BOMBAY HIGH COURT

R.M. Goculdas

Vs

Commissioner of Income-Tax

(S Desai, C.J. S Bharucha, J.)

16.09.1983

JUDGMENT

Desai, J.

1. In this reference two questions referred to us at the instance of the assessee by the Income-tax Appellate Tribunal, Bombay, Bench "D", are as under :

> "(1) Whether, on the facts and in the circumstances of the case, the loss apportioned to the wife in the firm of M/s. Kosangas & Company was rightly excluded in determining the appellant's total income or total loss ?
>
> (2) Whether, on the facts and in the circumstances of the case, the Additional Commissioner of Income-tax had rightly assumed jurisdiction under section 263 and had rightly passed the order in question ?"

2. A few facts necessary to appreciate the point in controversy may now be stated. The assessee, an individual, was a partner in the firm of Messrs. Kosangas & Company in which his wife, Rukmini, was also a partner. We are concerned in this matter for assessment years 1966-67 and 1967-68. For these two years the said firm had suffered a net loss in its business. When the ITO finalised the assessment for the two years, he included in the assessee's hands, under the provisions of s. 64 of the I.T. Act, the share of loss falling to the wife which came to Rs. 28,185 for the assessment year 1966-67 and Rs. 84,406 for the assessment year 1967-68. The total loss in the assessee's hands including these two amounts was computed at Rs. 2,06,856 and Rs. 6,48,590 respectively for the two assessment years. The Addl. CIT on going through the records formed the opinion that the wife's share of loss in the firm for the two years should not have been included in the assessment of the husband. This opinion was formed obviously in view of the decision of the Gujarat High Court *in Dayalbhai Madhavji Vadera v. CIT*[1] Accordingly holding that the orders of the ITO were erroneous and prejudicial to the interest of the Revenue, the Addl.

Commissioner acting under the provisions of s. 263(1) revised these orders directing the ITO to exclude the loss sufferred by the wife for the two years under consideration.

3. Aggrieved by this order of the Addl. Commissioner, the assessee appealed to the Income-tax Appellate Tribunal. Before the Tribunal it was urged in the first place that the inclusion of the loss in the assessment of the husband could not be regarded as prejudicial to the Revenue and consequently the Addl. Commissioner could not assume jurisdiction to pass orders under s. 263. The Tribunal negatived this argument, observing that the assessee owned considerable assets and the huge loss incurred during the two years would have to be set off against the likely incomes of future years. In the opinion of the Tribunal by reducing the quantum of loss determined for the two years under appeal there was likelihood of gain to the Revenue in subsequent years. In other words, determination of excessive loss in any particular year or years could be a matter likely to cause prejudice to the Revenue, although the prejudice will occur in subsequent years. It, therefore, negatived the submission of the assessee and held that the Addl. Commissioner had exercised the jurisdiction rightly.

4. The next point considered by the Tribunal was whether the Addl. Commissioner was correct in directing the ITO to delete the wife's (share of) losses. The Tribunal observed in its order dated 18th January, 1983, that this was the only High Court ruling directly on the point and this ruling of the Gujarat High Court was against the assessee. The observation in the Commentary to the Income Tax Act by Kanga and Palkhivala at page 599 of the 7th Edition Vol. 1, was brought to the attention of the Tribunal but the Tribunal preferred to accept, and rightly so, the decision of the High Court in preference to the opinion of the esteemed commentators.

5. It may be pointed out that in the statement of case, the Tribunal has referred to a later decision of the Karnataka High Court which was chosen to differ from the Gujarat High Court. This decision is Dr. *T. P. Kapadia v. CIT*[2]

6. The question No. 2 referred to us is based on the first argument considered by the Tribunal. In our opinion, the approach of the Tribunal on this aspect is correct and cannot be faulted. If that be so, the said question would be required to be answered in favour of the Revenue.

7. It is question No. 1 on which we have been called upon to lavish attention. Apart from the two authorities referred to in the statement of case, certain other authorities are cited at the bar. These later authorities have preferred the Karnataka view and have expressly dissented from the decision of the Gujarat High Court in Dayalbhai's case [1966] 60 ITR 551. We may now briefly review the authorities cited at the bar.

8. The decision on which reliance was placed by the Tribunal, which decision, as already pointed

out, has been adversely commented upon by Kanga and Palkhivala is that of the Gujarat High Court in Dayalbhai's case. In the aforesaid decision, whilst dealing with s. 16(3) of the Indian I.T. Act, 1922, it was observed that the said provision only provided for inclusion in the total income of the individual the income of his spouse or minor child and did not create a legal fiction whereby the income of another is deemed to the income of the individual. The Division Bench has accepted that income may in certain cases include a negative income, viz., loss but according to the Gujarat High Court that concept prevailed only in the case of computation of the actual income of the assessee and including a negative income was not warranted, according to the Bench, so far as sub-s. (3) of s. 16 was concerned. The Bench further observed that the expression "includes" in cl. (a) of sub-s. (3) of s. 16 prima facie denoted the concept of adding rather than substracting, deducting or setting off. It may be pointed out that before the Division Bench of the Gujarat High Court, counsel for the assessee had referred to a decision of the Bombay High Court, viz., *Harakchand Makanji & Co. v. CIT*[3] where the Division Bench has held that the expression "Profits and gains" as used in s. 42(3) of the Indian I.T. Act, 1922, means not only profits made by the business, but also the total result of the particular business, so that if in place of profits and gains there were losses, they were as much to be apportioned as the profits of the business. This observation was sought to be used in support of the contention that the term "income" used in s. 16(3) carried with it the concept of profits and gains, and, therefore, would include negative income, that is, loss (also). In the opinion of the Division Bench of the Gujarat High Court, the said argument was not well founded. According to the Gujarat High Court, s. 16(3) creates an artificial liability and provides for the inclusion or addition of income of a person other than the assessee. The Division Bench, accordingly, negatived the arguments advanced before it on behalf of the assessee and held in favour of the Revenue.

9. Our attention was drawn to a decision of the Supreme Court in *CIT v. Harprasad & Co. P. Ltd*[4]. wherein at p. 124, it has been observed as under :

> "From the charging provisions of the Act, it is discernible that the words 'income' or 'profits and gains' should be understood as including losses also, so that, in one sense, profits and gains represent 'plus income' whereas losses represent 'minus income'. In other words, loss is negative profit."

10. Even without referring to the other authorities cited at the bar we would like to observe, with respect to the learned judges of the Gujarat High Court, that the view taken and approach discernible in Dayalbhai's case [1966] 60 ITR 551 (Guj), appears to be narrow, over-technical and, hence, incorrect. We are fortified in our reaction by subsequent decisions of the several High Courts to which we may now briefly advert.

11. The decision of the Gujarat High Court came to be considered by the Mysore High Court (as it then was) in Dr. *T. P. Kapadia v. CIT*[5] The attention of the Division Bench of the Mysore High Court was drawn to C.B.R. Circular No. 20 of 1944, dated July 15, 1944, and which is set out at pages 514 and 515 of the Mysore High Court's decision. The Mysore High Court observed that the aforesaid circular was not brought to the notice of the Gujarat High Court in Dayalbhai's case [1966] 60 ITR 551(Supra), and the view taken by the Gujarat High Court was contrary to the instructions given by the Central Board of Revenue. The Mysore High Court then goes on to observe that under s. 5(8) of the 1922 Act and s. 119 of the 1961 Act, a circular of the above kind would be binding on all officers and persons employed in the execution of the 1922 Act and the 1961 Act. In this connection, the Mysore High Court refers to the decision of the Supreme Court in *Navnit Lal C. Javeri v. K. K. Sen, AAC of I.T*[6]. We may add that our High Court has expressed the same opinion on the binding force of circulars. This was in *Tata Iron & Steel Co. Ltd. v. N. C. Upadhyaya*[7] Accordingly, the Mysore High Court reversed the decision of the Tribunal which had followed the Gujarat High Court's decision in Dayalbhai's case and answered the question referred to it in favour of the assessee.

12. The point came to be considered once again by the Mysore High Court in J. H. *Gotla v. CIT*[8] The Mysore High Court followed its earlier decision in Dr. T. P. Kapadia's case [1973] 87 ITR 511(supra), and once again held that the loss incurred by a spouse was required to be treated as if it were a loss sustained by the assessee.

13. The Full Bench of the Kerala High Court applied its mind to the question *CIT v. B. M. Edward, India Sea Foods*[9] The Kerala High Court was considering the case of an assessee for the assessment year 1971-72, and noted that the 1944 circular of the Board of Revenue, on which reliance had been placed by the Mysore High Court in Dr. T. P. Kapadia's case [1973] 87 ITR 511(supra), had been withdrawn on April 6, 1972, that is, after the expiry of the assessment year 1971-72. According to the Kerala High Court, the fact that the assessment of the assessee for that assessment year was completed after the withdrawal of the circular would make no difference and the circular was still applicable. It confirmed the decision of the Tribunal holding that it was right in law in concluding that the instructions contained in the said circular which were in force on the first day of the assessment year would be applicable and the ITO was bound by it, even through the actual order was passed subsequent to the withdrawal of the circular.

14. In our opinion, there is no scope for any contrary view up to April 6, 1972, which was the date of the withdrawal of the said circular. It would have been possible to dispose of the reference made to us only on the aforesaid limited footing but we have been invited to express our view on the position between the said date and the amendment of s. 64, by which amendment Explanation 2 was added after sub-s. 2 of the said section. By this Explanation, it now appears to

have been clarified that for the purpose of this section, income would include loss. This Explanation 2 came to be inserted by the Finance Act, 1979, with effect from April 1, 1980.

15. It would, however, appear to us that this Explanation must be regarded as being clarificatory in nature as reflecting the correct legal position both under s. 16 of the Indian I.T. Act, 1922, as also under s. 64 of the I.T. Act, 1961, and the proper approach in the specific provisions for aggregation or clubbing. If the narrow view which commented itself to the Gujarat High Court was to be taken, a clearly anomalous position would arise. We may point out that in the later decisions in *CIT v. Smt. Mary Ignatius*[10], the Kerala High Court, and in *CIT v. Badri Prasad Agarwal*[11] the Madhya Pradesh High Court, have come to the identical conclusion as the Mysore High Court in Dr. T. P. Kapadia's case, [1973] 87 ITR 511 (Mys)(supra), without placing reliance on the said circular. The Madhya Pradesh High Court has specifically observed in the latter decision that the Explanation added in s. 64 must be regarded as parliamentary exposition of the meaning of the word "income" as used in the unamended section. In our opinion, even without the said Explanation 2, the correct view is the one taken by the Mysore, Kerala and the Madhya Pradesh High Courts and for the purpose of clubbing, income or profits would include negative income or negative profits, that is, loss also. If that be so, it would have to be held that on question No. 1, the view taken by the Tribunal was erroneous. We, accordingly, answer the questions referred to us as under :Question No. 1 : In the negative and in favour of the assessee. In our view the loss apportioned to the wife in the firm was includible in determining the assessee's total income or total loss.

Question No. 2 : In the affirmative and in favour of the Revenue.

16. The Commissioner to pay the costs of the reference to the assessee.

Cases Referred.

1[1966] 60 ITR 551
2[1973] 87 ITR 511 (Mys)
3[1952] 22 ITR 33
4[1975] 99 ITR 118
5[1973] 87 ITR 511
6[1965] 56 ITR 198
7[1974] 79 ITR 1
8 [1973] 91 ITR 531
9[1979] 119 ITR 334 [FB]
10[1983] 141 ITR 954
11[1983] 142 ITR 353