(1993) 05 RAJ CK 0007

In the Rajasthan High Court

Case No : Income Tax Reference No. 109 of 1981

Commissioner of Income Tax APPELLANT

Vs

Shree Textiles RESPONDENT

Date of Decision : 11-05-1993

Acts Referred:
Income Tax Act, 1961 — Section 2(13), 28, 43, 43(5)

Citation : (1994) 119 CTR 472 : (1994) 206 ITR 345 : (1993) 1 RLW 462 : (1994) 3 WLC 301

Hon'ble Judges : K.C. Agrawal, C.J;V.K. Singhal, J

Bench : Division Bench

Advocate : G.S. Bapna, for the Appellant;

Judgement

V.K. Singhal, J.—The Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, has referred the following question of law for the opinion of this court u/s 256(1) of the Income Tax Act, 1961, arising out of its order dated July 22, 1980, for the assessment year 1974-75 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the amount of Rs. 16,426 is a business loss and not a speculation loss ?"

2. The brief facts of the case are that the assessee had shown a loss of Rs. 16,426 in the cotton account and the entry was passed through the "Nakal Bahi" on the last date of the accounting year. This difference was paid on account of purchase and sale of 100 cotton bales which were through Messrs. Basant Kotak and Bros., Bombay. The Income Tax Officer held that it is a speculative transaction and as such cannot be adjusted against the business income and has to be carried forward for adjustment in the subsequent years against speculation profits.

3. An appeal was preferred against the said order, where an objection was taken that this was only one forward transaction of purchase and sale of 100 cotton

bales out of several transactions of business and a solitary transaction cannot be considered to be a speculation business. Reliance was placed on the decision of the Andhra Pradesh High Court in the case of Addl. Commissioner of Income Tax Vs. Maggaji Shermal and Another, . The Appellate Assistant Commissioner relied upon the definition of "business" given u/s 2(13) of the Income Tax Act, 1961, and came to the conclusion that it is not essential to constitute trade that there should be a series of transactions both of purchase and sale, and a single transaction can be considered as an adventure in the nature of trade. The order of the Income Tax Officer was upheld.

4. A second appeal was preferred to the Income Tax Appellate Tribunal which came to the conclusion that there should be more than one speculative transaction carried on by the assessee to constitute a business and reliance was placed on the Explanation to Section 28 of the Act where it was provided that "where speculative transactions carried on by the assessee are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business". The Income Tax Appellate Tribunal came to the conclusion that, in accordance with the meaning given under the Explanation, it cannot be said that a single transaction constituted a speculative business. It was, therefore, held that it is a business loss which is allowable u/s 28.

5. In accordance with the definition of business as given in Section 2(13) of the Act, "business" includes "any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture". The definition is not exhaustive but is inclusive. "Business" contemplates organised efforts on accepted commercial lines resulting in an activity.

6. The Madhya Pradesh High Court in Commissioner of Income Tax Vs. Bhikamchand Jankilal, examined the definition of "business" and Explanation 2 to Section 28 and came to the conclusion that the object of the said Explanation was to declare that speculation business shall be treated differently as distinct and separate from any other business. While applying the provisions of Section 13(2) of the General Clauses Act, 1897, it was held that the singular would include the plural and vice versa and accordingly, the speculative transaction would include speculative business. It was further held that Explanation 2 has not departed from the meaning to the definition of business as given in clause 2(13) of the Act and accordingly it was held that a single transaction could also be considered as a Speculative transaction.

7. The Andhra Pradesh High Court in Addl. Commissioner of Income Tax Vs. Maggaji Shermal and Another, on the basis of the Explanation 2 to Section 28 came to the conclusion that, in order to constitute a speculative business, there should be more than one speculative transaction carried on by the assessee and an isolated instance of a single transaction would not constitute a speculative business and no reasoning was given in this case inasmuch as the definition in Section 2(13) of the Act and the provisions of the General Clauses Act as contained in Section 13(2) were also not taken into consideration.

8. The provisions of Section 43(5) of the Income Tax Act have reference to speculative transaction which is defined as under :

"''speculative transaction'' means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips :

Provided that for the purposes of this clause-

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him ; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations ; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member ;

shall not be deemed to be a speculative transaction ;"

9. From the definition of "speculative transaction" as given in Section 43(5), the three exceptions given in Clauses (a), (b) and (c) are alone deemed not to be speculative transactions and if a transaction falls within the main clause, it cannot be excluded from the category of speculative transaction. Beside this, the object of Explanation 2 to Section 28 is to demarcate and classify separately out of the various transactions as to which constitute speculative business and which falls in the category of business. The Explanation refers to as to what would constitute a speculative business. The speculative business has to be treated and deemed to be separate from any other business. The speculative transaction carried on by the assessee should be a business of such a nature so as to constitute a "business". The definition of "business", therefore, becomes more relevant when it has to be seen as to whether the nature of the transaction carried on constitutes a business. The words "speculative transactions" used in the Explanation could only be in the sense so as to include speculative transaction and the words "speculative transaction" cannot be excluded from the words "speculative transactions". In a case where a trader carries on the business part of which (even one transaction) is in the category of speculative transaction as defined u/s 43(5) and part of which falls in the category of business, then the object of the Explanation is to treat them separately.

10. The Bombay High Court in Commissioner of Income Tax Vs. Indian Commercial Co. P. Ltd., has also examined this aspect in the light of Explanation 2 to Section 28 and came to the conclusion that there is nothing on the record to

show that it was a systematic or organised course of activity or conduct on the part of the assessee-company not to fulfil its contracts, and to settle the same with the other parties thereto, with the result that, even according to ordinary notions and common sense principles, it could not be said that a transaction of the nature of the transaction in question as in the present case amounts to "speculation business". It was also held in this case that even a single or isolated transaction can, in a conceivable case, amount to "business", provided that it bears the clear indicia of trade. In view of Explanation 2 to Section 28, it was held that, in order to contitute "speculation business" within the terms of that Explanation, a single transaction would not be sufficient. It was on the facts of this case that the transaction was held not falling within the definition clause as given u/s 43(5) of the Act as speculative transaction. The assessee has not contended before the Tribunal that the transaction is not a speculative transaction. Once a transaction falls within the definition given u/s 43(5) of the Act, then only three exceptions given thereunder could save the transaction from falling within the definition of speculative transaction. The interpretation which has been placed by the Bombay High Court on Explanation 2 to Section 28 that a single transaction would not be sufficient to constitute speculative business is contrary to the definition of business and the provisions of the General Clauses Act as referred to above.

11. We are, therefore, of the view that the view taken by the Madhya Pradesh High Court is the correct interpretation of law, viz., that a single transaction may constitute speculative business so as to be treated differently from other businesses u/s 28. Accordingly, it is held that the Income Tax Appellate Tribunal was not justified in holding that the amount of Rs. 16,436 is a business loss and not a speculation loss.

12. The reference is accordingly answered in favour of the Revenue and against the assessee. No order as to costs.

