The New Jahangir Vakil Millsco., Ltd. ... vs The Commissioner Of Income-Tax, Bombay ... on 10 April, 1963

Equivalent citations: 1964 AIR 318, 1964 SCR (2) 971, AIR 1964 SUPREME COURT 318

Author: S.K. Das

Bench: S.K. Das, A.K. Sarkar, M. Hidayatullah

PETITIONER:
THE NEW JAHANGIR VAKIL MILLSCO., LTD. BHAVNAGAR

Vs.

RESPONDENT:
THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH,KUTCH & SAURASH

DATE OF JUDGMENT:
10/04/1963

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
SARKAR, A.K.
HIDAYATULLAH, M.

CITATION:
1964 AIR 318 1964 SCR (2) 971

ACT:
Income Tax-Assessee dealer in shares and securities-Income from sale shares, if revenue receipt-Profits if be computed on basis of difference between original cost price and price realized at the sale-Res judicata, if appliable to matters of taxation -Taxing authorities if can consider position of assessee before the assessment year.

HEADNOTE:
The assessee appellant carried on the business of manufacturing and selling textile piece-goods. In the assessment year 1945-46, the Income-tax officer added to the taxable income of the assessee a sum of Rs. 1,86,931 which was later on reduced to Rs. 1,23,840 as a revenue receipt, representing an amount by which the sale price exceeded the

original cost of certain shares and securities purchased and sold by the appellant. The assessee was held to be a dealer in shares and securities.

The contention of the assessee was that it was not a dealer in shares and securities in the relevant account year or in the years past and the shares and securities were held by way of investment and the investment surplus was in the nature of capital receipt. Even if the assessee was a dealer in shares and securities in the relevant account year, the Income-tax officer committed an error in the matter of the computation of profits in not taking the market value of the shares as at the opening day of that year as the cost thereof. The Appellate Assistant Commissioner rejected the contentions of the appellant and held that the number of transactions was sufficiently large to show that the assessee was a dealer in shares. The Appellate Tribunal rejected the contentions of the appellant. These assertions were then referred to the High Court and they were decided against the assessec-appellant.

972

Held that the assessee was a dealer in shares and securities and the income from their sale was a revenue receipt and not capital receipt. The profits of the assessee were the difference between the original cost price of the shares to the assessee at the time of purchase and the price realized at the time of sale.

Held also that in the matter of taxation, there was no question of resjudicata. It was open to the taxing authorities to consider the position of the assessee in 1943 for the purpose of determining how the gains made in 1944 should be computed, even though the subject of the assessment proceedings was the computation of the profits made in 1944. The circumstance that in an earlier assessment relating to 1943, the assessee was treated as an investor would not estop the assessing authorities from considering, for the purpose of computation of the profits of 1944, as to when the trading activity of the assessee in shares began. The assessing authorities found that it began in 1943 and on that finding, the profits were correctly computed.

Commissioner of Income-tax v. Bai Shirinbai K. Kooka, [1962] Supp. 3 S.C.R. 391, Broken Hill Property Company v. Broken Hill Municipal Council, [1926] A.C. 94, Boystead v. Commissioner of Taxation, [1926] A.C. 155. Society of Medical officer of Health v. Hope, [1960] A.C. 551, Caffoor v. Income-tax Commissioner, [1961] A.C. 584 and Installment Supply (P) Ltd. v. Union of India, [1962] 2 S.C.R. 644, referred to,

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 445 of 1962. Appeal from the judgment and order dated April 1 1 and 12. 1960, of the Bombay High Court in Income-tax Reference No. 52 of 1959.

R. J. Kolah and I.N. Shroff, for the appellant. K. N. Rajagopal Sastri, and R.N. Sachthey, for the respondent.

1963. April 10. The judgment of the Court was delivered by S. K. DAS, J.-This is an appeal on a certificate of fitness granted by the High Court of Bombay under s. 66-A (2) of the Indian Income-tax Act, 1922. The New Jehangir Vakil Mills Co., Ltd.. Bhavnagar, appellant before us and called tile assessee, carried on the business of manufacturing and selling textile piecegoods at Bhavnagar in the former Bhavnagar State. The present appeal is concerned with the assessment year 1945-46, the account year being the calendar year 1944. In the said assessment year the Income-Tax officer concerned added to the taxable income of the assessee a sum of Rs. 1,86,931/- (which was later reduced to Rs. 1,23,840/-) as a revenue receipt, representing an amount by which the sale price exceeded the original cost of certain shares and securities purchased and sold by the appellant. It was held that in the relevant account year in which the shares were sold and profits made as also in the preceding years, the assessee was a dealer in shares and securities. In respect of this addition of Rs. 1,23,840/- the assessee raised two contentions. The first contention was that it was not a dealer in shares and securities in the relevant account year or in the years past and that the shares and securities were held by way of investment and the investment surplus was in the nature of a capital receipt. The second contention was that even if the assessee was a dealer in shares and securities in the relevant account year, the Income-tax officer committed an error in the matter of the computation of profits in not taking the market value of the shares as at the opening day of that year as the cost thereof.

These were the two questions along with a third question which were referred to the High Court under s. 66 (2) of the Act. The third question does not now survive, and therefore we set out below the two questions which fall for decision in this appeal:

1. In the event of the surplus aforesaid being held to be income assessable to income-

tax whether the income should be ascertained by taking the market value of the shares as at the opening day of the year as the cost ?

2. Whether there is any evidence on record to justify the Tribunal's finding that the assessee company was a dealer in shares not only in the year under consideration but in the years past ?

Now, as to the contention whether the assessee was a dealer or not in shares and securities in the calendar year 1944 the position appears to be that the Income-tax officer found against the assessee. There was an appeal to the appellate Assistant Commissioner who remanded the case to the Income- tax officer on the ground that the materials in the record were not adequate to decide the question. The the remand proceedings the assessee filed before the Income-tax officer statements showing the position of transactions relating to shares and securities from 1939 onward. These

statements marked as annexure 'C' form part of the statement of the case. In his remand report dated April 1, 1952 which is also a part of the statement of the case, the Income-tax officer examined the purchase and sale of shares in different years by the assessee and came to the conclusion that the assessee was a dealer in shares at least from the year 1942 by reason of the frequency and multiplicity of the transactions which the assessee conducted since that year. It further pointed out that the assessee had sold certain shares out of a block of shares in the year 1943, and after taking out the price of the shares realised in 1943, the remaining amount was shown in the balance sheet as the value of the remaining shares in each block. The value of such shares as shown in the balance sheet for 1943 was not the cost price of the assessee. In some cases it was below cost. As a result of this valuation in the balance sheet, the profits from the sale of shares during 1945,46 would be Rs. 1,23,8401-. If, however, the difference between the sale price and the market value of the shares as on the first day of the account year was taken into account, the results might be different.

On the basis of the aforesaid remand report the Appellate Assistant Commissioner examined the records of the transactions and observed :

> "There are five different transactions of purchase and two transactions of sale in 1942. The tempo of purchases and sales goes up from 1943. There are purchases of fifteen or twen- ty different dates in 1943. There is a similar number of transactions in 1944. Many of the shares purchased in 1943 have been disposed of in 1944. Several scrips purchased in 1944 have been sold within the year. The number of transactions is, in my opinion, sufficiently numerous to show that the assessee is a dealer in shares."

There was an appeal then to the Tribunal. The Tribunal came to the conclusion that so far as Government securities were concerned the assessee was obliged to keep its large cash invested in Government securities and, therefore, so far as these securities were concerned, the amount realised by their sale was not a revenue receipt and should not be included in the total income of the assessee. It held, however, that the assessee was a dealer in shares in 1944 and as to the computation of the profits made on the sale of the shares, such profits were correctly computed to be the difference between the original cost price of the shares to the assessee at the time of purchase and the price realised at the time of sale, and the Tribunal significantly added that this computation was correct on the finding that the assessee was a dealer not only in 1944 but from 1942onward. We may here state that for the years prior to the account year 1944, the department had treated the assessee as an investor and not a dealer in shares and had made assessments accordingly for those years. Those assessments have now become final.

When the matter went to the High Court on a case stated by the Tribunal, the High Court observed that the crucial year was the year 1943, for if the assessee was a dealer in shares since 1943 and sold some of them in the account year 1944 and made profits thereon, then both the questions referred to the High Court must be answered against the assessee. The High Court re-framed the second question by substituting the words "in the year 1943" for the words "in the years past". The High Court further pointed out that in the exercise of its advisory jurisdiction it did riot sit in appeal over the decision of the Tribunal that the assessee was a dealer in shares in the year 1943. It also held

that on the materials on record it was open to the Tribunal to come to the conclusion that the assessee was a dealer in shares in 1943 and as to the computation of profits it pointed out that if the assessee was a dealer in 1943 also, then it was not open to the assessee to say that the market value of the shares as on the opening day of the year 1944 should be taken as the cost of the shares. Accordingly, the High Court answered both the questions against the assessee. Learned counsel for the appellant has addressed us at length on both questions. However, it appears to us that by reason of the re-framing of the second question, the two questions really merge into one, namely, was the assessee a dealer in shares in 1943 and continued to be such a dealer in 1944 which is the relevant account year ? The question no doubt has two aspects. Firstly, there is the aspect whether there is any evidence to justify the finding that the assessee was a dealer in shares in 1943. ,Secondly, there is the aspect as to how the profits made from the sale of shares in 1944 should be computed in the assessment year 1945-46. It is however manifest that it' the assessee was a dealer in 1943 also, then the principle laid down by this court in Commissioner of Income-tax v. Bai Shirinbai K. Kooka (1), will not apply, for that decision proceeded on the footing that the assessee of that case converted her investment shares into a stock-in-trade and carried on a trading activity as from April 1, 1946, the relevant account year being the financial year 1946-47. If the assessee in the present case was a dealer in 1943, then nothing happened on the opening day of the relevant account year, namely, January 1, 1944 and there is no reason why the market value of the shares on that date should be taken into consideration in computing the profits. Learned counsel for the assessee has however pressed an argument which may now be stated. He has submitted that he is not arguing that it was not open to the assessing authorities to consider the question whether the assessee was a dealer in shares in 1944 which was the relevant account year. What he contends is that it was not open to the taxing authorities to consider and find that the assessee was a dealer in shares in 1943; because for all years prior to 1944 the department had already assessed the assessee on the footing that it was an investor of shares and not a dealer and those assessments having become final could be re-opened only either under s. 34 or s. 35 of the Act. The argument is that in assessing the assessee for the account year 1944 it was open to the department to treat the assessee as a dealer in 1944 but not for any earlier year which was not the subject of the assessment proceedings Learned counsel states that if he is right in his first contention, then the profits made on the sale of shares in 1944 must be computed in the manner laid down in Commissioner of Income-tax v. Bai Shirinbai K. Kooka(1), (1) [1962] Supp, 3 S.C.R. 391.

because the assessee will be treated as a dealer for the first time in the relevant account year 1944. The argument appears plaussible at first sight and it may perhaps be conceded that the question of the computation of profits in a case like this is not entirely free from difficulty. However, on a very careful consideration of the argument we have come to the conclusion that it is not worthy of acceptance. As to the first aspect of the question we see no difficulty. The appellate Assistant Commissioner and the Tribunal have referred to various transactions relating to shares shown in the books of the assessee. From those transactions they came to the conclusion that the assessee was a dealer in 1943. The High Court has also summarised the various transactions in which the assessee indulged in the year 1943. Having regard to the frequency and nature of those transactions it was open to the taxing authorities to come to the conclusion that the assessee was a dealer in shares in 1943. We are not prepared to say that the rule of "no evidence" can be applied to the present case. We therefore consider that the High Court correctly answered the question relating to this aspect of

the case. Now, as to computation of profits. Though it is true that the question which directly arose before the taxing authorities in the present case was' whether the assessee was a dealer in 1944, the question of the position of the assessee in 1943 also arose in determining how the profits made in 1944 should be computed. It is not therefore quite correct to say that the position of the assessee in 1943 was completely outside the scope of the assessment proceedings of 1945-46. In determining or computing the profits made by the sale of shares in 1944, the assessing authorities had to go into the question-did the assessee start its trading activity on January 1, 1944 or did it start the trading activity at an earlier date ? If the assessee was a dealer when the shares sold in 1944 were originally purchased, then obviously the principle in Commissioner of Income-tax v. Bai Shirin Bai K. Kooka (1), will not apply and the profits will be the excess of the sale price over the original cost price. The extent to which a decision given by an Income- tax officer for one assessment year affects or binds a decision for another year has been considered by courts several times and speaking generally it may be stated that the doctrine of res judicata or estoppel by record does not apply to such decisions; in some cases it has been held that though the Income-tax officer is not bound by the rule of res judicata or estoppel by record, he can re-open a question previously decided only if fresh facts come to light or if the earlier decision was rendered without taking into consideration material evidence etc. As to the argument based on ss. 34 and 35, it is enough to point out that the assessment relating to the year 1943 is not being reopened. That assessment stands. What is being done is to compute the profits of 1944, which the assessing authorities could do, by finding out when the trading activity in shares began? The question of the profits in 1944 was not and could not be the subject of any assessment proceeding relating to 1943, for such profits arose only on the sale of the shares in 1944.

In Broken. Hill Proprietary Company v. Broken Hill Municipal Council (2), the question was one of the capital value of a mine for rating purposes. This question of valuation as between the parties was determined by the High Court of Australia in a previous year. But it was held that the decision did not operate as res judicata. The reason given was :

> "The decision of the High Court related to a valuation and a liability to a tax in a previous (1) [1962] Supp. 3 S.C.R. 391.
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> (2) [1926] A.C. 94.

year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question-namely, the valuation for a different year and the liability for that year. It is not eadem questio and therefore the principle of res judicata cannot apply."

In another decision reported in the same volume, Hoystead v. Commissioner of Taxation (1), one of the questions was whether certain beneficiaries under a will were joint owners. It was held that though in a previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was so fundamental to the decision then given that it estopped the Commissioner. The latter decision was distinguished in Society of Medical officers of Health v. Hope (2). Both the decisions were again considered by the judicial Committee in Caffoor v. Income Tax Commissioner (3). The decision in Broken Hill Proprietary Company's case (4), was approved and the principle laid down was that in

matters of recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with eadem questio as that which arises in respect of an assessment for another year and consequently not to set up an estoppel. As to the decision in Hoystead's case (1), it was stated :

> "Their Lordships are of opinion that it is im- possible for them to treat Hoystead's case as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the Broken Hill case ; and to follow it would involve preferring a decision, in which the particular point was either assumed without (1) [1926] A.C. 155.
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> (2) [1960] A.C. 551.
>
> (3) [1961] A.C 584.
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> (4) [1926] A.C, 94, argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined."

In Installment Supply (P) Ltd. v. Union of India (1) this court referred to the decisions just mentioned and said that it was well settled that in matters of taxation there would be no question of res judicata.

On the principle stated above, it seems to us that it was open to the taxing authorities to consider the position of the assessee in 1943 for the purposes of determining how the gains made in 1944. should be computed, even though the subject of the assessment proceedings was the computation of the profits made in 1944. The circumstance that in an earlier assessment relating to 1943 the assessee was treated as an investor would not in our opinion estop the assessing authorities from considering, for the purpose of computation of the profits of 1944, as to when the trading activity of the assessee in shares began. The assessing authorities found that it began in 1943. On that finding the profits were correctly computed and the answer given by the High Court to the question of the computation of the profits was correctly given.

For these reasons the appeal fails and is dismissed with costs.

(1) [1962] 2 S.C.R. 644