

KERALA HIGH COURT

Joseph John

Vs

Commissioner of Income-Tax

(C.A. Vaidialingam, J.)

05.05.1962

JUDGMENT

C.A. Vaidialingam, J.

This is a reference by the Income-tax Appellate Tribunal, A Bench, Madras, under section 66 (1) of the Indian Income-tax Act, 1922. The questions referred are :

- "(1) Whether there are materials for the Tribunal to hold that the aforesaid transactions constitute speculative transactions in the nature of a business within the meaning of the first proviso to section 24 (1) ?
- (2) Whether the losses are deductible under section 10 as business losses of the two assessment years 1953-54 and 1954-55 ?"

The accounting periods are the calendar years 1952 and 1953. The two Members of the Appellate Tribunal, Messrs. Sambamurthi and Sankararaman, who heard the appeal, in the first instance, differed on the following point :

"Whether the losses of Rs. 26,248 and Rs. 14,043 incurred by the assessee in the settlement of forward contracts in cocoanuts oil in which also he traded in during the calendar years ended 1952 and 1953, the previous years for the respective assessment years 1953-54 and 1954-55, are deductible as business losses under section 10 in the respective assessment ?"

The President then made a reference under section 5A (7) of the Act to three other Members of the Tribunal including himself. Those three members agreed with Mr. Sankararaman and held that the two sums mentioned are not deductible as business losses under section 10 of the Act. The final decision, according to section 5A (7), is the decision which is in consonance with the opinion of the majority of the members of the Tribunal who have heard the case, including those who first heard it. Section 24 (1) of the Indian Income-tax Act, 1922, provides that 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. The heads mentioned in section 6 are six in number.

They are (1) salaries, (2) interest on securities, (3) income from property, (4) profits and gains of business, profession or vocation, (5) income from other sources, and (6) capital gains.

The first proviso to section 24 (1) is in the following terms :

"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 the nature of a business shall not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions." There can be no doubt that sub-section (1) of section 24 applies only when the loss under one head is sought to be set off against the profit under another head, and that it has no application to a case like the one before us where the loss under one head is sought to be set off against the profit under that head itself. *In Anglo-French Textile Co. Ltd. v. Commissioner of Income-tax the Supreme Court* referred to the decision of the Privy Council in *Arunachalam Chettiar v. Commissioner of Income-tax* and said :

"... a set-off under section 24 (1) can only be claimed when the loss arises under one head and the profit against which it is sought to be set off arises under a different head. When the two arise under the same head, of course, the loss can be deducted but that is done under section 10 and not under section 24 (1)".

Normally a proviso to a section is confined to the area covered by the section itself. In *Madras and Southern Mahratta Railway Co. v. Bezwada Municipality* Lord Macmillan said :

"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"

and in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax Bhagwati J.* said :

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other".

This is the ordinary rule, not the invariable rule. As pointed out in *Rhondda Urban District Council v. Taff Vale Railway Co.*, a case quoted with approval in *Commissioner of Income-tax v. Indo-Mercantile Bank Ltd.*, a section framed as a proviso to a preceding section may contain matter which is in substance a fresh enactment adding and not merely qualifying that which goes before. The first proviso to section 24 (1) came up for consideration before the Bombay High Court in *Keshavlal Premchand v. Commissioner of Income-tax*. Chagla C.J., delivering the judgment of the court, said :

"It is clear, therefore, on the language of the proviso itself and on the scheme of the Act, that the Legislature in enacting the so called proviso was enacting a substantive provision dealing with the mode of computing the profits and gains chargeable under the head profits and gains of business, profession or vocation, and what the Legislature provided was that when you compute these profits and gains, the loss sustained in a speculative transaction must not be taken into account except to the extent of the amount of profits

and gains, if any, in any other business consisting of a speculative transaction." In other words, the learned judges repelled the assessee's contention that the proviso to section 24 (1) can be considered only as an abridgment of the right conferred by that sub-section. The head-note embodies a clear summary of the decision :

"Even though the main portion of sub-section (1) of section 24 of the Indian Income-tax Act, 1922, provides only for cases where an assessee sustaining a loss under one of the heads of income mentioned in section 6, claims to have it set off against his income, profits or gains under any of the other heads mentioned in section 6, the first proviso to that sub-section is not confined in its application to such cases but applies also to case where a loss in speculative transaction in the nature of a business is sought to be set off against profits from other kinds of business transactions and the profits and the loss fall under the same head, namely, business. It is clear, therefore, on the language of the proviso itself and on the scheme of the Act, that the Legislature in enacting the so called proviso was enacting a substantive provision dealing with the mode of computing the profits and gains chargeable under the head profits and gains of business, profession or vocation and what the Legislature has provided is that when you compute these profits and gains, the loss sustained in a speculative transaction must not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of a speculative transaction. Though as a general rule a proviso to a section can apply only to cases which but for the proviso would have fallen within the section, and in construing statutes the operation of a proviso must ordinarily be confined to cases which might otherwise fall within the section, the Legislature may enact a substantive provision in the garb or guise of a proviso, and if the court is satisfied that the language used in the so called proviso is clearly wider in its scope, and is itself a substantive provision, effect must be given to the language used by the Legislature."

The decision was followed by the High Court of Madhya Pradesh in *Commissioner of Income-tax v. Ramgopal Kaniyalal* and by the High Court of Punjab in *Commissioner of Income-tax v. Hukamchand Dalal*. We too are in respectful agreement with the view expressed by the High Court of Bombay. Explanation 2 in section 24 (1) shows that though a transaction in which a contract for purchase and sale of any commodity is periodically or ultimately settled otherwise than by actual delivery is a speculative transaction, a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him, shall not be deemed to be a speculative transaction. The contention of the assessee is that all the transactions with which we are concerned are hedging transactions and should not hence be treated as speculative transactions. The Tribunal's conclusion that the transactions are speculative transactions, and not hedging transactions, seems to be based on a misapprehension of the ambit of the assessee's business. Paragraph 3 of the order of Mr. S. K. Aiyar, after the reference under section 5A (7) - an order with which the President and the other Member of the Tribunal concurred - shows that they were proceeding on the basis that the assessee was only a miller who bought copra, crushed it and then sold the resultant oil. He had also as a matter of fact a business of buying and selling oil quite apart from his business as a miller. This is not disputed and the assessment order clearly shows that in addition to the oil produced in the assessee's oil mill he was also selling oil purchased by him. In the background of the trade and the figures available we are inclined to

agree with Mr. Sambamurti when he says :

"It does not appear to me that the transactions in question amount to anything but genuine hedging. The quantity involved in these contracts is well within reasonable limits."

It follows that we must answer the first question in the negative and the second in the affirmative, or, in other words, both the questions in favor of the assessee. We do so, though in the circumstances of the case, without any order as to costs. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be forwarded to the Appellate Tribunal as required by sub-section (5) of section 66 of the Indian Income-tax Act, 1922. Questions answered in favour of the assessee.