

Jamnadas Daga Vs. the Commissioner of Income-tax, Madhya Pradesh and Bhopal, Nagpur

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Court : Mumbai

Decided On : Sep-03-1957

Reported in : AIR1958Bom239; (1957)59BOMLR1216; ILR1958Bom365; [1958]33ITR274(Bom)

Judge : Tendolkar and ;S.T. Desai, JJ.

Acts : Income-tax Act, 1922 - Sections 6, 10, 14, 14(2), 14(3), 14(4), 14(5), 16(1), 23(5), 24 and 24(1); [Code of Civil Procedure \(CPC\), 1908](#); Finance Act, 1956

Appeal No. : Income-tax Ref. No. 49 of 1957

Appellant : Jamnadas Daga

Respondent : The Commissioner of Income-tax, Madhya Pradesh and Bhopal, Nagpur

Advocate for Def. : G.N. Joshi and ;M.P. Amin, Advs.

Advocate for Pet/Ap. : J.M. Thakar, Adv.

Judgement :

Tendolkar, J.

1. On this Reference the Tribunal has stated to us two questions raised at the instance of the assessee and one question raised at the instance of the Income-tax Commissioner. The assessee before us has not pressed the questions raised at his instance, and, therefore, it is unnecessary to answer them; and the only Question that survives is the question raised at the instance of the Income-tax Commissioner, and the question is In the following terms:

'Whether the share income of the assessee from the unregistered firm (which is separately taxed) namely Rs. 26,110/- can be set off against their share loss from registered firms, namely, Rs. 13,167/-?'

2. Now, the relevant facts for the purpose of decision of this issue are these. The assessee is a partner in two registered firms, namely, R. B. Bansilal Abirchand Spg. & Wvg. Mills, Hingan-ghat and R. B. Bansilal Abirchand, Kamptee, and also in an unregistered firm by the name of Bissessar House Estate, Nagpur. In the relevant accounting year the two registered firms incurred losses. The firm at Hinganghat incurred a loss of Rs. 11,902/-. The firm at Kamptee incurred a loss of Rs. 1,265/-, the total loss in the two registered firms being Rs. 13,167/-. In the unregistered firm there was a profit of Rs. 26,110/-. These figures for all the three firms relate to the share of the assessee only and are not the figures of loss and profit for the firm. Now, it appears that there was a small British Indian Income of Rs. 262/- which arose under the head 'Salaries, securities, House property and other sources'. It was the case of the income-tax authorities that this amount had to be taxed at the rate applicable to the total income of the assessee and for the purpose of ascertaining his total income his share of profits from the unregistered firm should be set off against his share of loss from the two registered firms. It was the contention of the assessee that the income from the unregistered firm had been taxed in the hands of the unregistered firm and it must be completely ignored and cannot be set off against the assessee's share of loss from the registered firms.

3. Now, in order to appreciate the relative contentions of the parties, it is necessary to look at the general scheme of the Income-tax Act and in this regard we will look at the Act as it stood before it was amended by the Finance Act of

1956, because some of the relevant Sections were amended by that Act and we are not concerned in this Reference with the amended sections. Section 23 (5) provides what is to be done when the total income of a firm has been assessed under Sub-section (1), Sub-section (3) or Sub-section (4) of that section as the case may be. Sub-clause (a) provides that in the case of a registered firm, the sum payable by the firm itself shall not be determined but the total income of each partner of the firm shall be assessed and the sum payable by him on the basis of such assessment shall be determined. Therefore, in effect the registered firm is not subjected to tax; but the income of the registered firm is taxed in the hands of the partners in accordance with their shares in the income. Sub-clause (b) deals with a case of an unregistered firm; and it provides that the tax may be levied on the unregistered firm or at the option of the Income-tax Officer it may be levied on the partners if such course is likely to bring in more revenue to the exchequer. Then, we have the provisions of Section 14, Sub-section 2 (a). The section itself deals with exemptions of a general nature; and Sub-section 2 (a) provides:

'The tax shall not be payable by an asses-see if a partner in an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in Clause (b) of Sub-section (1) of Section 16 on which the tax has already been paid by the firm.'

Therefore, if the unregistered firm has been subjected to tax on its income the share of any partner in such income is not liable to tax In his hands.

4. We next come to Section 16. Sub-section 1 (a); and in so far as it is relevant it enacts:

'In computing the total income of an asses-see any sum exempted under Sub-sections. (2), (3), (4) and (5) of Section 14 shall be included.' The combined effect of Section 14 (2) (a) and Section 16 (1) (a) undoubtedly is that although the share of a partner in the profits of an unregistered firm is exempt from tax, it is included in his total income for the purpose of rate only.

5. Now, the question that we have been called upon to determine is whether in arriving at the profits under the head 'Business' of the assessee, the share of the

assessee in the losses made by the two registered firms is to be set off against the share of the assessee in the income of the unregistered firm. The Tribunal appears to have decided this question mainly relying upon Proviso 2 of Section 24 (1). That proviso is in these terms:

'Provided further that where the assessee is unregistered firm which has not been assessed under the provisions of Clause (b) of Sub-section (5) of Section 23 in the manner applicable to a registered firm, any such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm; and where the assessee is a registered firm, any loss which cannot be set off against other income, profits and gains of the firm shall be apportioned between the partners of the firm and they alone shall be entitled to have the amount of the loss set off under this section,'

The first part of the proviso deals with losses made by an unregistered firm; and the Tribunal thought that upon a parity of reasoning profits of an unregistered firm must similarly be treated.

6. Now, before considering the effect of this proviso, it is necessary in the first instance to consider what the position would be on the authorities with regard to the computation of the income under the head 'business'. That computation is made under Section 10 of the Act. In the case of *Commissioner of Income-tax v. Murli-dhar Mathurawalla Mahajan Association* : [1948]16ITR146(Bom) (A), a judgment to which I was a party, we held that all businesses constitute one head under Section 10; and in order to determine what are the profits and gains of a business under Section 10, an assessee is entitled to show all his profits and set off against those profits losses incurred by him under the same head. In other words, whilst the profits or losses of each distinct business may be computed separately, the tax is chargeable under the head 'business' on the aggregate of profits of all businesses after setting off the profits of one or more business against the loss, if any, in other businesses, in the case just referred to, we were dealing with losses made in a business carried on in an Indian State, the income of which was exempt from taxation under Section 14, Sub-section 2 (C) as it then stood, unless it was received or deemed to be received or brought into the

taxable territory; and we held that the losses in this business were liable to be set off against the profits of a business carried on in Bombay. In this case it had been argued on behalf of the Income-tax Commissioner that having regard to a proviso to Section 24 (1) of the Act, such losses could not be set off. That proviso which has since been repealed was in the following terms:

'Provided that, where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within an Indian State and would, under the provisions of Clause (c) of Sub-section (2) of Section 14, have been exempted from tax, such loss shall not be set off except against profits or gains accruing or arising within an Indian State and exempt from tax under the said provisions.'

We held that the proviso had no application because Section 24 Sub-section (1) dealt with setting off an income from one head against a loss under another head enumerated under Section 6 of the Indian Income-tax Act and it did not relate to setting off the loss in one business against the profits of another business both of which businesses came under the single head 'business' under Section 10 of the Indian Income-tax Act. Therefore, the general principle is that the profits under the head 'business' can only be ascertained as the aggregate of profits and/or losses made by the assessee in different businesses. It follows that the income under the head 'business' can be arrived at in the present case by setting off the share of profits in the unregistered firm against the assessee's share of loss in the registered firms, unless there is some section in the Income-tax Act which constitutes an exception to the general principle that we have just enunciated.

7. Now, Mr. Thakar for the assessee contends in the first instance that upon a correct interpretation of Section 14, Sub-section (2) and Section 16, Sub-section (1), the assessee's share in the profits of the unregistered firm is not to be included in his total income at all; but if the total income without such inclusion attracts tax, then his share in the profits of the unregistered firm is to be included in the total income for rate purposes only. His second contention is that the second proviso to Section 24 should be treated as a substantive enactment and not a proviso to Section 24 (1) and although it deals with losses made in an unregistered firm, on a parity of reasoning it should be applied to profits made in an unregistered firm as

well. In support of his argument, Mr. Thakur draws our attention to the first category of income exempted from tax which is contained in Section 14 (1); and that is in respect of any sum which an assessee received as a member of a Hindu undivided family. This sum, he points out, is not to be included in the total income even for rate purposes, because Section 14, Sub-section (1) is not one of sections enumerated in Section 16, Sub-section (1). This argument of Mr. Thakur does not appear to us to be well founded. The language employed in Section 14 is, so far as the operative words are concerned; 'tax shall not be payable by an assessee'. This is a far different thing from saying that the income on which such tax is not payable is not his income. The language may be contrasted with the language of Section 4, Sub-section (3), which is as follows:

'Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them.' If the intention of the Legislature was that the classes of income enumerated in Section 14 should not be included at all in the total income, they would have used the phraseology of Section 4, Sub-section (3) and not the phraseology that 'tax shall not be payable in respect of such income'. In other words, in our opinion, what is exempt from tax under Section 14 does not cease to be the income of the assessee. It merely does not attract tax. But then Mr. Thakar argues that if that be the correct position why was it necessary to enact Section 16, Sub-section (1) at all. because if the income exempted from tax was held to be the income of the assessee it is redundant to provide that in computing the total income of an assessee the income exempted under Section 14, Sub-section (2) shall be included. The reason for it appears to us to be quite clear. The Legislature intended that in respect of some and not of all incomes exempted from tax under the provisions of the Act, such income should be taken into account for rate purposes only. That also accounts for the fact that the income which an assessee receives from an H. U. F. and which is exempt from tax under Section 14 is not to be included in the total income, because the Legislature thought that it should not figure for rate purposes, either. We cannot, therefore, uphold the submission of Mr. Thakar that income which is exempt from tax under Section 14 does not form part in the income of the assessee at all and it is artificially to be added to his income in computing his total income merely for the purpose of determining the tax if tax is attracted by the

income as computed after exclusion of the income exempted under Section 14.

8. We next turn to the second contention advanced on behalf of the assessee that proviso 2 to Section 24 (1) which we have already set out above should be read as a substantive enactment and not as a proviso to Section 24 (1), which is in these terms:

'Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he would be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year'.

This sub-section is clear and unambiguous and the ambit of the section is well denned. It deals with a set off as between different heads of income and it does not deal with any question of a set off as between incomes which fall under the same head. The different heads of income are enumerated in Section 6 of the Income-tax Act. One of such heads, namely No. 4 in that section is 'Profits and gains of business, profession or vocation'; and we are here concerned not with any question of a set off between different heads at all but with a question of a set off as between different businesses which come under the same head 'profits and gains of business, profession or vocation'. Ordinarily the principle of construction is clear that the proper function of a proviso is to except and deal with a case which would have otherwise come within the general language of the substantive part of the enactment; and ordinarily, therefore, we must interpret proviso 2 as being limited for that purpose only. But it is argued that the first proviso to this sub-section which deals with the loss sustained in speculative transactions has been held by a decision of a Division Bench of this Court, to which I was a party, in *Keshavlai Premchand v. commissioner of Income-tax, Ahmedabad* : AIR1957 Bom20 (B), to be it-self a substantive enactment and not a proviso and equally the second proviso should also be held to be a substantive enactment and not a proviso. Now, when one looks at the decision in *Keshavlai v. The Commissioner of Income-tax (B)*, we clearly set out the well-recognised canon of construction of a proviso but we were in the main Influenced by the clear words of the first proviso in coming to the conclusion that it was a sub-etantive enactment. The words that we emphasised were 'in computing the profits and gains chargeable under the head

'profits and gains of business, profession or vocation'. We pointed out that the profits and gains of a business, profession or vocation were not computed under Section 24 but they were computed under Section 10; and, therefore, the words were quite incapable of an interpretation that the first proviso was a proviso proper to the substantive enactment in Section 24 (1); and therefore, we held that it was by itself a substantive enactment. No such consideration arises from the language of the second proviso, which we have reproduced. That language is clearly applicable to a set off as between different heads; and, therefore, in our opinion, the proviso should be restricted to the normal function of a proviso, namely, to exclude from the operative part of Section 24 (1) something which might otherwise have been included in it. But even assuming for a moment that this proviso was a substantive enactment, in so far as it deals with the loss of a registered firm, it provides that such loss shall be set off only against the income, profits and gains of the firm and not against the income, profits and gains of any of the partners of the firm. It does not deal with the question that we have to determine, namely, what is to be done with the profits of an unregistered firm; and the proviso, in our opinion, does not render any assistance in determining the question that we have been called upon to determine on this Reference.

9. It is next contended that the effect of holding that the assessee's share of the profits of the unregistered firm can be set off against his share of the loss of the registered firm is to deprive the assessee of the right which he would have had of carrying forward the loss. This is an argument which appears to have weighed with the Tribunal as well. But the argument appears to us to ignore the fact that once losses are set off against profits they are to that extent absorbed and there is nothing to carry forward. The right to carry forward can only be in respect of unabsorbed losses and not otherwise. If, therefore, the true position in law is that the assessee's share of profits in the unregistered firm has to be set off against his share of loss in the registered firm, it may conceivably lead to the position that all the losses are absorbed as in this case they undoubtedly are; but we might have had the case of an assessee where an unregistered firm made losses far exceeding the profits made by a registered firm in which case the losses less the profits would have been carried forward. The law cannot be one in a case where all losses are absorbed and in another case where only a part of the losses is

absorbed; and we cannot interpret the provisions of the Act merely with a view to prevent the consequence that a loss which might have been carried forward, being unabsorbed, ceased to be available for being carried forward by reason of the fact that it is absorbed by other profits made.

10. In our opinion, therefore, the Tribunal erred in coming to the conclusion that the assessee's share of profits in the unregistered firm could not be set off against the assessee's share of loss in the registered firms and our answer to the question raised in paragraph 7 of the Statement of the Case is in the affirmative.

11. The assessee to pay the costs of the Reference.

12. Answer in the affirmative.