

PATNA HIGH COURT

Basantlal Sanwar Prasad

Vs

Commissioner of Income Tax

Misc Judl. Case No. 1767 of 1964

(H. Mahapatra and A.B.N. Sinha, JJ.)

21.07.1966

JUDGMENT

Mahapatra, J.

1. This is a reference under Section 66 (1) of the Indian Income Tax Act in regard to the assessment of Income Tax for the assessment year 1961-62. The assessee is a registered firm having wholesale business in cloth. On the 10th of January, 1961, a burglary took place in the shop premises where cash was kept in the iron safe. A sum of Rs. 11,407 was found to have been stolen away from that. The assessee claimed that as a business expense, meaning thereby that the loss of the money was incidental to their business. The Income Tax Officer did not accept that and did not allow the deduction. The Appellate Assistant Commissioner, however, took the view that the loss having been caused in connection with the carrying of the business, and being incidental to the business of the assessee was allowable for the purpose of determining the net profit of the assessee out of the business. Against that, the Department came in appeal before the Income Tax Appellate Tribunal, who set aside the order in that respect of the Appellate Assistant Commissioner, and upheld the action of the Income Tax Officer. The assessee thereafter asked for a reference and the Appellate Tribunal has sent the statement of case to this Court. The question formulated is :

"Whether in the facts and circumstances of the case, the Tribunal was justified in disallowing the assessee's claim for deduction of Rs. 11,407 lost by theft as capital loss?"

2. The facts and the circumstances of the case appear from the order of the Appellate Assistant Commissioner which is a part of the statement of the case. He observed that it was necessary for the assessee to keep sufficient amount of cash in the shop premises during the night, so that the transactions of the next day may be started without any inconvenience. There was a theft in the shop in the night. It was true that the theft occurred at a time when no business transaction was being carried on, but the loss due to theft must necessarily be considered to have been directly arisen from the carrying of the business and incidental to it, because it was necessary to keep the money there for the purpose of carrying on the business. The appellate Tribunal also referred to this part of the order of the Appellate Assistant Commissioner in their order which is annexure

'C' to the statement of case. They observed :

"As the Appellate Assistant Commissioner was of the opinion that the deduction claimed in this case sprang directly from the carrying on the business and was incidental to it, he held that the loss should be allowed". At another place they also observed :

"On appeal the Appellate Assistant Commissioner held that when the day's work was finished and the cash in hand was ascertained and the shop was closed for the day, the cash had to be left in the shop room as it was necessary to keep sufficient amount of cash during the night so that transactions of the next day may be started without any inconvenience. If there was a theft in the shop at night even after business hours, the loss due to theft must necessarily be considered to have directly arisen from the carrying on the business and incidental to it."

3. This finding by the Appellate Assistant Commissioner, in relation to the justifiability or otherwise of the deduction claimed by the assessee, was not questioned before the Appellate Tribunal, I am rather inclined to say that the Appellate Tribunal proceeded on those facts and circumstances. But they preferred to apply the law in a different manner from what the appellate Assistant Commissioner did. I shall refer to that a little after Learned counsel appearing for the revenue contended that the observations of the Appellate Assistant Commissioner, which I have quoted above, were in a general way and did not relate to the facts and the circumstances of the case. According to him, the Appellate Assistant Commissioner only propounded a principle and in that context made those observations. To me, however, it appears that the position is not so, because it is in that circumstances, as stated by the Appellate Assistant Commissioner, that the loss was held to be incidental to the business. It is further to be found from the order of the Appellate Tribunal that on the day on which the loss was sustained by theft, the cash position of the assessee was as follows. On the 10th of January 1961, the opening balance was Rs. 586, sale proceeds was Rs. 4,888 and a cash loan of Rs. 9,000 was obtained from one Sheo Prasad Phoolchand of Jharia. The closing balance of that day was Rs. 11,470. The assessee, as I have stated before, is a registered firm. The cash balance kept in the shop premises that night obviously belonged to the firm itself. Keeping such amounts in the shop premises was necessary as held by the Appellate Assistant Commissioner, for the transaction of the business on the following day. That obviously was the trading practice with the assessee firm. In that view, there cannot be any doubt whatsoever that the loss sustained by theft in respect of that amount was incidental to the business and the assessee was entitled to deduct that from its gross receipt.

4. The appellate Tribunal did not dispute the principle which the appellate Assistant Commissioner applied to the case, on the basis of the case, *Badridas Daga v. Commissioner of Income Tax*¹, A claim for a deduction for which there is no specific provision under section 10 (2) of the Income Tax Act can be admissible if it arises out of the carrying on the business and is incidental to it, having regard to the commercial practice and trading principles. The case before the Supreme Court involved a claim for deduction on account of defalcation of money by an employee of the assessee. While laying the principle about such deduction as not specifically provided for under section 10 (2), their Lordships by way of elucidation, gave an example of theft of a money lender's money from his house during a night and observed that though by such theft there will be depletion of the resources available to the moneylender for lending business, it

is not a loss incurred in the running of the business, but is one to which all owners of the properties are exposed, whether they do business or not. The Appellate Tribunal equated this illustration with the facts of the present case and disallowed the claim deduction. This, in our view, was wrong. The principle laid down was the basis of the decision of the Court, the illustration was only explanatory. The proper test was if the principle applied to the facts of this case. The Tribunal did not say that it did not apply. They tried to apply the illustration only. Even there, they were wrong. The money stolen from a money lender's house may or may not be the money to be invested in or realised from the lending business. In the present case, the cash stolen was entered in books of account of the firm and was necessarily money belonging to the firm. Secondly, with reference to a case of theft of a money lender's money, their Lordships of the Supreme Court in *Commissioner of Income Tax. U. P. v. Nainital Bank Ltd*², preferred the minority view expressed in the case of *Ramaswami Chettiar v. Commissioner of Income Tax*³ : to the effect that it was a business loss. They laid down the guide line as below:

" We may now summarise the legal position thus Under section 10 (1) of the Act the trading loss of a business is deductible for computing the profit earned by the business. But every loss is not so deductible unless it is incurred in carrying out the operation of the business and is incidental to the operation. Whether loss is incidental to the operation of a business is a question of fact to be decided on the facts of each case, having regard to the nature of the operations carried on and the nature of the risk involved in carrying them out. The degree of the risk or its frequency is not of much relevance but its nexus to the nature of the business is material."

In that case they also indicated that theft at a time beyond the working hours of the business does not make any difference if the loss is otherwise incidental to the business.

5. Applying this principle and keeping in mind the facts and the circumstances of the present case, as stated by the Appellate Assistant Commissioner in his order, which appear to have been accepted by the Appellate Tribunal also. I have no doubt that the loss of cash caused by theft in the assessee's shop in the night of the 10th January, 1961, was incidental to the business of that firm, and in that view, is allowable as a legitimate deduction under section 10 (1) of the Act.

6. Learned counsel for the revenue drew our attention to certain passages in the judgment in (1965) 55 ITR 707 where the learned Judges drew a distinction between a case of a money lender and a public company carrying on banking business and said that in case of a money lender, the profits he makes may form part of his private funds kept in his house which he may or may not invest in his business, and that is indistinguishable from his other moneys. But in the case of a Bank the deposits received by it form part of its circulating capital and at the time of the theft formed part of its stock-in-trade. In one case it cannot be posited that the amount robbed in part of the stock-in-trade of the trader till he invests it in the business; in the other it forms part of the stock-in-trade without depending on the intention of the banking company. This distinction was in connection with the question whether the money that was robbed of the company's premises was or was not the stock-in-trade of the business as compared to the money kept by the money lender in his house at the time when the theft took place there. It cannot be contended that the loss in the stock-in-trade alone is permissible to be

deducted under section 10 (1) of the Act. Any loss other than in stock-in-trade, if incidental to the business, will also come within the purview of that section. That is why their Lordships of the Supreme Court while referring to the case reported in ILR 53 Mad 904 (FB) were inclined to agree with the minority view expressed in that judgment.

7. Learned counsel for the revenue also referred to the case of *Bansidhar Onkarmal v. Commissioner of Income Tax, Bihar and Orissa*³, which was also relied upon by the appellate Tribunal. There, the money lender's money was stolen from his shop premises by a relation of his who was working as an Accountant of the firm, after the business hours. That money had already been credited in the books of account to the personal account of the assessee. He had other business also. The learned Judges disallowed that loss because that money no longer represented, before it was stolen, as the money belonging to the business.

8. For the reasons given above, the answer to the question will be that on the facts and the circumstances of the case, the Tribunal was not justified in disallowing the assessee's claim for deduction of Rs. 11,407 on account of loss by theft as capital loss. This answer is in favor of the assessee.

9. The reference is thus disposed of. Since the Tribunal based their decision on certain observations of their Lordships of the Supreme Court in (1958) 34 ITR 10 , though incorrectly, there will be no order for costs in this reference.

Sinha, J.

10. I entirely agree.

Reference answered in negative.

Cases Referred.

¹(1958) 34 ITR 10

²(1965) 55 ITR 707

³ ILR 53 Mad 904 : (AIR 1930 Mad 808 (FB)

³(1949) 17 ITR 247