

CALCUTTA HIGH COURT

Shree Ramesh Cotton Mills Ltd

Vs

Commissioner of Income-Tax

(Mitter J.)

26.03.1965

JUDGMENT

Mitter J.

1. The question referred to us under section 66(2) is :

"Whether, on the facts and in the circumstances of the case, the business activities of the company, to wit, manufacture and business in cotton textiles of the assessee and in earning profits in forward transactions in hessian, sacking, bullion and castor seeds constituted the same business within the meaning of section 24(2) of the Indian Income-tax Act, 1922, so that the losses in the former year amounting to Rs. 5,60,854 could be set off against the profits in the latter year amounting to Rs. 3,57,356."

The facts taken from the statement of the case are as follows : The assessment year concerned is 1952-53, the corresponding accounting year ending on December 31, 1951. The assessee is manufacturer of yarn and cloth. It also enters into forward transactions in hessian, sacking, bullion and castor seed. In the accounting years ending December 31, 1951, it sustained a net loss of Rs. 1,36,090 in the manufacture of yarn and cloth and made a net profit of Rs. 4,93,446 in forward transactions in bullion, castor seed, hessian, etc. After setting off the above loss against the profit, the balance of Rs. 3,57,356 was assessed as business income of the assessee. The assessee wanted to set off the losses in the manufacture of yarn and textiles brought forward from the preceding years to the extent of Rs. 5,60,854 against the profits made in the forward transaction in the year of account, on the ground that they constituted the same business within the meaning of section 24(2) as it stood before its amendment in April, 1953. The claim to set off was not allowed by the Income-tax Officer. The appeals to the Appellate Assistant Commissioner and the Tribunal were also unsuccessful. Before the Tribunal the assessee relied on the following factors in order to establish that it was carrying on the same business in the year ending

December 31, 1951, as it was doing before :

- (a) One set of accounts was maintained for the several activities which were incorporated in the ordinary course of day to day transactions;
- (b) There was common finance;
- (c) The several activities were carried on under the same roof; and
- (d) There was a common staff and common ownership of the assets.

The Tribunal held, relying on the decision of the Bombay High Court in *Manilal Dahyabhai v. Commissioner of Income-tax*, that the above factors did not necessarily lead to the inference that the several activities of the company must be regarded as constituting one and the same business for the purpose of section 24(2). According to the Tribunal, "the correct test to be applied was whether one of the two business conducted by the assessee could be stopped without affecting the texture or framework of the other." Judging by this test the claim of the assessee was negatived. The relevant portion of section 24(2) of the Act, as it stood before the amendment in 1955, ran as follows :

"where any assessee sustains a loss of profits or gains in any year... in any business, profession or vocation, and the loss cannot be wholly set off under sub-section (1), so much of the loss as is not so set off, or the whole loss where the assessee had no other head of income 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....."

An assessee who has business activities of different kinds may in a particular year suffer loss in some and make profits in the others. For income-tax purposes only the result to the whole years activities is to be taken into consideration under section 10 of the Act. If he reaps profits in some and incurs loss in others, he can only be assessed under section 10 on the balance of the profits over the losses. If he suffers a loss as a net result, he is allowed to carry it forward. Section 24(2) determines how losses which are brought forward from a previous year can be set off towards profits of the business in a subsequent assessment year. The section lays down that the assessee's claim to set off a loss against profits is to be confined to the profits of the same business as that in which the loss was incurred. If an assessee has two business and makes profits A in one and loss B in the other, he is allowed to carry forward the loss B minus A to the next year, but this loss cannot be set off against the profits made in the first business. The question which arises in all such cases is whether the business in the subsequent year is the same business as that in the earlier year. It may be that the assessee carries on his different business activities under one roof

and under one management. It may again be that a part of the staff employed for business X also looks after business Y. The assessee may or may not maintain a common set of account books. He may or may not use finance employed in one activity when the occasion arises for it in the other activity. Various tests have been laid down from time to time to find out whether the business in the two years is the same. In my opinion, the activities of the assessee and his modus operandi in carrying them out must be examined as a whole. If the nature of the different activities or ventures is such and they are so conducted as to lead to an inference that the whole thing is one unit, the business must be considered as the same business notwithstanding the fact that a particular activity may be discontinued in one year. For instance, we may take the case of a big departmental store which sells goods of many and various kinds like furnishing material, textile goods, furniture, wearing apparel, household utensils, cosmetics and toiletry in one building and also runs a restaurant or a tea shop for the convenience of its customers : the business must be considered as the same business notwithstanding that the restaurant or the tea shop is discontinued for lack of patronage or other difficulty. The assessee may in the same building and as a part and parcel of the whole organization carry on a tailors shop. From this one would not be justified in saying that its business in tailoring, in running the tea shop or as a restaurateur is different from that of the sale of furniture, furnishing materials, cosmetics, etc. But if the same assessee carries on venture of dealing in petrol in a part of the same building or a workshop for effecting repairs to cars, it will be difficult to hold that his activity of dealing in petrol or of running the repair shop forms an integral part of the entire business and, notwithstanding the fact that he closed the workshop because of loss suffered, his business in the next year is the same as that in the previous year. Again, if the assessee deals in landed property either as land agents or as sellers of plots of land in a large block held by it, it will not be right to say that his activity of running the departmental store and as a dealer in land constitute the same business as that pursued in the next year although he has closed the land dealing business. Again, although shares are goods, I would hold that dealing in shares along with other commodities was not the same business in the next year when the share dealing activity is discontinued. Similarly, having forward transactions in bullion, hessian, sacking and castor seed constitute activity of a kind entirely different from manufacturing textiles or dealing in textile goods, although there might be unity of control or a considerable measure of unity of management of the two different kinds of activities. Coming to decided cases, it would appear that the fountain-head is the judgment of Rowlatt J. in *Scales v. George Thompson & Co, Ltd.* There the company, the assessee, was established, inter alia, (1) to acquire and take over as a going concern the business then being carried on under the name and style of George Thompson & Co. with all its assets or any of the assets, with or without all or any of the liabilities of the proprietors of that business in connection therewith, (2) to carry on all or any of the business of ship-owners, merchants, ship-builders, etc., (3) to insure the whole or any part of the property of the company and to accept the

whole or any part of the marine risk and liability of the company as underwriters and also to carry on the business of marine insurance in all its branches. By an agreement made between the firm of George Thompson & Co. and the company, it was inter alia provided that the vendor would sell and the company would purchase the goodwill of the business of the firm and take over the full benefit of all contracts and engagements relating to the business of the partnership. The interest in the underwriting account was sold to the company when the company was incorporated and, inasmuch as Lloyds would not recognise a company as a "name", it was continued in the names of the said George Thompson Handerson & Stephen Thompson (two of the partners of the firm), who acted as nominees of the company and handed over the profits to the company. The results of the underwriting were, from the date of incorporation up to the time underwriting was discontinued, regularly brought into the trading and profit and loss accounts of the company together with the rest of its business. It was held by the Commissioners of Inland Revenue that the business done at Lloyds was a separate and distinct business for the purpose of assessment. Rowlatt J. was of the view that there was no question of law raised and in any event the Commissioners had not gone wrong. He observed, "this company carried on the business of underwriting. It also had a fleet of steamers. I cannot conceive two businesses that could be more easily separated than those two. They both have something to do with ships; that is all that can be said about them. One does not depend upon the other; they are not interlaced; they do not dovetail into each other, except that the people who are in them know about ships; but the actual conduct of the business shows no dovetailing of the one into the other at all. They might stop the underwriting; it does not affect the ships. They might stop the ship and it does not affect the underwriting. They might carry on underwriting in a country where there were no ships, except that it would not be commercially convenient; but the two things have nothing whatever to do with one another." His Lordship went on to say that "the fact that the company is one company and declares one dividend and so on cannot affect this case. The company can carry on two businesses, although, it may for the purpose of convenience, if it wishes, amalgamate the proceeds before paying the shareholders." According to his Lordship, the method of book-keeping did not throw any light upon the matter and the real question was "was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses." The question came up before the Supreme Court in Setabgunj Sugar Mills Ltd. v. Commissioner of Income-tax. The facts there were as follows. For several years the assessee-company carried on the business of manufacture and sale of sugar only. In the accounting year ending August 31, 1945, it had made some profits in transactions in gunnies. In the next accounting year the company made a profit in transactions in gunnies and jute. In the accounting year ending August 31, 1947, the company did business in mustard seeds, gunnies and hessian and made profit. After this, the company ceased to have any business other than the manufacture and sale of sugar. During the accounting year ending on August 31, 1947, the profit from the sale

of gunnies, mustard seed and jute amounted to Rs. 6,14,018. The sugar business in that year resulted in a loss of Rs. 2,09,306. The loss in sugar was set off against the profits of the other business and assessment made on the net profit. The company claimed to set off against this profit, business losses of past years in sugar amounting to Rs. 13,43,069, which had been brought forward. Having lost throughout before the revenue authorities, the company asked the Tribunal to make a reference to the High Court. The Tribunal declined and the application under section 66(2) was also summarily dismissed. The company went up to the Supreme Court and obtained special leave. The court observed : "The question whether, on the application of the settled tests, different ventures carried on by an individual or a company form the same business is a mixed question of law and fact. Certain principles are applied to determine whether, on the fact found, a legal inference can be drawn that the different ventures constitute separate businesses or, viewed together, can be said to constitute the same business." After referring to Scales case, the court added that "no doubt, findings of fact are involved, because a variety of matters bearing on the unity of the business have to be investigated, such as unity of control and management, conduct of the business through the same agency, the inter-relation of the businesses, the employment of same capital, the maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth." In the result, the court allowed the appeal and directed the High Court to call for a statement of the case from the Tribunal on the question framed. Even before it came up before the Supreme Court, the question had engaged the attention of different High Courts from time to time and tests were formulated for judging whether the assessee was carrying on the same business in the later year as in a previous year. In *K. S. S. Soundrapandia Nadar and Bros. v. Commissioner of Income-tax*, the assessee were a Hindu undivided family carrying on business in rice and grains at Tuticorin and Virudhunagar. They bought ready stock at Rangoon through two agents there and imported them at Tuticorin for sale in India. For the first time in the accounting period for the assessment year 1938-39, they entered into contracts for deliveries at future dates in respect of the same commodities in which they were dealing. In the next accounting year relevant for 1939-40 assessment year, they bought only ready goods and did not enter into contracts for deliveries at future dates. In respect of the respective accounting years for two assessment years 1940-41 and 1941-42, they bought ready goods and also entered into contracts for the same kind of goods for delivery at future dates. In each of these two years the net result of these contracts for future deliveries was a loss and it was larger than the profits that arose in the handling of ready stocks and such losses were carried forward. In the returns submitted by the assessee for these two years, they had submitted that these losses had arisen in the single business carried on by them in these commodities. The question before the court was whether there was any material for the finding that the dealing in forward contracts, carried on by the assessee in the Rangoon grain market, was a distinct and

separate business from the dealing in ready goods of the same commodities. The High Court recognised that it was not easy to formulate a test applicable to all cases in order to determine whether two dealings in different commodities or the carrying on of different lines of business would constitute the same business or not within the meaning of section 24(2) of the Act. Satyanarayana Rao J. observed : "One thing, however, seems to be definite, and that is that common ownership alone would not constitute different lines of business the same business; nor the mere fact that two businesses are of a distinct nature would make them separate businesses. An individual may run multiple stores like Spencer & Co. at Madras, and yet the business may be only one business, though there are different lines. In the case of insurance companies, investment of their funds for the purpose of earning income is an ordinary incident of the business of insurance, and though insurance business and money-lending are two different lines of business, yet the business is treated as one and entire." The learned judge then referred to Scales case and various Indian cases which had been decided before. As to the conduct of the business, the learned judge found that "the assesses, who are members of an undivided Hindu family, had their place of business at Tuticorin and through their agents, either commission or otherwise, were buying ready goods and were also entering into forward contracts in respect of the grains. In the case of ready purchases, the grain was sent from Rangoon to Tuticorin and was sold. In respect of forward contracts, the sales and purchases were adjusted, and the differences were paid or received. Under the forward contracts, the assessee had the undoubted right to demand delivery in the case of purchases. It cannot be said that from the beginning the assessee did not entertain the intention of taking delivery under those contracts, and had in view only speculation upon the fluctuations on the grain market at Rangoon. The agents sent extracts of accounts to Tuticorin, and they were all entered in the same account books, though in a different folio. The financing of all the transactions, whether they related to purchases or whether they related to forward contracts, was from Tuticorin and the control of all the transactions was under a single management. The mere fact that the forward contract business could be separated, if trouble was taken to go through the accounts and to separate the dealings, does not make this business a distinct business from the other business of the assessee. It is the common practice of every merchant to enter under separate heads each line of business in order to ascertain whether that particular line was fetching profit or ending in loss. That circumstance, in my opinion, does not give the business a distinctive character so as to detract from its being the same business within section 24(2) of the Act." Viswanatha Sastri J. said : "There was here in truth one business, a business which was partly and which was primarily, it might well be, the business of buying and selling rice and other grains. But in course of time the activities of the assessee extended to entering into forward contracts for the purchase and sale of those very commodities in which they were dealing, but as part of the business itself. As I said, the business was carried on by the same persons, through the same agency, with the same funds, both with reference to

the dealings in futures and forward contracts as well as ready goods. The speculations in futures were entered into with a view to increase the profits of the business and also perhaps to impress the commercial public in Rangoon and command credit facilities. The speculations were merely ancillary to the ready goods business and they converged to the same point, namely, the earning of profits as a result of the rice and grain business." It will, therefore, be noted that both the learned judges laid great stress on the fact that the forward contracts were in respect of the same commodities as that in which the assessee carried on a trade in ready goods and that the conduct of the business was such as to show that the forward contracts and the transactions in ready goods were part of an integral whole and that speculations were merely ancillary to the ready goods business. The conclusion may be justified on the facts of the case but with great respect I venture to think that if an assessee carries on a business in ready goods and also enters into forward contracts in respect of the same class of goods but never takes or gives delivery under the forward contracts, he does not carry on one business. It is not the intention of the assessee but his actual conduct of the business which matters. A person who habitually deals in ready goods of a particular kind may anticipate that there will be a shortage of the commodity in the future and may enter into forward contracts for the purchase of the commodity. But if he never takes delivery of the goods after having entered into forward contracts but merely pockets the gains or pays out the losses incurred, i.e., deals in differences, it cannot be said that his business in forward contracts is the same as that in ready goods although carried out through the help of the same agency or the same staff or the employment of the same capital. Intrinsically the two businesses are different. Nor does it matter that they converge to the same point, namely, the earning of profits. After all, everybody carries on business with the sole idea of making profits. If the assessee in the Madras case had been dealing in ready goods like grains and pulses and had been dealing in forward contracts in bullion and hessian through the same agency, could it be said that they were carrying on the same business? In my opinion, the answer would clearly be in the negative. Nor, in my opinion, does it make any difference that the forward contracts were in respect of the same commodities as the ready transactions if no delivery was ever taken or given under the forward contracts. In *K. Govindan v. Commissioner of Income-tax*, the assessee carried on trade as commission agents at Madras. Among the several trading activities of his, both in the relevant accounting year and preceding years, was the purchase and sale of shares, which the Tribunal characterised as a speculative business. The assessee was not a share-broker. For the accounting year preceding the assessment year 1947-48, his profits from transactions in shares was computed at Rs. 13,275. He had sustained losses in the years preceding the relevant accounting year. After adjusting the losses sustained towards the profits, there was still a balance of Rs. 8,321. The assessee contended that this sum should be adjusted towards the income from his other trading activities. The Tribunal negatived this contention on the ground that his business in shares was different from that of commission agency. The Bench of the Madras High Court

consisting of Rajagopalan and Rajagopala Ayyangar JJ. found that according to the Tribunal "... the assessee had no separate establishment, no separate place of business and no separate finance for his trading activities in the purchase and sale of shares..... `Finances for both these activities of the assessee were derived from the same pool, that there was no separate establishment or expenditure, all these being inter-woven." The learned judges observed "that the nature of the business which the assessee carried on in the purchase and sale of shares, that is, really dealing in futures, was a relevant factor to be taken into account in deciding whether it constituted an item of business distinct and separate from the commission agency business which he carried on, cannot be disputed." Accordingly, the question referred was answered against the assessee. The learned judges referred to Nadars case and held that the question whether, for purposes of section 24(2), a given business is a separate business was essentially one of fact.

In *Manilal Dahyabhai v. Commissioner of Income-tax* the assessee was a Hindu undivided family. It was a wholesale dealer in cloth and also did speculation in gold, silver, cotton, etc. Two sets of accounts were maintained by it, one in the name of Manilal Dahyabhai, Bombay, and the other in the name of Dahyabhai Sobharam, Bombay. According to the assessee, the business in the name of Manilal Dahyabhai recorded transactions with upcountry merchants and that in the case of Dahyabhai Sobharam dealings with local parties and it was in the second set of books that speculation business was entered. In the assessment years 1947-48 and 1948-49, the assessee had suffered losses in respect of speculation business and claimed that the profit made by the first business should be set off against losses brought forward from the speculation business. There being a difference of opinion between the two members of the Tribunal, the matter was referred to the President who agreed with the Accountant Member and against the assessee. The Judicial Member referred to six factors in support of his conclusion that there was one business, namely, (1) only one set of accounts was maintained, there being only one cash book and the bank accounts being also the same both for the dealings in cloth as well as in speculation; (2) that the speculation business as well as dealings in cloth were carried on from the assessee's shop in Champa Galli in the name of Shah Dahyabhai Sobharam; (3) that the business was carried on with the help of the same staff; (4) that the capital employed for both the businesses was the same; (5) that the receipts in respect of one business was utilised for purposes of the other business indiscriminately and vice versa; and (6) that the terms of overheads and other expenses were common. According to the Judicial Member, all these factors led to the inevitable inference that the two lines of business conducted by the assessee constituted the same business. The Accountant Member was of the view that the principal business of the assessee was the cloth business and that the speculation business was carried on by the assessee by debiting the funds to the cloth business, and merely because there were withdrawals made from the cloth business for the purpose of the business in speculation, it could not be said that there was identity between the two lines of business carried on by the assessee. The President of the Tribunal agreed with the

Accountant Members view. The learned judges of the Bombay High Court however did not rest their judgment merely on the concurrence as to the findings of the two Members of the Tribunal. Shah J. observed : "The court must in each case ascertain whether, in view of the existence of these circumstances (the six factors mentioned above), unity between the two lines of business is established.... Though not a conclusive test, an important test, viz., whether one of the two businesses conducted by the assessee could be stopped without affecting the texture or framework of the other, may properly be applied in this case. It was possible for the assessee to close the cloth business and to conduct exclusively the speculation business and the texture or framework of the speculation business would not have been affected thereby : and by the closure of the speculation business, the texture or framework of the cloth business could not have been affected. Again, the nature of the two lines of business conducted by the assessee is not the same. The only similarity of it can be called a similarity between the two lines of business is that one of the items of the speculation business was cotton whereas the other business conducted by the assessee was of cloth... The nature of the two lines of business was entirely independent of each other, and there was no unity between the two lines of business conducted by the assessee. The financing of the two lines of business from the same source, conducting of the business from the same shop and attendance to the business by the same owner with the aid of the same staff do not by themselves establish the necessary unity which would constitute the same business." The other learned judge Daisy J., who came to the same conclusion, observed : "Here are two businesses conducted by the assessee with his own capital, and I shall assume that they were conducted from the same place.... He is maintaining one set of books of account. In substance and reality, that is all there is to it. The other so called factors are hardly of any importance. On the other hand, it is clear that in no sense was one business dependent on the other, unless the financial capacity of the assessee was to be taken into consideration. That certainly is not a relevant factor. There is no element of unity save the object of making profit. That, again, is not a factor which is relevant to the question before us. There was no interlacing and no blending of the two businesses which were totally diverse and distinct commercial operations. The nature of the two businesses, I may repeat, was wholly different."In *Standard Refinery & Distillery Ltd. v. Commissioner of Income-tax*, the assessee was at first the owner of a distillery. It subsequently acquired a refinery and still later obtained on lease a sugar factory and started manufacturing sugar. During the period between January 29, 1946, and April 23, 1946, the assessee purchased 41,300 shares of the sugar refining company. On April 30, 1947, the entire block of shares was sold away resulting in a loss amounting to Rs. 3,70,356. A portion of this loss which was carried forward was claimed to be set off against the assessee's business. This was disallowed. The Division Bench referred to *Setabganj Sugar Mills Ltd.'s* case and *Scales* case and said : "The position, therefore, is that whether or not it is the same business is dependent on a variety of matters bearing on the unity of the business, but the real question, the central fact, the principal

test is, whether there was any inter-connection, any interlacing, any inter-dependence, any unity embracing the ventures, whether the different ventures were so dovetailed into each other as to make them into the same business." The question referred was answered against the assessee.

In my opinion, the essential thing to be considered is the nature of the business in the two different years and the way it is conducted in each year. As the question can only arise in the case of one assessee, factors like employment of same capital or same management or the ventures being carried on under the same roof are not matters of such importance. The principal thing to consider is whether the activities are of such nature and are so linked as to appear to be one unity. As I have said, an assessee carrying on a business of a departmental store may trade in many and diverse classes of commodities in one building as parts of the same establishment. It may even run a tea shop or a restaurant as noted, for the convenience of its customers. In such a case, if one department is closed, say, the tea shop or the restaurant or the cosmetic department or the tailoring department, the business does not become a different business but is carried on with the help of the same or a depleted staff. But if the assessee were also to carry on business as land agents or share-brokers or enter into forward contracts in bullion and hessian, I would find it extremely difficult to hold that the share-dealing line or the activity in forward contracts or the agency in land transactions were part and parcel of the departmental store. The conduct of the business is certainly to be considered but the more important matter is the nature of the ventures. An assessee who is a dealer in cloth may have several shops in different localities in the same city. The mere fact that different staff are employed in the different shops or that profit and loss of the different shops are separately recorded in different books of account would not go against their being part and parcel of one unit. Again, an assessee, which is a manufacturing concern, may have two factories in two different places, but if the capital employed is one, if the profit and loss account is made up of the working at the two factories and the shareholders get their dividends as a result of the computation of the profit or loss in the two factories together, there would be only one business. If however an assessee carries on business in cloth at one place and in sweetmeat at another with his own funds, it would be impossible to hold that he is carrying on the same business in two years if he decided to close one of the ventures at the end of a particular year. In the light of the observations made, I find myself unable to hold that the activity in forward transactions in hessian, sacking and castor seed can have anything in common with the activity of the manufacture of yarn and cloth so as to constitute parts of one business. In all such cases, there is bound to be unity of ownership. Common finance and the employment of common staff do not carry the matter much farther. The maintenance of one set of account books is easily accomplished by suitable directions given to the clerks and accountants. The essential thing is the nature and texture of the activities said to constitute one business. Selling shares and selling petrol both involve transfer and delivery. Yet a petrol dealers business is as far removed from a share dealers as Digboi is from Dalal Street. The test whether the cessation of one activity

will affect the texture of the other is fairly useful test in such cases. In my opinion, the subordinate tests as to whether there was employment of common staff and unity of control, or whether there was user of common finance and common books of account, are only to be applied when it has been found that there is such interconnection or coherence between the different activities that they appear so linked together as to form a composite whole. The answer to the question posed is in the negative and against the assessee who must pay the costs of the reference.

Masud J. - I Agree.

Question answered in the negative.

Question answered in the negative.