

PETITIONER:
DALHOUSIE INVESTMENT TRUST COMPANY LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME-TAX (CENTRAL), CALCUTTA

DATE OF JUDGMENT:
22/11/1967

BENCH:
BHARGAVA, VISHISHTHA
BENCH:
BHARGAVA, VISHISHTHA
SHAH, J.C.
RAMASWAMI, V.

CITATION:
1968 AIR 761 1968 SCR (2) 353
CITATOR INFO :
RF 1986 SC1695 (33)

ACT:
Indian Income-tax Act, 1922 (11 of 1922), s. 2(4) Purchase and sale of share when amounts to adventure in the nature of Trade--Previous findings of Tribunal whether binding in subsequent assessment years.

HEADNOTE:

The principal activity of the assessee was investment of its capitals in shares and stocks. It changed its investments by sale of its shares and stocks from time to time. The assessee's income was primarily derived from dividends on shares and interest derived by it on the investments. The assessee purchased the shares of a company when their prices were falling by taking loan at interest and the return on investment was not at all substantial. The assessee's explanation that the shares were, in fact, being held as investment and were sold simply because the control of the company went out of the hands of the Directors of the assessee. was not accepted by the Tribunal.

HELD: The income derived by the assessee. from the sale of these shares was revenue receipt and as such taxable under the, Income-tax Act.

From the evidence about the course of dealings and conduct of the assessee the conclusion followed that the purchases of the shares were not for the purpose of keeping controlling interest in that company, or for investment, but shares were being purchased and sold for earning profit, so that the transactions were an adventure in the nature of trade in these shares. [359 A--B]

The acceptance by the Revenue, in the earlier years, that the acquisitions and sales of shares were in the nature of investments, was not binding in the proceeding for assessment during subsequent years. [356 B C]

Bengal and Assam Investors Ltd. v. Commissioner of income-tax, West Bengal, 59' LT.R. 547 and Commissioner of Income-tax v. Bai Shrinbai K. Kooka, 46 I.T.R. 86, referred to.

Ram Narain Sons (P) Ltd. v. Commissioner of Income-tax, Bombay. 41 I.T.R. 534, held inapplicable.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 581 to 584 of 1966.

Appeals by special leave from the judgment and order dated March 26, 1964 of the Calcutta High Court in Income-tax Reference No. 6 of 1961.

4. K. Sen, Bishan Narain, R.K. Chaudhuri and B.P. Maheshwari, for the appellant (in all the appeals).

Niren De, Solicitor-General, T.A. Ramachandran, R. N. Sachthey and S.P. Nayar, for the respondent (in all the appeals)

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The Judgment of the Court was delivered by Bhargava, J. These appeals came up before this Court on the 17th April, 1967, when an order of remand was made by this Court, asking the Income-tax Appellate Tribunal to submit a further statement of the case. The question that has come up for consideration is :--

"Whether on the facts and circumstances of the case, the surplus derived by the assessee in the sale of its shares and securities in the relevant previous years was a revenue receipt and as such taxable under the Income Tax Act."

The facts and circumstances under which the question was referred by the Tribunal for the opinion of the High Court are mentioned in that order of remand and need not be repeated.

In the order of remand, it was pointed out that it was not possible to find out from the statement of the case whether the Tribunal accepted the explanation of the assessee that, in the previous year relevant to the assessment year 1953-54, the control of McLeod & Co. Ltd. went out of the hands of the Directors of the assessee and it was for this reason that the assessee sold the shares of McLeod & Co. It was also pointed out further that the Tribunal had not stated what was the object of the assessee in buying 6,900 ordinary shares of McLeod & Co. It appeared from the order of the Income-tax Officer that these shares were purchased in a number of lots from the year 1948 to 1950, and it was also not stated as to what was the object in buying other securities, and why did the assessee confine its activities mostly to the shares of McLeod & Co. Ltd. and the companies managed by McLeod & Co. Ltd. It was in the light of these omissions that the Tribunal was asked to send a supplementary statement. That supplementary statement has now been received and the answer to the question has to be given on the basis of the facts contained in the original statement of the case as well as this supplementary statement.

The relevant facts which emerge out of these statements of the case are that the principal activity of the assessee was investment of its capital in shares and stocks. It changed its investments by sale of its shares and stocks from time to time. The income of the Company was primarily derived from dividends on shares and interest received by it on the investments. These activities were covered by Clauses (1), (3) and (4) of the Memorandum of Association. The activity mentioned as the object in Clause (2) is:

"to acquire, hold, sell and transfer shares, stocks, Debentures, 'Debenture Stocks, Bond, obligations and

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securities issued or guaranteed by any company constituted or carrying on business in British India and in the United Kingdom or in any colony, or dependency or possession thereof or in any foreign country and Debenture Stocks, Bonds, obligations and securities, issued or guaranteed by any Government, Sovereign, Ruler, Commissioners, public body or authority supreme, Municipal' Local or otherwise whether at home or abroad."

In the supplementary statement, the Tribunal has recorded the finding that, in its opinion, the purchases and sales of the shares in question were in pursuit of this clause (2) in the Memorandum of Association. The Tribunal has further stated that the assessee had not placed any evidence as to the object behind the acquisition of the shares of McLeod & Co. Ltd and the shares of companies managed by McLeod & Co. Ltd., nor had the Income-tax Officer ascertained the object behind such acquisitions. The Tribunal was also unable to find out why the assessee had more or less confined its activities mostly to the shares of McLeod & Co.. Ltd. and the companies managed by McLeod & Co. Ltd. The facts proved showed that, in the account year relevant to the assessment year in question, 21,046 shares were held by the Kanoria group, including 6,977 shares in McLeod & Co. Ltd. held by the assessee. Mr. C.L. Kanoria resigned his office as Director of McLeod & Co. Ltd. on 17th March, 1952, and the approval of the Government to his resignation was given by the Central Government on 16th October, 1952. Thereafter, Sri C.L. Bajoria joined the Directorate of McLeod & Co. Ltd. 6,900 shares. were sold by the assessee to Sri C.L. Bajoria or his nominees on 27th May, 1952, at a time when Sri C.L. Kanoria had already sent in his resignation from the office of Director, but the resignation had not yet been accepted by the Government. It has also, been found that Sri C.L. Bajoria acquired 12,440 shares in all. including 6,900 shares purchased from the assessee; but there was no material on the record to prove that his group obtained a controlling interest in McLeod & Co. Ltd. as a result of acquisition of these shares. As a fact, it was held that after the resignation of Sri C.L. Kanoria, Messrs C.L. Bajoria and Baijnath Jalan, both ; of M/s. Soorajmull Nagarmull, became Directors of McLeod & Co. Ltd. These are the principal facts on the basis of which it has to be determined whether the sale of these shares by the assessee resulted in a revenue receipt or in a capital gain.

It appears to us that the facts and circumstances in this case can lead to. no other conclusion, except that these shares were purchased and sold by the assessee with the motive of earning a profit by such purchases and sales and not with the object of investing its capital in these shares in order to derive

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income from that investment. It is true that the principal business of the assessee was to invest capital and to derive income from dividends on shares and interest on other investments; but at the same time, the object contained in the Memorandum of Association of the assessee Company clearly showed that one of the objects was also to deal in shares, stocks, debentures, etc., by acquiring, holding, selling and transferring them. In the years prior to the assessment year, the case put forward by the assessee that the various acquisitions and sales of shares were in the nature of investments was accepted by The Department but

such a decision given in the earlier years is not binding in the proceedings for assessment during subsequent years. The particular shares no, in question. it appears, were purchased between 31st March, 1948 and 31st March, 1952. The earliest purchases in March, 1948 were at an average price of Rs. 267-13-0 per share. In the next two years ended 31st March, 1949 and 31st March, 1950, the average purchase price was Rs. 201-8-0 and Rs. 182-10-0, and the last purchase in the year ended 31st March, 1952 was at the rate of Rs. 128-14-0. On 1st April, 1952, the assessee's total holding of shares in McLeod & Co. Ltd. was 6,977 at a total cost of Rs. 4,29,587-4-0 out of the total holding of shares, including shares in other companies, of the value of Rs. 17,58,741-4-0. Thus, on that date, the holdings in McLeod & Co. Ltd. formed the major part of the share holdings of the assessee. It is significant that the shares were purchased during a period when their market price was continuously falling. The earliest purchases in the year ended 31st March, 1948 were at an average price Rs. 267-13-0, while in the last of these three years ended 31st March 1952, the average price was Rs. 128-14-0. The largest block of 4,757 shares was purchased in the year ended 31st March, 1950, when the average price was Rs. 182-10-0. The assessment order of the Income-tax Officer also shows that the shares were not only purchased in a rapidly falling market, but, in order to make these purchases the assessee had taken loans amounting to about Rs. 8 lacs at interest varying from 31/2% to 5%. The dividend being declared was at a very low rate, so that the return on this investment, after taking into account the interest paid and super-tax to be paid, came to a very small percentage, being less than 1%. This circumstance that the shares were purchased at a time when their prices were falling and the return on investments was not at all substantial while loans had been taken to purchase these shares strongly points to a conclusion that the shares could not have been purchased as an investment to earn income from dividends and that the purchases of these shares were with the object of selling them subsequently at a profit. The shares were in fact, sold at considerable profit subsequently and that is how the question of charging that profit to tax as revenue receipt has arisen. The explanation sought to be given by the

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assessee that the shares were, in fact, being held as investment and were sold simply because the control of McLeod & Co. Ltd. went out of the hands of the Directors of the assessee has not been proved, according to the supplementary statement of the case submitted by the Tribunal. In fact, the Tribunal was not satisfied that even the purchasers, viz., the Bajoria group on buying these shares from the assessee acquired a controlling interest in McLeod & Co. Ltd. or in the companies managed by that Company. The object of the sale as given by the assessee has therefore, remained unproved, whereas the fact that the purchases of the shares were made at a time when they were not expected to give a good return as investment and were actually sold at a very good profit leads to the reverse inference that the purchases and sales of these shares were an adventure in the nature of trade. Even the sequence of events does not bear out the contention of the assessee. Sri C.L. Kanoria first resigned on 17th March, 1952 and he sold his shares while his resignation was still pending for approval by the Government. The sale took place on 27th May 1952, at a time when the resignation not having received the approval of the Government, the control of McLeod & Co.

Ltd. group of companies was still with the Kanoria group. The resignation was accepted on 16th October, 1952, about five months after the sale of the shares. There is no evidence to show that, as a result of this sale, the control in the McLeod & Co. group of companies passed to the Bajoria group though M/s. C.L. Bajoria and Baijnath Jalan did subsequently join the Directorate of McLeod & Co. Ltd. On these facts, it is not possible to hold that the Tribunal was incorrect in recording its conclusion that the sale of these shares by the assessee was not the result of control of the McLeod & Co. Ltd. passing from the hands of Kanoria group to the Bajoria group. In fact the Kanoria group was holding a majority 21,046 shares out of 40,000 shares in McLeod & Co. Ltd. even at the time when these shares were sold on 27th May, 1952. The assessee thus having failed to prove the object of the sale of these shares, the inference that the shares were sold with the sole object of earning profit is justified.

This conclusion is further strengthened by the conduct of the assessee as found by the Tribunal in subsequent years. In the year ended 31st March, 1955, the assessee again purchased a large number of shares of McLeod & Co. Ltd. These purchases were made between 23rd August, 1954 and 29th September, 1954. The first purchases were made at a rate of Rs. 150/- per share. and the purchases were continued even in the month of September when the rate rose to nearly Rs. 250/- per share. This purchase of shares of McLeod & Co. Ltd. in the account year 1954-55. when there was a rising market and when the control was no longer with the Kanoria group and having already passed to the

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Bajoria group, clearly shows that the Tribunal was not wrong in inferring that the purchases of shares of McLeod & Co. Ltd. were not for the purpose of keeping controlling interest in that Company or for investment, but that the shares were being purchased and sold for earning profit, so that the transactions were an adventure in the nature of trade in these shares of McLeod & Co. Ltd.

In this connection, Mr. A.K. Sen, learned counsel for the appellant drew our attention to the following view expressed in the remand order :--

"We are unable to answer the question referred because the mere fact that an investment company periodically varies its investments does not necessarily mean that the profits resulting from such variation is taxable under the Income-tax Act. Variation of its investments must amount to dealing in investments before such profits can be taxed as income under the Income-tax Act."

Reliance was also placed on the observations of this Court in *Bengal and Assam Investors Ltd. v. Commissioner of Income-tax, West Bengal*(1), which were quoted in the remand order and are as follows :--

"It seems to us that, on principle before dividends on shares can be assessed under section 10, the assessee, be it an individual or a company or any other entity, must carry on business in respect of shares; that is to say, the assessee must deal in those shares. It is evident that if an individual person invests in shares for the purpose of earning dividend, he is not carrying on a business. The only way he can come under section 10 is by converting the shares into stock-in-trade,

i.e., by carrying on the business of dealing in stocks and shares as did the assessee in Commissioner of Income Tax v. Bai Shirinbai K. Kooka(2)''.

It was urged that, in this case, the Tribunal has recorded no finding at all that the shares in McLeod & Co. Ltd. which were sold by the assessee were converted by it into stock-in-trade, nor has it been held that the variation of its investments by the assessee amounted to dealings in investments. The facts that we found above show that, so far as the shares of McLeod & Co. Ltd. and the allied companies which were sold by the assessee and the income from which has been taxed as revenue income are concerned, the assessee, in fact, dealt with them as stock-in-trade. It (1) 59 I.T.R. 547. (2) 46 I.T.R. 86.

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is true that in the account books they were never shown as such; but we have indicated how the evidence and the material in this case lead to the conclusion that the shares were in fact purchased even initially not as investments, but for the purpose of sale at profit and that they were actually sold with the purpose of earning profit, so that the transactions amounted to an adventure in the nature of trade.

Learned counsel also referred to the decision of this Court in Ram Narain Sons (Pr.) Ltd. v Commissioner of Income-tax, Bombay(1) to urge that the principal consideration in determining whether income from sale of shares is revenue income or capital gain, is to find out what was the purpose of purchase of those shares, and, if the purpose was investment, the fact that in varying the investment, the sale of those shares resulted in a profit will not make that profit revenue income. The principle is perfectly correct, but is not applicable to the case before us on the finding mentioned by us above that even the initial purchase of these shares by the assessee was not for the purpose of investment for earning income from dividends, but was with a view to earn profit by resale of those shares.

In these circumstances we hold that the High Court was right in arriving at the conclusion that, on the facts and circumstances of the present case, the income derived by the assessee from the sale of its shares and securities in the relevant previous years was revenue receipt and as such taxable under the Income-tax Act. The appeals fail and are dismissed with costs. One hearing fee.

Y.P. Appeals dismissed.

(1) 41 I.T.R. 534.

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