(1985) 07 DEL CK 0034

In the Delhi High Court

Case No : IT Case No. 36 of 1981

Cement Distributors Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 12-07-1985

Acts Referred:
Constitution of India, 1950 — Article 2(47), 256(1), 256(2)

Citation : (1986) 24 TAXMAN 777

Hon'ble Judges : Mahinder Narain, J;D.K. Kapur, J

Bench : Division Bench

Advocate : Bishambar Lal, for the Appellant; K.K. Wadhera and Miss Sita Vidya Lingam, for the Respondent

Judgement

D.K. kapur, J.—There are two petitions u/s 256(2) of the income tax Act, 1961 (''the Act'') which were directed to be heard together but actually they turn on the same point and involve the same assessee in relation to the same assessment year 1974-75. The circumstances as to why there are two cases are as follows: Initially an appellate order was passed on 20-8-1980. Then a miscellaneous application was moved by the assessee seeking rectification. This application was dismissed on 24-4-1981. A reference application u/s 256(1) was filed in relation to the original appellate order resulting in a statement of the case being submitted to this Court but some of the questions sought to be raised by the assessee were disallowed. The statement of case is dated 31-1-1981. After the miscellaneous application was filed and rejected, another petition u/s 256(1) was moved which was also rejected on 14-1-1982. A number of questions were sought to be raised in the case of the miscellaneous application but the Tribunal stated that none of those questions arise out of the order of the Tribunal but really were connected with the original order passed in appeal. In any event the assessee has moved income tax Case No. 36 of 1981 to submit that further questions arise out of the appellate order and has moved income tax Case No. 161 of 1982 to submit that the questions of law arise out of the miscellaneous application.

In actual fact, we find that the following two questions were referred by the Tribunal by its order dated 31-1-1981:

" 1. Whether, on the facts and in the circumstances of the case, the cancellation of equity shares numbering 20,001 to 25,000 of Hind Ceramics Ltd. consequent on the reduction of the share capital sanctioned by the Hon''ble Calcutta High Court amounts to a transfer u/s 2(47) of the income tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the assessee-company was entitled to claim a short-term capital loss of Rs. 5 lakhs on reduction of capital of Hind Ceramics Ltd. sanctioned by the Calcutta High Court?"

2. The assessee wants a number of other questions to be referred in income tax Case No. 36 of 1981. We have gone through the appellate order to find that the main controversy was regarding the loss claimed by the assessee said to arise out of the reduction of share capital of another company, Hind Ceramics Ltd. The assessee-company had 25,000 shares of this company, which were reduced as a result of an order passed by the Calcutta High Court to 20,000 shares to a face value of Rs. 20 lakhs. It is said that Hind Ceramics Ltd. had been suffering some loss and the reduction in share capital was made in order to adjust the reduced share capital against the carry forward loss in the profit and loss account. In any event, the question before the Tribunal was whether the assessee could claim a loss of Rs. 5 lakhs on this account. This was claimed to be a short-term capital loss by the assessee-company as the reduction in share capital took place soon after the company purchased the shares. The Tribunal had refused to make a reference regarding certain questions but at the same time it has referred to this Court as question No. 2, a very widely framed question, vis. :

"Whether, on the facts and in the circumstances of the case, the assessee-company was entitled to claim a short-term capital loss of Rs. 5 lakhs on reduction of capital of Hind Ceramics Ltd. sanctioned by the Calcutta High Court?"

It appears to us that this question is wide enough to cover the entire controversy being raised by the assessee-company. It appears to us that the Tribunal did not want to interfere with its own finding that there was a fictitious loss. We do not think that the Tribunal meant to say that this question of loss was not to be decided by the High Court. What it meant to say was that there was no actual loss in the normal sense resulting to the assessee, because admittedly the assessee had not parted with any shares. The real question was as to whether a redaction in share capital brings about a loss to the petitioner without there being any sale of the shares left with it.

3. The questions now sought to be raised in addition to the ones referred to us are as follows:

" 1. Whether, on the facts and in the circumstances of the case, the transaction of the cancellation of equity shares numbering 20,001 to 25,000 of Hind Ceramics Ltd. consequent on the reduction of share capital sanctioned by the

Hon''ble Calcutta High Court has resulted in a ''non-existent loss'' as held by the Tribunal?

2. Whether the Tribunal''s conclusion that the acquisition and subsequent reduction by cancellation of the shares of Hind Ceramics Ltd. carried out with ''the formal consent of the Hon''ble High Court of Calcutta, was a "mere device" and "not" a straightforward commercial transaction'' is perverse in law inasmuch as the same is arrived at on mere conjectures and imaginations, by relying on irrelevant materials, ignoring the relevant materials and by partly relying on materials and partly relying on conjectures?

3. Whether the Tribunal''s conclusion that ''its capital assets remain the same as on the date of purchase'' and ''there was no actual loss'' is perverse as the same is arrived at on mere conjectures and imaginations, by relying on irrelevant materials, ignoring the relevant materials and by partly relying on materials and partly relying on conjectures?"

It will be useful to just shortly examine these three questions in spite of them being somewhat different from the questions that were disallowed by the Tribunal. The first of these questions relates to the ''non-existent loss'' held by the Tribunal. In fact the Tribunal did not hold the loss to be non-existent. In fact the Tribunal had held that there was no actual loss in the sense that the shareholding of the petitioner assessee had remained intact except that on account of the reduction in share capital the number of shares was altered. It may be that some scrips may have been cancelled, but as to whether it resulted in a gain or a loss would depend probably on the market price which could be realised if the shares are sold. In that sense, there was no actual loss. We think the question referred to us covers the real controversy in the case, which is as to whether on the facts of this case a short-term capital loss was suffered by the petitioner. The second question, as to whether it was a mere device to create a loss, we think is an irrelevant question, because, if the loss is allowed under the Act, whether it has brought about a device or otherwise would not be very material. The third question sought to be referred suffers from the same objection. It is really an analysis of the reasoning of the Tribunal regarding the nature of the loss. To put it differently, if the extinguishment or reduction of the share capital of assessee-company in Hind Ceramics Ltd. amounts to a ''transfer'' in law then it could be argued that some of that share capital had been extinguished. In such a sense the question before the Court will be whether it amounts to a capital loss or not. This is the question discussed in the Tribunal''s judgment and we think the question remains to be answered. We, therefore, think that the above observations regarding the scope of the question are sufficient to dispose of this application. The real point is that there is a question to be answered by this Court, and it is not decided as a question of fact by the Tribunal. The parties will bear their own costs.

