

Pandyan Builders Vs. Inspecting Assistant Commissioner.

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Court : Chennai

Decided On : Jan-27-1992

Reported in : (1993)45TTJ(Mad)524

Appeal No. : ITA No. 3404/Mad/1987; Asst. yr. 1984-85

Appellant : Pandyan Builders

Respondent : inspecting Assistant Commissioner.

Judgement :

ORDER

S. KANNAN, A.M. :

This appeal by the assessee is directed against the order dt. 1st October, 1987 of the CIT(A)-I, Madras relating to the asst. yr. 1984-85.

2. The assessee, a registered firm, imports and sells Outboard Motors. At the relevant point of time, it had a branch at Porbandar in the state of Gujarat. During the night of 29th/30th May, 1983 the Porbandar office was burgled and a sum of Rs. 10,75,500 stolen. When the burglary came to light, the official in charge of the Porbandar Branch lodged an FIR, with the Police Station at Udyogmandal, Porbandar. It is a matter of record that the FIR was lodged at 4.30 AM on 30th May, 1983. Acting on the said FIR the police moved in the matter, and seized from the alleged culprits a sum of Rs. 5,57,404.25, as also various articles & things of the aggregate value of Rs. 1,02,439. Thereupon, on the application made by the

assessee, the Judicial Magistrate, First Class, Porbandar on 20th September, 1983 ordered that the said sum of Rs. 5,57,404 be released to the assessee, subject to the production of solvent sureties to the extent of Rs. 6 lakhs.

While the matter stood thus, some advocates purporting to act on behalf of the accused filed an application before the said Judicial Magistrate objecting to the release of the sum in question. Acting on the said petition, the Judicial Magistrate on 16th November, 1983 set aside the earlier order dt. 28th September, 1983 and further ordered that the sum of Rs. 5,57,404 should remain in Court custody.

Thereupon the assessee filed Misc. Criminal Application No. 2014 of 1983 before the High Court of Gujarat at Ahmedabad and the Honble Single Judge by his order dt. 25th April, 1984 set aside the impugned order dt. 16th November, 1983 of the Judicial Magistrate, leaving it open to the parties to take further action in the light of certain developments that had in the meanwhile taken place.

Thereafter Misc. Criminal Application No. 712 of 1984 (in Misc. Cri. Application No. 2014/1983) was filed by the assessee. This application was disposed of by the Single Judge on 6th August, 1984, who directed the Judicial Magistrate to first dispose of the fresh application filed by the respondents and thereafter to implement the order dt. 20th September, 1983.

It is a matter of record that on 12th January, 1985 the sum of Rs. 5,57,404 was released to the assessee, subject of course to its furnishing solvent sureties to the extent of Rs. 6 lakhs.

3. In the assessment proceedings for the asst. yr. 1984-85 (previous year ending on 31st March, 1984) the assessee claimed revenue deduction in respect of the entire amount of Rs. 10,75,500 stolen from its Porbandar office. The Assessing Officer negatived the assessee's claim in the following words :

'The assessee had claimed the entire amount of Rs. 10,75,500 as a business loss. In support of the assessee's case it has cited the decision of the Supreme Court in the case of Ramachander Shivnarayanan vs . CIT : [1978]111ITR263(SC) . In the above case the Supreme Court has held that it is immaterial whether the money

lost was part of the stock-in-trade as in the case of a banking-company. The money lost represented the sale proceeds of the assessee's stock-in-trade. The money was also lost from the business premises of the assessee. Therefore, the money was lost in the course of the assessee's business. However, the assessee has recovered part of the money during the accounting year itself (20th September, 1983). Assets worth Rs. 1,02,439 were also seized by the police. Both criminal case and civil suit for recovery of the money are pending. In these circumstances, it cannot be held that the assessee has incurred the loss. The assessee's contention is that the money received by it from the Court is held in trust and that as and when it is realised, the same will be offered for assessment under s. 41(1) of the IT Act. I do not agree with the assessee. So long as there is a reasonable prospect of recovery of the amounts lost, it cannot be held that the assessee has incurred a loss. The fact is that part of the cash has come back to the assessee. Cases are pending before the Court. Hence, the assessee's claim is not allowed.'

4. On his part, the CIT(A) held that the assessee was entitled to revenue deduction in respect of the loss occasioned by the burglary and theft. As for the quantum of the deduction, however, he negated the assessee's claim for revenue deduction in respect of the entirety of Rs. 10,75,500. According to him, the assessee having received Rs. 5,57,404 in cash and further, the police having recovered articles and things worth Rs. 1,02,439, the assessee was entitled to revenue deduction in a sum of Rs. 4,14,656 only.

5. Aggrieved by the said decision of the CIT(A), the assessee is now before us.

6. Sri Srinivasan, the learned counsel for the assessee, took us through the facts and circumstances of the case and contended that the assessee is entitled to revenue deduction in respect of the entirety of the sum of Rs. 10,75,500. The assessee was following mercantile system of accounting; the loss by the theft arose during the previous year relevant to the asst. yr. 1984-85 now before us; and, therefore, the assessee is clearly entitled to revenue deduction in respect of Rs. 10,75,500. According to Shri Srinivasan, the facts and circumstances of the case would show that, though the sum of Rs. 5,57,404 was released to the

assessee on its furnishing solvent sureties to the extent of Rs. 6 lakhs, yet, it would be difficult to predict what the final order of the Court would be. In this regard, he reiterated the fact that the case of the advocates for the accused was that the sum of Rs. 5,57,404 and the articles and things of the aggregate value of Rs. 1,02,439 seized by the police from the accused did not belong to the assessee and that, therefore, the assessee was not entitled to receive them. For a fact, the Judicial Magistrate set aside the earlier order and ordered that the seized cash and articles and things remain in Court custody. Of course, the High Court intervened and restored the order dt. 28th September, 1983, but the important point to be noticed in this regard is that even though the assessee had received the sum of Rs. 5,57,404, the said receipt was not final one but subject to the ultimate outcome of the case,. According to Shri Srinivasan, therefore, here is a case of contingent receipt.

In this connection, relying on the decision of the Supreme Court in the case of CIT vs . Hindustan Housing and Land Development Trust : [1986]161ITR524(SC) , Shri Srinivasan drew a parallel between that case and the case before us, and contended that just as in the case before the Supreme Court in the case before us also the assessee did not have any right to receive the said sum of Rs. 5,57,404; and that consequently the said sum could not be taken into account for the purpose of determining the deduction to be allowed on account of loss by theft.

As for the sum of Rs. 1,02,439 being aggregate value of the articles and things which were seized by the police from the accused, on the footing that the said articles or things came to be purchased out of the stolen money, Shri Srinivasan vehemently contended that the said articles and things are still in the custody of the police and have not been released to the assessee. Therefore, there is no question of setting the said sum of Rs. 1,02,439 as against the sum of Rs. 10,75,500 for purposes of calculating the deduction admissible to the assessee on account the loss.

In view of the foregoing, therefore, Shri Srinivasan contended, the assessee is entitled to succeed.

Shri Srinivasan then made an alternative submissions, of course, without prejudice to his main contention that the assessee was entitled to full deduction in respect of the sum of Rs. 10,75,500. Shri Srinivasan contended that the articles and things of the aggregate value of Rs. 1,02,439 seized by the police from the accused were not released to the assessee but were still in police custody. Therefore, the CIT(A) was not justified in taking into reckoning the said sum also. In other words, Shri Srinivasans alternative contention was that the assessee was entitled to a revenue deduction in a sum of Rs. 5,18,096 (Rs. 10,75,500 minus Rs. 5,57,404).

7. On his part, Shri D. Ravindran, the learned Departmental Representative, vehemently resisted the assessee's claim. He contended that there still existed good chances of recovery of the stolen money and that, therefore, it was premature for the assessee to claim full deduction. In this regard, he referred to and relied upon the following cases : CIT vs . Sugar Dealers : [1975]100ITR424(All) and Associated Banking Corpn. of India Ltd. vs . CIT : [1965]56ITR1(SC) .

Relying on certain passages occurring on page 1424 of Sampath Iyengars Commentary on Income-tax Law, Shri Ravindran contended that the fact that the sum of Rs. 5,57,404 was conditionally released to the assessee does not matter. The fact of the matter was that pursuant to the order of the Single Judge dt. 6th August, 1984, which was retrospective in operation, the assessee had received the said sum and, therefore, the assessee is not entitled deduction in respect of the entire sum of Rs. 10,75,500.

Another point was made by Shri Ravindran in this regard. Drawing our attention to the assessee's accounts relating to the year 1990-91. Shri Ravindran pointed out that the said sum of Rs. 5,57,404 was credited to the partners capital account and not to the P&L; A/c.

In the course of his arguments Shri Ravindran sought to suggest that there was no evidence to show that a sum of Rs. 10,75,500 was in fact stolen as alleged by the assessee. The Bench, however, made three points in this regard. First, the lower authorities had proceeded with the case on the footing that a sum of Rs. 10,75,500 was in fact stolen. Secondly, there being no evidence to the contrary, it is too late

in the day to embark upon a fishing expedition. Thirdly, the Department was the respondent in this case. Thereupon Shri Ravindran did not pursue this argument.

Summing up his arguments Shri Ravindran contended that the assessee's appeal is fit to be dismissed.

8. We have looked into the facts of the case. We have considered the rival submissions.

The development of case law on the admissibility of Revenue deduction in respect of loss occasioned by (a) embezzlement/defalcation by an employee or an agent and (b) by theft, burglary and the like, reveals a progressive departure away from the rigid view that was taken at the initial stages. Thus, in respect of loss occasioned by embezzlement/defalcation by an agent or employee, the loss was in the early stages treated as a 'loss by strategem', and hence, not connected with or arising out of trade, and was on that account held to be capital loss. Subsequently, a distinction was made between cases where embezzlement or defalcation occurs before the money reached the employers till and cases where such embezzlement took place after the money reached the employers till. It was held that the loss was revenue deductible in the former case and not in the latter case. Subsequently, this distinction was given up and loss by embezzlement was held to be revenue deductible.

Similarly, in respect of loss by theft, etc. in the initial stages distinction was made between loss occasioned by thefts which took place during office hours and the loss occasioned by theft that took place after hours. Again, some distinction was also drawn between cases where the theft was committed by an employee and a theft which was committed by a stranger. Ultimately, all such distinctions were given up. Thus, in the case of *Ramchander Shivnarayan vs . CIT* : [1978]111ITR263(SC) the Supreme Court dealing with a case of loss by theft while money was being deposited with bank observed at page 271 of the Report as under :

'It is to be remembered that the direct and proximate connection and nexus must be between the business operation and the loss. It goes without saying that a

businessman has to keep money either when he gets it as the sale proceeds of the stock-in-trade or for disbursement to meet the business expenses or for purchasing stock-in-trade and if he loses such money in the ordinary course of business, the loss is deductible trading loss. It is immaterial whether the money is a part of the stock-in-trade, such as, of a banking company or a money-lender, or is directly connected with the other business operations. The risk is inherent in the carrying on of the business and is either directly connected with it or incidental to it.'

In the light of the foregoing principles, we have no hesitation in coming to the conclusion that the assessee is entitled to revenue deduction in respect of the loss occasioned by the theft that took place in the Porbandar office. As for the assessment year in which the said loss is admissible, there can be no dispute that the assessee is entitled to the deduction in the assessment year which is now before us, because the theft took place in the relevant previous year. For a fact, the CBDT Circular No. 35D (XLVII 20) of 1965 (F.No. 10/48/65 IT (A-I) dt. 24th November, 1965 makes it clear that the legal position is that the loss by embezzlement by employees should be treated as incidental to a business and this loss should be allowed as deduction in the year in which it is discovered. The same principle will equally apply to loss by theft.

9. The question that then arises for consideration is what is the quantum of the deduction that is admissible to the assessee on this count. The assessee's case is that it is entitled to deduction in respect of the entirety of the sum of Rs. 10,75,500. The CIT(A) has restricted the deduction to Rs. 4,15,656 on the ground that a sum of Rs. 5,57,404 was released to it and that articles of aggregate value of Rs. 1,02,434 was in police custody. The contention of the Department is that the assessee having received the said sum, assessee is not entitled to full deduction.

As we see it, the assessee is entitled to succeed. It is a matter of record not only that the sum of Rs. 5,57,404 was released to the assessee on its furnishing solvent sureties to the extent of Rs. 6 lakhs, but also that whether the said sum of Rs. 5,37,404 recovered from the accused came out of the sum of Rs. 10,75,500 belonging to the assessee. We, therefore, hold that the learned counsel for the

assessee was justified in drawing a parallel between the case before us and the case of Hindustan Housing and Land Development Trust (supra). May be, the assessee has the user of this money, but it is difficult to hold that the said sum will go to fill in the hole created by the theft of Rs. 10,75,500.

As for the sum of Rs. 1,02,439, it is a matter of record that the articles and things are still in police custody. Therefore, there is no question of taking the said amount into account.

10. In view of the foregoing, therefore, we direct the Assessing Officer to allow deduction in the entirety of the sum of Rs. 10,75,500.

11. In the result, the assessee's appeal is allowed.

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