

(1997) 03 MAD CK 0081
In the Madras High Court
Case No : Tax Case No. 1390 of 1982

K. Govinda Bhatt

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 04-03-1997

Acts Referred:

Income Tax Act, 1961 — Section 24(1), 28

Citation : (1998) 149 CTR 444 : (1999) 235 ITR 528

Hon'ble Judges : M. Abdul Wahab, J; K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Thanikkachalam, J.—At the instance, of the assessee, the Tribunal, has referred the following question for the opinion of this Court under s.

256(1) of the IT Act, 1961.

Whether, in the facts and circumstances of the case, the interest paid on a mortgage to secure unpaid consideration for the purchase of the

property, could fall within the scope of s. 24(1)(iv) and 24(1)(vi) and allowable as a deduction in computing the income from property ?

2. The assessee is an individual. In the previous year ended 31st March, 1976 corresponding to asst. yr. 1976-77, the assessee purchased a

property at No. 460, P.H. Road, Madras from one S. Jayalakshmi Ammal on 25th May, 1972 for Rs. 1,15,000. The assessee paid Rs. 30,000 in

cash and mortgaged the property, which was purchased, to the seller for the balance of purchase money. The assessee claimed deduction for the

interest on mortgage loans paid to Smt. Jayalakshmi Ammal. The ITO disallowed the said claim and on appeal, the AAC accepted the view of the

ITO. On further appeal to the Tribunal, the contention of the assessee was that the interest paid on the mortgage loan was interest on capital

borrowed for acquiring the property and should be allowed as a deduction under s. 24(1)(iv) of the IT Act, 1961 (hereinafter referred to as the

Act). The Tribunal held that the liability to pay interest was neither the annual charge nor involuntarily created so as to be allowed as a deduction

under s. 24(1)(iv) of the Act. With regard to the deduction under s. 24(1)(vi), the Tribunal found that since the mortgage deed could not have been

executed before the sale, the loan raised could not be considered as capital borrowing for the acquisition of the property. The Tribunal, therefore,

confirmed the order of the authorities below.

3. According to the learned counsel appearing for the assessee, the sale deed and the mortgage deed in favour of Smt. Jayalakshmi Ammal were

executed simultaneously, and therefore, the mortgage deed was executed for the purpose of acquiring the property. Consequently, interest paid on

the mortgage amount, would be interest payable on the borrowed amount for acquiring the property.

4. On the other hand, Mr. S. V. Subramaniam, senior standing counsel for the Department, submitted that the sale deed was executed by

Jayalakshmi Ammal, in favour of the assessee first and thus, the assessee become the owner of the property and only thereafter, the assessee

mortgaged the same with Jayalakshmi Ammal, the vendor, for the balance unpaid purchase money. Therefore, it cannot be said that the property

was mortgaged for the purpose of acquiring the said property with borrowed amount.

5. Sec. 24(1)(iv) states thus :

24(1)(iv) where the property is subject to an annual charge (not being a charge created by the assessee voluntarily or a capital charge), the

amount of such charge"".

The assessee claimed interest on the mortgaged loan under the impression that the property has been acquired with borrowed capital. It is only for

the unpaid purchase money, the property had been mortgaged with the said Jayalakshmi Ammal.

On 25th May, 1972, the assessee purchased the property in question and the assessee could not pay off the entire sale consideration. For that

purpose he did not borrow any money from any one; but executed a mortgage deed in favour of the vendor herself for the unpaid purchase money

in a sum of Rs. 85,000.

6. On similar facts, the Supreme Court, in the case of BOMBAY STEAM NAVIGATION CO. (1953) PRIVATE LTD. Vs.

COMMISSIONER OF Income Tax, BOMBAY., , while considering the provisions of s. 10(2)(iii) of the Indian IT Act, 1922, held that the

expression "capital" used in s. 10(2)(iii) in the context in which it occurred, meant money and not any other asset, that there was in truth no capital

borrowed by the assessee in that case; but an agreement to pay the balance of consideration due by the purchaser did not in truth give rise to a

loan. Therefore, it was held in that case that the claim for deduction of the amount of interest under s. 10(2)(iii) was not admissible. It was further

held therein that an agreement to pay the balance of consideration due by the purchaser does not in truth give rise to a loan. A loan of money

undoubtedly result in a debt, but every debt does not involve a loan. The liability to pay a debt may arise from diverse sources and loan is only one

of such sources. Every creditor who is entitled to receive a debt cannot be regarded as a lender. If the requisite amount of consideration has been

borrowed from a stranger, interest paid thereon for the purpose of carrying on the business should have been regarded as a permissible allowance.

7. In METRO THEATRE BOMBAY LTD. Vs. COMMISSIONER OF Income Tax., , the Bombay High Court held that a mere purchase of

capital asset on long-term credit with a stipulation for payment of interest on the redeemed balance did not amount to borrowing capital within the

meaning of s. 10(2)(iii). In the present case, the assessee cannot execute the mortgage deed prior to the sale. It is only after the execution of the

sale deed, the assessee would become the owner of the property and only thereafter, he can mortgage the property. Therefore, the mortgage deed

in the present case cannot be considered as for the purpose of borrowing capital to purchase the property. Therefore, the assessee is not entitled

to ask for relief under s. 24(1)(vi) of the Act.

8. Alternatively, the assessee claimed that the interest payment made on the mortgage amount is allowable as annual charge, as contemplated under

s. 24(1)(iv) of the Act. According to learned counsel for the assessee, the

interest payable on the mortgage loan is a charge created by the statute and hence, it should not be said that the charge was created voluntarily. For the unpaid purchase money, the assessee was compelled to execute the mortgage deed in favour of the erstwhile owner of the property. "Charge" is defined under s. 100 of the Transfer of Property Act, but not defined in the IT Act. Since the charge created is one created under the statute and not a voluntary one, interest payable on the charge is allowed as the amount of such annual charge. Sec. 55(4)(b) of the Transfer of Property Act stated that the seller will be entitled where the ownership of the property has passed to the buyer before of the payment of the whole of the purchase money, to a charge under the property in the hands of the buyer. In other words, the seller will have an interest over the property till the unpaid purchase money is paid over to him. Therefore, if the interest is paid on such charge, that should be allowed as annual charge under s. 24(1)(vi) of the Act.

9. On the other hand, learned senior standing counsel for the Department submitted that the mortgage was created voluntarily by the assessee.

Therefore, the charge was not created involuntarily. Further, it was submitted that as per cl. 4 of the mortgage deed, the interest is payable within a period of one year along with the principal amount and, therefore, it is not annual charge. Therefore, according to him, interest payment is neither annual charge nor the charge is created voluntarily. Consequently, the assessee cannot claim deduction of interest payment under s. 24(1)(iv) of the Act.

10. We have already extracted the relevant portion of s. 24(1)(iv) of the Act as well as s. 55(4)(b) of the Transfer of Property Act. According to

s. 100 of the Transfer of Property Act, where immovable property of one person is by act of parties or operation of law made security for the

payment of money to another, and the transaction does not amount to mortgage, the latter person is said to have a charge on the property and all

the provisions in that Act, which apply to a simple mortgage, shall so far as may be, apply to such charge. Therefore, a transaction involving a

charge, does not amount to a mortgage. In the case on hand, the assessee has executed a mortgage deed in respect of a property by a registered

deed and that, therefore, the assessee cannot claim relief under s. 24(1)(iv) of

the Act. In Commissioner of Income Tax Vs. Smt. Indramani Devi Singhania, , the Allahabad High Court, while considering the provisions of s. 24(1)(iv) of the Act, held that no one mortgages his property, except when he is in need and on that account, the transaction of mortgage cannot be said to be an involuntary transaction. Therefore, the interest paid by the owner of a property on the mortgage executed by him, even though in the interest of his business, in respect of that property, is not deductible under s. 24(1)(iv) of the Act, as under that clause only an annual charge, which is not voluntary or which does not amount to capital charge, is deductible. In Commissioner of Income Tax Vs. Tarachand Kalyanji, , the Bombay High Court has held that where an assessee had created a charge on his property to meet his excess profit tax liability or a portion thereof, which is voluntary charge, the interest liability was not a permissible deduction under s. 24(1)(iv). In Commissioner of Income Tax Vs. Rajah Dhanrajgiri, , the Andhra Pradesh High Court held that whether the charge created was voluntary or not, is a question of fact. The mortgage in respect of the Bombay house property was created under the pressure of a Court sale and in respect of Pune property, since the creditor demanded additional security, the assessee was obliged to create an equitable mortgage. Therefore, it could not be said that the charge was created by the assessee voluntarily. Therefore, the amount paid towards interest on the mortgages were deductible under s. 24(1)(iv) of the Act. Such is not the case here. The mortgage in the case on hand, was created neither under a threat of Court sale nor to meet the demand of additional security.

In Commissioner of Income Tax Vs. Central Bank Executor and Trustee Co. Ltd., , the Bombay High Court, held that where an overdraft was obtained with a Bank on the security of the house property by creating a charge on it for the payment of Estate duty, the interest payable on such loan is not deductible under s. 24(1)(iv) of the Act, while computing the income from the property. In the present case, assuming there is a charge, the charge was created by the assessee voluntarily. It was not created on threat by the trustee either (sic-transferor) by operation of law or by a decree of a Court or by the act of his predecessor-in-title. Therefore we consider that the Tribunal was not (sic) correct in saying that in the

present case, there is neither charge nor the charge was created voluntarily, and therefore, interest payable on such charge is not deductible under

s. 24(1)(iv) of the Act. Accordingly, we answer the question referred to us in the negative and against the assessee. No costs.