

RAJA BAHADUR VISHESHWARA SINGH
AND OTHERS.

1960

December 15.

v.

COMMISSIONER OF INCOME-TAX, BIHAR
AND ORISSA

(J. L. KAPUR, M. HIDAYATULLAH and J. C. SHAH, JJ.)

Income Tax—Purchase and sale of shares and securities with surplus money—Such transactions, if amount to investment or business in shares—Test—Excess sale proceeds—If amount to business profit or mere accretion to capital—Indian Income-tax Act, 1922 (11 of 1922), s. 66(2).

The appellant used to invest his cash surplus in shares and securities and maintained an account book called Book No. 1 relating thereto. During the period from 1930 to 1941-42 he purchased a large number of shares and securities which by the accounting year 1941-42 were of a value Rs. 14'91 lacs. He sold certain shares and securities of the value of several lacs and made certain amount of profit on those sales. In 1940 the appellant borrowed a large amount of money from his brother, the Maharaja of Darbhanga and opened a new account named account No. 2 which contained all entries regarding shares purchased and sold out of the money borrowed from the Maharaja. In the assessment year 1944-45 to 1948-49 the profits made by the

1960

—
*Raja Bahadur
 Visheshwara Singh
 & Another*
 v.
*Commissioner of
 Income-tax, Bihar
 & Orissa*

appellant from purchase and sale of shares amounted to several lacs and the Income-tax Officer held those to be liable to income-tax as business profits. The Appellate Assistant Commissioner upheld the assessments but excluded the profits for the years 1944-45. On appeal by both the parties the Appellate Tribunal held on the evidence that the appellant was to be regarded as a dealer in shares and securities and therefore the profits were assessable to income-tax. The High Court stated the following two questions under s. 66(2) of the Income-tax Act and answered them in the affirmative:—

“(1) Whether in the circumstances of the case, there is material to support the finding of the Appellate Tribunal that the assessee was a dealer in shares and securities with respect to each of the account and, therefore, liable to be taxed?

(2) Whether having regard to the finding of the Appellate Tribunal in respect of 1941-42 assessment, it was open to the Appellate Tribunal in the present case to hold that the profits and transactions of sale and purchase of shares and securities amounted to profits of business and so liable to be taxed?”

On appeal by special leave the appellant contended *inter alia*, that being a Zamindar the buying and selling of shares was not his normal activity and he did not carry on any such business but his purchases and sales were in the nature of investments of his surplus monies and therefore the excess amounts received by sales were capital receipts being merely surplus and not profits.

Held, that on the materials produced and on the facts proved the appellant must be held to have been rightly assessed. The principle applicable to such transactions is that when an owner of an ordinary investment chooses to realise it and obtains a higher price for it than the original price paid by him, the enhanced price is not a profit assessable to income tax, but where as in the present case what is done is not merely a realisation or a change of investment but an act done in what is truly the carrying on of a business the amount recovered as appreciation will be assessable.

G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax, [1959] Supp. 1 S.C.R. 464, *Oriental Investment Company Ltd. v. The Commissioner of Income-tax*, [1958] S.C.R. 49, *Raja Bahadur Kamakshya Narain Singh v. Commissioner of Income-tax, Bihar and Orissa*, (1943) L.R. 70 I.A. 180, discussed.

The substantial nature of the transactions, the manner in which the books were maintained, the magnitude of the shares purchased and sold and the ratio between the purchases and sales and the holding justified the Tribunal to come to the conclusion that the appellant was dealing in shares as business. The High Court could not interfere with those findings and it rightly answered the questions in the affirmative.

There is no such thing as *res judicata* in income-tax matters

and it was quite open to the Appellate Tribunal to give the finding that it did.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 137 to 141 of 1958.

Appeals by special leave from the judgment and order dated April 26, 1956 of the Patna High Court in Misc. Judicial Cases Nos. 362 to 366 of 1955.

A. V. Viswanatha Sastri, S. K. Majumdar and I. N. Shroff, for the appellants Nos. 2 to 4 (In all the appeals).

Hardayal Hardy and D. Gupta, for the respondent (In all the appeals).

1960. December 15. The Judgment of the Court was delivered by

KAPUR, J.—The assessee who is the appellant has brought these five appeals against the judgment and order of the High Court of Patna by which it answered the two questions stated under s. 66(2) of the Indian Income-tax Act against the appellant and in favour of the Commissioner of Income-tax.

The appellant is the son of the late Maharajadhiraja of Darbhanga and the brother of the present Maharaja. The father died in 1929 and the appellant was given by way of maintenance the Estate of Rajnagar. He was also given a yearly allowance of Rs. 30,000 which was later raised to Rs. 48,000. From 1929, the appellant invested his cash surplus in shares and securities, the account of which was entered in what is called Account Book No. 1. From the year 1930 onwards up to the year 1941-42 the appellant purchased a large number of shares and securities which by the accounting year 1941-42 were of the value of Rs. 14.91 lacs. During this period the appellant sold shares and securities in the accounting years 1936-37 and 1939-40 of the value of 1.48 lacs and 1.69 lacs respectively. He made certain amount of profits on these sales but under orders of the Commissioner of Income-tax in the former case and of the Income-tax Tribunal in the latter case, these sums were not assessed to income-tax. In the

1960

*Raja Bahadur
Visheshwara Singh
& Others
v.
Commissioner of
Income-tax,
Bihar & Orissa*

Kapur J.

1960

Raja Bahadur
Visheshwara Singh
& Others

accounting years 1942-43 to 1946-47 the appellant purchased and sold some shares and securities. The entries in Account No. 1 stood as follows:—

v. Commissioner of Income-tax, Bihar & Orissa	Year	Total value of shares & securities at cost at the beginning of the year.		Total cost of shares and securities pur- chased during the year.		Total cost of shares and securities sold during the year.	
Kapur J.	<u>1350</u> Fs. 1942-43	Rs. 14'66 lacs		Nil		Rs. 4'68 lacs (13 items)	
	<u>1351</u> Fs. 1943-44	Rs. 9'98 lacs		Rs. 2'37 lacs. (4 items)		Rs. 4'16 lacs (12 items)	
	<u>1352</u> Fs. 1944-45	Rs. 8'20 lacs		Rs. 3'05 lacs. (2 items) and other call money.		Rs. 0'69 lacs (3 items)	
	<u>1353</u> Fs. 1945-46	Rs. 10'52 lacs		Nil		Rs. 1'03 lacs (3 items)	
	<u>1354</u> Fs. 1946-47	Rs. 9'50 lacs		Rs. 15'83 lacs. (9 items)		Rs. 3'39 lacs (2 items)	

and in all these years the appellant made profits which varied from Rs. 2,56,959 in the accounting year 1942-43 to Rs. 33,174 in the accounting year 1946-47.

On July 16, 1940, the appellant arranged an overdraft with the Mercantile Bank of India and actually withdrew Rs. 10,000 for the purchase of shares. But his brother the Maharaja advanced to him without interest Rs. 10 lacs and thus the overdraft was paid off. A new Account was opened in the books of the appellant named No. 2 Investment Account which contained all entries in regard to shares purchased and sold from out of the money borrowed from the Maharajadhiraj. In this account entries of the different years were as follows:—

Year.	Total value of shares & securities at cost at the beginning of the year.	Total cost of shares and securities purchased during the year.	Total cost of shares and securities sold during the year.	1960 — <i>Raja Bahadur Visheshwara Singh & Others</i> v. <i>Commissioner of Income-tax, Bihar & Orissa</i> — <i>Kapur J.</i>
<u>1347 Fs.</u> 1939-40	Nil	Rs. 6'05 lacs (8 items)	Nil	
<u>1348 Fs.</u> 1940-41	Rs. 6'05 lacs	Rs. 6'21 lacs (32 items)	Rs. 1'78 lacs (1 item)	
<u>1349 Fs.</u> 1941-42	Rs. 10'47 lacs	Nil	Nil	
<u>1350 Fs.</u> 1942-43	Rs. 10'55 lacs	Rs. 0'24 lacs (1 item) (Darbhanga Sugar)	Rs. 3'60 lacs (2 items)	Under Ap- peal.
<u>1351 Fs.</u> 1943-44	Rs. 7'80 lacs	Rs. 2'29 lacs (1 item) (Darbhanga Sugar)	Rs. 3'60 lacs (9 items)	
<u>1352 Fs.</u> 1944-45	Rs. 6'49 lacs	Nil	Rs. 1'25 lacs (3 items)	
<u>1353 Fs.</u> 1945-46	Rs. 5'23 lacs	Rs. 9'65 lacs (1 item) (Port Trust Deb.)	Rs. 0'30 lacs (1 item)	
<u>1354 Fs.</u> 1946-47	Rs. 14'60 lacs	Rs. 11'04 lacs (5 items)	Rs. 9'65 lacs (1 item) (Port Trust Deb.)	

The High Court divided the transactions of the appellant into three periods, i.e., assessment years 1930-31 to 1940-41, 1941-42 to 1943-44 and 1944-45 to 1948-49. In the first period as the statement of account shows two sales were effected in which there was a profit which the appellant claimed as appreciation of capital. Both those sums were held by the Income-tax authorities in the one case and the Income-tax Appellate Tribunal in the other to be exempt from assessment as being conversion of investments. Similarly during the second period also the sum of Rs. 39,325 for the assessment year 1942-43

1960
 —
Raja Bahadur
Visheshwara Singh
& Others
 v.
Commissioner of
Income-tax,
Bihar & Orissa
 —
Kapur J.

was held not to be taxable. Thus in the second period the assessee was held not to be carrying on any trade. In the third period, i.e., the assessment years 1944-45 to 1948-49 the profits made by the appellant from purchase and sale of shares were as follows:—

1944-45	.....	.....	Rs. 2,62,000 and odd
1945-46	.....	.....	Rs. 3,95,000 and odd
1946-47	.....	.....	Rs. 1,57,000 and odd
1947-48	.....	.....	Rs. 1,33,000 and odd
1948-49	.....	.....	Rs. 76,000 and odd

The Income-Tax Officer held these to be liable to income-tax as business profits. On appeal the Appellate Assistant Commissioner excluded the profits for the years 1944-45 and 1945-46 but for the years 1946-47 to 1948-49 the assessments were upheld. Both parties appealed to the Appellate Tribunal. It held on the evidence that the appellant was to be regarded as a dealer in shares and securities and therefore the profits were assessable to income-tax. The appellant applied for a case to be stated under s.66(1) of the Income-tax Act. This application was dismissed but the High Court made an order under s. 66(2) of the Income-tax Act to state a case on two questions of law. The questions were as follows:

(1) Whether in the circumstances of the case, there is material to support the finding of the Appellate Tribunal that the assessee was a dealer in shares and securities with respect to each of the accounts and, therefore, liable to be taxed?

(2) Whether, having regard to the findings of the Appellate Tribunal in respect of 1941/42 assessment, it was open to the Appellate Tribunal in the present case to hold that the profits and the transactions of sale and purchase of shares and securities amounted to profits of business and so liable to be taxed?

The High Court held that the facts and circumstances which the Tribunal took into consideration in arriving at the finding were the material before the Tribunal to support the finding and the first question

was answered in the affirmative and therefore against the appellant. In regard to the second question the answer was again in the affirmative and against the appellant who has come to this Court by special leave.

It was argued on behalf of the appellant that he was not carrying on the business of buying and selling shares but his purchases and sales were in the nature of investments of his surplus monies and therefore the excess amounts received by sales were capital receipts being merely surplus and not profits. It was also submitted that the appellant being a zamindar the buying and selling of shares was not his normal activity; that he had a large income and it was his surplus income which he was investing in buying the shares and whenever he found it profitable he converted his holdings and securities and for a number of years from 1931-32 he had been buying shares but he did not sell them; that the very nature of investments was such that they had to be constantly changed so that the monies invested may be used to the best advantage of the investor; and that the sales were really for the purpose of re-employing the monies that he had invested to his best advantage.

Counsel for the appellant relied upon certain cases in support of his submission that the first question raised was of a wider amplitude and that it had been erroneously restricted by the High Court and that its true import was the same as of the questions which were raised in the following cases decided by this Court. He relied on *G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax* ⁽¹⁾, *Oriental Investment Co., Ltd. v. The Commissioner of Income-tax, Bombay* ⁽²⁾. In the former case the assessee purchased four plots of land adjacent to the mills of which he was the Managing Agent. On various dates and about five years later sold them to the mills in which he realized about Rs. 43,000 in excess of his purchase price. This was treated by the Income-tax authorities as purchase with a view to sell at a profit. The question referred was whether there was material for the

1960

Raja Bahadur
Visheshwara Singh
& Others

v.

Commissioner of
Income-tax,
Bihar & Orissa

Kapur J.

(1) [1959] Supp. 1 S.C.R. 646.

(2) [1958] S.C.R. 49.

1960

Raja Bahadur
Visheshwara Singh
& Others

v.

Commissioner of
Income-tax,
Bihar & Orissa

Kapur J.

assessment of that amount as income arising from an adventure in the nature of trade. The High Court held that that was the nature of the transaction. On appeal this Court held that before the Tribunal could come to the conclusion that it was an adventure in the nature of trade, it had to take into consideration the legal requirements associated with the concept of the trade or business and that such a question was a mixed question of law and fact. It was also held that where a person invests money in land intending to hold it and then sells it at a profit it is a case of capital accretion and not profit derived from an adventure, in the nature of trade but if a purchase is made solely and exclusively with the intention to resell it at profit and the purchaser never had any intention to hold the property for himself there would be a strong presumption that the transaction is in the nature of trade but that was also a rebuttable presumption. The purchase in the absence of any rebutting evidence was held to fall in the latter category, i.e., adventure in the nature of trade. In the *Oriental Investment case* ⁽¹⁾ the assessee was an investment company. It had purchased certain shares and sold them and qua those shares it claimed to be treated as an investor and not a dealer on the ground that it did not carry on any business in the purchase and sale of shares. The assessee's applications for reference to the High Court were rejected on the ground that no question of law arose out of the order of the Tribunal. It was held that the question whether the assessee's business amounted to dealing in shares and in properties or was merely an investment was a mixed question of law and fact and the legal effect of the facts found was a question of law and this Court ordered the case to be stated on two questions that it framed. One of the questions was similar to the first question in the present case but the second question was a wider one, i.e., whether the profits and losses arising from the sale of shares etc. could be taxed as business profits.

The question which the High Court had to answer

in the present case was a narrow one and the answer to that on the material before the Court was rightly given in the affirmative. But even if the question is taken to be wider in amplitude, on the materials produced and on the facts proved the appellant must be held to have been rightly assessed. Counsel for the appellant argued that the amounts received by him in the accounting years were in the nature of capital accretions and therefore not assessable. In support, Counsel for the appellant relied on the following cases:—*Raja Bahadur Kamakshya Narain Singh v. The Commissioner of Income-Tax, Bihar & Orissa* ⁽¹⁾ where Lord Wright observed that profits realised by the sale of shares may be capital if the seller is an ordinary investor changing his securities but in some instances it may be income if the seller of the shares is an investment company or an insurance company. The other cases relied upon were *Californian Copper Syndicate Limited v. Harris* ⁽²⁾; *Cooper v. Stubbs* ⁽³⁾; *Leeming v. Jones* ⁽⁴⁾ and *Edwards v. Bairstow & Harrison* ⁽⁵⁾. It is not necessary to discuss these cases because the principle applicable to such transactions is that when an owner of an ordinary investment chooses to realise it and obtains a higher price for it than he originally acquired it at, the enhanced price is not a profit assessable to income tax but where as in the present case what is done is not merely a realisation or a change of investment but an act done in what is truly the carrying on of a business the amount recovered as appreciation will be assessable.

In July 1948 the appellant had borrowed, though without interest, a large sum of money to the extent of about Rs. 10,00,000, no doubt from his brother. He started a new account calling it No. 2 Investment Account. For the assessment years under appeal shares purchased and sold were of a large magnitude ranging from Rs. 4.68 lacs to Rs. 69 thousands in what is called the first account and from Rs. 9,64,000 or even if Port Trust Debentures are excluded

1960
—
Raja Bahadur
Visheshwara Singh
& Others
v.
Commissioner of
Income-tax,
Bihar & Orissa
—
Kapur J.

(1) [1943] L.R. 70 I.A. 180, 194.

(2) [1904] 5 T.C. 159.

(3) [1925] 10 T.C. 29, 57.

(4) [1930] 15 T.C. 333

(5) [1955] 36 T.C. 207.

1960

Raja Bahadur
Visheshwara Singh
& Others

v.

Commissioner of
Income-tax,
Bihar & Orissa

Kapur J.

Rs. 3,60,000 to Rs. 30,000. The magnitude and the frequency and the ratio of sales to purchases and total holdings was evidence from which the Income-tax Appellate Tribunal could come to the conclusion as to the true nature of the activities of the appellant. The principle which is applicable to the present case is what we have said above and on the evidence which was before the Tribunal, i.e., the substantial nature of the transactions, the manner in which the books had been maintained, the magnitude of the shares purchased and sold and the ratio between the purchases and sales and the holdings, if on this material the Tribunal came to the conclusion that there was material to support the finding that the appellant was dealing in shares as a business, it could not be interfered with by the High Court and in our opinion it rightly answered the question against the appellant in the affirmative.

The second question is wholly unsubstantial. There is no such thing as *res judicata* in income-tax matters. The Appellate Tribunal has placed in a tabulated form the activities of the appellant showing the buying and selling and the magnitude of holdings and it cannot be said therefore that it was not open to the Appellate Tribunal to give the finding that it did.

In our opinion the High Court rightly held against the appellant. The appeals are therefore dismissed with costs. One hearing fee in this Court.

Appeals dismissed.
