs. Rose Wilson & others, in which Gopaldas Mohta claimed that Rampiaribai was his benamidar and that he was the person who was entitled to enforce the agreement of sale in favour of Rampiaribai. This was Suit No. 139 of 1961.

4. The agreement between the assessee and Rampiaribai provided that in case Suit No. 135 of 1961 was decided against her, both the parties to the agreement would be absolved of their respective obligations and Rampiaribai would be liable to refund the earnest money of Rs. 10,000.

5. It may be stated that Mrs. Wilson had already entered into an agreement in respect of the same property with Mahal Pictures and, in their suit, Mahal Pictures sought to enforce that agreement of sale. While all the above mentioned suits were pending, the assessee-company filed a suit in this High Court, being Suit No. 211 of 1967, against Rampiaribai for specific performance of the agreement to sell and in the alternative claiming damages of Rs. 45,00,000. Apart from Mrs. Wilson, the owner of the property, the other claimants to the property, viz., Mahal Pictures and Mohta, were defendants in the suit. The assessee-company had incurred an expenditure of Rs. 16,050, on account of litigation resulting from filing of Suit No. 211 of 1967. This amount was claimed by the assessee-company as expenditure laid out wholly and exclusively for the purpose of business and the assessee wanted the ITO to allow this as permissible deduction. The ITO, however, rejected this claim on the ground that the assessee-company was not a dealer in land and that it has not acquired any property.

6. In appeal, the AAC treated the expenses as having been incurred in connection with acquisition of the land which had not yet been purchased by the assessee-company, and held the expenditure to be of a capital nature and disallowed it.

7. Before the Tribunal, the case of the assessee was that the transaction was entered into as an adventure in the nature of trade and not by way of investment. The claim for deduction was supported by the assessee on the ground that the litigation expenses were

incurred for defending and protecting its title to the estate. On behalf of the Revenue, the contention raised was that the transaction of purchase was in the nature of investment and, in the alternative, even if it was held that the assessee had entered into the transaction in the course of his regular business in real estate or as an adventure in the nature of trade, it was not entitled to claim the deduction of the litigation expenses as they constituted capital expenditure having been incurred to perfect its title and not to protect title already acquired. The Tribunal held that the transaction was not in the nature of an investment and that the assessee-company entered into the agreement to purchase the land as an adventure in the nature of trade. But even then, according to the Tribunal, that was not enough to allow deduction of litigation expenses as revenue expenditure. The Tribunal took the view that what the assessee had acquired was merely a contractual right to purchase the estate, and several steps were required to be taken for acquisition of the asset and the litigation expenses would go to form a part of the title cost of the estate, if and when it was ultimately acquired. The Tribunal further took the view that there was no question of incurring expenses for protecting or defending its title to the estate, so long as the title to the estate is not acquired. These are facts so far as question No. 1 is concerned.

8. So far as question No. 2 is concerned, the deduction claimed was on account of premium paid by the company securing insurance conversing risk in travelling such as loss of personal luggage, accident and sickness insurance for Shreekrishna Somani, a director. The reason why Somani, who was one of the three directors, was alone the beneficiary of such a policy was that he was continuously required to visit various places for the purposes of the business of company and the company, therefore, considered it to be an obligation to provide him with an insurance to provide for all the normal risks involved in journey from place to place. The Tribunal took the view that it was not possible to ascertain the reasons which might have impelled the company to go in for the package insurance as the relevant resolution of the company was not produced and it was not specified how the sickness insurance could be said to have been taken for the purpose of the business of the company. It further noticed that the proposal for insurance was not submitted by the company but was submitted by Somani himself and that it was difficult to believe that out of a host of the employees of the company, Shreekrishna Somani alone ran a greater risk. The deduction of Rs. 1,152 was thus disallowed.

9. M. S. J. Mehta appearing on behalf of the assessee has, with regard to the first question contended that the Tribunal has found, as a fact, that the transaction in question did not represent any investment and that the Tribunal further found that the transaction was an adventure in nature of the trade. The learned counsel, therefore, contended that the company had a right under the agreement of sale, which it could enforce, and the litigation expenses incurred must be treated as having been necessary for protecting the right under the agreement of sale and should, therefore, have been allowed as a revenue expenditure. Now, the finding that the transaction was not in the nature of any investment and the decision of the company to purchase the land was an adventure in the nature of

trade will have to be accepted for the purpose of this reference. These findings, however, do not necessarily mean that the assessee''s claim for deduction on account of litigation expenses must be accepted as a matter of course. It is important to bear in mind that though the Tribunal has recorded a finding that the transaction was an adventure in the nature of trade, the Tribunal has also found that the land would have become a capital asset, which the assessee-company had not yet acquired and that it was only in the process of acquiring the capital asset, and further that, if and when the land as a capital asset is acquired, the litigation expenses in question would go to form part of the title cost of the said asset. The observations and findings of the Tribunal that the transaction in question was an adventure in the nature of trade have to be read in the light of the finding that what the assessee was going to acquire was a capital asset. This would clearly show that the order of the Tribunal cannot be read to say that the adventure consisted of buying land with a view to sell it so as to acquire land as a trading asset or as stock-in-trade. The finding that the transaction was an adventure in the nature of the trade reflects the contention of the assessee that the assessee had seized of an opportunity accruing to it, which consisted of taking of a chance of obtaining the property worth Rs. 45,00,000 by risking Rs. 1,35,000. There is no finding in the order of the Tribunal nor was it contended before the Tribunal on behalf of the assessee that the land was being purchased with a view to sell it or with a view to make it a part of its stock-in-trade or to treat it as a trading asset.

10. Now it is no doubt true that under the agreement of sale the assessee had a right to have the sale transaction gone through and to have a sale deed executed by the vendor. Any expenses incurred, if the vendor had voluntarily executed the sale deed, would have formed part of the cost of the capital asset acquired, viz., the land. Since it was not possible for the assessee to have the sale deed executed, the assessee had to file a suit. The remedy resorted to by the assessee, viz., filing a suit, was to enforce the right to obtain title to the land agreed to be sold by the vendor. In such a case, their is no question of the litigation expenditure being incurred for protecting any asset in the form of land, because that asset was never acquired by the assessee and did not belong to the assessee. It is, therefore, difficult to accept the contention of the learned counsel for the assessee that the litigation expenses must be treated as revenue expenditure. The Tribunal was clearly right in taking the view that if and when the assessee succeeded in getting the land, the litigation expenses would have formed part of the cost of acquiring the capital asset. Question No. 1 must, therefore, be answered in the negative.

11. Now so far as the second question is concerned, it is difficult for us to see how there was any obligation on the part of the assessee to take out an insurance policy of the nature taken out to protect one of the directors against loss of personal luggage, accident sickness, etc., The company would not be liable to its director if the director''s personal luggage was lost in the course of his travel. Even if the director fell ill, it is difficult to see how, in the absence of any binding obligation on the company, the company was bound to provide for the expenditure incurred by the director consequent upon his sickness. The

Tribunal also found that the insurance proposal itself was submitted not by the company but by the director. If there was no obligation on the assessee-company to reimburse the director in respect of loss of personal luggage or loss resulting from accident or sickness, it is clear that taking out such insurance and payment of insurance premium cannot be said to be expenses incurred wholly and exclusively for the purposes of the business of the assessee-company. The second question must also, therefore, be answered against the assessee-company.

12. The two questions referred are, therefore, answered as follows :

Question No. 1 : In the negative and against the assessee.

Question No. 2 : In the negative and against the assessee.

13. The assessee to pay cost of the reference.