
(1992) 07 CAL CK 0028

In the Calcutta High Court

Case No : Income-tax Reference No. 292 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Shree Krishna Properties Ltd.

RESPONDENT

Date of Decision : 23-07-1992

Acts Referred:

Income Tax Act, 1961 — Section 256

Citation : (1994) 205 ITR 308

Hon'ble Judges : K.M. Yusuf, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : B.K. Naha, for the Appellant; Nirmal Poddar and S.N. Dey, for the Respondent

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(2) of the Income Tax Act, 1961, made at the instance of the Revenue, the following questions have been referred by the Tribunal for the opinion of this court:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal ignored relevant material in arriving at the finding that the assessee was acquiring and selling the share of Ochterlony Valley Estates (1938) Ltd. in the normal course of business as dealer in shares and whether such finding is otherwise unreasonable and/or perverse ?

(2) Whether, on the facts and in the circumstances of the case, the conclusion of the Tribunal that the assessee-company was acquiring and selling shares of the said Ochterlony Valley Estates (1938) Ltd. not with the intention of having a controlling interest in that company but in the normal course of share dealing business is unreasonable or perverse ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in law in holding that the assessee was entitled to deduction on account of loss sustained by it in respect of the shares of Ochterlony Valley Estates (1938) Ltd. for the assessment years 1964-65, 1965-66 and 1966-67 ?"

2. The dispute in this case relates to the deduction claimed by the assessee on account of losses sustained in the previous years relevant to the assessment years 1964-65, 1965-66 and 1966-67 in the sales of shares of Ochterlony Valley Estates (1938) Ltd. (hereinafter for the sake of brevity referred to as "O.V.E. Ltd.").

3. The deductions claimed by the assessee on account of these losses in the assessments for the assessment years 1964-65, 1965-66 and 1966-67 are Rs. 5,979, Rs. 74,788 and Rs. 12,976, respectively. The Income Tax Officer disallowed the claim for deduction of these losses on the ground that the shares in question were acquired by the assessee as capital and not as stock-in-trade and, therefore, the losses, if any, arising from the sales of these shares could only be regarded as capital loss but not as business loss. The reasoning of the Income Tax Officer in disallowing the claim is as follows :

"The assessee-company is one of a group of concerns controlled by one Sri Balmukund Bajoria. With a view to acquiring a controlling interest in Messrs. O.V.E. Ltd., the said Sri Balmukund Bajoria got the assessee-company and other concerns of that group to acquire a considerable number of shares of Messrs. O. V. E. Ltd. By virtue of the shares held by the assessee-company and other concerns of the group controlled by him, Sri Balmukund Bajoria became the managing director of Messrs. O. V. E. Ltd., with effect from April 1, 1966, which position he held till early 1969. If shares in a company were acquired with the object of acquiring the controlling interest over it, the obvious inference was that they were not acquired with the intention of dealing in them and the shares so acquired did not take the character of stock-in-trade. The deduction claimed by the assessee was, therefore, not admissible as a business loss. As regards the loss claimed for the assessment year 1965-66, the additional reason given by the Income Tax Officer for disallowing the claim was that the loss in respect of which the deduction was claimed was fictitious inasmuch as the shares 90,000 in number, were shown to have been sold to the share-broker, Messrs. Murarka Bros., who, in their turn, sold the same to Sri B.K. Jaipuria, a family member of Sri Balmukund Bajoria."

4. Against the said assessment, the assessee preferred appeals to the Appellate Assistant Commissioner. The reasonings of the Income Tax Officer discussed in the foregoing paragraph did not find favour with him. The Appellate Assistant Commissioner held that the assessee was a dealer in shares and it purchased and sold the shares of Messrs. O. V. E. Ltd. in the course of its business in share dealings. He further held that, in the assessment years under appeal, Sri Bajoria did not become a managing director of Messrs. O. V. E. Ltd. and it could not, therefore, be said that the shares were acquired by the assessee-company with a view to enable Sri Balmukund Bajoria to acquire a controlling interest in Messrs. O.V.E. Ltd. He referred to the fact that all the shares held by the concern under the control of Sri Bajoria were sold in 1969 to Sri Biswanath Jhunjhunwalla of the Birla group and observed that, if the shares had really been acquired with the

intention of Sri Balmukund Bajoria acquiring a controlling interest in Messrs. O. V. E. Ltd., as opined by the Income Tax Officer, they would not have been relinquished within such a short time after Sri Bajoria became a managing director. He further observed that the acquisition of shares of Messrs. O. V. E. Ltd. by the group commenced as early as 1962 and was spread over a number of years and that these facts were not consistent with the inference that the shares were acquired by the group with a view to acquiring a controlling interest over Messrs. O. V. E. Ltd.

5. The above finding of the Appellate Assistant Commissioner was challenged by the Department in these appeals filed before the Tribunal. The Tribunal disposed of all these appeals by a consolidated order. It agreed with the contention of the learned Departmental Representative that the only relevant consideration was whether the assessee-company and other concerns of the same group purchased the shares of Messrs. O. V. E. Ltd. not in the normal course of business as share-dealers, but with the intention of merely acquiring a controlling interest in that company and that if it was found that the shares were acquired not in the normal course of business but with the intention of acquiring a controlling interest, the fact that the group controlled by Sri Bajoria relinquished all the shares in 1969 would not alter the position. But the Tribunal held that the various facts and circumstances relied upon by the Department did not conclusively establish that the shares of Messrs. O.V.E. Ltd. were acquired by the assessee-company and other concerns of the group with a view to acquiring a controlling interest over the company and not in the ordinary course of share-dealing business. It was argued on behalf of the assessee that the assessee being a dealer in shares was showing its income from the sale of shares as business profits and bringing the same to its profit and loss account, that its profits from the sale of shares were all along assessed to tax as business profits and that the assessee-company and other concerns of the Bajoria group were purchasing and selling shares as dealers in shares and not as investors. In the assessment for the assessment year 1963-64, the Income Tax Officer himself treated the profits of the assessee-company from the sale of shares of Messrs. O. V. E. Ltd., as business profits. In the previous year relevant to the assessment year 1965-66, the assessee earned profit in the sale of 26,350 shares of Champdany Jute Mills Ltd., and that profit was assessed to tax as business profit in the assessment year 1965-66. Messrs, National Finance and Investment Ltd. another concern of the same group suffered loss in the sales of shares of Messrs. O. V. E. Ltd., in the previous years relevant to the assessment years 1963-64 and 1966-67. Those losses were allowed as business losses in the assessments for those assessment years. The total number of shares of Messrs. O. V. E. Ltd. was 9,72,900 as could be seen from the balance-sheet of that company as at December 31, 1962. But, all the concerns of Sri Balmukund Bajoria group together held only 3,88,907 shares of Messrs. O. V. E. Ltd. as on December 31, 1967, and December 31, 1968. It could not, therefore, be said that the group held majority of shares, at the relevant time, in Messrs. O. V. E. Ltd.

6. On a consideration of all the aforementioned facts and circumstances, the Tribunal held that the group of Sri Balmukund Bajoria including the assessee-company was acquiring and selling shares of Messrs. O. V. E. Ltd. in the normal course of business as dealers in shares. The Tribunal further held that the mere fact that Sri Bajoria happened to be the managing director of Messrs. O. V. E. Ltd. was not a circumstance warranting the Income Tax Officer to hold that the group was acquiring the shares as an investor and with a view to gain control over the said company. It, accordingly, upheld the finding of the Appellate Assistant Commissioner and dismissed the departmental appeals.

7. Mr. B. K. Naha, learned counsel appearing for the Revenue, tried to assail the findings of the Tribunal. According to him, the findings of the Tribunal are perverse for the following reasons :

(a) The Tribunal failed to consider and properly appreciate the significance of the fact that Mr. Balmukund Bajoria became the managing director on the strength of the shares acquired by the assessee and others in this group.

(b) The Tribunal failed to consider that Mr. Bajoria also purchased shares of Messrs. O. V. E. Ltd. in the name of the assessee-company outside its regular books of account.

(c) The Tribunal failed to appreciate the facts that the shares held by the assessee-company in O. V. E. Ltd. were shown as investment in the balance-sheet of the assessee-company and that these shares were registered in the name of the assessee-company.

(d) The Tribunal failed to consider that the shares of O. V. E. Ltd. were sold by the assessee-company within the group.

(e) The mere fact that, in the earlier years, profits and losses on the sale of shares in O. V. E. Ltd. were assessed under the head "Profits and gains of business or profession" were wholly irrelevant since the principles of *res judicata* are not applicable to Income Tax proceedings.

8. We do not find any substance in the submissions made on behalf of the Revenue. Both the Appellate Assistant Commissioner as well as the Tribunal have found that the shares of O. V. E. Ltd. were acquired by the assessee-company as well as other companies in the group of Sri Balmukund Bajoria during the year 1962. The Tribunal has considered the details of acquisition of shares of O. V. E. Ltd. made by the assessee-company as well as other companies in the group and observed that the group never held the majority shares of O. V. E. Ltd. at the material time. The Tribunal also recorded in its order that, in the voluntary disclosure petition made by Sri Balmukund Bajoria, there was nothing to indicate that the shares in O. V. E. Ltd. were acquired and held by the concerns in Sri Balmukund Bajoria Group not in the course of business as share dealers, but with a view to acquire control over that company.

9. As regards the contention that these shares were shown in the balance-sheet

under the heading "Investment", we may refer to the decision of the Supreme Court in Investment Ltd. Vs. Commissioner of Income Tax, Calcutta, . There, the Supreme Court observed that the description of stock of shares in the balance-sheet as "investment" was not decisive. The Tribunal also appears to have accepted the assessee's contention that the shares were shown under the heading "Investment" in conformity with the provisions of Schedule VI of the Companies Act, 1956. We find that the Tribunal has considered all the facts and materials placed on record by both the assessee-company and the Department and it ultimately came to the conclusion that the mere fact that Sri Balmukund Bajoria happened to be the managing director of O. V. E. Ltd. for a few years was not a circumstance warranting the Income Tax Officer's finding that the group was acquiring the shares as an investment with a view to acquire a controlling interest in that company. We find no reason to hold that the findings recorded by the Tribunal are perverse.

10. In this view of the matter, we answer all the three questions referred to this court in the negative and in favour of the assessee.

K.M. Yusuf, J.

11. I agree.