
(1973) 05 CAL CK 0035

In the Calcutta High Court

Case No : Income-tax Reference No. 105 of 1968

Gold Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax (Central)

RESPONDENT

Date of Decision : 24-05-1973

Acts Referred:

Income Tax Act, 1922 — Section 66

Citation : (1973) 92 ITR 121

Hon'ble Judges : Sabyasachi Mukharji, J;S. Hazra, J

Bench : Division Bench

Advocate : Chandan Banerjee, for the Appellant;Dipankar Gupta and R. Murarka, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this case u/s 66(1) of the Indian Income Tax Act, 1922, a familiar question has been referred to this court:

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the loss of Rs. 36,035 incurred by the assessee-company on sale of preference shares of S. K. G. Sugar Co. Ltd. and Bengal Jute Co. Ltd. was a loss of capital nature ?"

The year in question is the assessment year 1959-60 for which the previous year is the year ending 31st March, 1959. For that year a return was filed showing a total income of Rs. 20,063. The assessee-company is a dealer in shares.

2. Before the Income Tax Officer, the assessee claimed deduction on account of loss of Rs. 36,035 consisting of alleged loss of Rs. 26,565 on sale of 1,000 preference B shares of S. K. G. Sugar Co, Ltd. and of loss of Rs. 9,470 on sale of 250 preference shares of Bengal Jute Co. Ltd. The Income Tax Officer found that 1,000 shares of S. K. G. Sugar Co. Ltd. had been purchased from Mugneeram Bangur & Co. on 28th March, 1951, at Rs. 91 per share. On 19th September, 1958, these shares were sold to Mugneeram Bangur & Co, at Rs. 65 per share giving rise to the said loss of Rs. 26,565. It appears that these shares were

ultimately acquired by Messrs. Indian Textile Agency Ltd. numbering 300 shares and by the Calcutta Properties Ltd. numbering 700 shares. The Income Tax Officer observed that these two companies were controlled by the members of the Bangur family and disallowed the loss on the ground that the transaction in question did not take place in the ordinary course of business. The Income Tax Officer further held that the sales had been made to one of the controlled companies of the Bangurs by another of their controlled companies and the transaction could be described as one of inter-company transfer of investments with a view to create artificial losses. As regards 250 preference shares of the Bengal Jute Co. Ltd. it was found by the Income Tax Officer that these were purchased by the assessee from Mugneeram Bangur & Co. on 6th January, 1941, at Rs. 104 per share. On 19th September, 1958, these shares were sold to Messrs. Mugneeram Bangur & Co. at Rs. 67 per share giving rise to the aforesaid loss of Rs. 9,470. The Income Tax Officer further found that on the same date, i.e., on 19th September, 1958, Messrs. Mugneeram Bangur & Co. sold the shares to Indian Textile Agency Ltd. at Rs. 67.25 per share. The Income Tax Officer disallowed this loss also as not arising in the ordinary course of business. The Income Tax Officer also found that this was also an inter-company transfer of investment and had been done with a view to create artificial losses.

3. There was an appeal to the Appellate Assistant Commissioner. Before the Appellate Assistant Commissioner, it was contended that the assessee had all along been held to be a dealer in shares and the shares under consideration had all along been treated by the assessee as a stock-in-trade and the dealings in shares was its main business. This contention was not opposed, it appears, before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner further observed that the shares had been purchased at the market rate and the intention at the time of purchase could only be made out by the subsequent course of dealings. The Appellate Assistant Commissioner further observed that it was the assessee's contention that these shares were purchased in the course of their share dealing business and the Income Tax Officer had not been able, according to the Appellate Assistant Commissioner, to prove that these shares were acquired for investment purposes. So far as the shares of S.K.G. Sugar Co. were concerned, the Appellate Assistant Commissioner held that the shares were sold at the market rate. But, so far as the shares of Bengal Jute Co. Ltd. were concerned, the Appellate Assistant Commissioner observed that the shares were purchased on 6th January, 1941, at Rs. 104 per share and these were sold at Rs. 67 per share on the 19th September, 1958. The market rate on 17th January, 1958, till the end of September, 1958, was Rs. 72.50 per share and, thereafter, Rs. 77 per share. It was contended before the Appellate Assistant Commissioner that though the market rate shown was Rs. 72.50 per share it had to be taken as a nominal quotation and the very fact that the share prices remained stationary for a period of 9 months showed that there was no transaction and as such what the assessee got was the best price available at that time and there was no reason to suspect the genuineness of the sale price.

The Appellate Assistant Commissioner, therefore, found that the sales in the aforesaid cases in fact had taken place and at real prices.

4. There was an appeal to the Tribunal. The Tribunal noted the findings of the Income Tax Officer as well as the findings of the Appellate Assistant Commissioner, referred to hereinbefore, and observed that, on the facts found by the Appellate Assistant Commissioner, it saw no reason to interfere with the findings in regard to the share-dealing losses which arose in the first year, viz., the assessment year 1958-59, with which we are not concerned in this reference. As regards the second year, that is the year in question with which we are concerned, viz., the assessment year 1959-60, the Tribunal observed that the shares were preference shares and it had been held for a long period. For these factors the Tribunal was of the opinion that the Income Tax Officer was justified in treating these as investment shares. The Tribunal further observed that even a share dealer could have investments and on the facts found the Tribunal upheld the Income Tax Officer's finding that the share-dealing losses amounting to Rs. 36,035 should be held to be of capital nature. Thereafter, the aforesaid question has been referred to this court.

5. It is to be observed that there is a slight error in the order of the Tribunal. The Income Tax Officer had not disallowed the sum of Rs. 36,035 to be deducted on the ground that it was a loss of capital nature. The Income Tax Officer disallowed this loss on the ground that the loss did not take place because the alleged transactions were not genuine in character. The Income Tax Officer in coming to this conclusion had observed that these were inter-company transfers of investments. That was on the ground that these were not genuine transactions. The Income Tax Officer did not in his order advert to the question whether the shares in question were held either as a stock-in-trade or as investment and whether the loss arising from the sale of such shares in question were capital or revenue loss. It, however, appears the Appellate Assistant Commissioner found that the assessee was a dealer in shares and the Appellate Assistant Commissioner, because of the contention raised before him and because there was no evidence adduced on behalf of the department to the contrary, had accepted the position that the shares in question, viz., the preference shares of S. K. G. Sugar Co. Ltd. and Bengal Jute Co. Ltd., had been acquired as a stock-in-trade of the assessee in its share-dealing business. Furthermore, it appears, in respect of these shares the assessee had been treated as a dealer in shares. Indeed in the statement of the case which has been filed before this court after hearing both the parties, the Tribunal records that the assessee is a dealer in shares. Therefore, it appears that the facts that emerged in this case were that the assessee was a dealer in shares and it was contended before the Appellate Assistant Commissioner and nothing was shown to the contrary by the department that these shares were not acquired as a stock-in-trade by the assessee and the assessee had been treated as such by the department in respect of these shares. As against these, there are two factors which the Tribunal had observed, viz., that the shares in question were

preference shares and these shares in question had been held for a considerable length of time. It is not necessary for us to refer to the numerous decisions on the question as to how loss arising from a particular transaction should be examined to determine whether it is a revenue loss or capital loss. In the case of *Ramnarain Sons (Pr.) Ltd. Vs. Commissioner of Income Tax, Bombay*, the Supreme Court observed that in considering whether a transaction was or was not an adventure in the nature of trade, the problem should be approached in the light of the intention of the assessee having regard to the legal requirements which were associated with the concept of trade and business. The inference on this question raised by the Tribunal on the facts found was a mixed question of law and fact and was open to challenge before the court on a reference u/s 66 of the Act. As observed by the Supreme Court that the question is a mixed question of law and fact, the Tribunal should take into consideration all the facts and circumstances of the case. No particular factor, however, is a determining factor or a decisive factor. The length of time, nature of the dealings, the method of dealings, how the proceeds of the sale are dealt with by the assessee, these ingredients and other factors are some of the principles that the courts have laid down which should determine the question whether a particular transaction is in realisation of investment or sale in the ordinary course of business. It is observed by the Supreme Court in *Investment Ltd. Vs. Commissioner of Income Tax, Calcutta*, that the mere length of time might not be a determining factor.

6. The Supreme Court had also considered this question in the case of *New Era Agencies (Pvt.) Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City I, Bombay*, . There the Supreme Court was dealing with the preference shares; this fact has to be noted, because in this case we are concerned with preference shares and these shares had been held for a considerable time. The Supreme Court observed that the fact that the appellant had not dealt with the shares for about 14 years from 1949 to 1963 would not be sufficient to draw the inference that the assessee had treated his holding of shares as investment.

7. The Supreme Court had also considered this question in the case of *Karam Chand Thapar and Bros. P. Ltd. Vs. Commissioner of Income Tax, (Central), Calcutta*, where the assessee which had acquired 2,400 shares of a company in two lots in 1941 and 100 shares in 1950 had sold the entire block of shares in 1955 at a loss. The Tribunal held that the loss was a capital loss, on the basis, inter alia, of the fact that: (1) the shares were shares of a company managed by the assessee ; (2) that the shares were shown in the account books and the balance-sheet as investment shares; (3) that the shares were not sold when their price was high; and (4) that the shares were held for about 14 years. In those circumstances the Tribunal was justified in coming to the conclusion that the loss was a capital loss. The Supreme Court further observed that the locking up of shares for about 14 years was normally an unusual feature if those shares were trading assets of the assessee. The Supreme Court reiterated the view that whether a particular loss is a capital or a revenue loss was a mixed question of law and fact. It appears that the following facts must be borne in mind in this

case :

(i) The assessee is a dealer in shares, a fact which was found by the Appellate Assistant Commissioner and that finding has not been disturbed.

(ii) The shares were sold and purchased in the regular manner, namely, through a broker.

(iii) The sale proceeds were realised and the moneys were put in the bank and purchases were made. This, however, is consistent with the fact of the assessee being either an investor or a trader in shares. It was contended before the Appellate Assistant Commissioner that the assessee had all along been treated as a dealer in shares in respect of these shares and these shares had been treated as stock-in-trade of the assessee. The Appellate Assistant Commissioner seems to have accepted the contention and the Tribunal has not negated this contention.

(iv) Therefore, the fact remains that these shares were acquired as stock-in-trade of the assessee.

(v) The shares of S.K.G. Sugar Ltd. were held for about 7 1/2 years and had been sold at the available market price.

(vi) The shares of Bengal Jute Mills Ltd., however, were held for a longer period, namely, over 16 years, and they had been sold at a price considerably less than the market price. Furthermore, it appears that after the sale, there was certain increase in the price available. (vii) All these shares, however, were preference shares.

Having regard to the facts and circumstances of this case it appears to us that so far as the shares of the Bengal Jute Mills Ltd. are concerned, in view of the fact that these were held for a very considerable length of time and in view of the nature of transaction in sale, inasmuch as the shares were held for over 16 years, it appears to us that the Tribunal was right in coming to the conclusion, so far as these shares were concerned, in disallowing the loss. But, so far as the shares of S. K. G. Sugar Ltd. are concerned, considering all the facts and circumstances of the case and in view of the fact that these shares were sold at the market price and these were held for 7 1/2 years, it appears to us that the Tribunal was not justified in coming to the conclusion that this loss was a capital loss.

8. In the premises, we answer the question by saying that the Tribunal was not justified in holding that the loss of Rs. 26,565 incurred by the assessee-company on the sale of preference shares of S.K.G. Sugar Ltd. was a loss of capital nature. The Tribunal was justified, however, in holding that the loss of Rs. 9,470 on the sale of the shares of Bengal Jute Mills Ltd. was loss of capital nature.

9. In the view of the divided success, each party will pay and bear its own costs.

Hazra, J.

10. I agree.