

PETITIONER:
ORIENTAL INVESTMENT CO. (P) LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, BOMBAY

DATE OF JUDGMENT:
10/09/1968

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
SHAH, J.C.
GROVER, A.N.

CITATION:
1969 AIR 460 1969 SCR (2) 46
CITATOR INFO :
RF 1970 SC 394 (7)

ACT:
Indian Income Tax Act, 1922, s. 66(1)-Mixed questions of fact and law-What are-Jurisdiction of High Court in dealing with such questions is the same as in dealing with questions of law-Appropriate form for such questions.

HEADNOTE:

For the assessment years 1940-41 to 1943-44 the assessee company claimed to be an investor in shares and properties and not a dealer. The contention was rejected by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal. The company then applied to the Tribunal under s. 66(1) of the Income tax Act, 1922 for a reference of the following questions of law for the opinion of the High Court: (i) whether on the facts and in the circumstances of the case the assessee company can rightly be treated as a dealer in investments and properties? (ii) whether the profits and losses arising from the sale of shares, securities and immovable properties of the assessee company can be taxed as business profits. The Tribunal refused to make the reference and the High Court dismissed the application under s. 66(2). On appeal by special leave this Court held that the question as to what were the characteristics of the business of dealing in shares or that of an investor was a mixed question of law and fact. It remanded the case to the High Court for directing the Tribunal to state a case under s. 66(2) on the following questions: (i) whether there are any materials on the record to support the finding of the Income tax Officer that the assessee company was a dealer in shares., securities and immovable property during the assessment year in question (ii) whether the profits and losses arising from the sale of shares, securities and immovable properties of the assessee company can be treated as business property? On these questions being referred to the High Court by the Tribunal, the High Court decided them against the assessee company. The company again appealed to this Court. It was contended on behalf of the appellant that the questions as framed by this. Court did not reflect the real controversy 'and

therefore the questions as originally framed in the company's application under s. 66(1) should be referred to the High Court in a fresh statement of case to be made by the Tribunal.

HELD: (i) The questions framed by this Court and the form in which they were framed seemed to assume that the questions involved were questions of fact for it is only in regard to a question of fact that the question can properly be framed "as to whether there was material to support the said finding". This Court had itself held that the questions involved in the present case were mixed questions of law and fact. Therefore the questions framed by this Court were not appropriate and did not reflect the real controversy between the parties. It was therefore appropriate that the questions should be modified as suggested by the appellant in its petition under s. 66(1) to the High Court. [53 G--54 B]

(ii) The proper construction of statutory language is always a matter of law and therefore the claim of the assessee that the profits and losses arising from the sale of shares securities etc. cannot be treated as profits

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of a business involves the application of law to the facts found in the setting of the particular case. In dealing with findings on such questions of law and fact the High Court must no. doubt accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal had 'applied the relevant legal principles correctly or not in reaching its final conclusion; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure questions of law. [53 B-D]

G. Venkataswami Naidu & Co. v.C.I.T., 35 I.T.R. 594, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 651 to. 655 of 1967.

Appeals from the judgment and order dated March 2, 1966 of the Bombay High Court in Income-tax Reference No., 73 of 1962.

S.T. Desai, D. Dwarkadas and S.S. Javali, for the appellant..

C.K. Daphtary, Attorney-General, R. Gopalakrishnan, R.N. Sachthey and B.D. Sharma for the respondent in all the appeals.

The Judgment of the Court was delivered by

Ramaswami, J. These appeals are brought by certificate from the judgment of the Bombay High Court dated March 2, 1966 in Income Tax Reference No. 73 of 1962.

The appellant company, hereinafter called the assessee company, was incorporated on July 29, 1924, as an investment company, the objects of which are set out in el. III of the memorandum of association and more particularly in sub-cl. 1, 2, 15 and 16 of that clause. The assessment years in question are 1943-44 to 1948-49, excepting the year 1947-48. According to its petition made in the High Court, the assessee company dealt with its assets as follows:

"The petitioner company purchased during the period 1st July, 1925 to 30th June, 1928, shares of the value of Rs. 1,86,47,789 major portion of which was comprised of shares in

the Sassoon Group of Mills. During the year ended 30th June, 1929, the petitioner company promoted two companies known as Loyal Mills Ltd., and Hamilton Studios Ltd. and took over all their shares of the value of Rs. 101/2 lacs. In the year 1930, the petitioner company purchased shares of Rs. 1,33,930. During the period of 9 years from 1st July, 1930, to 30th July, 1939, no purchases were made with the exception of a few shares of Loyal Mills Ltd. taken over from the staff of E.D. Sassoon & Co. Ltd., who retired from service. In the year ended 30th June, 1940, reconstruction scheme of the Appollo Mills Ltd.

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took place under which debentures held by the petitioner company in the Appollo Mills Ltd., were redeemed and the proceeds were reinvested in the new issue of shares made by the Appollo Mills Ltd. Out of the purchases of the value of Rs. 2,794 made by the petitioner company during the year ended 30th June, 1941, Rs. 2,000 was the value of shares of the Loyal Mills Ltd., taken over from the retiring staff. In the year ended 30th June, 1943, the petitioner company took over from the David Mills Co. Ltd., shares of the Associated Building Co., of the value of Rs. 56,700. After this there were no purchases at all to this date excepting purchases of the value of Rs. 34,954 during the year ended 30th June, 1946."

The sales are contained in paragraph 3(b) which states:

"In relation to the purchases made by the petitioner company as stated above no appreciable sales of shares were made during the period 29th July, 1924 to 30th June, 1942, the sales made in the year ended 30th June, 1929, of the value of Rs. 1,29,333 included shares of the value of Rs. 45,000 in the Loyal Mills Ltd., sold to the members of the staff and shares of the value of Rs. 83,833 representing sterling investments handed over to the creditors of the petitioner company in part repayment of the loan taken from them in the year ended 30th June, 1931, shares of the value of Rs. 7,48,356 were handed over to the creditors in payment of the loan granted' by them. From the year ended 30th June, 1943, E.D. Sassoon & Co. Ltd., started relinquishing the managing agencies of the various mills under their agency and the shares held by the petitioner company in the Sassoon Group of Mills were handed over to the respective purchasers of the mills agencies."

Prior to 1940 the assessee company made a claim every year being treated as a dealer in investments and properties but this contention was repelled by the Income Tax authorities and upto the assessment year 1939-40 the assessee company was assessed on the basis of being an investor but it appears that for the assessment years 1940-41, 1941-42 and 1942-43 the Income Tax department accepted the plea of the assessee company and treated it as a dealer in shares, securities and immovable properties and assessed it on that basis. For these years and for the assessment year 1943-44 the assessee company made its return in that basis. But after the return had been filed for the year 1943-44, the assessee company withdrew its return and

filed a revised return on March 7, 1944, contending that it was not a

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dealer but merely an investor. Along with the return it filed a letter dated March 6, 1944 in which it stated:

"The return of Total Income which was submitted with the Company's letter of 25th May 1943 was prepared in conformity with the ruling of the Income-tax Officer in the 1940-41 assessment that the company was to be assessed as a dealer in Investments. Since that return was submitted the Central Board of Revenue has decided that the Company is an Investment Holding Company, and accordingly an amended Return of Total Income under Section 22(1) of the Indian Income-tax Act is submitted herewith on which the assessment for 1943-44 may be based, as on this particular question the company obviously cannot have one status for Excess Profits Tax and another for Income-tax."

It was contended by the assessee company that it never carried on any business in the purchase or sale of shares, securities or properties. In support of this contention the assessee company relied on the order of the Central Board of Revenue dated August 18, 1943 passed under s. 26(1) of the Excess Profits Tax Act. The Income Tax Officer rejected the plea and held that the investments were held by the assessee company as the stock-in-trade of its business which it carried on during the previous year and also in the preceding years. The assessee company took the matter in appeal to the Appellate Assistant Commissioner who dismissed the appeal and upheld the order of the Income Tax Officer. The assessee thereafter appealed to the Income Tax Appellate Tribunal and the same contentions were urged on behalf of the assessee company. The Appellate Tribunal rejected the assessee's claim that it was showing itself as a dealer in shares, securities and immovable properties under a misapprehension and without appreciation of the correct facts. The Appellate Tribunal held that in the case of the assessee company not only the Memorandum of Association gave the power to the company to deal in investments but the case of the company all along in the past was that it was a dealer in investments and properties. Consequently, the Tribunal held that the assessee company was a dealer in shares, securities and properties and dismissed the appeals. Thus the grounds on which the case was decided against the assessee company were (1) that the assessee claimed to be a dealer or an investor according as it incurred losses or made profits and (2) that because of the objects contained in the memorandum of association and because of its assertion made in the past as being a dealer the assessee company could not be held to be an investor. The assessee company then applied to the Appellate Tribunal under s. 66(1) of the Income Tax Act, 1922,

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hereinafter called the 'Act' for a reference of the following questions of law for the opinion of the High Court:

- "(i) Whether on the facts and in the circumstances of the case the assessee company can rightly be treated as a dealer in investments and properties; and
- (ii) Whether the profits and losses

arising from the sale of shares, securities and immovable properties of the assessee company can be taxed as business profits."

The application was rejected by the Appellate Tribunal on the ground that no question of law arose out of its order. The assessee company then made an application under s. 66(2) of the Act to the Bombay High Court which dismissed the application by its order dated June 15, 1952. The assessee company thereupon obtained special leave to appeal to this Court. The appeal was allowed by this Court by its judgment dated May 22, 1957 and the order of the Bombay High Court dated June 15, 1952 was set aside. It was pointed out by this Court that the Appellate Tribunal in arriving at its finding that the assessee was a dealer and not an investor, had relied on two basic facts, viz., the objects set out in the Memorandum of Association and the previous assertion made by the assessee company that it was a dealer in investments and properties and not merely an investor. It was observed that merely because the company had within its objects the dealings in investments, shares and properties the circumstance did not give it the characteristics of a dealer in shares. The circumstance, though relevant, was not conclusive. It was pointed out in the judgment of this Court that the question as to what were the characteristics of the business of dealing in shares or that of an investor was a mixed question of fact and law and what was the legal effect of the facts found by the Appellate Tribunal, and whether as a result thereof the assessee could be termed a dealer or an investor was itself a question of law. Accordingly the Court formulated the following two questions of law as arising out of the order of the Tribunal:

"(1) Whether there are any materials on the record to support the finding of the Income Tax Officer that the assessee company was a dealer in shares, securities and immovable property during the assessment year in question?

(2) Whether the profits and losses arising from the sale of shares, securities and immovable properties of the assessee company can be taxed as business profits.?"

The case was therefore remanded to the High Court for directing the Appellate Tribunal to state a case on the aforesaid questions of law under s. 66(2) of the Act. In accordance with the direc-

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tion of this Court the Appellate Tribunal made a statement of the case on June 12/13, 1962. The reference being Income-tax Reference No. 73 of 1962 was heard by the High Court which by its judgment dated March 2, 1966 answered both the questions against the assessee company and in favour of the Commissioner of Income Tax.

On behalf of the assessee company Mr. S.T. Desai argued that the question whether the assessee company was a dealer dealing in investments and properties or whether it was a mere investor will have to be judged on a proper scrutiny of the transactions themselves considered in the light of the Circumstances in which the transactions 'both of purchase and sale had been brought about. If it is found on an examination of the transactions themselves that the essential characteristics of the business of the assessee were of dealing in shares and investments, the assessee will undoubtedly be taken as a dealer. If, on the other hand, the characteristics revealed by the transactions

are those' peculiar to mere investments in shares, securities and properties, the finding of the Court must be that the assessee is an investor and the profits made by it are only excess obtained on realisations of the investments and not liable to be taxed. According to Mr. S.T. Desai, neither the Memorandum of Association nor the previous assertions made by the assessee company either under a misconception or even deliberately will not have the effect of changing the legal nature of the transactions as revealed by the transactions themselves and the circumstances in which the transactions have taken place. In support of this argument reference was made on behalf of the appellant to the statements of the transactions, Annexures 'E' and 'F' of the statement of the case and detailed explanations, statements M-1 and M-2. The substance of the argument of the appellant was that (1) most of the shares, securities and properties acquired by the assessee company were the properties of E.D. Sassoon & Co. and the family of Sassoons; (2) a large block of shares held by the company consisted of the shares of the Sassoon Group of Mills and the block was held all along since its acquisition before the year 1930 until E.D. Sassoon and Co. and the Sassoons continued to be interested in the said Group of Mills and they were realised by sale only when E.D. Sassoon & Co. and the Sassoons decided to relinquish their interest in the said Group of Mills, and (3) neither the mode of acquisition of these shares, and properties nor the mode and manner of their disposal have any of the distinctive characteristics of business dealings.

On the questions actually formulated by this Court upon which the Appellate Tribunal has made a statement of the case it is not possible for us to entertain the argument advanced by Mr. S.T. Desai. It was contended on the contrary by the Attorney-General

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that upon the questions actually referred, the answers must be against the assessee company. It was said that there were at least two materials on record to support the finding of the Appellate Tribunal that the assessee-company was a dealer in shares, securities and immovable properties during the assessment year in question. The first is that in its own memorandum dated October 2, 1942, the assessee company contended that it was a dealer in shares and investments and set out various reasons in support of its contention. The second circumstance is that el. 3 of the Memorandum of Association gave the power to the assessee company to deal with investments. The contention of the Attorney General was that there was material on the record to support the finding of the Appellate Tribunal that the assessee-company was a dealer in shares, securities and immovable properties and the questions, as already framed, were rightly answered by the High Court in the affirmative and against the assessee company. In answer to this contention Mr. S.T. Desai submitted that the real controversy in this case is not reflected in the two questions framed by this Court in its judgment dated May 22, 1957. It was argued that the two questions upon which the assessee company applied for a reference under s. 66(1) of the Act were properly framed and were questions arising out of the order of the Appellate Tribunal. Mr. S.T. Desai urged that we should modify the questions in a manner suggested by the assessee company in the application under s. 66(1) of the Act and ask the Appellate Tribunal to make a fresh statement of the case. In our opinion, the argument put forward on behalf of the appellant is well rounded and

as we shall presently point out, it is necessary in the interest of justice that we should modify the questions framed by this Court on the last occasion and call upon the Appellate Tribunal to make a fresh statement of the case.

There is no doubt that the jurisdiction conferred on the High Court by s. 66(1) of the Act is limited to entertain references involving questions of law. If, for instance, the point raised on reference relates to the construction of a document of title or interpretation of relevant provisions of a statute, it is a pure question of law. In dealing with it, the High Court may have due regard for the view taken by the Tribunal, but its decision would not be lettered by that view. In some cases, the point sought to be raised in a reference may turn out to be a pure question of fact and if that be so, the finding of fact recorded by the Appellate Tribunal must be regarded as conclusive in a proceeding under s. 66(1). But it would be open to challenge the conclusion of fact drawn by the Appellate Tribunal on the ground that it is not supported by any legal evidence or material or that the conclusion of fact drawn by the Appellate Tribunal is perverse and is not rationally possible. It is within these narrow limits that the

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conclusions of fact by the Appellate Tribunal can be challenged under s. 66(1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence. There is, however, a third class of cases in which the assessee or the department may seek to challenge the correctness of the conclusion reached by the Tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. To put it differently, the proper construction of statutory language is always a matter of law and therefore the claim of the assessee that the profits and losses arising from the sale of shares, securities etc. cannot be taxed as profits of a business involves the application of law to the facts found in the setting of the particular case. In dealing with findings on such questions of mixed law and fact the High Court must no doubt accept the findings of the Tribunal on the primary questions of fact; but it is open to the High Court to examine whether the Tribunal had applied the relevant legal principles correctly or not in reaching its final conclusion; and in that sense, the scope of enquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law. (See the decision of this Court in *G. Venkataswami Naidu & Co. v. C.I.T. (1)*). On the last occasion it was pointed out by this Court that the question as to what are the characteristics of the business in shares or that of an investor is a mixed question of fact and law. To put it differently, the question as to what is the legal effect of the facts found by the Tribunal and whether as a result the assessee can be treated as a dealer or an investor is itself a question of law. The final conclusion of the Tribunal can, therefore, be challenged on the ground that the relevant legal principles have been mis-applied by the Tribunal in reaching its decision on the point; and such a challenge is open under s. 66(1) because it is a challenge on a ground of law. It is because the question involved in this case was not a question of pure fact but was a mixed question of fact and law that this Court allowed the appeal on the last occasion and set aside the judgment

of the Bombay High Court dated June 15, 1952 and directed the Appellate Tribunal to state a case, but owing possibly to some mistake or inadvertence the actual questions framed by this Court (quoted at page 676 of 32 I.T.R.) and the form in which the questions were framed by this Court seem to assume that the questions involved are questions of fact. The reason is that it is only in regard to a finding of fact that the question can be properly framed "as to whether there was material to support the said finding". We are accordingly of the opinion that the questions actually framed by this Court on the last occasion are not appropriate and

(1) 35 I.T.R. 594

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do not reflect the real controversy between the parties. It is therefore, expedient in the interest of justice that the questions should be modified as suggested by the assessee company in its petition under s. 66(1) of the Act to the High Court and the Appellate Tribunal should be asked to make a fresh statement of the case.

For these reasons we allow these appeals and set aside the judgment of the Bombay High Court dated March 2, 1966 and direct the Appellate Tribunal to make a fresh statement of the case on the following questions of law:

"(1) Whether on the facts and in the circumstances of the case the assessee company can rightly be treated as a dealer in investments and properties; and

(2) whether the profits and losses arising from the sale of shares, securities and immovable properties of the assessee company can be taxed as business profits."

After the Appellate Tribunal has made a statement of the case the High Court will dispose of the reference in accordance with law. The appellant must pay the costs of this appeal in this Court to the respondent. We should like to add that we have not considered whether the High Court has in its judgment reached the correct conclusion on what the High Court assumed were 'the questions to be decided by it. We are setting aside the judgment of the High Court only on the ground that the enquiry made by the High Court was, on the view taken by us, not competent on the questions as framed at present. We therefore express no opinion on the merits of the dispute. We trust that the Tribunal will make the fresh reference with the least practicable delay.

G.C.

Appeals allowed.

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