BOMBAY HIGH COURT

Govindram Bros. Ltd

Vs

Commissioner of Income-Tax

(L Stone, Kt., C.J. Chagla, J.)

27.08.1946

JUDGMENT

L Stone, Kt., C.J.

1. This is a reference under Section 66(1) of the Indian Income-tax Act, and the question which we are asked, in our advisory capacity, to express an opinion upon, is whether, the loss which was incurred by the assessee company and which was attributable to speculation in silver, can he set off, in the following year, against the income, profits and gains in speculation in cotton, having regard to the provisions of Sub-section 24(2) of the Indian Income-tax Act. That sub-section provides that such a set-off, in a subsequent year, can only be made against income, profits and gains from "the same business".

2. The question as framed by the Tribunal "in the original case was:

Whether, in the circumstances of the case, the assessee is entitled to set off the loss of Rs. 71,008 in silver speculation carried forward from the assessment for 1940-41 against the profits from speculation in New York cotton considered in the assessment for 1941-42, under Section 24(2) of the Indian Income-tax Act, 1939 ?Section 24(2.) is in these terms:-Where any assessee sustains if loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 81st day of March 1940, under the head 'Profits and gains of business, profession or vocation and the loss cannot be wholly set off under Sub-section (1), the premium not so set off 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.There follows a provision for a still further carry forward. The material words, which are to be noted, are that it must be from " the same business, profession or vocation".

3. In their judgment the Appellate Tribunal commenced in paragraphs 1 and 2 by stating the facts which are as follows:-

1. This appeal relates to an assessment made upon the appellant Co. for the charge year 1941-42. It is a private limited company and was registered on 16th November 1987. Its various objects are described in paragraph 3 of the Memorandum of Association which include carrying on business as managing agents of the Seksaria Cotton Mills Ltd., any trade, business, manufacture or commercial operations in any part of the world in any merchandise, commodities, goods, etc., and establishing and maintaining agencies at any place or places in the world for the conduct of business of the company. The 'previous year,' i.e., account year, of the company for the purpose of income-tax is the calendar year (1940).

2. A part of the assessee company's business is speculation in wheat, linseed, silver and cotton. In the account year 1939 it incurred a loss of Rs. 3,445 in linseed and wheat, and Rs. 1,38,875 in silver. In the assessment of 1940-41 the loss was adjusted against income, profits and gains of the company from other sources. But it could not be wholly set off, and a net loss of Rs. 71,008 was carried to the next year. In the account year (1940) the assessee speculated in New York cotton and made a profit of Rs. 2,04,827 which was brought into the present assessment for 1941-42. It claimed to set off the net loss of Rs. 71,008 carried forward as just stated, against the profit in New York cotton. The income-tax officer held that the set off could not be allowed haying regard to Section 24(2) of the Indian Income-tax (Amendment) Act, 1930. His view was upheld by the Appellate Assistant Commissioner.

4. The Tribunal held that the speculations in New York cotton were not the same business as speculation in silver in Bombay.

5. In that state of the record this matter came before us in October, 1944, and in referring the case back to the Tribunal my learned brother Kania, delivering the judgment of this Court on October 12, 1944, said:The question whether the business is the same, under Section 24(2) is a question of fact. It is a conclusion to be drawn from various facts which are established from the records produced before the Tribunal. The question, which this Court can consider is whether any evidence exists for the conclusion of the Tribunal. Apart from that, the Tribunal being the final fact-finding authority, this Court cannot go into the question. From that aspect the two statements found in the statement of case appear to be conflicting. In paragraph 8 it has stated: ' A part of the assessee's business is speculation in wheat, linseed, silver and cotton.' Towards the "end of paragraph 5 it has stated : 'We held that speculation in silver, wheat and linseed and that in New York cotton were not the same business within the meaning of the section.' It may be noted that at this stage also the Tribunal has omitted to notice the word 'cotton' in describing the nature of the business of the assessee, as it had first described.

6. The supplemental case returned to us by the Tribunal, and which is now before us is highly unsatisfactory. The Tribunal appear to be far more concerned with excusing the statements of

facts in the first case, which are unquestionably contradictory, than with complying with the directions of this Court given under Section 66(4) of the Indian Income-tax Act. In the supplemental case the Tribunal states:We have recorded a clear finding that in account year, 1989, the assessee's business relevant to the question was in wheat, linseed and silver only, while that in 1940 was in cotton.And finally they stated:-The affidavit that we have referred to (i.e. an affidavit of Mr. Pralhadrai Brijlal) is annexed to this supplementary statement, Ex. F. It is stated therein that speculation business in different markets and in different commodities constitutes one and the same business. That is a matter of argument. Further, it is stated that speculation business is one unified and organised activity of the assessees and that it is carried on with the same staff and with the aid of the same accounts and in the same premises. This fact was not before us when we heard and disposed of the assessee's appeal. And we are unable to include it in the case at this stage of the proceedings and equally because it requires to be established by evidence which is not before us.

7. The matter was referred back to the Tribunal to record its finding of fact more clearly, and implicit in that direction is the taking of further evidence, if there is no other way of determining facts in order that the Tribunal -may make its finding clear. For the Tribunal to say that because a fact was not before it when they disposed of the assessee's appeal, "we are unable to include it in the case at this stage of the proceedings", is a most surprising statement and is one which indicates that the Tribunal does not appreciate the duties cast upon it when this Court refers a matter back under Section 66(4). The reference back to the Tribunal was to record its finding more clearly, and after a lapse of one year and ten months the matter now comes back with nothing new except the affidavit of Mr. Pralhadrai Brijlal, which is annexed to the supplemental ease. The delay is not due to any fault of the Tribunal, but it is very oppressive on the assessee, who under the proviso to Section 30 of the Act has had to pay the full amount of the claim.

8. To the affidavit of Mr. Pralhadrai Brijlal there has been no affidavit in answer, and no application to cross-examine the deponent upon his affidavit has: been made, Mr. Setalvad, on behalf of the Commissioner, states, and I think, very fairly and properly, in the circumstances, that he is prepared to accept the affidavit as it is uncontroverted.

9. Paragraph 1 of the affidavit, which is the only paragraph relevant to what we have to consider, says:From the date of its incorporation a part of the business of the applicants consisted of speculation in different markets in different commodities. It may be that in any particular accounting year the applicants may not have speculated in any particular market or in any particular commodity but that was because the applicants thought it not advisable or expedient to do so during the particular accounting year. From the commencement speculation business in different markets and in different commodities constituted one and the same business of the applicants. In proof of the fact that the applicants' dealings in several markets in different

commodities form part of the same business, I produce the following evidence. One of the objects of the incorporation is to carry on speculation business in any part of the world in any commodity. For brevity's sake I crave leave to refer to the memorandum and articles of the company when produced. Speculation business is one unified and organised activity of the applicants. Speculation business is carried on with the same staff and with the aid of the same accounts and in the same premises. The nature of all speculative business is the same and the difference in commodities or the difference in the markets makes no difference to the nature of the speculative business.

10. Mr. Setalvad has referred us to the *case of Scales v. George Thompson & Co., Ltd*[1]. In that case the question arose whether the company was carrying on one business or two businesses, the activities of the company being underwriting and shipping, and Bowlatt J. said (p. 89):-The method of book-keeping does not seem to me to throw any light upon this matter at all. 1 think the real question is, was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses; and I should have thought, if it was a question for me, that there was none. But I do not think it was a question of law. I think the Commissioners had ample evidence upon which they could decide, and they did so decide.

11. As has been pointed out by Mr. Justice Finlay in the case of H, *and G. Kinemas, Ltd. v. Cook (H. H. Inspector of Taxes*[2]*)* which is a very well-known case to which this Court Is not infrequently referred, the only matter which this Court in its-advisory capacity can consider on a finding of fact is whether there is any evidence upon which the Tribunal could, come to the conclusion to which it in fact came. To quote from the language of Mr. Justice Finlay (p. 121):

I have come to the conclusion is this case that I cannot interfere with the decision of the Commissioners, I desire to say quite definitely that it is their decision and not mine. It is not necessary that I should express an opinion, and I do not express an opinion, as to whether, if I had been in their position, I should have arrived at the same conclusion. There are two reasons, one of general application and one of special application, for saying this. The one of general application is that this is, in my opinion, a pure question of fact. It accordingly results that all questions of fact and of degree are for the Commissioners, and it is never proper for this Court to interfere, unless it is prepared to say that there was no evidence upon which the finding could be made.

12. The Tribunal would do well to study the ease submitted to the Court which is fully set out in this report, and to treat it as a guide to the way in. which a ease ought to be stated by them. In view of the delays which have taken place, we are very reluctant to send this matter back once again to the Tribunal to comply with our directions given on October 12, 1944, and in view of Mr. Setalvad's statement, on behalf of the Commissioner, that he accepts the affidavit of Mr.

Brijlal as being uncontroverted, we are prepared to proceed with the matter.

13. Mr. Setalvad has submitted that there is no such thing as the business of a speculator and that the position must be regarded as if the assessee company is carrying on separate businesses as dealers on the New York Cotton Exchange and as dealers on the Bombay Bullion Exchange. But there is no evidence of this. On the other hand, I can see no reason why a person, provided lie conducts himself in a lawful manner, should not carry on the business of speculating in futures. One of the dictionary meanings of "speculation" is an act or instance of speculating; a commercial venture or undertaking of an enterprising nature especially, one involving considerable financial risk on the chance of unusual profit, (see Oxford Dictionary, New Series, Vol. IX, p. 559).

14. The fact that in a particular year the assessee company as a speculator does not happen to speculate in a particular commodity or in a particular market does not in my opinion make him carry on a separate or a new business when he recommences to deal in that commodity or in that market. I cannot see how a business which speculates in any commodity in which it anticipates that it will make a profit, is, for the purpose of determining whether it is carrying on one business or a multiplicity of businesses, in any different position from a stock broker, or a book-maker, or a man who keeps a general store. Having carefully considered the original case, the supplemental case and the affidavit annexed to it, there is not, in my opinion, any evidence that the assessee company is carrying on more than one business, upon which any such finding could be based. There is no clear finding by the Tribunal at all and in such circumstances the "case must be decided by the Court on the materials before it. The evidence contained in the affidavit of Mr. Pralhadrai Brijlal is all in favour of there being only one business, and that evidence must in my opinion be accepted. Accordingly, the question "referred to us must be answered in the affirmative. The Commissioner must pay the costs.

Chagla, J.

15. It is with considerable hesitation that I have come to the same conclusion as the learned Chief Justice. The jurisdiction that we are exercising under the Income-tax Act is a purely advisory jurisdiction. The Appellate Tribunal is the final fact finding authority, and in our advisory capacity it is not open to us to go behind the findings of facts arrived at by the Tribunal. It is only if we come to the conclusion that there was no evidence to justify a particular finding of fact that it is open to us to set aside the particular finding arrived at by the Tribunal. Therefore the statute has cast upon the Tribunal very important duties and responsibilities, and I regret to say that the Tribunal does not always appreciate or realize its own duties and responsibilities. If we have to exercise our advisory jurisdiction in the manner in which the statute expects us to do, it is essential that the Tribunal must find facts clearly and explicitly. It is only on such clear and

explicit findings of facts that we can satisfactorily exercise our advisory jurisdiction.

16. Now there can be no question that whether a certain business is or is not the same business within the meaning of Section 24, Sub-section (2), oil the Act, is a question of fact, and it is for the Tribunal to find that fact. Unfortunately in this ease the Tribunal has deliberately ignored important pieces of evidence that were placed before it in the form of the affidavit to which the learned Chief Justice has referred. Although in the judgment of Mr. Justice Kania the Tribunal was given liberty to call further evidence to arrive at its finding of fact, it refused to take the materials contained in the affidavit into consideration. The question is whether apart from those materials contained in the affidavit there is any other evidence on the record which would justify the finding of fact arrived at by the Tribunal. Now Mr. Justice Rowlatt in the case to which the learned Chief Justice has just referred (*Soales v. George -Thompson & Co., Ltd*[3]*.)* has laid down the test which should be applied in order to determine whether two businesses are separate businesses or are the same business. There must be, as the learned Judge observes, an inter-connection, an interlacing and an inter-dependence between the two businesses and there must be a unity embracing the two businesses. Now, with great respect to the learned Chief Justice, I do not agree that "speculation" by itself is a nexus that connects the silver business of the assessee with the New York cotton business. I do not frankly understand the expression that a man is doing business in speculation. "Speculation", in its legal connotation, does and can. only mean that a man is doing forward business, The question will still remain: in; what commodity is he doing forward business? He may be doing forward business in silver; he may be doing forward business in cotton; or he may be doing forward business in linseed. But what would make those businesses into one business is not the factor of speculation or the fact that he does not take delivery of those commodities but does forward business, but some other inter-connection or a nexus which has got to be found independently of the speculative character of those businesses. Therefore the main question to which the Tribunal should have applied its mind was in my opinion whether there was any inter-connection between the silver business of the assessee and the New York cotton business of the assessee, and I have looked through the record in vain to find whether the Tribunal ever approached the question from that aspect.. Unfortunately the view that the Tribunal took was that the question whether the business is the same business within the meaning of Section 24, Sub-section (2), of the Act, was a question of law and not a question of fact and, therefore, the whole of the statement of facts is vitiated by this erroneous consideration. If the Tribunal had correctly approached the question and had considered this particular matter as a question of fact, then it would have given the necessary findings which we might have considered; but having looked upon it as a question of law, the Tribunal's statement of the case and judgment contains arguments and discussion of law rather than findings of fact or reference to evidence on which its conclusions are based.

17. Therefore, one course open to us would have been to have sent the matter back to the Tribunal for determining the necessary questions of fact; but the matter has already been referred to the Tribunal once, and I do not think it is fair to the assessee that the matter should be referred back again. On the whole I am satisfied and I come to the same conclusion as the learned Chief Justice, that as the record stands, there is no evidence on which the findings of facts of the Tribunal can be justified, namely, the business of cotton and the business of silver is not the same business within the meaning of Section 24, Sub-section (2), of the Act.

18. I, therefore, agree that the question referred to us should be answered in the manner suggested by the learned Chief Justice.

Cases Referred.

1(1927) 18 T. C. 83
2 (1988) 18 T. C. 116
3(1927) 13 T. C. 83