

Messrs. Produce Exchange Corporation

Vs

The Commissioner of Income-Tax (Central), Calcutta

Civil Appeals Nos. 2538 and 2539 of 1966

(J. C. Shah, K. S. Hegde, A. N. Grover JJ)

27.04.1970

JUDGMENT

SHAH, J. -

1. The appellant is a public limited company doing business as a dealer in diverse commodities, and also in stocks and shares. The Company maintains its accounts according to the calendar year. In the year of account 1949 the Company suffered a loss of Rs. 3,71,700/- in the sale of shares of public limited companies. In proceedings for assessment of income-tax, for the assessment year 1950-51, the Income-tax Officer disallowed the claim to set off loss against the profits from transaction in other commodities in that year. The appeal filed before the Appellate Assistant Commissioner was unsuccessful. But the Appellate Tribunal upheld the claim of the Company.

2. In the meanwhile assessment for the year 1951-52 was completed, and the income of the Company was computed at Rs. 1,00,777/-. In proceedings for assessment of income for the assessment year 1952-53 the Income-tax Officer computed the income of the Company from its business at Rs. 3,39,399/- and declined to take into account the loss suffered by the Company in the share transactions. In the view of the Income-tax Officer even if the loss be treated as a trading loss it could not be set off against the business income of the Company, because the loss resulted from transactions in shares which constituted a business distinct from the business in other commodities.

3. In appeal against the order to the Appellate Assistant Commissioner the order of the Income-tax Officer was confirmed. The Appellate Assistant Commissioner held that the business in shares and the business in other commodities were not the "same business" within the meaning of Section 24(2) of the Income-tax Act, 1922, as then in force. He observed that a common capital, a common set of employees and a common set of account and common business premise are not "the deciding factors in determining whether the various activities carried on by the assessee constituted one business or separate business" : it is the nature of the business which is "the main factor" and where separate profit or loss was ascertainable and the nature of the business was different, the activities could not be held to form one and single unit for the purposes of Section 24(2) of the Indian Income-tax Act.

4. The Tribunal disagreed with the Appellate Assistant Commissioner. The Tribunal observed that there was complete unity of control and shares were one of a number of commodities in which the Company dealt in the ordinary course of business. There was, in the view of the Tribunal, "no element of diversity or distinction or separateness about the transaction in shares." Accordingly, the Tribunal upheld the claim of the appellant Company and directed that the loss be set off under Section 24(2) of the Indian Income-tax Act then in force.

5. The Tribunal referred the following question to the High Court of Calcutta :

"Whether on the facts and in the circumstances of the case, the business activities of the company to wit, dealings in shares and its dealings in other commodities and selling agency on commission basis constituted the same business within the meaning of Section 24(2) of the Indian Income-tax Act ?"

The High Court held, following their judgment in *Shree Ramesh Cotton Mills Ltd., v. Commissioner of Income-tax (64 ITR 317)* that the "essential matter to be considered in determining whether the two businesses carried on by the assessee constitute the same business, is about the nature of the two commodities, the manner in which they are conducted being a secondary consideration." They observed that "unity of control or management, the employment of the same or common finance, the user of the same business premises and the record of the transactions in the same set of books of accounts are matters to be considered only when it is found that two businesses are of the same nature. Merely because the transactions in shares consist of sales and purchase as do dealings in order commodities like sugar, molasses, etc., the two activities cannot be held to form one unit of business", and that the Tribunal erred in holding that because there was complete unity of control and shares formed a part of number of commodities in which the assessee dealt with, the whole trading activity formed one business.

6. Section 24(2) of the Indian Income-tax Act, 1922, as in force in the relevant years, reads as follow :

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head "Profits and gains of business, profession or vocation" and the loss cannot be wholly set off under sub-section (1), the portion not so set off shall be carried forward to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year, and if it cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following year, and so on; X X X."

The section contemplated that the loss which could not be wholly set off against the other income under sub-section (1) could be carried forward to the following year and set off only against the profits and gains, if any, from the same business. There was difference of opinion among the High Courts as to the meaning of the words "same business". It is unnecessary to refer to those authorities. This Court in *Commissioner of Income-tax, Madras v. Prithvi Insurance Company Ltd.*(63 ITR 632) set out the test for determining whether two lines of business constitute "same business" within the meaning of Section 24(2) at the relevant time. It was observed at p. 636 :

"A fairly adequate test for determining whether the two constitute the same business is furnished by what Rowlatt, J., said in *Scales v. George Thompson and Co. Ltd.*, [(1927) 13 Tax Cases 83].

'Was there any inter-connection, any inter-lacing, any inter-dependence, and unity at all embracing those two businesses ?'

"That inter-connection, inter-lacing, inter-dependence and unity are furnished in this case by the existence of common management, common business organisation,

common administration, common fund and a common place of business."

Applying that test in the present case there is no doubt that there is a common management of the share and stock business and other lines of business, unity of trading organization, common employees, common administration, a common fund and a common place of business.

7. We need not consider whether the ultimate decision of the High Court in Shree Ramesh Cotton Mills Ltd.'s case (supra) on which reliance was placed is correct, but we are unable to agree with the High Court that the decisive test for determining whether the two lines of business constitute the same business is the nature of the two business.

8. In our judgment the Tribunal was right in holding that the share business and other businesses carried on by the appellant Company constituted the same business within the meaning of Section 24(2) as that section stood before it was amended in 1955.

9. Counsel for the Commissioner contended that the Commissioner had applied under Section 66(2) to the High Court for calling for a statement of the case from the Tribunal on the following question :

"Whether there was any evidence in support of the Tribunal's finding that there was complete unity of control and that shares formed a part of the commodities in which the assessee company deals regularly from year to year in the ordinary course of its business ?"

The High Court declined to make an order on that application calling for the statement of the case on the ground that the first question was "sufficiently comprehensive" and included enquiry into the question proposed. In our judgment the decision of the Tribunal is amply supported by the evidence which is referred to in the order of the Tribunal. Even if the question had been raised and statement of case had been called for, it could not affect the ultimate result.

10. The answer to the question referred to will be in the affirmative.

11. The appeals are allowed. The Commissioner of Income-tax to pay the costs of the company in this Court and the High Court. One hearing fee.

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