

# RAJASTHAN HIGH COURT

Chhotulal Ajitsingh Bijainagar

Vs.

Commissioner of Income-Tax

S.B. Civil Income-tax Reference case No. 9 of 1969

(L.N. Chhangani and B.P. Beri, JJ.)

06.04.1972

## JUDGMENT

### **Chhangani, Actg., C.J.**

1. This is a reference by the Income-tax Appellate Tribunal, Delhi Bench " A ", stating a case and referring the following question for our opinion :

"Whether, on the facts and in the circumstances of the case, the sum of ₹ 20,272 being loss suffered by theft is an admissible charge against the income of the previous year ?"

2. The assessee carries on business as a commission agent for the purchase and sale of cotton and the question relates to the assessment year 1961-62, the accounting year ending on 17th July, 1960. The assessee used to keep cash in his business premises in connection with his business. In the night between 10th and 11th June, 1960, a theft was committed in the business premises and an iron safe was broken and ₹ 20,272 in cash comprising currency notes and change was stolen. The assessee claimed this amount as admissible deduction while computing the total income of the previous year. The claim was rejected by the Income-tax Officer, by the Appellate Assistant Commissioner and finally by the Appellate Tribunal. At the instance of the assessee, the Tribunal has made the present reference.

3. At the outset we may address to the precise findings of fact arrived at by the Tribunal. The Tribunal in its order dated January 23, 1967, observed that the assessee was keeping cash in hand from time to time is not in dispute. For the period of May

12, 1960, to June 10, 1960, the opening cash balance with the assessee varied between ₹ 8,044 and ₹ 36,193. The assessee has also given us the day's total credits and debits. These include adjustment entries also. The Tribunal thus did not indicate its intention to dispute the assessee's claim that the retention of money in the business premises was necessary for the conduct of the business. The Tribunal, however, emphasized the fact that the theft had occurred at a time when all the business transactions had been finalised. The business had closed down for the day. The income or capital of the assessee had come to his "till". It was after the cash had come to the "till" that the thieves broke into the assessee's shop and stole away the amount. It was on account of the theft having been committed outside business hours that the Tribunal held that the loss did not directly spring from the business and was not incidental to the business. We will, therefore, answer the question on the implied finding that the retention of the money in the business premises was necessary for the conduct of the business.

4. Coming to the law on the point, we may at once state that the loss on account of theft cannot fall under any of the categories mentioned in subsection (2) of Section 10 of the Indian Income-tax Act, 1922. At the same time it is now well-settled that the enumeration of items under Section 10(2) is not exhaustive and that losses can be taken into account while calculating profits and losses under Section 10(1). Thus, profits and losses have to be determined on the well-recognized commercial principles. A case somewhat similar to the facts of the present case came up before the Patna High Court in *Motipur Sugar Factory Ltd. v. Commissioner of Income-tax*,<sup>1</sup> In that case the assessee-company was carrying on business in the manufacture of sugar and molasses out of sugarcane. The company deputed an employee in compliance with the statutory rules, with cash for distribution to sugar-cane cultivators at the spot of purchase. The cash was robbed on the way. The company claimed loss on account of robbery as permissible deduction. The Income-tax Officer and the Tribunal disallowed the claim of the assessee. On a reference, the Patna High Court held that the loss of money was a loss arising out of the business of the assessee and sprang from the statutory necessity of sending money to various purchasing centres for distribution and, therefore, the assessee was entitled to deduct the loss in computing its taxable income under Section 10.

5. The question came up before the Supreme Court in *Badridas Daga v. Commissioner of Income-tax*,<sup>2</sup> In that case the law was stated in the following terms :

"When a claim is made for a deduction for which there is no specific provision

under Section 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and be incidental to it. The loss for which a deduction is claimed must be one that 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 some connection with his business. If that is established, then the deduction must be allowed, provided that there is no provision against it, express or implied, in the Act."

The Supreme Court approved the decision of the Patna High Court in *Motipur Sugar Factory Ltd. v. Commissioner of Income-tax* (Supra), and also the cases of the Bombay and Madras High Courts in *Lord's Dairy Farm Ltd. v. Commissioner of Income-tax*,<sup>3</sup> and *Venkatachalapathy Iyer v. Commissioner of Income-tax*,<sup>4</sup> taking a similar view. After stating the governing principles, the Supreme Court observed that in deciding whether the loss resulting from embezzlement by an employee or agent in a business is admissible as a deduction under Section 10(1) of the Indian Income-tax Act, what has to be considered is whether it arises out of the carrying on of the business and is incidental to it. If the employment of agents is incidental to the carrying on of business, it must logically follow that losses which are incidental to such employment are also incidental to the carrying on of the business. The Supreme Court, however, emphasized that the loss for which a deduction could be made under Section 10(1) must be one that springs directly from the carrying on of the business and is incidental to it and is not any loss sustained by the assessee, even if it has some connection with his business. This was illustrated with reference to a theft committed in the premises of a money-lender and it was observed that the loss on account of such theft cannot be said to be 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. This illustration has given rise to further controversy in deciding whether a loss on account of theft should be considered as an admissible deduction under Section 10(1).

6. In a later decision reported as *Commissioner of Income-tax v. Nainital Bank Ltd.*,<sup>5</sup> the Supreme Court had an occasion to consider the same question. In that case a burglary was committed resulting in the loss of ₹ 1,06,000 to the Nainital Bank Ltd. The bank claimed the loss as admissible deduction. The income-tax authorities disallowed the claim, but on a reference, the Allahabad High Court held that the loss by the bank was incidental to the banking business and, therefore, was a trading loss.

On appeal, the Supreme Court affirmed the view of the High Court. In that case dealing with the contention that "...every loss of a stock-in-trade in whatsoever way is caused is not a trading loss, but the said loss should have been caused not only in the course of the business but also should have been incidental to it," their Lordships noticed Badridas Daga's case and referred to the passage relating to the illustration of theft in a money-lender's house and observed as follows:

"That passage in terms refers to a money-lender and does not deal with a public company carrying on banking business. In the case of a money-lender, the profits he made may form part of the private funds kept in his house which he may or may not invest in his business. It 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 is part of the stock-in-trade of the trader till he invests it in his business; in the other it forms part of the stock-in-trade without depending on the intention of the banking company. . . . We have only suggested a distinction, but we are not expressing any definite opinion on the question whether the loss incurred in the case illustrated is or is not a trading loss. The correctness or otherwise of the said observation may fall to be considered when such a case directly arises for decision."

In this manner, their Lordships pointed out the distinction between the case before them and the illustration referred to in the earlier decision. The Supreme Court also indicated that the fact that the theft or burglary is committed outside business hours makes no substantial difference if the loss is otherwise incidental and arises out of the business. Their Lordships then referred to the decisions of the High Court of Australia, and the Supreme Court, of New Zealand and eventually summarized the position as follows:

"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."

We may also usefully notice some of the decisions of the High Courts subsequent to

the Supreme Court decision in Nainital Bank's case. In *Basantal Sanwar Prasad v. Commissioner of Income-tax*,<sup>6</sup> the assessee was a registered firm having wholesale business in cloth. A burglary took place at night in its shop premises and a sum of ₹ 11,407 was lost. The assessee claimed loss on account of burglary as permissible deduction. The Appellate Tribunal did not allow the deduction. On a reference, the High Court held that on the facts it was necessary for purposes of the assessee's business to keep cash in its shop. The loss sustained by theft was, therefore, incidental to the business. In that case after referring to Badridas Daga's case, the principle enunciated in that case and the illustration, the Bench observed as follows:

"The Appellate Tribunal equated this illustration with the facts of the present case and disallowed the claim for 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 this illustration only. Even there, they were wrong."

The Bench also referred to the Supreme Court decision in Nainital Bank's case, and observed that :

"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. "

Dealing with some argument based on certain passages in the judgment of Nainital Bank's case, drawing distinction between a case of the moneylender and the public company, the Bench observed :

"This distinction was in connection with the question whether the money that was robbed off the company's premises was or was not the stock-in-trade of the business as compared to the money kept by the moneylender 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 section."

"That is why their Lordships of the Supreme Court, while referring to the case

of *Ramaswami Chettiar v. Commissioner of Income-tax*,<sup>7</sup> were inclined to agree with the minority view expressed in that judgment."

7. In this view of the matter, the Patna High Court held the loss on account of theft as permissible deduction.

8. In *Commissioner of Income-tax v. Sarya Sugar Mills (P.) Ltd.*,<sup>8</sup> the assessee was a company carrying on the business of manufacturing and selling sugar. A theft was committed at 3 o'clock of the morning in the factory premises resulting in some loss. The assessee claimed the loss as permissible deduction. The High Court on a reference held that the loss on account of theft was a permissible deduction. Dealing with the argument of the revenue that the theft having been committed outside the business hours the loss could not be stated to be incidental to the business, the Bench observed :

"The submission, it seems to us, proceeds upon a fallacy. It rests on an unreasonably limited view of the time during which the assessee's business can be said to have been conducted."

On the facts of the case, the High Court held that the loss by theft was a loss arising out of the carrying on of the assessee's business and incidental to it.

9. Similar view was taken in *Commissioner of Income-tax v. Ganesh Rice Mills*,<sup>9</sup>

10. All the principles laid down in the Supreme Court cases and the three High Court decisions noticed above go to support the assessee's claim. Even so, the learned counsel for the revenue referred to *Maduri Rajeshwar v. Commissioner of Income-tax*,<sup>10</sup> *Ram Gopal Ram Sarup v. Commissioner of Income-tax*,<sup>11</sup> and *Salem Gugai Sri Krishna Bank Ltd. v. Commissioner of Income-tax*,<sup>12</sup> and wanted us to express a contrary view. All these cases were decided prior to the Supreme Court decision in *Nainital Bank's case*, and after considering the case, we have not felt persuaded to change our opinion. Learned counsel for the revenue also sought to rely upon the Short Notes of a case of the Andhra Pradesh High Court in *Commissioner of Income-tax v. Ramchandar Shivnarayan*,<sup>13</sup> The citation does not contain a full report of the case. Having regard to the manner in which the case was presented to us, we are of the opinion that the case is distinguishable and need not affect our decision arrived at on a

consideration of the entire case law discussed in detail.

11. For the reasons given above, our answer to the question is that, on the facts and circumstances of the case, the sum of ₹ 20,272, the loss suffered by theft, is an admissible charge against the income of the previous year. The reference is answered accordingly. There will be no order as to costs.

Cases Referred.

1. [1955] 28 I.T.R. 128 (Pat.).
2. [1958] 34 I.T.R. 10; [1959] S.C.R. 690 (S.C)
3. [1955] 27 LT.R. 7(10 (Bom)
4. [1951] 20 I.T.R. 363 (Mad)
5. [1965] 55 I.T.R. 707, 711, 715; [1965. 1 S.C.R. 340 (S.C)
6. [1968] 67 I.T.R. 380, 383, 304, 385 (Pat)
7. A.I.R. 1930 Mad. 808 [F.B]
8. [1968] 70 I.T.R. 109, 112 (All)
9. [1970] 77 I.T.R. 889 (M.P)
10. [1964] 51 I.T.R. 213 (A.P)
11. [1963] 47 I.T.R. 611 (Punj)
12. [1962] 46 I.T.R. 422 (Mad)
13. [1972] 83 I.T.R. (Sh. N.) 10--fully reported in [1972] 84 I.T.R. 296 (A.P)