M/S. Ramchandar Shivanarayan

Vs

The Commissioner of Income Tax, Andhra Pradesh

Civil Appeal No. 1611 of 1972

(N. L. Untwalia, D. A. Desai JJ)

04.11.1977

JUDGMENT

UNTWALIA, J. -

1. This is an assessee's appeal by special leave from the decision of the Andhra Pradesh High Court in a reference made by the Income Tax Appellate Tribunal, Hyderabad Bench under Section 256(1) of the Income Tax Act, 1961 - hereinafter referred to as the 1961 Act. The question referred for the opinion of the High Court at the instance of the Revenue was in the following terms :

> Whether, on the facts and in the circumstances of the case, the assessee was entitled to the allowance of the loss of Rs. 30,000 ?

2. The facts of the case as found by the Tribunal are in a very narrow compass. Their correctness was neither challenged nor could it be challenged in the High Court on any legal grounds, such as, that the findings were vitiated as being perverse, wholly unreasonable or unsupported by any evidence. No reference to challenge the correctness of the facts was either asked for or made. The High Court has, therefore, rightly proceeded to answer the question on the facts found by the Tribunal.

3. The assessee is a registered firm carrying on business in gold, silver, and guineas at Rajahmundry. It also derives income from investment in Government securities. The assessment year in question is 1964-65. The corresponding accounting year ended on October 16, 1963. The assessee had sold some Government securities and bonds in the years both preceding and succeeding the accounting year concerned in the present appeal. Income-tax was levied on such income also. For the assessment year 1964-65 it returned a loss of Rs. 5008 from the business. The said figure was arrived at after claiming a loss of Rs. 30,000 on account of theft committed by some stranger during the corresponding accounting period. A sum of Rs. 50,000 of for the purpose of purchasing Government securities was brought in cash to Rajahmundry by its employee. The money was handed over to its cashier. When the cashier turned his back to take out some books, a stranger suddenly arrived at the place of assessee's business and committed the theft of Rs. 30,000. In spite of the lodging of a report with the police, no amount could be recovered. The assessee claimed the sum of Rs. 30,000 lost by theft as a permissible deduction in computation of his net income on the ground that it was a trading loss. The Income Tax Officer rejected the claim treating the loss as being either of idle money or a capital loss. According to him it was not incidental to the business of the assessee. Its appeal before the Income Tax Appellate Commissioner failed but the assessee succeeded in the further appeal taken to the Tribunal. The loss was allowed on the ground that it was incidental to the carrying on of the business of the assessee. The Commissioner of Income Tax

asked for a reference which was made on the question of law above mentioned.

4. Many cases of this kind involving almost identical questions on facts somewhat similar or varying have come up for consideration before the Courts in England and other countries and the various High Courts in India. The line of distinction as to whether a particular loss is a trading loss or a capital loss has sometimes been very subtle and thin resulting in expression of different opinions by he different High Courts almost on identical or similar facts. The leading decision of this Court is in the case of Badridas Daga v. CIT [34 ITR 10 : 1959 SCR 690 : AIR 1958 SC 783]. The principle decided in that case was reiterated with greater force, if we may say so with respect, in another decision of this Court in CIT v. Nainital Bank Ltd. [55 ITR 707 : (1965) 1 SCR 340 : AIR 1965 SC 1227] After the said two decisions most of the High Courts have applied, as they were bound to, the principles enunciated in them in favour of the assessees under similar circumstances and facts. But we shall presently show that the Andhra Pradesh High Court persisted and has done so even in the judgment under appeal in taking, rather, a narrow view of the matter and not correctly applying the ratio decidendi of Badridas Daga's and Nainital Bank's cases.

5. Under Section 10(1) of the Income Tax Act, 1922 - hereinafter called the 1922 Act, the assessee was required to pay tax in respect of the profits or gains of any business carried on by him. The corresponding provision in the 1961 Act is to be found in Section 28. Sub-section (2) of Section 10 of the 1922 Act prescribed the method for computation of profits or gains after making the allowances enumerated in the various clauses of that sub-section. The corresponding Section 29 of the 1961 Act says : "The income referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43A". In terms no specific provision is to be found in either of the two Acts for allowing deduction of a trading loss of the kind we are concerned with in this case. But it has been uniformally laid down that a trading loss not being a capital loss has got to be taken into account while arriving at the true figures of the assessee's income in the commercial sense. The list of permissible deductions in either of the Acts is not exhaustive. We may just refer to Section 10(2)(xv) of the 1922 Act corresponding to Section 37 of the 1961 Act. The relevant words of the said provision namely "any expenditure . . . not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business. . ." occurring in either of the two provisions has not been able to take within its ambit loss of property or money by theft or dacoity as it is not an expenditure which has an element of volition, but a forced loss. The cases have laid down that such a loss is a trading loss in the commercial sense and has got to be taken into account for ascertainment of true taxable profits.

6. Now we proceed to refer to some decisions of the High Courts and this Court. We may start with a Patna decision reported in Motipur Sugar Factory Ltd. v. CIT [(1955) 28 ITR 128 (Pat HC)]. The assessee company carrying on business in the manufacture of sugar and molasses out of sugarcane deputed an employee, in compliance with the statutory rules, with cash for distribution to sugarcane cultivators at the spot of purchase. The cash was robbed on the way. The High Court took the view that the loss was one arising out of the business of the assessee and sprang from the statutory necessity of sending money to various purchasing centres for distribution and hence was deductible from the assessee's taxable income. The stress by the High Court that sending of money to various purchasing centres sprang from the statutory necessity was not of much consequence. The method of business operation springing from custom, trade usage or practice or otherwise may make the assessee send cash to or bring cash from other places. The Patna decision has been approved in the decisions of this Court in Badridas Daga's and Nainital Bank's cases.

7. In Badridas Daga's case an agent of the assessee withdrew from the firm's bank account large

sums of money and applied them in satisfaction of his personal debts incurred in speculative transactions. A part of it was recovered from him but the balance of Rs. 2,00,000 and odd was written off at the end of the accounting year as irrecoverable. The question for consideration was whether the amount embezzled by the assessee's agent was to be deducted in computation of the assessee's profits. Venkatarama Aiyar, J. delivering the judgment of the Court has said at page 15 of 34 ITR :

> The result is that when a claim is made for a deduction for which there is no specific provision in Section 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and to be incidental to it. If that is established, then the deduction must be allowed, provided of course there is no prohibition against it, express or implied. . . .

The learned Judge emphasised at page 16 : ". . . that the loss for which a deduction could be made under Section 10(1) must be one that springs directly from the carrying on of the business and is incidental to it and not any loss sustained by the assessee, even if it has some connection with his business". An example of theft committed by a thief by breaking overnight the premises of the money-lender and running with the funds was given to show in Daga's case that it would not be an allowable loss. But the example was not considered to be quite apposite in the case of Nainital Bank for taking the opposite view. The majority opinion of a special Bench of the Madras High Court in S.P.S. Ramaswami Chettiar v. CIT [(1930) ILR 53 Mad 904 (FB)] was merely referred in Badridas Daga's case but was disapproved in Nainital Bank's case. The facts of the latter case were that the Bank in the usual course of its business had to keep cash money in various safes in its various branches. At one of its branches the cash amount of Rs. 1,00,000 and odd was stolen in a dacoity committed at about 7.00 p.m. Subba Rao, J., as he then was, dismissing the departments appeal held the loss to be an admissible deduction chiefly on the ground that it formed part of the stock-in-trade of a banking company. A large number of authorities were considered including the one in Badridas Daga's case. A distinction drawn in some of the cases between misappropriation of the assessee's money by a servant or loss to him by reason of cash being robbed from its servant was held to be of no consequence. In that regard referring to the decision of the Madras High Court in Ramaswami Chettiar's case it was held that the correctness of the said decision was shaken when this Court in Badridas Daga's case approved the Patna view in Motipur Sugar Factory's case. The minority view expressed by Anantakrishna Ayyar, J. was preferred. The decision of the High Court of Australia in Charles Moore & Co. (W.A.) Pty. Ltd. v. Federal Commissioner of Taxation [(1956-57) 95 Commonwealth Law Reports 344] was heavily relied upon. Reference was also made to the decision of a learned single Judge of the New Zealand Supreme Court in the case of Gold Bank Services Limited v. Commissioner of Inland Revenue [1961 New Zealand Law Reports 467] which had followed the Australian decision in Charles Moore's case. The case of Nainital Bank was held to be stronger than the two foreign decisions aforesaid. We may, however, point out the slight distinction between the Income-tax law of Australia and New Zealand and that of India, although basically in principle there is hardly any difference. In the Australian case the statutory language of Section 51(1) of the Income Tax and Social Services Contribution Assessment Act, 1936-1952 fell for consideration. The relevant words of the said provision were : "losses necessarily incurred in gaining or producing the assessable income". In our Acts there is no such express provision because the corresponding provision used the term 'expenditure' and not losses. But the principle decided by the full Court of the High Court of Australia (the highest Court in the land) is aptly applicable in India. The argument for the Commissioner that before the money was stolen it had come home to the tax-payer so as to form part of the capital resources was rejected at page 351 on the ground :

> . . . . We are here dealing with a loss incurred in an operation of business concerned with the regular inflow of revenue, not with a loss of or concerning part of the "profit yielding subject", the phrase in which Lord Blackburn in United Collieries Ltd. v. Inland Revenue Commissioners [1930 SC 215, 220 : (1929) 12 Tax Cas 1248, 1254] summarised the characteristics of a business undertaking or enterprise considered as an affair of a capital nature.

The language of the New Zealand statute was more or less the same except that it contained the adverb "exclusively". Haslam, J., therefore, stated at page 470 of (1961) New Zealand Law Reports :

> While our section contains the adverb "exclusively", which is absent from its Australian counterpart, I do not think on the instant facts this difference in wording can affect the conclusion. In my opinion, the loss was exclusively incurred in the manner described, since the risk of precisely such an event was inherent in the course of the production of assessable income.

The principle applicable in India is more or less the same. If there is a direct and proximate nexus between the business operation and the loss or it is incidental to it, then the loss is deductible, as, without the business operation and doing all that is incidental to it, no profit can be earned. It is in that sense that from a commercial standard such a loss is considered to be a trading one and becomes deductible from the total income, although, in terms neither in the 1922 Act nor in the 1961 Act there is a provision like Section 51(1) of the Australian Act.

8. There is a veritable roll-call of cases of the various High Courts in India, mostly under similar circumstances, taking the view on the lines of Daga's and Nainital Bank's cases. We may just refer to some of them. In Basantlal Sanwar Prasad v. CIT [67 ITR 380 (Pat HC)] the loss of cash in a burglary committed at night in a wholesale cloth shop was held to be allowable. In U.P. Vanaspati Agency v. CIT [68 ITR 120 (All HC)] (Allahabad) money entrusted to an employee for being deposited in the Bank but lost in the way by robbery was held to be deductible. To the same effect is the view expressed by Allahabad High Court in the case of CIT v. Sarya Sugar Mills (P) Ltd. [78 ITR 109 (All HC)]; by the Madras High Court in CIT v. K.T.M.S. Mahmood [74 ITR 100 (Mad HC)]; by the Madhya Pradesh High Court in CIT v. Ganesh Rice Mill [77 ITR 889 (MP HC)] and the Rajasthan High Court in Chhotulal Ajitsingh v. CIT [89 ITR 178 (Raj HC)]. The contrary view expressed in the case of Bansidhar Onkarmal v. CIT [17 ITR 247 (Orissa HC)] and in the Madras Full Bench case of Chettiar's is no longer good law. The ratio of Daga's case does not seem to have been correctly applied by the Punjab High Court in Messrs Ram Gopal Ram Sarup v. CIT [47 ITR 611 (Punj. HC)].

9. Now we proceed to point out the persistently wrong application of the law laid down by this Court by the Andhra Pradesh High Court in two earlier decisions followed in the decision under appeal also. They are : CIT v. Chakka Narayana [43 ITR 249 (AP HC)] and Maduri Rajeshwar v. CIT [51 ITR 213 (AP HC)]. In Chakka Narayana's case the assessee who was a dealer in cloth and government securities encashed government securities worth about Rs. 20,000. He went to the Madras Railway Station for taking the cash to his place of business but lost the money on account of theft committed. The High Court referred to Badridas Daga's case but yet distinguished it and preferred to follow the majority decision of the Full Bench of the Madras High Court in Ramaswami Chettiar's case, which, as we have already pointed out, was not approved by this Court in Nainital Bank's case. The High Court enunciated the law correctly, but committed an error in

applying the same to the facts of that case when it said : "It could not be posited that it was absolutely necessary for the assessee to cash the cheque issued and to carry the money on his person. It is only when it could be posited that it was part of his business to take money with him that it could be said that the loss was incidental to his business". We do not approve of this distinction. Similarly the Andhra Pradesh High Court took a narrow view in Maduri Rajeshwar's case also. There a stranger came to the assessee's shop during business hours and, when the assessee had gone into another room to talk on the telephone, the stranger removed the cash box and disappeared. Chandra Reddy, C.J., who had delivered the leading judgment in the earlier case as also in this case, if we may point out with respect, committed the same mistake when he said at page 216 :

> It cannot be postulated that the loss sustained by the assessee resulting from the theft committed by the stranger springs directly from his business or is incidental to the carrying on of it. The only connection that could be established in this case is that at the time theft was committed money was in the business premises and it was during business hours. There is no other connection between the theft of the money and the business of the assessee.

It is to be remembered that the direct and proximate connection and nexus must be between the business operation and the loss. It goes without saying that a businessman has to keep money either when he gets it as sale-proceeds of the stock-in-trade, or for disbursement to meet the business expenses or for purchasing stock-in-trade and if he loses such money in the ordinary course of business, the loss is a deductible trading loss. It is immaterial whether the money is a part of the stock-in-trade, such as, of a banking company or a money-lender, or is directly connected with the other business operations. The risk is inherent in the carrying on of the business and is either directly connected with it or incidental to it.

10. In the judgment under appeal the High Court, to our mind, has taken the same erroneous view and given the answer against the assessee in spite of the fact that it has noticed a catena of cases of the various High Courts already alluded to by us also. Distinguishing the pre-ponderance of the view expressed in the various decisions in favour of the assessee, the High Court, in our opinion, wrongly chose to stick to its earlier narrow view.

11. In the light of the conspectus of the law, as discussed above, let us see whether on the facts found by the Tribunal the loss of Rs. 30,000 was allowable as a trading loss. The assessee had borrowed a sum of Rs. 50,000 from some creditor. The money was brought in cash to Rajahmundry by its employee. Such a mode of business operation is very common and well-known. Out of the said of Rs. 50,000 which was meant for purchase of Government securities a sum of Rs. 30,000 was lost by theft. It is immaterial whether Government securities were purchased by the remaining sum of Rs. 20,000 or not. The loss was, however, directly connected with the business operation and was incidental to the carrying on of the business of purchase of Government securities to earn profit. In such a situation it was a part of the trading loss and deductible as such in arriving at the true profits of the assessee.

12. In the result we allow the appeal, set aside the decision of the High Court and answer the question in favour of the assessee and against the Commissioner of Income Tax. The latter must pay to the appellant the costs in this appeal.

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