

PUNJAB AND HARYANA HIGH COURT

Commissioner of Income-Tax

Vs

Ram Sarup

(D Falshaw, C.J. M Singh and A Grover, JJ.)

14.11.1961

JUDGMENT

Grover, J.

(1) The facts are set out in my referring order and need not be restated. The question that is to be answered is-

"Whether on a true interpretation of section 10 and sub-section (1) of section 24 and the first proviso thereto, the assessee was entitled to claim a set-off of the loss suffered by it in speculation business against the profits of the assessee in a business other than a business consisting of speculative transaction?"

(2) Now, identically this very matter came up for consideration before a Bench of the Bombay High Court consisting of Chagla, C. J. and Tendolkar, J. in *Keshavlal Premchand v. Commr. of Income-tax, Bombay*¹, and after examining the relevant provisions of the Income-tax Act, 1922, and bearing in mind the principles relevant for determining the proper function of a proviso, the following view was expressed:

"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 provision dealing with the mode of computing the profits and gains chargeable under the head 'profits and gains or 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 the extent of the amount of profits and gains, if any, in any other business consisting of a speculative transaction." The mischief that was sought to be remedied by the Legislature in enacting the proviso was also mentioned and judicial notice was taken of the fact that in recent times businessmen have been known to buy speculative losses in order to reduce their profits and clearly the Legislature was aiming at that mischief could only be removed by preventing the assessee from reducing his profits by these speculative losses, and that was what was exactly done by the Legislature in enacting the proviso. The Bombay decision was followed by the Madhya Pradesh Court in *Commr. of Income-tax, Nagpur and Bhandara v. M/s. Ramgopal Kaniyalal*²,

Indeed, a Division Bench of this Court consisting of my Lord Falshaw and Chopra, J. in *M/s. Manohar Lal Munshi Lal v. Commr of Income-tax, new Delhi*³, accepted the reasoning of

Chagla, C. J. in the Bombay case and followed the same view. There also the question was whether the assessee firm which had earned profits in its trading accounts but had lost a sum of Rs. 20,206/- in certain speculative transactions could set-off that loss against the profits earned in the other business. After referring to the provisions of sections 6 and 10 and the scheme of Chapter III of the Act followed by Chapter IV and sub-section (1) of section 24 together with the proviso, the question was considered whether the proviso comes into operation only when under section 24 a question arises for setting off losses under one of the heads contained in section 6 against profits earned under other heads or whether it is intended also to apply when income is computed under section 10 under the head "Profits and gains of business, profession or vocation". The following observations from that judgment are noteworthy and may be reproduced:

"The main lines of arguments open to an assessee in such a case are clear and two-fold, firstly the general principle well affirmed by authority that where a proviso is inserted in a particular section or sub-section, its application is limited to the provisions of the section or sub-section in question and secondly that if it was intended to lay down a principle for computing profits and gains of business, profession or vocation the Legislature could have incorporated a suitable amendment in the provisions of section 10 itself. At the same time the words of the proviso appear to be clear and free from any ambiguity whatever and their plain meaning is that in computing the profits and gains from a business, profession or vocation any losses incurred in a speculative business are to be left out of account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transaction,....."

V. S. Sundram in his work "The Law of Income-tax in India", 8th Edition, at page 780 has expressed a view which is similar to what has been laid down in the aforesaid decisions.

(3) The learned counsel for the assessee has frankly conceded that there is no authority in his favour taking a contrary view but he has relied a great deal on the true and proper functions of a proviso appearing in a section and has stressed the point of view put forward by Mr. Palkhivala before the Bombay Bench which has also been embodied in "the Law and Practice of Income-tax", 4th Edition, by Kanga and Palkhivala. As regards the argument that the effect of the proviso should be limited to the section in which it is to be found, all the three decisions, referred to before, accord full recognition to the general principle that it should be normally so limited but, as has been pointed out, there may be cases in which the language of the proviso in such that the Courts would treat it as a substantive enactment. Their Lordships of the Supreme Court in *Commr. of Income-tax v. Indo Mercantile Bank Ltd.*⁴, made the following observations at p. 718 which are noteworthy:

"The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. (Vide also *Corporation of the City of Toronto v. Attorney-General for Canada*, 1946 AC 32)."

(4) Adverting to the comment in Kanga and Palkhivala's book it is necessary to set out in the words of the learned authors the true interpretation of section 24(1) read with the proviso:

"In case where the assessee claims to set-off a business loss against income under another head under sub-section (1), it is clear that the first proviso applies and its effect is to prevent the set-off of such a loss in speculative transactions in the course of business against income under any other head. The question, however, remains whether such a loss in a business consisting of speculative transactions can be adjusted or set-off against profits in any other non-speculative business, profession or vocation under section 10 itself. It is submitted that such a loss can be so adjusted or set-off and to such a case this proviso would have no application at all. The words of the proviso, apart from the context, are wide enough to cover such a case. But the proviso would nevertheless not apply because where a loss in any business is sought to be adjusted or set-off against the profits of any other business, profession or vocation, such adjustment or set-off is to be made under section 10 itself, and sub-section (1) of this section has no application to such a case since the sub-section applies only to cases where a loss under one head is sought to be set-off against profits under another head."

The view can be effectively controverted by what was observed by Chagla, C. J. in the Bombay judgment with regard to the process of computation as understood by the Income-tax Act which is antecedent to the right to the assessee to claim any set-off under section 24. According to the learned Chief Justice, the question of set-off under section 24 only arises when there is a loss under one head, the loss having been arrived at in the manner of computation laid down in Chapter III and there is a profit under another head, the profit having been arrived at in the manner laid down in the same Chapter. As was further pointed out it was entirely unnecessary to compute the profit and gains of a business, professions or vocation for the purpose of section 24(1) because that had already been done under section 10. In view of the clear language employed in the proviso to section 24(1) which expressly relates to computation of profits and gains chargeable under the head "Profits and gains of business, profession or vocation" and there being no such rigid rule that a proviso can never be treated as a substantive provision or that a proviso to the one section cannot be looked upon as a proviso to another section provided always that the intention of the Legislature is clear from the language employed it is not possible to accede to the contention that has been canvassed before us that the proviso in question should be restricted to Section 24 (1) alone.

(5) The learned counsel for the assessee has endeavored to show that the proviso if confined to section 24(1) is not meaningless and if that be so, its scope should not be extended nor should it be treated as a substantive provision. Even if this suggestion can be substantiated by certain illustrations which were sought to be given but which were not clear and cogent, the question still is what was the intention of the Legislature in enacting the proviso. If the intention clearly was to make a substantive provision for the purpose of computing the profits and gains chargeable under head (iv) of section 6, namely, "Profits and gains of business, profession and vocation", it would not be open to the Courts to confine the operation of the proviso to section 24(1) alone. The reasons given by Chagla C. J. in his judgment for the insertion of the proviso by section 3 of the Finance Act, 1953, and the mischief that was sought to be remedied are weighty and must be borne in mind while interpreting the language of the proviso in question. It is well-settled by now that it is legitimate to take into consideration for the purpose of interpretation of a statute the evil

which was sought to be remedied. If the mischief which was aimed at was the one suggested by the learned Chief Justice which suggestion has not been controverted by the learned counsel for the assessee, the whole purpose of insertion of the proviso would be defeated by accepting the interpretation sought to be placed on it on behalf of the assessee.

(6) The learned counsel for the Commissioner of Income-tax has called out attention to the changes which have been introduced in the Income-tax Act, 1961 which has been enacted to consolidate and amend the law relating to income-tax and super-tax. It is pointed out that the Act of 1922 had several anomalies and its provisions were to be found in a scattered manner and at places where certain provisions could not be legislation has been no amplify and systematise the various provisions of the income-tax law. In the new section 28 which deals with the head "profits and gains of business, profession or vocation" Explanation 2 has been incorporated which explanation originally existed in Section 24 of the Act of 1922. Section 73 of the new Act contains an independent and substantive provision in the matter of losses in speculation business. It is in the following terms:

"73.(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

(2) Where for any assessment year any loss computed in respect of a speculation business has not been 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 income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and-

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on....."

According to the learned counsel for the Commissioner of Income-tax, the Legislature has accepted the view of the Courts contained in the decisions previously mentioned and has incorporated the same in section 73 as a substantive and independent provision. Whatever the position may be with regard to the provisions in the new enactment, it is not permissible to interpret the proviso to sub-section (1) of Section 24 of the Act of 1922 with reference to what has been embodied in the new statute. It is only when the aforesaid section in the new Act comes up for interpretation that such a rule can be invoked or applied.

(7) As we are of the opinion that the view which was already been clearly and cogently expressed in unexceptional, we would answer the question referred to us in the negative. The Commissioner of Income-tax shall be entitled to costs which are assessed at Rs. 250/

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Mehtar Singh, J.

(8) I agree.

Falshaw, J.

(9) I agree.

(10) Answer accordingly.

Cases Referred.

1(1957) 31 ILR 7: (AIR 1957 Bom 20)

2(1960) 38 ITR 193: (AIR 1960 Madh Pra 106)

3(1960) 62 Pun LR 765: (AIR 1960 Punj 520)

4AIR 1959 SC 713