Commissioner of Income-Tax, New Delhi

Vs

Chuni Lal Moonga Ram

Civil Appeals Nos. 39 and 40 of 1960

(S. K. Das, M. Hidayatullah, J. C. Shah JJ)

05.05.1961

JUDGMENT

S. K. DAS J. –

These two appeals have been brought to this court on a certificate of fitness granted by the High Court of Punjab under section 66A(2) of the Indian Income-tax Act, 1922.

The relevant facts are these. Messrs. Chunilal Moonga Ram, a firm of Delhi carried on a speculative business in bullion, mostly in gold and silver, in Chandni Chowk at Delhi. For the assessment year 1946-47 it was charged to income-tax on its income from the business in the relevant accounting period. Similarly, it was charged to excess profits tax for the chargeable accounting period ending on February 6, 1946. One of the appeals, Civil Appeal No. 39 of 1960, arises out of the assessment of Income-tax and the other appeal, Civil Appeal No. 40 of 1960, arises out of the assessment of excess profits tax. During the relevant accounting periods the firm entered into certain transactions called "hedge" transactions in the bullion market at Bhatinda (then a part of the Patiala State, that is, outside the taxable territories of British India). It claimed that it had incurred losses to non-residents there in the sums of Rs. 6,366 and Rs. 16,615 in the said transactions and claimed that these losses should be taken

> "To start with, it seems to us that there is no warrant either in terms of section 14(2)(c) or in terms of the proviso to section 24(1) to split up the transactions in the taxable territories and transactions without the taxable territories. Even if that treatment were permitted and the profits or losses resulting from transactions outside the taxable territories can be described as income, profits and gains, such income, profits and gains are deemed under section 42 to have accrued or arisen in British India. The results of transactions of the nature under review are, therefore, not exempt from tax by virtue of section 14(2)(c). The proviso to section 24(1) does not in any case come into play. The income-tax authorities have in this view that we have taken wrongly disallowed the assessee's claim for adjustment of losses amounting to Rs. 6,366 and Rs. 16,615. We allow these losses."

The Tribunal accordingly allowed the two appeals. We may here state that the income-tax authorities as also the Tribunal considered the claim for deduction in relation to the assessment for income-tax only. As to the excess profits tax there was no separate discussion of the provisions of section 5 of the Excess Profits Tax Act, 1940, and they dealt with the assessment of excess profits tax as a mere consequential matter.

The Commissioner of Income-tax, Delhi, then made two applications asking the Tribunal to refer certain questions of law arising out of its orders to the High Court of Punjab. The Tribunal came to the conclusion that no question of law arose out of its orders and rejected the applications. The High Court was then moved under section 66(2) of the Income Income-tax Act, 1922, and the High Court heard the two applications together and directed the Tribunal to state a case on the following two questions which, in the opinion of the High Court, arose out of the Tribunal's orders :

> "(1) Whether the claim of loss in the case is governed by the provisions of section 10(1) or section 24(1) proviso, read with section 14(2)(c), or by the provisions of section 42 ?
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> (2) Whether on the facts of the case a loss of Rs. 22,981 is allowable in computing the income of the assessee chargeable to the excess profits tax ?"

The Tribunal then drew up a statement of case on the two questions aforesaid. By its judgment and order dated January 23, 1957, the High Court answered both the questions in favour of the assessee. Thereafter the Commissioner of Income-tax, Delhi, asked for and obtained a certificate under section 66A(2) of the Indian Income-tax Act and on that certificate the present appeals have been brought to this court.

As to the first question the learned Additional Solicitor-General, appearing on behalf of the appellant, has conceded that he is not in a position to dispute the correctness of the answer given, in view of the decision of this court correctness of the answer given, in view of the decision of this court in Commissioner of Income-tax v. Indo- Mercantile Bank Ltd. This dispose of Civil Appeal No. 39 of 1960 which must be dismissed.

In Civil Appeal No. 40 of 1960, the second question falls for decision. In answering this second question the High Court has proceeded on two grounds : firstly, it has referred to section 5 of the Excess Profits Tax Act, 1940, particularly the third proviso thereto, and contrasting the provisions of that section with section 5 of the Business Profits Tax Act of 1947, has expressed the view that neither of these provisions touched the question whether losses incurred in an Indian State could be taken into account in assessing the taxable income of an assessee in British India for purposes of assessing excess profits tax or business profits tax; it then referred to the decision of the Bombay High Court in Karamchand Premchand Ltd. v. Commissioner of Income-tax and said :

> "It would seem that in spite of the slightly different language of the Excess Profits Tax Act from that of the Income-tax Act, no distinction has ever been drawn in this matter between the principles governing assessment to income-tax and the principles governing assessment to excess profits tax and in fact it would appear to have been the universal practice that decisions of the income-tax authorities and High Courts have been followed by consequential orders relating to the same assessee's taxable income for the purpose of the Excess Profits Tax Act, and the learned counsel of the Commissioner has not been able to cite any decision in which different principles have been applied on this particular matter. Admittedly one of the reasons given in his judgment by Chagla C.J. for coming to the decision mentioned above was that the third proviso had been changed in the Business Profits Tax Act as compared with the Excess Profits Tax Act, but this is only one of a number of reasons, and the question has been cons

The second ground given by the High Court depended on the facts found. The High Court expressed the view that on the facts found it was doubtful if the losses in question could be deemed to have occurred in Bhatinda. It said :

> "... it is not in dispute that the only place where the assessee carries on business in Delhi, and that its transactions in other markets are carried out by means of communication by telephone or post. There is no suggestion that the firm has any agent or branch in any native State, and it therefore seems to me that whether profits result or losses are incurred as the result of transactions of this kind even with firms in Indian States, the profits accrue or the losses are incurred at the place where the payments are received, or from which they are made, namely, the firm's place of business at Delhi."

On behalf of the appellant it is contended that both the aforesaid grounds given by the High Court for the answer which it gave to the second question are unsubstantial. The first ground, it is contended, is untenable in law, and the second ground proceeds not on the findings of fact arrived at by the Tribunal but on new findings made by the High Court, which course was not open to the High Court to take.

We consider that these contentions are correct. As to the first ground, it seems clear to us that under the third proviso to section 5 of the Excess Profits Tax Act, 1940, where the profits etc., of a part of the firm's business accrued or arose at Bhatinda, that part of the business shall for the purpose of the said section be deemed to be a separate business. If that is so the losses which arose art Bhatinda must also be the losses of a separate business. We may here read section 5 and the third proviso thereto :

> "5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :...
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> Provided further that thus Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State; and where the profits of a part of a business accrue or arise in an Indian State such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arisen in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business."

In Commissioner of Income-tax v. Karamchand Premchand Ltd., this court considered section 5 of the Business Profits Tax Act, 1947, and pointed out the distinction between the third proviso thereto and the third proviso to section 5 of the Excess Profits Tax Act, 1940. This court quoted with approval the decision in Commissioner of Excess Profits Tax v. Bhogilal H. Patel and held that the language used in the third proviso to section 5 of the Excess Profits Tax Act, 1940, was one of exclusion and that Act did not apply to profits etc., if that part of the business has to be treated as a separate business for the purposes of the Excess Profits Tax Act, it is difficult to see how the losses incurred in an Indian State can be taken into consideration for the same purposes. We think that the High Court was in error in thinking that the third proviso to section 5 of the Excess Profits Tax Act did not touch the question which the High Court had to answer. On the contrary, we think that the proviso answers the quest

Now, as to the second ground given by the High Court. It seems to us that there can be no doubt that the assessing authorities proceeded on the footing that the losses for which the assessee firm claimed a deduction arose and were incurred at Bhatinda, even though the firm's place of business was Delhi. The Income-tax officer, as also the Appellate Assistant Commissioner referred to section 14(2)(c) of the Income-tax Act, 1922; that provision related to income, profits or gains accruing on arising in an Indian State. The assessing authorities proceeded on the footing that as the profits were exempt from tax in terms of section 14(2)(c), the losses arising outside the taxable territories could not be take into account. The Tribunal did not rely on section 14(2)(c), nor on the proviso to section 24(1) of the Income-tax Act, 1922. But it relied on section 42. That again shows that it proceeded on the footing that though the income actually arose outside the taxable territories, it should be deemed to have arise

The two appeals were heard together and in view of the divided success of the parties, the parties must bear their own costs in both appeals.

Civil Appeal No. 39 of 1960 dismissed.

Civil Appeal No. 40 of 1960 allowed.

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