

# ANDHRA PRADESH HIGH COURT

Madhuri Rajeshwar

Vs.

Commissioner of Income-tax

Case Referred No. 44 of 1960

(P. Chandra Reddy, C.J. and Gopal Rao Ekbote, J.)

19.10.1962

## JUDGMENT

### **P. Chandra Reddy, C.J.**

1. The question referred for the opinion of this Court under Section 66(1) of the Indian Income-tax Act is :

"Whether on the facts and in the circumstances of the case, the loss of Rs. 4,004/- caused by theft is an allowable deduction ?"

2. The reference relates to the assessment year 1957-58, the accounting year being 1956-57. The assessee derived income from several sources one of them being the agency of Tata Mercedes Benz. It would appear that a stranger came to the assessee's shop during business hours, sat down near the cash box and was talking to him. Just then, he had to go into another room to talk on the telephone. Taking advantage of this situation, the stranger is said to have removed the cash from the cash box and disappeared with it. The assessee claimed this loss under Section 10(1) of the Indian Income-tax Act as an allowable deduction as incidental to the carrying on of the business. This was disallowed by the Revenue.

3. The appeals carried by the assessee to the Appellate Assistant Commissioner and the Tribunal proved unfruitful.

4. However, at the request of the assessee, the Income-tax Appellate Tribunal referred the question formulated above for the opinion of this Court.

5. The fact that theft occurred is not in dispute. But the only point for consideration is whether the loss is a permissible deduction under Section 10(1). This, in its turn, depends upon whether the loss could be described as one incidental to or directly connected with the carrying on of the business. Thus, the question resolves itself into this, namely, whether the loss of this money could be said to spring directly from the business.

6. In support of his contention that the loss in this case is intimately connected with the assessee's business and it should, therefore, be treated as an allowable deduction, the learned counsel for the assessee, Sri Kuppaswamy, called in aid the decision *Motipur Sugar Factory v. Commissioner of Income Tax, Bihar*<sup>1</sup>, The facts of that case are these. An employee of the assessee, who had been entrusted with the funds of the company for the purpose of distributing among the sugarcane cultivators in accordance with statutory rules, was robbed of the cash on the way. In those circumstances, Ramaswami and Sahai, JJ. of the Patna High Court ruled that the loss was incidental to the conduct of the trade and that it was an allowable deduction. The learned Judges relied on the circumstance that the purchase of sugarcane was controlled by statutory rules framed under the Bihar Sugar Factories Control Act and that by virtue of these rules the assessee company was bound to set up purchasing centres and to locate weigh bridges for the purchase of sugarcane. The assessee company was also bound to purchase sugarcane at these weighment centres and to make payment to the sugarcane cultivators within a fortnight of the date of weighment. It is thus seen that sending money through an employee for the purpose of distribution among the sugar-cane growers was an incident of business. It is in such a situation that the learned Judges treated the loss as directly connected with the business and as such it was a trading loss. That decision has no parallel here.

7. Nor does *Badridas Daga v. Commissioner of Income Tax*<sup>2</sup>, comes to the rescue of the assessee. There, the assessee was a money-lender, dealer in shares and bullion and commission agents in Bombay. He was resident of Bikaner and he had to manage his business at several places through agents. During the relevant period, the agent of the firm at Bombay, who was authorised to operate on bank accounts by a power-of-attorney, withdrew from the firm's account large sums of money and applied them in satisfaction of his personal debts incurred in speculative transactions. The assessee could recover only a small portion of it and the balance had to be written off. The question arose whether the amount thus lost to the assessee could properly be claimed as a permissible deduction in computing the profits of the business for the relevant year. It was laid down by their Lordships of the Supreme Court inter alia that when the agent was in charge of the business with authority to operate on the bank account and withdrawal of the money was in the purported exercise of authority, his action could be referred to his character as agent and the loss resulting from misappropriation of funds by him was a loss incidental to the carrying of the business.

8. The observation of Venkatarama Aiyer, J. who spoke for the Court, are opposite :

"A business especially such as is calculated to yield taxable profits has to be carried on through agents, cashiers, clerks and peons. Salary and remuneration paid to them are admissible under Section 10(2)(xv) as expenses incurred for the purpose of the business. If employment of agents is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. Human nature being what it is, it is impossible to rule out the possibility of an employee taking advantage of his position as such employee

<sup>1</sup>(1955) 28 ITR 128 : AIR 1955 Patna 389

<sup>2</sup>(1958) 34 ITR 10 : ( AIR 1958 SC 783)

and misappropriating the funds of his employer, and the loss arising from such misappropriation must be held to arise out of the carrying on of business and to be

incidental to it..."

9. The principle underlying this decision therefore, is that it is only such losses as are incidental to the carrying on of the business that should be claimed as allowable deductions. His Lordship observed that the loss for which a deduction could be made under Section 10(1) of the Income-tax Act 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 the business.

10. This pronouncement of the Supreme Court far from lending any colour to the contention urged on behalf of the assessee, furnishes an answer to his argument. 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.

11. Reliance was next placed on behalf of the assessee on an observation in *Bansidhar Onkarmal v. Commissioner of Income Tax*<sup>3</sup>. In that case, the assessee who carried on the business of selling yarn, also speculated on cotton and money-lending business. He claimed a deduction of Rs. 8,675/- as business loss. This amount was said to have been kept in an iron-safe in his shop and a relation of his, who at the material time was his accountant, walked into his residential house, got hold of the keys without the knowledge of the assessee, came to the business premises, forced his entry into the shop and after opening the iron safe removed Rs. 8,995/-leaving behind the balance out of which Rs. 325/-was later on recovered from him and it is the balance of Rs. 8,675/- which was claimed as business loss. This was disallowed by the concerned Income-tax Officer, which was upheld by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. In a reference under Section 66(1) of the Indian Income-tax Act, the Orissa High Court agreed with the view of the Department and of the Appellate Assistant Commissioner and answered the reference against the assessee. It was ruled that the assessee was not entitled to claim deduction for the reason that the theft which occurred after the close of the shop was not committed by the accountant in the course of his employment, and that the theft was not incidental to the conduct of the business. The learned Judges observed that there was hardly any distinction between the case of a theft of this type committed by an employee or servant of the owner on the one hand and by an ordinary burglar on the other and that the fact that he was an employee merely facilitated the commission of the theft by giving him access to the keys.

12. No doubt, the learned Judges observed that the position might have been quite different if the theft had occurred during office hours, prior to the crediting of the sum to the account of the employer. This remark does not really help the assessee in the present case for the reason that it has reference only to a situation where theft is

<sup>3</sup>(1949) 17 ITR 247

committed by an employee of the firm during office hours. The employee is expected to handle money during business hours and if in the course of such handling he commits either theft or misappropriation of the money, it could properly be said that it was done in the discharge of his duties as an employee, and therefore, related to the conduct of the business. But that is not the position in the present case where the theft could not be said to have any relation to the business. Occurrence of this nature could not be regarded as incidental to the carrying on of the business.

The observation relied upon by the learned counsel for the assessee does not, therefore, render any assistance to the assessee.

13. In *Ramaswami Chettiar v. Commissioner of Income Tax*<sup>4</sup>, a Full Bench of the Madras High Court took the view that the loss occurred by theft of money used in the money-lending business was not an allowable deduction where the theft was committed by persons, who were not at the time of the offence employed as clerks or servants in the business of the assessee. Curgenvin, J., one of the members of the Full Bench, who agreed with Beasley C. J. in disallowing the claim of the assessee, observed inter alia as follows :

"To recognize it we must, I think, find not only that the cash had to be kept on the premises, but that its loss by theft was a circumstance which was so far probable as to be an occurrence incidental to, if not inseparable from, the manner in which it had to be kept".

14. The principle contained in these observations is quite applicable to this case. In fact, this is an a fortiori case. It is not suggested in this case that cash had to be kept in the premises for carrying on the business. Be that as it may, it has not been established that the loss resulting from the theft has arisen out of the conduct of the business and is incidental to the trade. Hence, it is not included within any of the deductions permissible under Section 10(2) of the Act.

15. For these reasons, we think that the view of the Income-tax Appellate Tribunal cannot be successfully impugned. We accordingly answer the question in favour of the Department and against the assessee. But, in the circumstances of the case, we make no order as to costs. Reference answered accordingly.

<sup>4</sup>ILR 53 Mad 904 at p. 919 : (AIR 1930 Mad 808 at 813) (FB)