

(1996) 07 AHC CK 0108

In the Allahabad High Court

Case No : Income-tax Reference No. 134 of 1980

Commissioner of Income Tax

APPELLANT

Vs

Ashwani Kumar Liladhar

RESPONDENT

Date of Decision : 19-07-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200

Citation : (1997) 143 CTR 449 : (1997) 225 ITR 576

Hon'ble Judges : B.M. Lal, J;Alok Chakrabarti, J

Bench : Division Bench

Advocate : S. Srivastava, for the Appellant; A.N. Mahajan, for the Respondent

Final Decision : Disposed Off

Judgement

1. Heard Sri A. N. Mahajan, for the assessee, and Sri S. Srivastava, for the Revenue.

2. For the opinion of this court the following questions of law have been referred :

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the loss of Rs. 1,72,279 was a loss by embezzlement by an employee and as such was a business loss ?

2. Whether, on the facts and in the circumstances of the. case, the Appellate Tribunal was justified in holding that the loss of Rs. 1,72,279 was completely irrecoverable during the previous year relevant to the assessment year 1968-69 ?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in holding that the loss of Rs. 1,72,279 was a business loss allowable in the assessment year 1968-69 ?"

3. The assessee is a registered firm and the reference relates to the assessment year 1968-69. Amongst the claims made by the assessee before the Income Tax Officer in the proceedings for the assessment year 1968-69, the claim of deduction of bad debts amounting to Rs. 1,72,279 was made on account of

embezzlement said to have been committed by one Sri Ganesh Narain Somani, who was appointed by the assessee-firm to look after the iron and steel business.

4. The Income Tax Officer found that the claim of loss was not proved as for such a huge amount the assessee did not file any criminal complaint after lodging the first information report and that Sri Somani was not an employee of the assessee, rather was a partner of the assessee-firm as the iron and steel business was in the nature of a joint venture under the agreement dated February 26, 1963, arrived at between the assessee and Sri Somani because, under the agreement, Sri Somani was entitled to 40 per cent. of the share of profits and thus the loss, if any, was capital loss and not a business loss. On this reasoning, the Income Tax Officer did not accept the assessee's claim for deduction.

5. The Appellate Assistant Commissioner dismissed the appeal filed by the assessee. The Appellate Tribunal, however, held that Sri Somani was not a partner but was merely an employee of the assessee and in lieu of fixed salary he was entitled to 40 per cent. profits in the iron and steel business, and even though the assessee-firm did not pursue the matter further by filing a criminal complaint, the amount embezzled by Sri Somani was irrecoverable and accordingly the Tribunal allowed the assessee's claim of deduction.

6. Before endeavouring to answer the aforesaid questions referred to this court, it has to be seen whether the claim of loss was proved by the assessee. No doubt the assessee lodged the first information report in Collectorganj Police Station on December 11, 1965, but it appears that after lodging the first information report the assessee did not pursue and care to find out the fate of the same. Thereafter, the assessee neither filed a protest petition if a final report was filed nor any complaint u/s 200 of the Criminal Procedure Code for taking appropriate action against Sri Somani although the huge amount of Rs. 1,72,279 was involved. No civil proceedings have been initiated to recover the huge amount said to have been embezzled by Sri Somani. The finding reached by the Income Tax Officer is that the claim of loss was not proved. The finding is affirmed in appeal by the Appellate Assistant Commissioner.

7. It is settled that the burden to prove a loss lies on the assessee who is seeking deductions. If the assessee does not prove the loss, the inference goes against him.

8. The Tribunal in para. 7 of its judgment has mentioned that the police submitted a final report in the first information report proceedings of the assessee, in the absence of sufficient evidence. It leads to an inference that the assessee miserably failed to adduce sufficient evidence to prove the loss.

9. The absence of evidence to prove the alleged embezzlement also creates a doubt that assuming that Sri Somani kept the amount of Rs. 1,72,279 out of the profit of the iron and steel business, it is not proved whether the said amount was embezzled by Sri Somani or Sri Somani has taken the same towards his 40

per cent. share in the profit of iron and steel business. Further, as per Clause 3 of the agreement, Sri Somani is responsible for bad debts to the extent of 40 per cent. in the said business. It is also not clear whether the loss of Rs. 1,72,279 includes the 40 per cent. share of Sri Somani or not.

10. The Tribunal, vide para. 8 of its judgment, while discussing the point as to whether Sri Somani was an employee of the assessee or partner has recorded the reasoning that in case of persons holding managerial posts it would be more like a prudent businessman to pay a portion of profits as salary rather than a high fixed salary and such persons are bound to have sufficient power to carry on the responsibility entrusted to them and it is not necessary that if they enjoy sufficient or more powers, they cease to be employees. These reasonings cannot be inferred from the statements made by the assessee in his reply dated October 22, 1971, which reads as under :

" However, Sri Ganesh Narain Somani had no money and since there was hardly any chance of recovery."

11. If the reasoning assigned by the Tribunal that Sri Somani was having more powers on managerial post attracting high fixed salary and in lieu thereof was being paid 40 per cent. of the profits in the said business, the statement of the assessee that Somani had no money and, therefore, the money was not recoverable, does not remain worth believing.

12. Taking into account the fact that the police submitted a final report for want of evidence, the assessee did not take proper legal steps for recovery of the said amount and considering the status of Sri Somani as discussed in the order of the Tribunal, it cannot be presumed that the amount was not recoverable. Had Sri Somani been some low paid employee, it could have been presumed that he would have no money or he would have no property from which the amount could not have been recovered. Under these circumstances, there appears to be no reason and justification to disbelieve the findings of fact recorded by the Income Tax Officer which are affirmed by the first appellate authority.

13. Learned counsel appearing for the assessee, relying on Associated Banking Corporation of India Ltd. Vs. Commissioner of Income Tax, Bombay-1, , Kothari and Sons Vs. Commissioner of Income Tax, Madras, and Hopkin and Amp; Williams (Travancore) Ltd. Vs. Commissioner of Income Tax, Kerala, , contended that the deduction claimed by the assessee was an admissible deduction as it was not possible to recover the loss from Sri Somani.

14. There are no two opinions about the proposition of law laid down in the aforesaid cases relied upon by learned counsel, but, on the facts and circumstances of the instant case, they are of no avail to the assessee. In Associated Banking Corporation of India Ltd. Vs. Commissioner of Income Tax, Bombay-1, , it has been held that in all cases when the principal obtains knowledge of the embezzlement, loss results. The erring servant may be persuaded or compelled by process of law or otherwise to restore wholly or

partially his ill-gotten gains. Therefore, so long as a reasonable chance of obtaining restitution exists, loss may not in a commercial sense be said to have resulted.

15. In the instant case, as discussed above, the assessee did not compel Sri Somani by process of law or otherwise to restore wholly or partially his ill-gotten gains. Therefore, the aforesaid case does not help the assessee.

16. In *Kothari and Sons Vs. Commissioner of Income Tax, Madras*, it is held that the question when loss by embezzlement can be said to occur was a mixed question of fact and law. A decision on this point would rest on the facts and circumstances of each case, the basic principle to be considered in this connection being that the loss must be actual and present.

17. On the facts and in the circumstances of the present case as discussed above, the actual loss has not been proved by the assessee and Sri Somani was not a petty or low paid employee, rather he was getting 40 per cent. share in the iron and steel business of the assessee. Thus, the aforesaid case also does not help the assessee.

18. In *Hopkin and Amp; Williams (Travancore) Ltd. Vs. Commissioner of Income Tax, Kerala*, it is held that the deduction claimed was an admissible deduction if it was not possible to recover the loss from the persons responsible for the same. If the assessee has made the necessary attempts to recover the loss from the persons concerned and had failed or if the assessee did not make such attempts because it was useless to make them in view of the financial position of the persons concerned, then and then alone the loss could be allowed.

19. In the instant case, as discussed above, the assessee has not made the necessary attempt to recover the loss from Sri Somani and considering the financial position of Sri Somani as highlighted by the Tribunal in its judgment, it cannot be said that it was useless to make attempts for recovery of the amount from Sri Somani. Thus, this case is also of no avail to the present assessee.

20. In view of the discussions aforesaid, all the three questions referred to this court are answered in the negative, i.e., in favour of the Revenue and against the assessee. The reference is answered accordingly.