(1993) 04 GAU CK 0012

In the Gauhati High Court

Case No : Income-tax Reference No. 14 of 1987

Shakuntala Devi Killa APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 19-04-1993

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

Citation : (1993) 114 CTR 227 : (1993) 202 ITR 108 : (1993) 71 TAXMAN 284

Hon'ble Judges : U.L. Bhatt, C.J;R.K. Manisana Singh, J

Bench : Division Bench

Advocate : A.K. Saraf, for the Appellant; D.K. Talukdar and B.J. Talukdar, for the Respondent

Judgement

U.L. Bhat, C.J.—The following question has been referred at the instance of the assessee by the Appellate Tribunal u/s 256(1) of the Income Tax Act, 1961 :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding the loss of Rs. 59,678 resulting from share transactions as speculation loss and not a loss arising from business as claimed by the assessee ?"

2. The assessee is an individual. The assessment relates to the assessment year 1981-82. The original return as well as a revised return show total income of Rs. 10,890. A sum of Rs. 59,678 was shown as short-term capital loss in the original return and business loss in the revised return. The loss, it was said, arose on account of purchase and sale of shares. The assessing authority held that the loss arose in connection with speculative transactions as defined in Section 43(5) of the Act and, therefore, cannot be treated as business loss. He directed that the same may be set off against future gains from business. The Appellate Assistant Commissioner of Income Tax as well as the Appellate Tribunal affirmed this decision. Hence, this reference.

3. Section 43(5) of the Act defines "speculative transaction" as follows :

"''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."

4. In other words, a transaction can be regarded as a speculative transaction, if the following conditions are satisfied :

(i) There must be a contract for the purchase or sale of shares or any other commodity, (ii) the transaction must be periodically or ultimately settled, and (iii) settlement must be otherwise than by the actual delivery or transfer of the commodity or scrips.

Particulars of transactions can be summarised as follows:

3-11-1980

7,000 shares purchased by the asses - see through broker, Messrs. K. K. Jhunjhunwala

Price Rs. 10.19 per share

6-4-1981

Bill for price of shares was drawn

9-4-1981

Assessee made payment through bank draft

2-3-1981

Assessee sold the aforesaid shares through share broker, Messrs. Laxmi and Co., against price of Rs. 1.67 per share

8-4-1981

Bill for payment was prepared by the assessee.

5. On the above facts and in consideration of notes of contract, the Tribunal came to the conclusion that both transactions were completed as sales, that there was nothing to suggest that delivery of shares had been obtained by Messrs. Jhunjhunwala on behalf of the assessee, that there was no evidence that shares were delivered to the assessee, that even assuming that payment was made on April 9, 1981, and delivery was effected on the same day to the assessee, there was no evidence to show that payment was made to the assessee by Messrs. Laxmi and Co. on or after March 2, 1981, and that there was no evidence to show that the assessee or her broker actually delivered the shares to Messrs. Laxmi and Co., and that the names of the sellers and purchasers were not brought on record. On these findings, the Tribunal came to the conclusion that the transactions were settled otherwise than by actual delivery or transfer of the shares and Section 43(5) of the Act was attracted in the instant case. It was on

this basis that the Tribunal declined to reckon loss caused on account of the transaction in shares.

6. Learned counsel for the assessee conceded that no documents have been produced to prove delivery of shares initially to the assessee by the stock broker or subsequently by the assessee or her representative to the vendee. However, he contended that no receipt could be obtained and, therefore, no evidence could be produced to prove evidence to prove delivery. u/s 43(5) of the Act, the statutory authority has to satisfy itself that there was actual delivery or transfer of the shares. The assessee must be able to place materials before the statutory authority to show actual delivery ; if she fails to do so, the natural corollary would be to hold that the transactions were settled otherwise than by actual delivery. The argument put forward by the assessee was that delivery did not take place on the dates of the original contracts but subsequently. As a prudent person, if delivery took place subsequently, she would have taken precautions to obtain necessary documents in proof of delivery. The assessee also failed to produce materials suggesting actual delivery, In the circumstances, there would be nothing wrong in coming to the conclusion that the transactions were completed otherwise than by actual delivery or transfer. That being so, the transactions must be considered speculative transactions as defined u/s 43(5) of the Act. The question referred is answered in the affirmative, that is, in favour of the Revenue and against the assessee. The reference is answered accordingly.

7. A copy of the judgment under the signature of the Registrar and seal of the High Court shall be transmitted to the Appellate Tribunal. There is no direction as to costs.