

BOMBAY HIGH COURT

The Commissioner of Income-tax

Vs.

Chimanlal J. Dhlal

Income- tax Reference No. 15 of 1962

(Tamble and V.S. Desai, JJ.)

05.03.1965

JUDGMENT

Tambe, J.

1. This is a reference under sub-section (1) of section 66 of the Income-tax Act, 1922, at the instance of the Commissioner of Income-tax. We are here concerned with the assessment year 1959-60, the relevant accounting period being calendar year 1958. The assessee is a registered firm carrying on business as share and stock broker, ready and forward. In the earlier year, i.e., for the calendar year 1957, the assessment year being 1958-59 the assessee-firm suffered a speculation loss which was computed at ₹ 2,60,128. The Income-tax Officer made an order under section 23(6) apportioning this loss among the various partners to be carried forward and set off in their respective future assessments against their individual profits from speculation.

2. In the next calendar year 1958, i.e., the assessment year 1959-60, the year with which we are here concerned, there was a speculation profits which was computed at ₹ 2,38,777. The assessee contended before the Income-tax Officer that the said speculation loss amounting to ₹ 2,60,128 suffered by it in the earlier year, i.e., in the assessment year 1958-59, should be carried forward and set off against the said speculation profit of ₹ 2,38,777. The Income-tax Officer rejected this contention and apportioned the profits amongst the partners under section 23(6) in the same manner as he had apportioned the losses in the earlier assessments year 1958-59. The assessee appealed to the Appellate Assistant Commissioner and reiterated its contentions. It was argued before the Appellate Assistant Commissioner that the assessee-firm was entitled to carry forward the speculation loss of the earlier year under section (2) of section 24 of the Act. The assessee took a further appeal before the tribunal, and the same contention was reiterated on behalf of the assessee before the Tribunal. The Tribunal accepted the contention raised on behalf of the

assessee. The view taken by the Tribunal in its own words is :

"On a plain reading of proviso to section 24(1) and the Explanation (1) thereto, speculation business requires to be deemed to be distinct and separate from any other business; the loss from such business in any year shall not be taken into account in the computation of profits and gains of business, profession or vocation for assessments under section 10; if there is, however, a profit from such speculation business only when it shall be so included in such computation; the divisible profits for purposes of section 23(6) cannot include speculation loss as it cannot enter into the computation under section 10 and it commences to do so only after the loss is wiped out by future profits.

A registered firm is an assessee under the definition in section 3(2) as tax payable by it, in certain circumstances no doubt, but clearly so when a tax is demanded from it. In this situation this registered firm, assessee, can demand under section 24(2)(1) that the loss it had suffered in the assessment year 1958-59 shall be carried forward in its own account and set off against future profits from the business in speculation transactions as laid down therein. It is only after the set-off if in any year there is left any profit, that such profits becomes liable to get included in the computation under section 10 for that year. Till such a contingency occurs, the loss from such a business requires to be carried forward in its own assessment pending such set off and not liable to be apportioned under section 23(6)."

3. In this view of the matter, the Tribunal allowed the appeal. On an application on behalf of the commissioner of Income-tax the Tribunal has stated the case referring to us the following question of law :

"Having regard to the latter part of the 2nd proviso to section 24(1) Whether the speculation loss of ₹ 2,60,128 determined for the assessment year 1958-59 which was apportioned among the partners of the firm under section 23(6) can be set off against the speculation profit of the assessee-firm for the assessment year 1959-60 ?"

4. The question in short is, whether a registered firm is entitled to carry forward the speculative loss suffered by it in earlier year and set it off against speculative profits of the subsequent year ?

5. Mr. Joshi, learned counsel for the Revenue, contends that having regard to the relevant provisions of section 24, and on a true construction of the relevant provisions of sub-sections, (5) and (6) of section 23 and section 24 of the Act, the registered firm is not entitled to carry forward the speculation losses of the earlier years and have them set off against the speculation profits of the year of assessment. The speculation losses of the earlier years have to be apportioned to the respective shares of the partners in those very assessment years themselves.

6. Mr. Mehta on the other hand, contends that a registered firm is entitled to carry forward

speculative losses of earlier year and set off against the speculative profits earned in the year of assessment under sub-section (2) of section 24 of the Act. According to Mr. Mehta, the speculative losses do not get apportioned amongst the partners of a registered firm. They remain out of the apportionment and are available to a registered firm for being set off against speculative profits of the following year. Mr. Mehta stated before us that he adopts the decision of the Gujarat High Court in *Commissioner of Income-tax v.*

*Kantilal Nathuchand*¹, as his argument in support of the contention.

7. It is indeed true that the decision of the Gujarat high Court fully supports the contentions raised by Mr. Mehta. Facts in that case were : The assessee was a registered firm. It suffered losses in speculation business in the assessment years 1958-59 and 1959-60 amounting to ₹ 6,26,606 and ₹ 5,416 respectively. In the assessment year 1960-61, it earned a profit in speculation business amounting to ₹ 6,19,784. The said loss in the years 1958-59 and 1959-60 had been apportioned as amongst the partners in the assessments of those respective years. The assessee claimed that the losses in the speculation business suffered by it in the assessment years 1958-59 and 1959-60 should be set off against the profits of the speculation business earned in the assessments year 1960-61. The tribunal had upheld the contention raised on behalf of the assessee. At the instance of the High Court. The High Court decided the reference against the Revenue, holding that "Section 24(1) does not apply to loss incurred in speculative business and so the loss sustained by a registered firm in speculative business cannot be apportioned amongst its partners under the second proviso to section 24(1). The registered firm is entitled under section 24(2) to have such a loss carried forward and set off against profits earned by it in speculative business in subsequent years." Facts in the case decided by the Gujarat High Court and those of the case before us are very similar. barring some exceptions, it has been the general policy laid down by this court in income-tax matters that whatever our own view may be, we should follow the view taken by another High Court on the interpretation of a section. Chagla C.J., though he disagreed with the view taken by the Madras high Court, followed that view in *Manekalal Chunilal & Sons Ltd. v. Commissioner of Income-tax*², At page 385 of the report, Chagla C.J. observed :

"A special Bench of the Madras high Court has taken the view favorable to the commissioner and contrary to the view suggested by Mr. Palkhivala and in conformity with the uniform policy which we have laid down in income-tax matters, whatever our own view may be, we must accept the view taken by the another High Court on the interpretation of the section of a statute which is an all India statute."

8. This is the practice of this court, and, as we have already stated, it has been generally followed by this court, barring certain exceptions like where inadvertently the decision was not brought to its notice or where in the decision of the other courts some relevant provision of law had been

omitted to be considered. The decision of the Gujarat high Court is a very elaborate one, considering all the relevant provision of law. This is, therefore, not a case in which we should depart from the aforesaid policy of this court. The answer, therefore, will have to be against the Revenue.

9. However, it should not be understood that, in our opinion, the contentions raised on behalf of the Revenue are without merit. Had the matter to be decide for the first time we might have agreed with the construction canvassed for on behalf of the legislature expressed in the Act in respect of the assessment of a registered firm. The relevant provisions in an enactment have to be construed as a whole. We may briefly state our

reasons :

¹(1963)53 I.T.R. 420

²(1953)24 I.T.R. 375, S.C. 55 Bom. L.R. 819

Section 3, which is a charging section, charges to tax the total income earned by an assessee in a year of assessment. A registered firm is one of the units of assessments, and in that of sense, an as:

"Total income has been defined in section 2(15) as "total income" means total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act." section 4 Provided that subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived. Six heads of income chargeable to income-tax are enumerated in section 6. One of them is : "Profits and gains of business, profession and vocation". Section 7, 8, 9, 10 and 12(2)(b) provide the mode of computation of income under different heads : "Profits and gains of business, profession and vocation." section 13 relates to the method of accounting adopted by an assessee, and its relative evidentiary value in assessment. Section 14 relates to exemptions of a general nature. Sections 15, 15A, 15B and 16 relates to exemptions of a special nature like the exemption in respect of premium on life insurance policies, paid, earned income, donations and charities etc., section 16 partly deals with certain exemptions as well as making additions to the income of the assessee in certain cases. Section 17 relates to determination of tax payable in certain special cases like person not resident in taxable territories, etc. These are the material provisions relating to the computation of income under various heads. A situation may arise and often arises when an assessee has more than one source or heads of income. In computation of income from these different sources, the result may in case of income from one source be profit and in the other a loss. In what manner these situations have to be dealt with in computation of the total income is provides in section 24, and the section provides in what manner the loss under one head should be set off against profits under another head in computation of the aggregate income. It is on the computation of this aggregate income that ultimately an assessment is made under section 23. In brief, thus, income-tax is charged on an assessee in respect of the total income derived by him from the various heads of his income chargeable to tax and computed in

the manner provided in the Act. All the provisions of the Income-tax Act ultimately are directed towards the ascertainment of the total income, bringing it to tax, and the recovery of tax from persons liable to pay the tax. The proceedings ultimately culminate in an assessment under section 23 of the Act under which the amount of total income is computed and the amount to tax payable by an assessee is quantified. The first stage, therefore, is determinations of the income, either profit or loss, under the various heads. The second stage is adjustments and the results obtained under the different heads for determination of the aggregate amount of the total income and last stage is determination of the amount of total income and quantification of the tax on the amount of total income so determined. Section 24 which relates to set-off of loss under one head against profits of another head for purposes of determination of total income thus comes into play after determination of the income under different heads, and the levy of tax under section 23 would be the final stage after the determination of the total income. The provisions of sections 24 and 23 are thus closely interconnected. It would be at this stage convenient to refer to the relevant provisions of sections 23 and 24. Sub-sections (5) and (6) of section 23 provide the special mode of assessment of a registered firm. The material part runs :

"(5) Notwithstanding anything contained in the forgoing sub-sections, when the assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-sections (4), as the case may be, -

(a) in the case of a registered firm,

(i) the income-tax payable by the firm itself shall be determined; and

(ii) the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable him on the basis of such assessment shall be determined :

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of section 24...

(6) Whenever the Income-tax Officer makes a determinations in accordance with the provisions of sub-sections (5), he shall notify to the firm by an order in writing the amount of the total income on which the determination has been and the apportionment thereof between the several partners."

10. It would be seen that the assessment of the registered firm is a composite assessment both of the registered firm as well as its partners. Whether the firm is registered or not, the first stage is common, namely, determination of the total income of the firm. The difference starts from this stage. In the case of an unregistered firm, tax is levied on the unregistered firm itself and recovered from it. There is, however, a difference in the case of a registered firm. After computation of the total income of a registered firm, tax payable by the firm itself is determination and levied. The tax imposed on a registered firm since 1956 is however at a very low rate. The Income-tax Officer is also required to determine the total income of each partner of a registered firm including therein his share of its income, profits and gains of the previous year. In other words, the Income-tax Officer has to determine the total income of an individual partner

of a registered firm after taking into account his share of income in the profits and gains in the business of a registered partnership. After the said amount of total income is determined, the Income-tax Officer has to determine the tax payable by an individual partner on the basis of his total income inclusive of his share of profits in the partnership business, Proviso to sub-sections 5(a) makes it clear that loss suffered by an individual partner in the business of the partnership enters his personal assessment, and he has a right to set off that loss against his income from other sources as well as to carry it forward and set off the unabsorbed loss against income of subsequent year in accordance with the provisions of section 24. The scheme of section 23(5) this is that except a nominal tax levied on the registered firm in respect of its income in certain cases, the liability to pay tax thereon in substance is of its partners. The positive result of computation of total income of a registered firm, i.e., profits, or the negative result, i.e., loss, enters, the assessment of the individual partners in proportion to their respective total income. No exception in respect of the speculative loss has been, in express terms, made therein. In the context of this position emerging from sub-section (5), the provisions of sub-section (6) have to be read, and it provides that the Income-tax Officer has to notify to the firm the amount of its total income determined by him as well as apportionment thereof as amongst its partners. The question to be considered is whether in respect of the speculative loss the position is in any way different by reason of the provisions of section 24(1). Section 24(1) relates to the set off of loss under one head against income, profits and gains of the other in the matter of computation of the aggregate income. The stage contemplated by section 24 thus is earlier than of the final stage, namely, determination of the amount of total income. It is step in aid in determining the resultant amount of total income. The stage of assessment of partners of a registered firm contemplated in sub-section 5(a)(ii) is a stage subsequent to the determination of the total income of a registered firm, and as we have already pointed out, it provides that, the positive income, that is, profits as well as negative income. i.e., loss, sustained by a registered firm are both to be distributed and apportioned as amongst its partners in proportion of their respective shares. This intention of the legislature is clearly indicated in sub-section 5(a)(ii) of section 23 with the proviso.

11. We now turn to the relevant provisions of section 24, and the material part reads :

"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 the against his income, profits and 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 the nature of a business shall not be taken into account except to the extent of speculative transactions :

Provided further that where the assessee is an unregistered firm... any such loss shall be set off against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm, and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have

the amount of the loss set off under this section.

Explanation 1. - Where the speculative transactions carried on are of such a nature as to constitute a business, the business shall be deemed to be distinct and separate from any other business.....

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous 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

(i) Where the loss was sustained by him in a business consisting of speculative transactions, it shall be set off only against the profits and gains, if any, of any business in speculative transactions carried on by him in that year;...

Provided that -...

(c) nothing herein contained shall entitle any assessee being a registered firm, to have carried forward and set off loss which has been apportioned between the partners, under the proviso to sub-section (1), or entitle any assessee, being a partner in an unregistered firm which has not been assessee under the provisions of clause (b) of sub-section (5) of section 23 to have carried forward and set off against his own income any loss sustained by the firm;..."

12. The first proviso to sub-section (1) of the section 24 has been construed by this court in *Keshvalal Premchand v. Commissioner of Income-tax*³, and this court has held that the language used in the said proviso is wider in its scope and the proviso itself is a substantive provision relating to the computation of income under section 10 of the Act in respect of income, profits and gains of business, profession or vocation. The proviso provides that the loss sustained in speculative transactions cannot be set off only against income earned in any other business, but will have to be set off only against income earned in any other business. This court further held that though it was a substantive provision, it was not altogether unconnected with the principal provisions of sub-sections (1) of section 24. At page 16 of the report, Chagla, C.J. observed :

"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 provisions 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 extent of the amount of profits of gains, if any, in any other business consisting of a speculative transaction. It is not as if the proviso has no connection whatever with section 24(1). In one sense it has, because what is available for being set off is the resultant profit or loss under section 24(1) and the proviso sets out of the mode of arriving at the resultant profit or loss in the computation of profits and gains of a business, profession or vocation."

13. It is clear that the speculative losses are not available for being set off against the profits and gains earned under other heads except if there be any profit in certain other speculative transactions. The question then is whether the speculative loss can be apportioned as amongst the partners of a registered firm. If they get apportioned amongst the partners under the second proviso to sub-section (1), it is clear that proviso (c) to sub-section (2) of section 24 provides that they are not available to the registered firm for being set off against its future income. Now, the argument advanced by the Mr. Mehta, in brief is that the first consequence of the aforesaid decision in Keshvalal Case is that the total income of an assessee registered firm chargeable to tax would not be included loss in speculative business and the second consequence would be that the loss in speculative business would not be included in the income from business in respect of which a set-off can be claimed under section 24(1) and would not form part of the subject-matter of that section. As speculative loss does not form part of the subject-matter of sub-section (1) of section 24, it therefore does not form part of the subject matter of the loss which gets apportioned under the second proviso to section 24(1). Consequently, the speculative loss is available to a registered firm to carried forward under section 24(2). To, accept the argument of Mr. Mehta would lead to the results entirely different than the intention of the legislature clearly expressed in sub-section (5) of section 23 of the Act, which as we have already stated is : whether it be profits earned or loss suffered by a registered firm in any assessment year, it has to be distributed as amongst its partners in accordance with their respective shares. The second thing is, it involves constructing differently clauses substantially similarly worded in the second proviso to sub-section (1) of section 24 and sub section (2) of section 24. The clauses to which we are referring are; "any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned

³(1956)31 I.T.R. 7, s.c. 58 Bom. L.R. 945

between the partners of the firm" occurring in sub-section (2) of section 24. It is contended by Mr. Mehta that "any loss which cannot be set off against other income" in the second proviso to subsection (1) means loss other than the speculative loss, which cannot be set off because there is no income or sufficient profits under other heads to wipe it off, but the clause, "so much of the loss as is not so set off" in section 24(2) includes speculative loss which cannot be set off against the income of a registered firm under other heads. The argument is that the clause in the second proviso, being a clause in the proviso, has to be limited to the contents of sub-section (1), speculative loss does not enter substantive provisions of sub-section (1), and therefore, the second proviso does not operate on it; sub-section (2) not being a proviso, it is not necessary to give such a limited meaning to the said clause. We find it difficult to accept that the necessary consequence or corollary of the decision of this court in Keshavlal's case is that the speculative loss does not form part of the subject-matter of the substantive provisions of sub-section (1) of section 24. It is indeed true that it has been held in Keshavlal's case that the first proviso to sub-section (1) of section 24 is a substantive provision relating to computation of profits and gains under section 10 of a "business, profession and vocation", but that does not mean that the said proviso has no connection whatever with the substantive provisions of sub-section (1) of section

24, or does not act as a proviso thereto. In our opinion, but for the first proviso, the speculative loss would have been available to an assessee for being set off against his income from other heads. Speculative transactions in the nature of a business carried on by an assessee are, by reason of the Explanation to section 24(1), deemed to be a distinct and separate business other than his other business. Speculative loss would, therefore, be a loss of profits and gains sustained by an assessee in a business which is distinct and separate from his other business. It may be that the said speculative loss is not taken into account in computing profits and gains of the business of an assessee other than the business in speculative transactions, But that only means that in the case of an assessee, carrying on business in speculative transactions as well as carrying on business other than speculative transactions, computation of profits and gains would be in two parts - (1) profits and gains of a business other than speculative transactions, and (2) loss in profits and gains of speculative transactions in the nature of a business. Loss sustained in speculative transactions none the less does not cease to be a loss sustained by an assessee in a business. Business is one of the heads of income under section 6 of the Act. Speculative loss sustained by an assessee would, therefore, fall within the clause "loss of profits and gains in any year under any of the heads mentioned in section 6" occurring in the substantive provisions of section 24(1), would have been available to the assessee for being set off against the profits under other heads but for the abridgment of the said right by reason of the provisions contained in the first proviso. It is in this sense that the first proviso acts as a proviso to the substantive provisions of sub-section (1) of section 24. Chagla C.J., at page 16 of the report in Keshavlal's case observed :

"It is true that the proviso, as we have construed it, does not deal with the abridgment of the right of the assessee to set off a loss under one head against profit under another head, but it does not in one important sense abridge the right of the assessee to set off under section 24(1) and that abridgment consists, if one might so put it, in the quantum of profit or loss on which the assessee can rely for the purpose of claiming a set-off under section 24(1) against the head. Therefore, although in the larger sense the proviso is a substantive enactment, it cannot be said that the legislature in placing it after section 24(1) in the shape and form of a proviso has done something for which there is absolutely no justification."

14. Further, what is spoken in sub-section (2) is not something different than what is spoken in sub-section (1) of section 24. It is necessary to read and construe the section as a whole. The section speaks of adjustment or set-off of losses under one head against income and profits under other heads, and carrying forward of the unabsorbed loss in any business, profession or vocation to the following year. The manner in which the loss under one head is to be set off against profits under another head is provided in section 24(1). Loss under one head may not get set off against profits under another for reasons more than one. If there be no profits under other heads or no sufficient profits under other heads, the loss in its entirety or part cannot be set off. Similarly, loss if it is a speculative loss, cannot be set off against the income of other heads by reason of the first

proviso. It is such a loss which cannot be set off for one reason or another that is spoken of in sub-section (2) as well as in the second proviso to sub-section (1). If the speculative loss is not spoken of at all in or does not form part of the substantive provisions of sub-section (1), we find it difficult how it can be taken to sub-section (2). The clause in sub-section (1), so much of the loss as is not so set off." It would be reasonable to assume that the language indicates that the loss which can be carried forward has capacity or quality of being set off under the substantive provisions of sub-section (1) of section 24, but are not set off on account of the other provisions in the section itself. If the speculative loss does not enter the substantive provisions of sub-section (1) of section 24, it would not enter the substantive of sub-section (2) as well.

15. These are in brief our reasons why we find it difficult to accept Mr. Mehta's argument. But, however, we have already stated that, in conformity with general practice of this court, we would with respect follow the decision of the Gujarat High Court in *Commissioner of Income-tax v. Kantilal Nathuchand*.

16. Mr. Joshi pointed out to us that we have in one case taken a view different from that of the Punjab High Court. It is indeed true that through inadvertence, we have departed from the uniform practice, the aforesaid decision of this court reported in *Maneklal Chunilal & Sons Ltd. v. Commissioner of Income-tax*, not having been brought to our notice. That, however, in our opinion, would not be a good ground for consciously departing from the uniform practice, especially in this case where after reviewing all the relevant provisions, a very elaborate judgment has been given by Bhagwati J. and where more than one view is possible on the construction of this section. The relevant provisions of law have been, at page 425 of the report, described by the learned judge as :

"The question is primarily one of construction and is certainly not free from difficulty, arising as it does on one of the least happily drafted sections in an Act not remarkable for perspicuity. It may be possible but we doubt whether it would be easy to compress into one single section more fertile opportunities for doubt and error."

17. In the result, our answer to the question is in the affirmative, No order as to costs. Answer accordingly.