BOMBAY HIGH COURT

Ambica Silk Mills, Co. Ltd

Vs.

Commissioner of Income Tax

Income-Tax Ref. No. 37 of 1951

(Chagla, C.J. and Tendolkar, J.)

26.03.1952

JUDGMENT

Chagla, C.J.

1. The facts giving rise to this reference are these:

2. The assessees, the Ambika Silk Mills Co., Ltd., were assessed for the assessment year 1948-49. They had made a business profit of Rs. 37,703. Under Section 10 (2) (vi), the depreciation that was allowable to them was Rs. 52,985. In the same year, the assessee company had made a capital gain of Rs. 90,400. Deducting Rs. 52,985 from the business profit of Rs. 37,703 there would be a business loss of Rs. 15,282; and tho first question that arose for the consideration of the Tribunal, and which has been referred to us now, was whether this business loss of Rs. 15,282 can be set off against the capital gain of Rs. 90,400.

3. Now, frankly speaking, the sections which we have to consider cause considerable difficulty, by reason of the language used by the Legislature, in giving a proper interpretation to them. But the best way to approach the matter is first to consider the scheme underlying the various sections and then to give an interpretation, which, as far as possible, fits in with that scheme. Turning first to section 10 it deals with one of the heads of income referred to in Section 6. It provides that tax shall be payable by an assessee under that head in respect of profits and gains of any business carried on by him. These profits and gains are to be computed as indicated by Sub-Section (2); and they are to be computed after making various allowances which are set out in the various clauses that follow, and one of the allowances is in respect of depreciation which is dealt with in clause (vi). Therefore, it is clear that as far as Section 10 itself is concerned, profits or gains of business are arrived at after giving credit for the various allowances referred to in sub-section (2). It is also clear that as a result of various allowances in the year of account, a business may work at a loss rather than at a profit in which case the assessee would show a loss as a result

of the working of the business and not a profit. Although the language used in Sub-Section (2) is that "profits and gains are to be computed," it cannot be disputed that what was intended by the Legislature was that the result of the working of the business should be arrived at by taking into consideration the various permissible allowances and then determining whether the business had worked at a profit or at a loss. Then, we turn to Section 24 (1) which provides for a set off of loss in computing the aggregate income, and it provides that where an 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 set off the amount of the loss against his income, profits or gains under any other head in that year. Therefore, if the assessee sustains a loss in his business under Section 10 (and as I have just pointed out that loss would be arrived at after taking into consideration all the allowances mentioned in Section 10 (2)), then the assessee would be entitled to set off that loss against the profits under any other head. Therefore, when an assessee sustains a loss, the loss would include depreciation under Section 10 (2) (vi). Then we turn to Section 24 (2) which provides that when the loss cannot be wholly set off under Sub-Section (1) of that section, it can be carried forward to the following year, but then the loss can only be set off not against any other head but it can be set off only against the profits in the same business, and even with regard to this the Legislature has fixed a period, and that is a period of six years during which the loss can be carried forward, so that it can be set off against the same business. Now, to this extent there is no difficulty in understanding the scheme of the Legislature. But the difficulty is created by the proviso to Section 10 (2) (vi) and that proviso is as follows (I will quote only relevant words) :-

> "Where full effect cannot be given to any such allowance in any year . . . owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance. . . the allowance or part of the allowance, to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be allowance for that year, and so on for the succeeding years; ..." So that in substance what the proviso provides is that an unabsorbed depreciation may be carried forward from year to year until it has been absorbed.

4. Now, what is contended by Mr. Desai on behalf of the assessee is that the proviso contains a separate and independent provision with regard to depreciation, and that whereas a loss, other than a loss represented by depreciation can be set off under Section 24, Sub-Section (1) or (2), depreciation as such can only be carried forward from year to year and can only be absorbed when there are profits in the particular business in respect of which depreciation has been allowed. Emphasis has also been placed upon the language of Section 24 (2) (b) which provides that "where depreciation allowance is, under clause (b) of the proviso to clause (vi) of Sub-Section (2) of Section 10, also to be carried forward, effect shall first be given to the provisions of this sub-section." Therefore, in the first place a loss has to be set off under Section 24 (1) and only after setting off the loss contemplated by Section 24, the depreciation which has not already

been absorbed would be absorbed. Now, Mr. Desai is right in emphasizing the language used by the Legislature in the proviso. The language used is, "there being no profits or gains chargeable for that head," and what is contended is that the profits or gains referred to are the profits or gains of the business in respect of which depreciation is claimed.

Now, whichever way one looks at this proviso it creates difficulty. If the plain natural meaning is to be given to the expression "profits or gains," then it would include depreciation which has got to be calculated in order to arrive at profits or gains within the meaning of section 10 and that quite obviously cannot be the meaning of "profits or gains" used in this proviso. Therefore, whatever other view is possible it is clear that "profits or gains" in this context means profits or gains without taking into consideration the depreciation referred to in clause (vi). Now, even so construing the term "profits or gains" is capable of three different constructions. It may mean profits or gains of the business in respect of which depreciation is claimed under clause (vi); it may mean profits or gains in respect of all businesses which come under the head of Section 10; or it may mean profits or gains derived from the head of business or derived from any source whatsoever. Now, in placing the construction that we are going to place upon this proviso we are actuated by three powerful considerations. The first is that a proviso should never be construed in a manner which would nullify the effect of the main section to which it is merely a proviso. Sometimes a proviso may be of assistance in construing a section when the construction of the section is ambiguous; but when the section itself is clear and the scheme which the Legislature had in mind is also clear, then the proviso must not be so construed as to defeat the scheme which the Legislature intended to carry out. The second consideration is, as I shall presently show, that three different High Courts in fact have taken the same view as to the proper construction to be put upon this proviso and this High Court has consistently laid down that as far as possible in construing a statute which is an all-India statute there should be uniformity amongst the different High Courts. The third consideration is that the interpretation which we are giving is a more favorable one to the assessee than the construction contended for by Mr. Desai. It is also a well-settled principle in construing fiscal statutes that when two interpretations are possible, the Court should give that interpretation which is of help and assistance to the assessee rather than the one which would help the taxing department. In our opinion the only proper interpretation that should be placed upon the expression "profits or gains" is "profits or gains, not merely from the particular business in respect of which depreciation is claimed, nor profits or gains from any business conducted by the assessee, but the profits or gains which may accrue or arise to the assessee under any of the heads referred to in Section 6." Therefore, if the assessee has been assessed to income under the head capital gains as he has been in this case, viz., to the extent of Rs. 90,400, and if depreciation has been absorbed only to the extent of Rs. 52,985, he is entitled to set off the balance of Rs. 15,282 against the capital gains of Rs. 90,400, thus showing his total income at the figure of Rs. 75,118. Therefore, by enacting Section 10 (2) (vi) and the proviso and Section 24 (2) (b) what the Legislature had in mind was this : If a business was worked at a loss in any particular year, the loss can be set off against any other head under Section 24 (1); if the loss cannot be fully set off, then it can be carried forward to the next year, but then it can be only set off against the profits of that particular business and that set off would

be permissible to the assessee for a period of six years only. After six years the right to set off would come to an end. But in the case of depreciation and to the extent that the loss was caused by depreciation being not fully absorbed, there would be no limit to the carrying forward of that depreciation, and that depreciation can be set off at any time so long as the business showed a profit in the future. Any difficulties of construction apart, the scheme that we are suggesting is a consistent scheme which fits in with the other provisions of the Act.

5. Turning to the authorities there is a judgment of the East Punjab High Court, Income-tax Assessment of Laxmichand Jaiporia Spinning and Weaving Mitts, In re, 1950-18 ITR 919. In that case the assessee was a registered firm and the profits and gains were not sufficient to cover the full depreciation allowance under Section 10 (2) (vi), and the claim made was that the portion of depreciation not set off against profits should be apportioned amongst the partners in their individual assessments under proviso to Sub-Section (2) of section 24 and that claim was allowed by the Lahore High Court. To the same effect is the judgment of the Madras High Court in *Suppan Chettiar and Co. v. Commissioner of Income-tax, Madras*[1], There also the profits and gains of the business were insufficient to cover the depreciation allowance under Section 10 (2) (vi) and the excess depreciation was allowed to be set off against the profits and gains of other businesses and even from other sources. The emphasis placed by the Madras High Court (as indeed was also placed by the Lahore High Court) was on the fact that the depreciation under clause (vi) must be put upon the same footing as the other allowances referred to in Section 10 (2), because if depreciation could not be set off under Section 24 (1), the result would be that a different situation would arise with regard to an allowance under Section 10 (2) (vi) from what would arise with regard to other allowances under Section 10 (2). The Nagpur High Court has also taken the same view in *Ballarpur Collieries, Chanda v. Commissioner of Income-tax, C. P*[2]., There also, as in the East Punjab case, there was a depreciation which could not be fully absorbed by the profits of the business and the excess was allowed to be set off against the other income of the members of the firm under Section 24, Income-tax Act. Therefore, in our opinion the Department was right when it contended that the sum of Rs. 15,282 which could not be set off against the business profits could be set off against the capital gains, viz. Rs. 90,400.

6. It may seem surprising why the Department has raised this question. The Department has raised this question not in order to give any relief to the assessee but because in this particular case the view taken by the Department would be more favourable to it so far as this particular assessment is concerned because the question as to the liability of the assessee to pay super-tax under Section 17 arises. The assessee claims a rebate under Section 17 (7) and the rebate in respect of supertax is to be given where in the total income of a company is included any income chargeable under the head "capital gains" and the contention of the assessee is that its income under the head "capital gains" is Rs. 90,400 and the assessee is entitled to a rebate on that amount. The contention of the Department on the other hand is that rebate must be restricted, not to Rs. 90,400 but to Rs. 90,400 less Rs. 15,282 set off in respect of the business loss and therefore the Department contends that the assessee is entitled to rebate only on Rs. 75,118. It

will now be appreciated why the Department contends that Rs. 15,282 should be set off against Rs. 90,400, because in that view of the case the relief to the assessee in respect of the super-tax would be less if Rs. 15,282 were so set off. But the error into which the Department has fallen is that in construing Section 17 (7) we are not concerned with any set off arrived at as a result of Section 24 (1). The relief to which the assessee is entitled in respect of super-tax is on the amount which is included as income chargeable under the head of "capital gains" and, therefore, when the assessee makes its return it must in its return show Rs. 90,400 as income derived from capital gains. It is only after its other income is looked at and computations are made that the question of set off would arise under Section 24 (1). But all that we are concerned with under Section 17 (7) is whether in the total income of the assessee there is any income which actually falls under the head "capital gains," and if there is such income which falls under the head "capital gains," then the assessee is entitled to a relief. It is clear that as far as the assessment of the assessee is concerned his income under the head "capital gains" is Rs. 90,400 and not Rs.

[1]4 ITC 211 (Mad SB)

[2] 4 ITC 255 (Nag)

75,118 as the Department contends. Rs. 75,118 is only arrived at after a set off is allowed under Section 24, but as we pointed out we are not concerned for the purposes of Section 17 (7) with any set off which may result by reason of the operation of Section 24 (1). Therefore, the assessee must succeed in the reference to the extent that it contends that it is entitled to a rebate for the purpose of super-tax on the amount of Rs. 90,400.

7. The Solicitor-General is apprehensive that by reason of the rebate the assessee may get something more than what is actually paid for super-tax. The provisions of Section 17 make it perfectly clear that what the assessee is entitled to is a reduction in the amount of super-tax which the assessee is liable to pay. Therefore the rebate can only be something less than what the assessee would have been liable to pay but for the provisions of Section 17 (7).

8. The Commissioner has taken out a notice of motion asking us to direct the Tribunal to raise certain questions which according to the Commissioner arise on the statement of the case. We agree with the Solicitor General that the questions raised by the Tribunal are not properly framed and they do not bring out the real controversy between the parties. However, we do not think it is necessary to send the matter back to the Tribunal because we have got all the facts and the materials before us. All that we are going to do is to reframe the questions as suggested by the Commissioner. The questions when reframed will be :

> 1. Whether under the circumstances of the case the depreciation of Rs. 15,282 which could not be wiped off owing to the insufficiency of the business income could not be set off against the capital gains for that year? The answer to this question will be in the affirmative; it could be set off against Rs. 90,400.
> 2. Whether when the total income in any year of a company consists entirely of a residue of capital gains remaining after set off against the total capital gains of that year of loss from business the amount by which the super-tax payable by them should be reduced

should be computed on the total amount of the capital gains or only on the residue mentioned above. The answer to this question will be, "On the total amount of the capital gains".

9. The assessee has raised a question, whether the provisions of Section 12-B, Income-tax Act are ultra virus the Indian Legislature. We have already decided this question on earlier references and, therefore, we answer that question in the negative. There will be no order as to the costs of the reference.

Reference answered.