
(2017) 04 CAL CK 0047
In the Calcutta High Court
Case No : I.T.A. No. 1 of 2017

Deeplok Financial Services Ltd.

APPELLANT

Vs

Commissioner of Income

RESPONDENT

Date of Decision : 04-04-2017

Acts Referred:

Income Tax Act, 1961 — Section 45

Citation : (2017) 393 ITR 395 : (2017) 247 Taxman 139

Hon'ble Judges : Aniruddha Bose and Arindam Sinha, JJ.

Bench : Division Bench

Advocate : Mr. Sharma, Advocate, for the Assessee; Mr. Lodhe, Advocate, for the Revenue

Final Decision : Disposed Off

Judgement

Arindam Sinha, J.—The assessee being aggrieved by order dated 27th November, 2015 passed by the Income Tax Appellate Tribunal, Kolkata "A" Bench, Kolkata, in ITA no.1279/KOL/2010 pertaining to the assessment year 2006-07 has preferred this appeal. The substantial question of law suggested by the assessee is as follows:-

"Whether on the facts and circumstances of the case the Tribunal erred in affirming the order of the AO disregarding the conversion of the trading shares into investment shares and treating the long term capital gain of Rs. 22,27,819/- arising from the sale of those shares as profit of trading in shares and bringing the same to tax?"

2. The assessee is a company which is engaged in the business of leasing, finance and investment. On 1st April, 2004, i.e. during the previous assessment year 2005-06 the following shares were transferred by the assessee from its trading stock into investments:-

1. Hind Lever Chem Limited 10,370 shares;

2. Chambal Fertilisers Chem Limited 38,000 shares;
3. Eveready Industries Limited 14,580 shares; and
4. Shrachi Securities Limited 48,000 shares.

3. Out of the above shares, entire shares of Hind Lever Chem Ltd. and Shrachi Securities Ltd. and 5,000 shares of Chambal Fertilisers Chem Ltd. were sold by the assessee in the previous year relevant to assessment year 2005-06. The balance 33,000 shares of Chambal Fertilisers Chem Ltd. and 14,580 shares of Eveready Industries Ltd. were sold by the assessee during the year under consideration and the profits arising from the sales were claimed to be exempted from tax as long term capital gains. In the assessment completed under section 143(3) for the previous assessment year, the claim of the assessee for conversion of shares from stock-in-trade into investment was not accepted by the Assessing Officer. That decision was appealed against and carried up to the Tribunal which confirmed the same. The assessee though preferred a delayed appeal to this Court but was unsuccessful in having the delay condoned and thereby lost that right of appeal. For the assessment year under consideration the Assessing Officer following the assessment order of the previous year held accordingly on this claim of conversion by the assessee. The CIT(A) allowed the assessee's appeal but on further appeal, the Tribunal by the impugned order held as follows:-

".....It is true that in the various judicial pronouncements cited by the Id. Counsel for the assessee, the conversion of shares from stock in trade into investment has been accepted despite there being no specific provision to recognize such conversion. However, in assessee's own case, the Tribunal has not accepted such conversion in the immediately preceding year, i.e. A.Y. 2005-06 and it, therefore, follows that the shares sold by the assessee during the year under consideration continued to constitute its stock-in-trade and not investment. Consequently the profit arising from the sale of the said shares, in our opinion, is chargeable to tax in the hands of the assessee as its business income as rightly held by the Assessing Officer and not long term capital gain as held by the Id. CIT(Appeals). We, therefore, set aside the impugned order of the Id. CIT(Appeals) on this issue and restore that of the Assessing Officer. The appeal of the Revenue is accordingly allowed."

4. So it was that the appeal was admitted on the following substantial question of law formulated.

"Whether the Tribunal was correct in holding that the profit arising from the sale of the said shares is chargeable to tax in the hands of the assessee as its business income and not long term capital gain since in the assessee's own case in the previous assessment year the conversion of the shares was not accepted by the Tribunal?"

5. We however intend to answer both the above questions upon having heard the

parties in this appeal.

6. Mr. Sharma, learned Advocate appeared on behalf of the assessee and submitted, the conversion claimed by his client, of shares as stock-in-trade into investment, had been shown in the books to be a conversion at the fair market value of the shares as on the date of conversion. He relied on several decisions, the first of them being in the case of *Sir Kikabhai Premchand v. CIT* reported in (1953) 24 ITR 506 (SC) to submit, the Supreme Court had held that a person cannot transact with himself. It is only after the asset is dealt with to a third party can a profit or loss be ascertained on the basis thereon. There was no bar imposed by the Income Tax Act, 1961 on an assessee from converting its stock-in-trade into investment. That conversion could not be deemed to be a transaction but when the asset is dealt with, the profit or loss is to be ascertained and in the case of capital asset, if there is profit then to be assessed as capital gain. That if shares be disposed of at a value other than the value at which it was transferred from the business stock, the question of capital loss or capital gain would arise. He also relied on the case of *CIT v. Dhanuka & Sons* reported in (1980) 124 ITR 24 (Cal) by which a Division Bench of this Court on considering *Kikabhai Premchand* (supra) and several other judgments had expressed (age 31 of 124 ITR):-

"14. Further, in our view, there cannot be any actual profit or loss in such transfers where no third party is involved and the items are kept in a different account of the assessee himself. The question of gain or loss would arise in the facts of the instant case only in future when the stocks transferred to the investment account might be dealt with by the assessee. If such shares be disposed of at a value other than the value at which it was transferred from the business stock, the question of capital loss or capital gain would arise."

7. He submitted, the assessee could convert its stock-in-trade into investment. There being no provision in the law for the same could not be interpreted to be a bar. So much so that the CBDT by its Circular no.6/2016 dated 29th February, 2016 had said in paragraph 3 therein as follows(See (2016 382 ITR (St.) 14) :-

"3.....

(a).....

(b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

(c)....."

8. On the point of *res judicata* Mr. Sharma relied on the case of *Snow White Food*

Products Co. Ltd. v. CIT reported in (1982) 10 Taxman 37 (Cal), in particular to the extracted portion from paragraph 10 of that judgment.(Page 872 of 141 ITR):

"In any event, it is well settled that the principles of res judicata are not applicable in revenue matters and findings of fact in an earlier year are not binding in the assessments in subsequent years and can be resisted on new evidence."

9. Mr. Lodhe, learned Advocate appeared on behalf of the Revenue and submitted that neither the above questions were substantial questions of law nor were they involved in this case because when in the previous assessment year the claim of conversion by the assessee was turned down by the Tribunal, the assessee's delayed appeal was dismissed by a Division Bench of this Court on 5th May, 2015 on the reason of choice made by the assessee.

"The petitioner made a conscious choice of not preferring an appeal and accepting the order, which is now sought to be challenged. When the petitioner chose not to prefer an appeal at the appropriate time, he cannot be allowed to file an appeal after expiry of more than 1500 days simply because he is now advised otherwise. It is not a case where the petitioner was prevented from presenting an appeal within the period of limitation. It is a case where the petitioner chose not to challenge the order within the prescribed period of limitation. Therefore, we are not inclined to admit the appeal after such a long delay."

10. That being the position the Tribunal did not commit any error in restoring the order of the Assessing Officer on the claim since the said claim stood rejected in the previous assessment year. He also relied on the said circular dated 29th February, 2016 to submit that once the shares of the assessee were treated as part of the stock-in-trade, the same shall remain applicable in subsequent assessment years and the assessee should not be allowed to adopt a different and contrary stand in subsequent years.

11. Section 45(2) of the Act provides for conversion by the owner of a capital asset into or its treatment by him as stock-in-trade of a business carried on by him as chargeable to income-tax as income of his previous year in which such stock-in-trade is sold or otherwise transferred by him and fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of a capital asset. The Act however does not provide for the conversion of stock-in-trade into capital asset.

12. Whether or not such omission would operate as a bar on an assessee is a question that can be answered on the basis of a view taken by a learned Single Judge of this Court in the case of Maniruddin Bepari v. The Chairman of the Municipal Commissioners, DACCA decided on 16th April, 1935 and reported in 40 Calcutta Weekly Notes (CWN) 17 being as follows:-

"It is a fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of a statutory corporation it is just the other way. The corporation has no power to do anything unless those powers are conferred on it by the statute which creates it."

13. This view finds support from Kikabhai Premchand (*supra*) where the situation at hand was contemplated as would appear from the following as expressed in the dissenting view (516 of 24 ITR):

".....When the asset is withdrawn from the stock-in-trade of the business the position in my opinion would be no different. So far as this business is concerned the asset would go out and cease to be a part of its stock-in-trade and this again would be the measure of the profit or loss as the case may be of the business qua that particular asset....."

14. In Dhanuka & Sons (*supra*) the same situation was contemplated where on stock transferred in investment account, the question of capital loss or capital gain, was held, would arise if such shares be disposed of at a value other than the value at which it was transferred from the business stock. We, on noticing that the Tribunal did not really hold otherwise but had held against the assessee on the point of *res judicata*, had formulated the above question. Nevertheless for the reasons aforesaid we answer the question suggested by the assessee in the affirmative and in its favour. In that regard the said circular dated 29th February, 2016 has no application because the assessee's stand was not accepted by the Revenue.

15. So far as the formulated question relating to *res judicata* is concerned, in answering the same reference may be had to the decision in *Amalgamated Coalfields Ltd. & Anr. v. Janapada Sabha Chhindwara* reported in AIR (1964) SC 1013 in which the Supreme Court said, *inter alia*, as follows:-

".....Where the liability of a tax for a particular year is considered and decided does the decision for that particular year operate as *res judicata* in respect of the liability for a subsequent year? In a sense, the liability to pay tax from year to year is a separate and distinct liability; it is based on a different cause of action from year to year, and if any points of fact or law are considered in determining the liability for a given year, they can generally be deemed to have been considered and decided in a collateral and incidental way. The trend of the recent English decisions on the whole appears to be, in the words of Lord Radcliffe, "that it is more in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result, some expectations may be frustrated and some time wasted." (*vide Society of Medical Officers of Health v. Hope Valuation Officer* [(1960) 2 W.L.R. 404, 563.]. The basis for this view is that generally, questions of liability to pay tax are determined by Tribunals with limited

jurisdiction and so, it would not be inappropriate to assume that if they decide any other questions incidental to the determination of the liability for the specific period, the decisions of those incidental questions need not create a bar of res judicata while similar questions of liability for subsequent years are being examined....."

16. That apart, this assessee lost its right of appeal to this Court on the question arising in the previous assessment year on account of delay in preferring the same. There was no adjudication on merits, of its claim of conversion, on appeal to the High Court. The only reason given by the Tribunal in rejecting the claim of the assessee for the previous assessment year, as would appear from its order dated 13th May, 2011 (copy handed up), is that to the Tribunal it appeared there is no provision in the Act in respect of conversion of stock-in-trade into investment and its treatment. Hence, it held that the lower authorities rightly made the addition as there was understatement of income by analysing the assessee's trading and investment account in shares. Thus, before us there is no impediment for the assessee to seek adjudication on the point. The question formulated is answered accordingly and in favour of the assessee.

17. The appeal is disposed of.