

PUNJAB AND HARYANA HIGH COURT

Messrs. Ram Gopal Ram Sarup

Vs

Commissioner of Income Tax

(Tek Chand J.)

03.01.1962

JUDGMENT

Tek Chand J.

1. The question of law referred to the High Court by the Income-tax Appellate Tribunal, Delhi Bench, in this case is :

"Whether, on the facts and in the circumstances of the case, the loss of Rs. 9,300 arose in the ordinary course of, and incidental to, the assessee's business and was, as such, a trading loss under section 10(1) of the Income-tax Act allowable in computing the business income ?"

The assessee is a registered firm of two partners with its head-office at Beri in Rohtak district and with branches in several places including the one at Calcutta. This firm used to transact business in foodgrains and other agricultural products on commission agency basis. The Calcutta branch earned a net commission on agency basis. The Calcutta branch earned a net commission amounting to Rs. 58,246 in the assessment year 1956-57 for which the accounting year ended on 13th November, 1955. Prabhu Dayal was an employee of the assessee's Calcutta branch and was sent with a sum of Rs. 9,300 in cash on 13th November, 1955, to the Punjab National Bank Limited, Bara Bazar branch, Calcutta, for depositing the sum in the account of the assessee firm. A thief snatched from Prabhu Dayal the bundle containing the money and consequently a report was lodged with the police authorities. The culprit could not be traced and in the assessee's books of account the amount of Rs. 9,300 was written off for the reason that the sum had been stolen. In the income-tax return the assessee firm claimed the amount as a trade loss. The Income-tax Officer in his order dated 23rd February, 1957, said that the assessee had failed to prove that the amount involved was necessarily for business purposes. Therefore, in the absence of any evidence produced by the assessee, he treated the amount as capital loss and added back Rs.

9,300. The assessee was unsuccessful in his appeal before the Appellate Assistant Commissioner expressed the view that the assessee had lost the cash which was not the stock-in-trade and, therefore, was not a revenue loss suffered. He did not disagree with the Income-tax Officer that the loss was not accidental and in the ordinary course of the business affairs, but even if it was so the Appellate Assistant Commissioner did not consider it to be a revenue loss and expressed the view that it partook of the nature of capital loss in the hands of the assessee. On these grounds he agreed with the Income-tax Officer that the assessee could not be allowed to set off this loss.

The Appellate Tribunal did not accept the assessee's contention that the loss suffered arose in the course of the assessee's business or was incidental thereto. The provisions of section 10(1) could not be attracted. The case of *Lords Dairy farm Ltd. v. Commissioner of Income-tax*, which was cited on behalf of the assessee, was held inapplicable and the Tribunal thought that the principle set down in *Mulchand Hiralal v. Commissioner of Income-tax* was fully applicable. Reliance was placed upon the observations of Courtney-Terrell C.J., who said :

"When money is stolen, the person from whom such money is stolen is parting with the money unwillingly or unknowingly and he cannot be said to lose the money for the purpose of earning such profits or gains".

Thus the contention, which is the subject-matter of this reference did not prevail before the Tribunal. The assessee then submitted his application requiring the Tribunal to refer the question of law reproduced above to this court.

Learned counsel at the Bar for the assessee and also for the department have cited a number of authorities, but they do not call for discussion in any great detail. A duty is cast upon the assessee to prove necessary facts entitling him to claim deduction. It has to furnish proof as to how the deduction claimed is connected with its business or its profit. It was contended by learned counsel for the department that no evidence has been furnished showing the connection of sum of Rs. 9,300 with the assessee's business and that no facts had been brought out justifying how the assessee is entitled to the exemption claimed by it. He maintained that it was for the assessee to establish by evidence that the alleged loss was a trading loss or connected directly with the business or was incidental to it. He drawn attention to the observations of the Income-tax Officer referred by the assessee that the amount in question was necessarily concerned it was argued that assuming that the amount was in the nature of a business loss, even then the loss by reason of theft could not be taken into consideration either under sub-section (1) or under sub-section 10 of the Income-tax Act. Both sides relied upon the observations of the Supreme Court in *Badridas Data. v. Commissioner of Income-tax*. In that case, an employee of the assessee which carried on business of money-lending and also dealt in shares in bullion was empowered

by the power of attorney to operate on the assessee's bank accounts. He withdrew from the firm's bank account large sums and applied them for the satisfaction of his personal debts, which he had incurred in speculative transactions of his personal debts, which he had incurred in speculative transactions. The misappropriation was proved. The assessee firm had written off the amount due from their employee in the accounting year in question. The dispute before the income-tax authorities was whether the amount embezzled was an admissible deduction. It was held, on the facts of that case, that the loss which had been sustained by the assessee as a result of misappropriation by its employee was incidental to the carrying on of its business and it should, therefore, be deducted in computing the profits under section 10(1) of the Act. It was held that the employment of agents was incidental to the carrying on of business and losses which were to such employment were also incidental to the carrying on of the business. The Supreme Court then observed :

"At the same time, it should be emphasized that the loss which a deduction could be made under section 10(1) must be one of springs directly from the carrying on of the business and is incidental to it and not any loss sustained by the assessee, even if it has connection with his business. If, for example, a thief were to break over-night into the premises of a money-lender and run away with funds secured therein, that must result in the depletion of the resources available to him for lending and the loss must, in that sense, be a business loss, but it is not one incurred in the running of the business, but is one to which all owners of properties are exposed whether they do business or not. The loss in such a case may be said to fall on the assessee not as a person carrying on business but as owner of funds. This distinction, though fine, is very material as on it will depend whether deduction could be made under section 10(1) or not."

Their Lordships of the Supreme Court cited with approval the under-noted observations of the Chief Justice in *Ramaswami Chettiar v. Commissioner of Income-tax*, as laying down the scope of the assessee's right to deduction of loss resulting from embezzlement by an employee and also as showing the extent and limits of that right :

"If any one is paid a sum due to him as profits and he puts that in his pocket and on his way home is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more when he was reached his home and put these profits in a strong room or some other place regarded by him to be a place of safety. I can well understand that in cases where the collection of profits or payment of debts due by, is entrusted to a gumastha or servant for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such

servants may rove to be dishonest and instead of a paying the profits over to him convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to him business. In this case, none of the thieves were the then servants of the assessee although one of them had formerly been his cook." Whether the loss incurred was incidental to the carrying on of the trade and therefore admissible would depend upon the facts of a particular case and in this case evidence has not been adduced to show that the loss incurred by the assessee in the manner alleged was in fact incidental to the conduct of his business. A decision of a Division Bench in commissioner of Income-tax v. Chukka Narayana was cited at the Bar. In that case an assessee who was a dealer in cloth and Government securities encashed them for Rs. 20,790, but lost the cash by theft at a railway station. I was held that the loss was not incidental to the assessee's business and, therefore, was not an allowable deduction and that it was only when it could be pointed out that it was part of the assessee's business to take cash with him that it could be said that the loss was incidental to the business. It was observed :

"In our opinion, every loss sustained by an assessee having some connection with his business would not amount to a loss incidental to his business. It must be directly connecting the business or it must arise out of the business. The mere fact that there is some remote connection between to loss and the business would not bring the loss within the expression loss incidental to the business. It should spring directly from the carrying on of the business and be incidental to it. The loss should be inseparable from the business."Applying the above test to the facts of that case, it was held that the loss was not incidental to or one arising out of the business. In the circumstances, we have not considered it necessary to examine the other aspect of the case whether loss resultant on theft in the circumstances of this case sides one the same footing as loss resulting from embezzlement by an assessee's employee. This reference can be disposed of on the ground that the assessee had failed to prove that the sum of Rs. 9,300, which was snatched away from its employee, Prabhu Dayal, on 3rd November, 1955, was connected with or incidental to the assessee's business.

For reasons stated above, I would answer the question under reference in the negative. The Commissioner of Income-tax shall be entitled to Rs. 100 as costs.

Inder Dev Dua J. - I Agree.

Question answered in the negative.