

T.D. Kumar And Brothers (P.) Ltd. vs Commissioner Of Income-Tax, Calcutta on 14 September, 1966

Equivalent citations: [1967]63ITR67(SC)

Author: J.C. Shah

Bench: J.C. Shah

JUDGMENT

Shah, J.

1. Messrs. T. D. Kumar & Bros. (Private) Ltd., hereinafter called "the company", was incorporated in 1923 under the Indian Companies Act, 1913. The paid up capital of the company was Rs. 1,02,000 representing 1,020 shares of Rs. 100 each. The entire share capital was held by three persons who may be called "Kumars". Between September 19 to November 14, 1952, the shareholding of Kumars was transferred to five persons who may be called "Ghoshes", and as a part of that scheme for transfer of the shares, investments of the company of the value of Rs. 1,01,000 odd were transferred to Kumars and the company purchased 400 shares of Messrs. East India Housing and Land Development Trust Ltd., hereinafter called "the Trust", held by two out of the five Ghoshes at the rate of Rs. 257-4-0 per share. The company sold the shares of the trust to Messrs. Chandoo Lall, a registered sharebroker, at the rate of Rs. 60 per share, and the latter in their turn sold the shares to Bijan Mohan Kundu at the rate of Rs. 61 per share.

2. In proceedings for assessment for the assessment year 1953-54 the company claimed that it suffered a total loss of Rs. 76,241 in the transactions of purchase and sale of shares. The Income-tax Officer disallowed the claim and the order was confirmed by the Appellate Assistant Commissioner. In appeal, the Income-tax Appellate Tribunal held that the transaction of purchase and sale of the shares of the trust was not a part of the company's business and on that account must be regarded as a loss in the nature of capital and cannot be set off against the company's profits. The Tribunal at the same time observed that they did not propose to express any opinion on the genuineness or otherwise of the transaction relating to the purchase and sale of the shares of the Trust.

3. During the pendency of proceeding for assessment of income, the Income-tax Officer, Companies District IV, Calcutta, initiated proceedings under section 28(1)(c) of the Indian Income-tax Act, 1922, and passed an order on September 29, 1955, imposing upon the company a penalty of Rs. 42,000. In the view of the Income-tax Officer there was "overwhelming proof that the company had neither purchased nor sold the shares of the trust." The Appellate Assistant Commissioner in appeal confirmed the order imposing penalty. The Tribunal in second appeal held on review of the evidence that the company had failed to substantiate their claim that any sale of the shares of the trust had at

all been effected. There was, in the view of Tribunal, deliberate fabrication of accounts in recording the sales and that, in the circumstances of the case, "imposition of penalty under section 28(1)(c) was undeniably called for." The Tribunal, However, reduced the penalty to Rs. 25,000. The company then applied that a statement of the case be drawn up and the following question be referred under section 66(1) of the Income-tax Act, 1922 to the High Court of Calcutta as arising out of the order of the Tribunal :

"(1) Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal had evidence or material for the finding that there was deliberate fabrication of the accounts by the assessee- company in order to claim the loss in the return and the imposition of penalty upon the company in order to claim the loss in the return and the imposition of penalty upon the company under section 28(1)(c) of the Act is proper and valid ?

(2) Whether in view of the finding of the Tribunal, in the appeal against the assessment, that the transaction was not a trading transaction of the company, the company could be made liable for penalty under section 28(1)(c) of the Act ?"

4. The Tribunal rejected the application. They observed that in the proceedings for imposition of penalty they had to consider whether the company had concealed inaccurate particulars of such income so as to attract liability to pay penalty provided for in section 28(1)(c) of the Income-tax Act, and that no question of law arose out of their order.

5. A petition under section 66(2) of the Income-tax Act, 1922, was lodged by the company before the High Court of Judicature at Calcutta. It was argued in that proceeding that, even if the facts found by the Tribunal be correct, section 28(1)(c) of the Indian Income-tax Act, 1922, was not attracted regard being had to "the proper meaning of the word 'income ' in that sub-clause." The High Court rejected the application observing that the question sought to be raised before them did not arise out of the order of the Tribunal, and even if it arose on the finding given by the Tribunal, the judgment of this court in Commissioner of Income-tax v. Scindia steam Navigation Co. Ltd. precluded the Court from calling for a statement of the case on the questions suggested. With special leave granted by this court, the company has appealed to this court.

6. Counsel for the company concedes that the first question submitted in the applications to the Tribunal and the High Court was one of fact and the High Court could not call upon the Tribunal under section 66(2) of the Income-tax Act to state a case and refer that question. Counsel, however, submitted that the second question arose out of the order of the Tribunal and raised a substantial question of law. The question suggested in the petition under section 66(2) before the High Court was that since the Tribunal had in an appeal against the order of assessment come to the conclusion that the transaction relating to the purchase and sale of the trust shares was a genuine transaction, but it was not a part of its trading activity, an order under section of the Indian Income-tax Act could not be made by the Income-tax Officer. The question sought to be argued before the High Court was somewhat different. The company apparently did not press the question set out in the petition, but submitted before the High Court that the loss alleged to have been suffered in respect

of the transaction of sale of shares of the trust is not "income" within the meaning of section 28(1)(c) of the Income-tax Act. But the Tribunal was never asked to refer that question to the High Court : nor was the High Court requested to call upon the Tribunal to state a case on that ground alone the argument raised by the company was liable to be rejected.

7. Again it is clear that the question whether having regard to the decision of the Tribunal in the assessment proceedings an order imposing penalty under section 28(1)(c) of the Act could be made was never raised or argued before the Tribunal, and the Tribunal did not decide that question. The only contention raised before the Tribunal was that the transaction of sale and purchase in the shares of trust being genuine, no case under section 28(1)(c) of the Indian Income-tax Act was made out. This court has in *Scindia Steam Navigation Company's* case held that "it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order." In respect of the question of the which was not raised before the Tribunal, argued or decided by the Tribunal, a reference under section 66(2) of the Indian Income-tax Act could not be asked for.

8. Counsel submitted that in *Scindia Steam Navigation Company's* case this court held that the question whether an amendment in the Income-tax Act was in force in the year of assessment with which the case of the assessment with which the case of the assessee company was concerned, was allowed to be raised before the Bombay High Court even though that question was not raised or argued before the Tribunal, and this court approved of the High Court that the question could be raised and decided by the High Court. But in *Scindia Steam Navigation Company's* case the question framed was as to the liability of sum of money to be assessed to tax as income received by the assessee in the assessment year. The question was couched in general terms, and it was held by this court that the Tribunal having decided the question against him, the assessee applied for reference of that very question. This court observed that if the question itself was in issue before the Tribunal, there is no further limitation that the reference must be limited to aspects of the question which had been argued before the Tribunal.

9. The question on which a reference to the High Court was sought was a limited question and the Tribunal declined to refer the question because it did not arise out of its order, the question not having been raised before or decided by the Tribunal. The question sought to be raised before the High Court in reference under section 66(2) was not an aspect of a question raised before the Tribunal. The High Court was, therefore, right in rejecting the prayer for an order under section 66(2) of the Act.

10. The appeal therefore fails and is dismissed with costs.

11. Appeal dismissed.