

MADNANI DEVELOPMENT CORPN. (P) LTD.

v.

COMMISSIONER OF INCOME-TAX, ORISSA

JULY 16, 1986

[R.S. PATHAK AND SABYASACHI MUKHARJI, JJ.]

Income Tax Act, 1961—s. 70—Assessee—A Contractor—Purchased two plots of lands for excavation of land to fulfil railway contract—After work completed lands sold—Loss incurred—Whether capital or revenue loss.

The assessee-company while carrying on business as a Contractor entered into a contract with the Railway Administration, *inter alia*, for the execution of earth work required for the construction of a new railway yard. For this purpose, the assessee purchased two pieces of land at a total cost of Rs.68,241. Soon after the work was over, the assessee sold both lands for a sum of Rs.23,000, thereby sustaining a loss of Rs.45,241. The assessee treated this as the value of the excavated earth, and apportioned the amount in its accounts in assessment years 1965-66, 1966-67 and 1967-68. The claim of the assessee to a deduction of Rs.30,045 for the assessment year 1966-67 was disallowed by the Income-tax Officer on the ground that it represented a capital loss. The Appellate Assistant Commissioner dismissed the first appeal of the assessee. The Income Tax Appellate Tribunal allowed the second appeal of the assessee on the ground that the land formed a wasting asset and by constant digging of the earth the land had become unserviceable.

In the Reference, on the question whether the loss of Rs.30,045 claimed by the assessee is a capital loss or a revenue loss, the High Court held that the loss of the said amount claimed by the assessee was a capital loss and, therefore, the assessee was not entitled to a deduction.

Dismissing the appeal of the assessee-company to this Court,

HELD: The assessee was full proprietor of the two pieces of land and for an indefinite period. The reason for acquiring the land was no doubt to provide a ready supply of earth to the work site nearby, but there was nothing to prevent the assessee from continuing as owner of

A the land even after the railway contract had been executed and putting it to any other use. The land was treated by the assessee as its fixed asset. In all the circumstances of the case, the two pieces of land must be regarded as capital assets, and the loss claimed by the assessee must be regarded as a capital loss. [222B-D]

B *M.A. Jabbar v. Commissioner of Income-tax, Andhra Pradesh*, [1968] 68 ITR 493, 497-8 distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1649 (NT) of 1974

C From the Judgment and Order dated 25.1.1974 of the Orissa High Court in S.J.C. No. 111 of 1972.

Govind Das and J.R. Das for the Appellant.

D S.C. Manchanda, Miss A. Subhashini and K.C. Dua for the Respondent.

The Judgment of the Court was delivered by

E **PATHAK J.** This appeal by special leave is directed against the judgment of the High Court of Orissa disposing of an Income-tax Reference and answering the following question in favour of the revenue and against the assessee:

“Whether in the facts and circumstances of the case, the loss of Rs.30,045 claimed by the assessee is a capital loss or a revenue loss?”

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The assessee is a private limited company carrying on business as a contractor. In April 1964 it entered into a contract with the South-Eastern Railway Administration for the execution of earth work, bridge work and other miscellaneous works required for the construction of a new railway yard. As it was required to supply earth outside the railway land the assessee found it expedient to buy two pieces of land from which earth could be excavated and conveniently taken to the work site. One piece of land was acquired at a cost of Rs.53,196 during the calendar year 1964 corresponding to the assessment year 1965-66, and the other piece of land was acquired for Rs.15,045 during the calendar year pertaining to the assessment year 1966-67, bringing

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the total cost to Rs.68,241. Soon after the work was over, the assessee sold both lands for a sum of Rs.23,000, thereby sustaining a loss of Rs.45,241. The assessee treated this as the value of the excavated earth, and apportioned the amount in its accounts in the following manner, Rs.8,196 as the cost of the earth for the assessment year 1965-66, Rs.30,045 towards the earth excavated in the assessment year 1966-67, and Rs.7,000 towards the earth excavated for the assessment year 1967-68. The Income-tax Officer accepted the claim for the assessment year 1965-66. The claim of the assessee to a deduction of Rs.30,045 for the assessment year 1966-67 was disallowed on the ground that it represented a capital loss. The assessee proceeded in first appeal to the Appellate Assistant Commissioner of Income-tax but the appeal was dismissed. A second appeal was allowed by the Income-tax Appellate Tribunal on the ground that the land formed a wasting asset and by constant digging of the earth the land had become unserviceable. On a reference being made to the High Court of Orissa at the instance of the Commissioner of Income-tax on the question of law set forth earlier the High Court held that the loss of Rs.30,045 claimed by the assessee was a capital loss and therefore, the assessee was not 'entitled to a deduction.

The question in this appeal before us is a short one. Can it be said that the loss of Rs.30,045 is a capital loss or a revenue loss? It is not in dispute that the assessee did not deal in land. It was a contractor and it had acquired the land for the purpose of obtaining a ready supply of earth in order to fulfil the contract with the Railway Administration. The land was not its stock-in-trade. What it needed as raw material for the purpose of the contract was loose earth and this it obtained by the process of excavation from the land. Moreover, the two pieces of land were shown as fixed assets by the assessee itself in its balance-sheet.

Learned counsel for the assessee relies on *M.A. Jabbar v. Commissioner of Income-tax, Andhra Pradesh*, [1968] 68 I.T.R. 493, 497-8 but that is a case where the land was taken on lease for a limited period of 11 months with the right to enter, occupy and use for a quarrying purpose and to render marketable and carry away sand within or on the land. This Court held that the lease money paid by the assessee was deductible as revenue expenditure. The Court referred to the short period of the lease, which indicated that the lease was not an asset of an enduring nature, that the only right under the lease was to take away the sand lying on the land, and in fact as the sand lay on the

A surface no question arose of digging and excavating for the sand, and no operations were to be performed on the land. The Court laid great emphasis on the circumstance that the assessee did not acquire the land. Therefore, the Court held that the assessee "did not acquire any fixed or capital asset of an enduring nature."

B The facts in the present case are entirely different. Here, the assessee was full proprietor of the two pieces of land and for an indefinite period. The reason for acquiring the land was no doubt to provide a ready supply of earth to the work site nearby, but there was nothing to prevent the assessee from continuing as owner of the land even after the railway contract had been executed and putting it to any other use.

C The land was treated by the assessee as its fixed asset. In all the circumstances of the case, the two pieces of land must be regarded as capital assets, and the loss claimed by the assessee must be regarded as a capital loss.

D The High Court is right in the view taken by it, and the appeal is liable to be dismissed.

The appeal is dismissed with costs.

A.P.J.

Appeal dismissed.