

CALCUTTA HIGH COURT

Sree Hanuman Investment Co. Ltd

Vs

Commissioner of Income-Tax

(G.K. Mitter J.)

13.02.1962

JUDGMENT

G.K. Mitter J.

1. In this reference under section 66(1) of the Indian Income-tax Act, the point of law involved is whether loss incurred by the assessee in a speculative business can be set off towards profits and gains of his other business not of a speculative nature arising to him in the same year under section 24(1) of the Act read with the first proviso thereto. The relevant portion of section 24(1) with the proviso is as follows :

"24 (1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year :

Provided that in computing the profits and gains chargeable under the head profits and gains of business, profession or vocation, any loss sustained in speculative transactions which are in nature of a business shall not taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transaction."

The assessment year of the assessee company for the purpose of this reference is 1953-54, the corresponding accounting year being the financial year ending on March 31, 1953. During the relevant period the assessee carried on business in managing agency, money-lending, etc. It also carried on a speculative business in sales and purchases of gunny bags, the loss whereof was computed at Rs. 57,750. The assessee claimed to set off the same towards its business income from managing agency, money-lending, etc., in the year showing a net profit of Rs. 59,289. The Income-tax Officer added back the loss of Rs. 57,750 and this was upheld both by the Appellate Assistant Commissioner and the Tribunal. The question which has been referred to us is :

"Whether, on the facts and in the circumstances of the case, the loss arising in the speculation business could be set off against the other business income falling under section 10 of the Act ?"The contention of the assessee is that profits and gains of its business, profession or vocation carried on during the year in question must be computed under section 10. As it has several business each business must be computed separately deducting allowances permissible under the section and the net result thereof is to be taken either as its profits and gains or as its loss for the relevant year. In support of this reliance was placed on the judgment of the Privy Council in *Arunachalam Chettiar v. Commissioner of Income-tax*. The Judicial Committee there approved of the judgment of the Madras High Court in *Commissioner of Income-tax v. Arunachalam Chettiar* where it had been held that a person carrying on two different trades, one individually and the other as a member of an unregistered firm, was entitled to set off for purposes of income-tax the loss incurred by him in respect of the partnership trade against profits made by him in his individual trade. Reliance was also placed on the very clear words of the Bombay High Court in *Commissioner of Income-tax v. Murlidhar Mathurawalla* :

"Different businesses do not constitute different heads under the Income-tax Act. All businesses wherever carried on constitute one head which falls under section 10 of the Act and in to determine what are the profits and gains of a business under section 10, an assessee is entitled to show all his profits and set off against those profits, losses incurred by him under the same head. It is only when he proceeds to set off a loss under business against a profit under some other head that section 24 comes into operation and various considerations will arise whether he is entitled to such a set-off or not."

The proviso set out above was not embodied in the Act at the time when *Murlidhar Mathurawallas* case was heard and naturally Chagla C.J. who delivered the judgment in the above case, did not have to deal with effect of the proviso. According to the assessee the purpose of a proviso is to carve out something which would otherwise be covered by the language of the section and must be confined to that alone. Reliance was placed in support of this proposition on the following observations of Lord Macmillan in *Madras and Southern Mahratta Railway Company Ltd. v. Bezwada Municipality* : "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case." This has been quoted in many judgments of different High Courts in India including some of our Supreme Court. Reference was made to the judgment of the Supreme Court in *Commissioner of Income-tax v. Indo-Mercantile Bank Ltd.*, where it was said : "Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."It was strenuously argued that section 24(1) does not fall to be considered at all

unless the assessee claims to set off a loss of profits or gains in any year under any of the heads mentioned in section 6 against his income, profits or gains under any other head in that year as the authorities mentioned above lay down that in arriving at the net result under section 10 losses in any business must first be deducted from the profits in any other business of the assessee. It was urged that the question of set off under section 24 is entirely irrelevant to a case where adjustment has to be made under section 10 itself and the proviso to section 24(1) cannot enlarge the scope of the section so as to prevent deduction of loss in a speculative business from profits and gains of other business to arrive at the net result of the operation of section 10. Normally no doubt a proviso is not meant to enlarge the scope of the main section but this does not hold universally true. There have been instances where we have come to the conclusion that in enacting a proviso the legislature has in effect enlarged the scope of the section and in my opinion the present is a case of that type. In *Rhondda Urban District Council v. Taff Vale Railway Co.* it was observed by Lord Loreburn L. C., at page 258 :

"It is true that section 51 (Railway Clauses Act of 1845) is framed as a proviso upon preceding sections. But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before."

Looking at the scheme of the Indian Income-tax Act I find that Chapter I containing section 3 and 4 provides for the charge of tax on income by section 3 and the application of the Act under section 4. The last mentioned section shows what kind of income is to be taken into consideration for computing the total income assessable to tax under section 3 and what kinds of income are not to be included in the total income. Chapters II and IIA describe the authorities constituted for the purpose of the Act and their jurisdiction. Chapter III containing section 6 to 17 shows what are taxable incomes. The different heads under which all income must fall for the purpose of computation under the Act are classified under section 6 and their computation is provided for in section 7 to 12B. Exemptions of general or special nature which the Act allows are contained in section 14 to 16. Section 17 deals with determination of tax payable in certain special cases. Section 10 shows how profits and gains of "business, profession or vocation" carried on by an assessee are to be computed. There is no specific provision for computation of separate or diverse businesses carried on by an assessee in the section itself. All the profits and gains of business, profession or vocation carried on by an assessee have to be computed under this section and in order to arrive at the total income of an assessee (an expression defined in section 2(15) of the Act) the revenue authorities must find out the total amount of income, profits and gains computed in the manner laid down in the Act. Chapter IV of the Act containing section 18 to 39 is headed "deductions and assessment". Section 18 deals with deduction at source, 18A with advance payment of tax, 19 for payment in other cases. Section 22 deals with total income

during the previous year exceeded the maximum amount which is not chargeable to income-tax. Section 23 gives the Income-tax Officer jurisdiction to assess the total income of the assessee and determine the sum payable by him. Section 23A, 24A, 25 and 25A contain provisions for assessment in certain special cases. Section 24 which falls within this group of sections providing for assessment is headed "set-off of loss in computing aggregate income." Without this section it would be difficult to compute the total income of an assessee where he has made a profit under any of the heads mentioned in section 6 but suffered a loss under one or more of the other heads. But for the proviso to section 24(1) loss in a speculative business would be treated just like any other loss and set-off under profits and gains computed under any of the other heads of income mentioned in section 6. It was argued by counsel for the assessee that section 24(1) deals with the question of set-off of loss against income intra head and not inter head so far as heads of income under section 6 are concerned and the proviso to the section ought not to be construed so as to disturb the computation of profits or loss inter head. According to him on account of loss in speculative business there was a balance of loss taking into account all business under section 10 of the Act the same could not be set off under profits and gains under any of the other heads of income under section 6 in the same year but had to be carried forward. In my view the wording of the proviso does not permit of such narrow construction. The text of the proviso shows that where an assessee sustains a loss in speculative transactions which are in the nature of a business in computing profits and gains chargeable under the head "profits and gains of business, profession or vocation" such loss is not to be taken into account except to the extent of the amounts of profits and gains, if any, in any other business consisting of speculative transactions. Now, computation of "profits and gains of business profession or vocation" is what section 10 deals with, the identical field in which the proviso to section 24(1) is to operate. It would have been better if the legislature had added the expression "subject to the first proviso to section 24(1)" at the beginning of section 10(2) of the Act. But this omission is immaterial. If the object of the legislature in enacting the proviso to section 24(1) was to deny an assessee a set-off of loss incurred in speculative transactions in the nature of business against profits and gains under any of the other heads mentioned in section 6 there was no need to use the words "in computing the profits and gains chargeable under the head profits and gains of business, profession or vocation" in the proviso at all. Moreover, it is difficult to see why loss in speculative transactions should be allowed to be set off against profits and gains of business which was not speculative but not against profits and gains under any of the other heads mentioned in section 6. Reading the whole of the proviso it appears to me that what the legislature was aiming at was to prevent loss sustained in speculative transactions reducing the taxable income of an assessee. The legislature seems to have provided for setting off of loss in speculative transactions only against profits and gains of business of a similar nature. Such losses are allowed to be carried forward but even under sub-section (2) are not to be set off except against profits made in business of the same

nature. In this connection reference may be made usefully to the objects and reasons for enacting this proviso. This proviso was inserted in the main section by section 3 of the Finance Act of 1953 (XIV of 1953) with effect from April 1, 1953. It forms sub-clause (d) of clause 3 of the Bill and the Objects and Reasons of the Finance Bill of 1953 to be found at page 41 onwards of volume 23 of the Journal Section of the Income-tax Reports shows that the legislature wanted to restrict the set-off of speculation losses against speculation profits only. Reference was also made to it in the budget speech of the Finance Minister in 1953-54, the relevant portion whereof is to be found at page 61 of the said journal. Referring to this clause the Finance Minister said "it was designed to check the practice to buying up speculative losses" on the basis of the recommendation of the Income-tax Investigation Commission that speculative losses should be allowed to be set off against speculative gains only. In construing statutory enactments courts of law have taken into consideration the state of the law before the enactment, the mischief and defect for which the law did not provide and the remedy which Parliament have resolved to cure the disease. An instance of this is provided by the reference made to the Income-tax Enquiry Report in 1936 by the Supreme Court in considering the provisions of section 16(3) of the Indian Income-tax Act as amended in 1937 : *Commissioner of Income-tax v. Sodra Devi*. This is not the first occasion when the above proviso has come up for consideration by courts of law. In the case of *Keshavlal Premchand v. Commissioner of Income-tax*, Chagla C.J. went elaborately into the question and came to the conclusion that the proviso was a substantive enactment and its effect could not be whittled down merely because it had been placed as a proviso to section 24(1) of the Act. His Lordship took into account the fact that businessmen had been known to buy speculative losses in order to reduce their profits and the legislature was aiming to prevent that mischief by this enactment. With respect I agree and no reasoning has been adduced before me as to why I should come to a different conclusion. The contention of the assessee, namely, that it did not matter what speculative losses he suffered so long as it did not encroach on the income, profits and gains from sources other than those mentioned in section 10 of the Act is noteworthy of acceptance. In effect it would allow a businessman to reduce his business income to nil by buying up speculative losses and avoiding payment of tax. Tendolkar J., who did not deliver a separate judgment in *Keshavlal Premchand's* case, had to consider that judgment again in the case of *Jamnadas Daga v. Commissioner of Income-tax* and has in the last mentioned case given reasons for coming to the conclusion that the proviso was a substantive enactment. I do not think it will serve any useful purpose to consider the cases which were examined by the learned Chief Justice of the Bombay High Court in coming to the conclusion he did in *Keshavlal Premchand's* case and for the reasons given above the answer to the question in this case must be given in the negative and against the assessee. The assessee must pay the costs of this reference.

RAY J. - I agree.

Question answered in the negative.