
(1971) 03 AP CK 0020

In the Andhra Pradesh High Court

Case No : Case Referred No. 28 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Ramchandar Shivnarayan

RESPONDENT

Date of Decision : 04-03-1971

Acts Referred:

Income Tax Act, 1961 — Section 28(1)

Citation : (1972) 84 ITR 296

Hon'ble Judges : Sriramulu, J;Kondaiah, J

Bench : Division Bench

Advocate : P. Rama Rao, for the Appellant; Y.V. Anjaneyulu, for the Respondent

Judgement

Kondaiah, J.—This is a reference by the Income Tax Appellate Tribunal, Hyderabad Bench, u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as " the Act "), for the opinion of this court on the following question:

" Whether, on the facts and in the circumstances of the case, the assessee was entitled to the allowance of the loss of Rs. 30,000 ? "

2. In order to appreciate the scope of the question, it is necessary to refer to the material facts that gave rise to the same. Messrs. Ramchandar Shivnarayan, Rajahmundry (hereinafter referred to as " the assessee"), is a registered firm carrying on business in gold and silver, gunnies, etc. It also derives income from investment in Government securities. For the assessment year 1964-65 relevant to the accounting year ending with October 16, 1963, it returned a loss of Rs. 5,008 from the business. A sum of Rs. 50,000 for the purpose of purchasing Government securities was brought in cash to Rajahmundry, the place of business of the assessee-firm, by its employee and was handed over to its cashier. The aforesaid amount which was in bundles of 100 and 10 rupee notes was kept by the cashier on a desk. While he turned his back to take out a book, some stranger committed theft of Rs. 30,000. No amount was recovered in spite of the police report. The assessee claimed the loss of Rs. 30,000 as a permissible

deduction. The Income Tax Officer rejected the claim of the assessee on the ground that what was lost was not profits or monies sent for a specific trade liability or for purchases, but it was a loss of either idle money or a capital loss. The loss was found to be not incidental to the business of the company. The appeal preferred by the assessee to the Income Tax Appellate Commissioner was without success. However, on further appeal to the Appellate Tribunal, the claim of the assessee was allowed on the ground that the loss was incidental to the carrying on of the business of the assessee. Hence, this reference at the instance of the Commissioner of Income Tax.

3. It was contended by Sri P. Rama Rao, the learned standing counsel for the Income Tax department, that the loss claimed by the assessee is of capital nature but not a permissible deduction and the Tribunal has erred in law in holding that the loss was incidental to the business of the assessee. It is also urged that the loss does not spring from the activity of business carried on by the assessee nor is it incidental to, or has any connection with its business activity as the money borrowed from Messrs. Hirma Ramsukh of Hyderabad was intended for the purchase of Government securities but not for money-lending business.

4. This claim of the revenue is resisted by Sri Anjaneyulu, learned counsel appearing for the assessee, contending, inter alia, that the assessee carried on business in gold, silver, gunnies, Government securities and money-lending, that the assessee required considerable money for the purpose of the carrying on of its business, that the money borrowed by the assessee was for purchasing Government securities which is part of its business and that the money was stolen in the business premises of the assessee during business hours and the amount was entrusted to the cashier of the assessee and hence, the loss of money is incidental to the business of the assessee and, the decision of the Tribunal is correct.

5. Section 4 of the Act is the charging section whereunder the total income of the previous year of every person shall be liable to charge of Income Tax for any assessment year at any rate or rates specified in the concerned Central Act. "Total income" is defined under Clause (45) of Section 2 as "the total amount of income referred to in Section 5, computed in the manner laid down in this Act". By Section 5 the total income of any previous year of a person includes all income from whatever source derived, which is received or is deemed to be received, or accrues or arises or is deemed to accrue or arise to him, or accrues or arises to him outside, India during such year. Chapter III comprising sections 10 to 13 provides for incomes which do not form part of the total income. Sections 14 to 59 comprised in Chapter IV deal with the computation of total income under various heads. Sections 15, 16 and 17 provide for the income relating to salaries whereas sections 18 to 21 deal with interest on securities. Sections 22 to 27 provide for the income from house property whereas sections 28 to 44 deal with profits and gains of business or profession. Section 28(1),

corresponding to Section 10(1) of the Indian Income Tax Act, 1922, makes the profits and gains of any business or profession carried on by the assessee at any time during the relevant previous year chargeable to Income Tax under the head " Profits and gains of business or profession". Section 29 states that the income from business or profession referred to in Section 28 shall be computed in accordance with the provisions of Sections 30 to 43. The amount spent towards rent, rates, taxes, repairs and insurance for premises used by the assessee for the purpose of the business or profession has to be allowed u/s 30 in the manner specified therein. The amount spent by the assessee towards repairs and insurance of machinery, plant and furniture is deductible. Depreciation, development rebate and expenditure on scientific research and other deductions permissible under Sections 32 to 40 must be allowed. Any bad and irrecoverable debts are also admissible deductions.

6. Any loss or expenditure which is of business nature is a permissible deduction in computing the income of the assessee under the head " profits and gains of business or profession ". A loss or expenditure of capital nature is the one which is not permissible to be deducted from the profits and gains derived from the business or profession. Whether a particular amount of loss is business or capital loss depends upon the facts and circumstances of each case.

7. It is settled law that u/s 28(1) of the Act, a business loss is deductible in computing the profits and gains earned from the business. It is not every loss incurred by the assessee that is permissible to be deducted from the business profits. In order to claim a deduction on the ground that a loss is a business loss, the assessee has to establish that it has incurred it in carrying out the operation of the business and it must have sprung directly from the business or it must be incidental to the conduct of the business operation. It is its nexus or relationship to the nature of the conduct of the business, but not the degree of risk or its frequency that is material and relevant for the purpose of finding whether or not the loss in a particular case is incidental to or has arisen from the business of the assessee. Where the loss relates to stock-in-trade just as in the case of a banking or money-lending business, such loss must invariably be held to be a business loss. As observed by the Privy Council in *Arunachalam Chettiar v. Commissioner of Income Tax* [1936] 4 ITR 173 :

" The basis of the right to deduct irrecoverable loans before arriving at the profit of money-lending is that to the money-lender, as to the banker, money is his stock-in-trade or circulating capital: he is dealing in money."

8. We may notice the following observations of the learned judges of the Madras High Court in *The Commissioner of Income Tax Vs. S.R. Subramanya Pillai*,

" In the case of banking or money-lending business.....allowance for bad and doubtful debts was given for the reason that all the moneys embarked in the money-lending business and lent out for interest were in the nature of stock-in-trade of the banker or money-lender and the bad and doubtful debts represented

so much loss of the stock-in-trade. Losses in respect of the stock-in-trade have always been regarded as trade losses and allowed to be set off against the receipts."

9. See-also Ramaswami Chettiar and Others Vs. Commissioner of Income Tax, and Motipur Sugar Factory Ltd. Vs. Commr. of Income Tax,

10. Payment received by an assessee from an insurance company towards compensation for stock destroyed by fire was held to be income receipt for the purpose of computation of assessable profits of the recipient-assessee : vide Raghuvanshi Mills Ltd. Vs. Commissioner of Income Tax, Bombay City, In Pohoomal Bros. Vs. Commissioner of Income Tax, Bombay City, it was held that the losses sustained by the assessee in that case due to destruction of its stock-in-trade by enemy invasion were trading losses which the assessee was entitled to deduct from the profits and gains of the business. Loss incurred in stock-in-trade by ravages of white ants was held in HIRA LAL PHOOLCHAND Vs. COMMISSIONER OF Income Tax C. P., U. P. and BERAR., to be a trading loss deductible from the profits of the business of a firm. In Badridas Daga Vs. The Commissioner of Income Tax, it was held by the Supreme Court that the loss of Rs. 2,02,442 incurred by the assessee-firm who carried on business as money-lenders, dealers in shares and bullion and commission agents in Bombay, Calcutta and other places, resulting in embezzlement by an employee or agent in its business was a permissible deduction u/s 10(1) of the Indian Income Tax Act, 1922, as it was incidental to the carrying on of its business. It was observed by the learned judge, Venkatarama Aiyar J. thus:

"At the same time, it should be emphasized that the loss for which a deduction could be made u/s 10(1) 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."

11. The next leading decision is that of the Supreme Court in Commissioner of Income Tax U.P. Vs. Nainital Bank Ltd., In that case, the loss of Rs. 1,06,000 incurred by the Nainital Bank Ltd. due to dacoity was held to be incidental to the carrying on of the business of banking and was deductible as a trading loss in arriving at the profits of the bank from its banking business.

12. In the light of the foregoing discussion, we shall proceed to examine whether the loss of Rs. 30,000 incurred by the assessee due to the theft committed by a stranger is a trading loss permissible to be deducted as claimed by the assessee or a capital loss not admissible to be deducted from the profits or gains of the assessee's business as urged by the revenue.

13. The assessee would be entitled to claim allowance only if it is established that the loss is of a trading nature. It must have arisen from the operations of the business carried on by the assessee. The deduction would be admissible even if it is proved that the loss was incidental or has nexus or proximate connection with the nature of the business carried on by the assessee. The submission of Mr.

Anjaneyulu. that the loss has arisen from or is incidental to the business of the assessee is based on the following three grounds: firstly, the assessee required considerable money in cash for the purpose of carrying on its business in gold, silver, gunnies. Government securities and money-lending; secondly, the money was borrowed for purchasing Government securities which is part of its business; and, thirdly, the theft occurred in the business premises of the assessee during business hours and after entrustment of the amount to the cashier of the assessee. Though, as observed by the Tribunal, the assessee was also carrying on money-lending and commission business for which it required considerable amount of money in cash, it was found on, the facts that the stolen money " was admittedly intended for the purchase of Government securities ". When once the money lost was not borrowed for the purpose of money-lending or commission business but to purchase Government securities, it can, by no stretch of reasoning, be said that it formed part of stock-in-trade of the money-lending business. If really the borrowal was for money-lending business and the amount lost had been entrusted to the cashier of the assessee-firm for the purpose of money-lending, the loss should have been an admissible deduction as it amounts in such a case to a trading loss. If the Government securities purchased by the assessee had been lost, then such a loss would have been a permissible deduction as it amounts to a loss in stock-in-trade of its business. Before purchasing the Government securities, if the amount set apart for such purchase is lost or stolen, such a loss incurred by the assessee cannot, (1). in our opinion, be said to be a business loss. Unless and until the assessee has purchased the securities, the business operation of the assessee cannot be held to have been commenced in the instant case. The money had been lost or stolen while the assessee was in the process of preparation to purchase the Government securities to earn, profit. The mere keeping or retention of a certain sum of money in the business premises is not incidental or integral with the business activity of the assessee who was dealing in gold and silver, gunnies and Government securities. However, the retention of cash by a money-lender or banker in his business premises assumes importance as it forms part of stock-in-trade of such, person. The principles applicable to the case of a money-lender and a banker in dealing with admissible deductions u/s 28(1) of the Act are not applicable to cases where the assessee does not fall under the aforesaid category. Hence, even though the assessee borrowed a sum of Rs. 5.0,000 for the purpose of purchasing Government securities, unless the securities are purchased, it cannot be said that the business operation of the assessee has been commenced so as to enable it to claim the loss of the amount in question as a trading loss. The Government securities are a capital asset. The assessee can earn profit by purchase and sale of Government securities. Though in the assessment years 1962-63 and 1965-66, the assessee is stated to have earned Rs. 4,516 and Rs. 13,132 respectively in purchase and sale of Government securities, admittedly there was no income earned in the year of account relevant for the assessment year 1964-45 with which we are concerned in this reference. It is not even established that the remaining Rs. 20,000 out of Rs. 50,000 borrowed from

Hiranand Ramsukh was invested in Government securities in the year of account as no material has been placed before the authorities, nor income from that source has been returned. The Government securities are only capital investments and any money kept with a person for the purpose of purchasing Government securities cannot be said to be a trading loss but it can only be a capital loss.

14. On the facts found by the Tribunal, we are unable to agree with the view expressed by the Tribunal that the loss incurred by the assessee is incidental to its business. Admittedly, the loss in question did not spring from the very business of the assessee, nor it has any direct or proximate connection or nexus to its business in Government securities. The submission of Mr. Anjaneyulu that this money was required for money-lending and commission business of the assessee cannot be acceded to, in view of the admitted fact that the amount was intended for the purchase of Government securities. Though it was contended that the assessee had money-lending business also, it was not disclosed from the accounts that it had any earnings from such money-lending business also. In our opinion, the money was stolen, though in the business premises of the assessee during hours of business, only before the actual investment in Government securities. It was admittedly not stolen after the commencement of the business activity or in the course of the business of the assessee. The amount at the point of time of theft did not form part of the assessee's business asset. Either the borrowal by a partner of the assessee from third parties or the handing over of such borrowed amount to the assessee's cashier would not amount to a business dealing of the assessee and, hence, any loss sustained at that stage cannot be termed to be a loss incidental to its business.

15. This view of ours finds support in the decision of this court in COMMISSIONER OF Income Tax, ANDHRA PRADESH Vs. CHAKKA NARAYANA., and Madhuri Rajeshwar Vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad, In Chakka Narayana's case, the assessee, who was a dealer in cloth and Government securities having his place of business at Proddatur in Cuddapah district, encashed Government securities for Rs. 20,790 but lost the cash by theft at the Central Station, Madras. The loss sustained by the assessee was found to have no direct or proximate connection with the business of the assessee and hence was held to be not incidental to his business. The claim of the assessee was therefore disallowed. The loss of Rs. 4,004 during business hours incurred by the assessee who derived income from other sources, on account of theft committed from the cash box by a stranger who came to the assessee's shop, was held in Madhuri Rajeshwar's case, to have not arisen out of the conduct of, the business and incidental to the trade, and hence, the claim of the assessee was disallowed. We are not impressed with the contention of Mr. Anjaneyulu that the aforesaid two decisions are no longer good law in view of the decision of the Supreme Court in Nainital Bank's case and in any event they are distinguishable. The decision of the Supreme Court in Nainital Bank's case relates to a banking company for whose business large amounts had to be kept

in various safes in the premises of a branch situated at Ramnagar where dacoity of Rs. 1,06,000 cash had taken place at about 7 p.m. on June 11, 1951. The learned judge, SubbaRao J. (as he then was), who spoke for the court, observed thus :

" It is an integral part of the process of banking that sufficient moneys should be kept in the bank duly guarded to meet the demands of the constituents. The retention of the money in the bank is a part of the operation of banking. The retention of money in the bank premises carries with it the ordinary risk of its being subject of embezzlement, theft, dacoity or destruction by fire and such other things. Such risk of loss is incidental to the carrying on of the operations of the business of banking. In this view, we are clearly of the opinion that the loss incurred by dacoity in the present case is incidental to the carrying on of the business of banking. "

16. As pointed out above, the facts of that case are distinguishable from those of the present case. The retention of money by the assessee in the present case in its business premises kept for the purchase of Government securities can, by no stretch of reasoning, be said to carry with it the ordinary risk of its being subject of embezzlement, theft or dacoity which amounts to risk of loss incidental to the carrying on of the operations of its Government securities business. The observations of the learned judge that the Special Bench of the Madras High Court in Ramaswami Chettiar v. Commissioner of Income Tax, has taken a narrow view of the problem and the dissentient view expressed by Anantakrishna Ayyar J. contained a constructive criticism of the majority view, pertain to the view expressed by the majority that the loss incurred by theft of money used in money-lending business by persons who were at the time of commission not employed as clerks or servants of the assessee, was not an admissible deduction. If the money was stolen or embezzled by the persons employed in the business, it is indisputably a permissible deduction as a trading loss. However, the Supreme Court pointed out specifically that every loss is not deductible unless it is incurred in carrying out the operation of the business and is incidental to the operation. Hence, the decisions of this court in Chakka Narayana's case and Maduri Rajeshwar's case, cannot be said to have been overruled by the decision of the Supreme Court in Nainital Bank's case.

17. In each case, it has to be decided whether the loss claimed by the assessee has arisen out of the conduct of, or is incidental to, or has nexus or connection with the operation of, the business of assessee. Where the loss is unconnected with the business carried on by the assessee or has only a remote connection, such loss cannot be held to be an admissible deduction. The nature of the business and the nexus of the risk involved to the nature of the business are material factors that govern the result. We may also turn to the decision of the Patna High Court in Basantlal Sanwar Prasad Vs. The Commissioner of Income Tax, and that of the Allahabad High Court in U. P. VANASPATI AGENCY Vs. COMMISSIONER OF Income Tax., and another of the same High Court in

COMMISSAR OF Income Tax, U. P. Vs. SARYA SUGAR MILLS (P.) LTD., and that of the Madhya Pradesh High Court in The Commissioner of Income Tax, M.P. and Nagpur Vs. Ganesh Rice Mills, , on which strong reliance has been placed by Mr. Anjaneyulu in support of his plea that in order to claim a loss as a trading loss, the assessee need not invariably be a banker or moneylender.

18. In the case of Basantlal Sanwar Prasad, the question that fell for decision was whether a sum of Rs. 11,407 lost by the assessee, a registered firm having wholesale business in cloth, due to burglary at night in his shop's premises was a trading loss. The High Court of Patna, on a consideration of the facts and circumstances, was of the view that it was necessary for the purpose of the assessee's business to keep cash in its shop and, therefore, the loss sustained by theft was incidental to its business. It was observed thus :

" It cannot be contended that the loss in the stock-in-trade alone is permissible to be deducted u/s 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 that section."

19. In the case of V. P. Vanaspati Agency, the assessee-firm who was a commission agent of M/s. Berar Oil Industries, Akola, for vanaspati, soap, refined oil, etc., gave an amount of Rs. 13,100 to one Prem Narain, a third person, for depositing in the State Bank, Kayaganj, to honour a hundi of its principal and that amount was reported to be stolen before it was deposited in the bank. An amount of Rs. 1,100 was recovered on a police complaint by the assessee. It was held, on a consideration of the facts and circumstances, that the hundi was in respect of a business transaction between the assessee and its principal and, hence, the loss of Rs. 12,000 was held to be a business loss. The facts of the aforesaid two cases, though cited to show that it is not essential in every case where the loss is claimed to be a trade loss that the amount formed the stock-in-trade, are distinguishable from those of the present case.

20. The next case is that of Sarya Sugar Mills (P.) Ltd., wherein the loss of Rs. 53,121 stolen by thieves at about 3 o'clock in the morning in the factory premises of the assessee was held to be a loss incidental to its business. It is pertinent to notice the following material facts found by the learned judges:

" Here, in the instant case, we have an assessee who finds it necessary for the purposes of its business to withdraw from the bank and lodge in the factory safe-room a sufficient amount of money for paying out to cane-growers and for meeting other business expenses. There is no mixing of the money with profits earned by the assessee or with private funds. It is money appropriated, as it were, to business expenditure. It is money which, upon withdrawal from the bank, has been put into movement for payment ultimately in discharge of the business liabilities of the assessee. The lodging of the money in the factory safe-room is, like the retention of the money in the bank, a part of the operation of its business. We are clear, upon this, that the loss by theft in the instant case is a loss arising out of the carrying on of the assessee's business and incidental to it.

The assessee is entitled to the deduction."

21. On the aforesaid facts, the assessee was certainly entitled to claim the deduction as a trade loss. That case has no analogy to the one before us.

22. The last case that requires consideration is of the Madhya Pradesh High Court in Commissioner of Income Tax v. Ganesh Rice Mill. Therein, the loss of an amount of Rs. 23,000 withdrawn by a partner of the assessee-firm which carried on business of a rice mill at Kargi Road, from a bank at Bilaspur after depositing a cheque issued to the mill by the Government, due to robbery by some unknown persons in his return journey from Bilaspur to Kargi Road, was held to be incidental to the carrying on of the business of the assessee. In that case, the deposit of the cheque in the bank and withdrawal of a sum of Rs. 23,000 from the bank by the partner of the assessee-firm were for the purpose of disbursements necessary at the mill and, therefore, the loss incurred by the assessee was rightly held to be an admissible deduction. The facts of that case are analogous to those of Motipur Sugar Factory Ltd. v. Commissioner of Income Tax. Hence, that decision also does not render any assistance to the assessee herein. We are, therefore, of opinion that none of the cases cited by the assessee renders any assistance to its plea that the loss of Rs. 30,000 in the present case is a trade loss.

23. We are clear in our mind that the Tribunal was not justified in holding that the loss of Rs. 30,000 in this case is incidental to the business of the assessee and, hence, it is an admissible deduction. The amount lost by the assessee is not part and parcel of the gross receipts or daily collections. Nor is it the case of the assessee that the amount of loss incurred by it is part of assessable income. In the circumstances, it must be held that it is only a capital loss as the capital expenditure has been depleted. For all these reasons, our answer to the question is in the negative and against the assessee, who shall pay the costs of the reference to the Commissioner of Income Tax. The counsel's fee is fixed at Rs. 250.