
(1983) 01 MAD CK 0049

In the Madras High Court

Case No : Tax Case No. 617 of 1977 (Reference No. 430 of 1977)

P.C. Dharmalinga Mudaliar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-01-1983

Acts Referred:

Income Tax Act, 1961 — Section 36(2)

Citation : (1985) 152 ITR 588

Hon'ble Judges : S. Padmanabhan, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : K. Srinivasan, for the Appellant; J. Jayaraman and Nalini Chidambaram, for the Respondent

Judgement

Balasubrahmanyam, J.—It is a short point we have to decide in this case. The assessee-family is a trader in cloth and yarn. The karta of the

assessee-family took money from the funds in this business and advanced the money as a loan to a transport company in which both he and his

wife were interested as shareholders. The transport company ran into a loss, and there was no prospect of the money being repaid by the

company. The assessee, accordingly, wrote-off the amount in the books of the yarn and cloth trade. The write-off amounted to Rs. 90,771. An

allowance was claimed in respect of this amount as a bad debt in the assessment year 1973-74. But this claim was negatived not only by the

Departmental authorities, but also by the Tribunal. The Tribunal held that this was not an allowable bad debt because it was not a debt which had

been incurred in the course of, or for the purpose of, or incidental to, the assessee's cloth and yarn business.

2. The assessee has challenged the determination of the Tribunal on the following

question of law :

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is not entitled to a claim of

Rs. 90,771 as bad debt u/s 36(2)(i)(a) of the Income Tax Act, 1961 ?

3. The answer to the question stares one in the face, on the very finding of the Tribunal which was to the effect that it was not a business debt at all,

in the first instance, so as to entitle the assessee to claim it as a bad debt. The debt was not a debt which arose in the assessee's cloth or yarn

trade, in the sense that it was not taken into account in the computation of the assessee's income from the cloth and yarn trade during any relevant

year. Hence, the debt does not answer the requirements of s. 36(2)(i)(a) of the Act.

4. Mr. K. Srinivasan, for the assessee, however, argued that this was an allowable bad debt under that provision. He put forward what we regard

as an astounding proposition of law, based on his peculiar reading of that section. While accepting the Tribunal's finding that the debt in question

did not arise in the assessee's cloth and yarn trade, Mr. Srinivasan pressed for the allowance on the basis that even so, it was an allowable

deduction under s. 36(2)(i)(a). He said that for purposes of s. 36(2)(i)(a) of the Act, it was not necessary that the debt should have been incurred

in the course of the assessee's trade. According to the learned counsel, the requirement that the debt should arise in the ordinary course of the

assessee's business is a requirement only where the assessee carries on a non-banking or a non-money-lending business, as in this case, according

to Mr. Srinivasan, the statute does not require that the debt should have been incurred in the course of the carrying on the business. As we

remarked earlier, this is an astounding proposition to advance, both as a matter of principle and as a matter of statutory construction. This

proposition is against the time-honoured principle of write-off of bad debts. It also goes counter to the decisions of our courts while interpreting s.

36(2)(i)(a) as well as a similar provision in s. 10(2)(xi) of the Indian I.T. Act, 1922.

5. Mr. Srinivasan's thesis, however, was that s. 36(2)(i)(a) makes a clear departure from the statute law as it existed prior to its introduction into

the statute. According to him, s. 36(2)(i)(a) deals with a bad debt from two

points of view : (i) from the point of view of a banking or money-lending business; (ii) from the point of view of a non-banking or non-money-lending business. In the former case, according to Mr. Shrinivasan, the section requires that the debt should be incurred in the course of the carrying on of the business. In the latter case, however, according to the learned counsel, there is no such requirement. Learned counsel referred to the structure of s. 36(2)(i)(a) wherein a debt represented by money lent in the ordinary course of banking and money-lending is separated from the other kinds of debts by the disjunctive "'or'". According to the learned counsel, the implication of this disjunctive is that only in cases where the business of the assessee is banking or money-lending, the requirement is that the debt should be in the ordinary course of business. Learned counsel said that other cases of non-banking and non-money-lending business are clearly separated by the expression "'or'". Since, in the latter case, there is no express requirement laid down by the statute to the effect that the debt must have arisen in the course of business, one must proceed as though no such condition was intended to be imposed by Parliament.

6. We do not accept learned counsel's construction of s. 36(2)(i)(a) as being supported by any acceptable rule of statutory construction. In the first place, the I.T. Act, 1961, in which this provision occurs, is an amending and consolidating Act. If a departure from the earlier state of the statute is pleaded, there must be words expressing an intention to bring about a clean break with the past. We should not construe a section by reference to a single word, or merely because it is differently worded, when the provision as a whole does not convey a different statutory result. Even under s. 10(2)(xi) of the Indian I.T. Act, 1922, the words "'in the course of business'" were employed with particular reference to banking and money-lending business alone. Nevertheless, a long line of decisions of High Courts and the Supreme Court has held that the requirement of the debt having to be incurred in the ordinary course of the trade is a common feature of both money-lending and non-money-lending business. The same pattern has been followed in s. 36(2)(i)(a) and, therefore, we must hold that no departure is intended by Parliament, when the same words which had been the subject of a judicial interpretation, are followed in the subsequent enactment.

7. Quite apart from this aspect of construction, from the point of view of the evolution of the statute also, we must refer to the existence of an

express requirement in s. 36(2)(i)(a) which related to non-banking or non-money-lending business. This requirement is that the debt should have

figured, or should have been taken into account, in the computation of the assessee's income from that business. This provision is an a fortiori

indication that the debt must have been incurred in the course of business. In order that a particular debt may figure as an item of income receipt, it

is necessary that it should have been incurred not only in the course of business, but must have figured in the revenue account. Otherwise, it cannot

become deductible at all, when it becomes bad. This idea that it must figure as income, either in the one or the other of the relevant years, is very

pithily put by Rowlatt J., in his famous dictum in *Curtis v. J. & G. Oldfield Ltd.* [1925] 9 TC 319, which runs as follows (p. 330) :

When the rule speaks of a bad debt it means a debt which is a debt that would have come into the balance-sheet as a trading debt in the trade

that is in question and that it is bad. It does not really mean any bad debt which, when it was a good debt, would not have come in to swell the

profits.

8. The first limb of s. 36(2)(i)(a) of the present Act only incorporates Rowlatt J.'s principle; that limb exacts very clearly that no deduction shall be

allowed for a bad debt, unless such debt has been taken into account in computing the income of the assessee for the previous year or for an

earlier previous year. It is implicit in this express condition that the debt should have arisen in the course of carrying on his business. In the second

limb of s. 36(2)(i)(a), this condition is not repeated, for the simple reason that the second limb deals with money-lending and banking business in

which the money itself is regarded as a stock-in-trade and, therefore, the money lent would certainly come into the revenue account, and, hence, it

was perhaps thought to be unnecessary to emphasise the obvious by saying that money lent in a money-lending or banking business. The only

requirement which was worth while to make mention of in a banking or money-lending business is that it must have been money lent in the course

of the business of the assessee. Therefore, taking the provision in s. 36(2)(i)(a) as a whole, it is necessary in every case to find if a debt in a

money-lending or banking business or a debt in a non-money-lending or a non-banking business must have been incurred in the course of the

assessee's business. The second limb is that in the case of non-money-lending or non-banking business, a debt in order to be a bad debt must

have been taken into account in the computation of the income of the assessee. This particular requirement takes care to exclude what may be

called capital debts from qualifying for write-off as bad debts. We must, therefore, reject Mr. Srinivasan's construction of s. 36(2)(i)(a) as a

negation of the tradition of years of statutory construction and judicial elucidation of the principle of write-off of bad debts.

9. Mr. Srinivasan, however, sought support from a decision of the Andhra Pradesh High Court in CIT v. K.C.P. Ltd. [1974] TLR 12. A few

passages from that judgment were relied upon by Mr. Srinivasan. In that case, the assessee which was not carrying on a money-lending business

advanced some amount to a subsidiary company and when the subsidiary failed to repay the amount, it was written off by the assessee-company in

its accounts. This write-off was disallowed by the assessing officer as well as by the Tribunal in appeal. Criticising the Tribunal's decision, the

learned judges of the Andhra Pradesh High Court observed as follows (p. 14) :

The Tribunal in paragraph 13 of its order thought that in order to apply section 36(2), there must exist three conditions : (1) that the debt or loss

should be in respect of a business carried on by the assessee; (2) that the debt should have been taken into account in computing the assessee's

income either for the relevant accounting year or for an earlier year; and (3) that the debt should have become bad and irrecoverable and should

have been written off as such in the accounts of the assessee for the accounting year in which the claim was laid. In appreciating the section in that

fashion, the Tribunal seems to have missed the word "or" appearing between situation No. 1 and situation No. 2.

10. The learned judges then proceeded to lay down what according to them, was the proper construction of s. 36(2)(i)(a) in the following passage

(p. 13) :

It is pertinent to note that between the two situation referred to above, the disjunctive word "or" appears and it cannot be in doubt that the

disjunctive word separates the two things and puts them in alternative. It cannot

be read as "and" and thus combine the two requirements of section 36(2)(i)(a). They are separate situation and have to sub-clause (a) is satisfied, then such debt or part thereof can earn deduction under that provision of law.

11. The learned judges concluded with the following observation (p. 13) :

It was accepted by all concerned that the said advances constituted debt within the meaning of section 36(2). If that is so, then what has to be seen only is whether such debt or part thereof was taken into account in computing the include the income of the assessee of that previous year or of an earlier previous year.

12. Proceeding, the learned judges observed (p. 13) :

In the view which we have taken, it is not necessary for us to consider whether although not expressly mentioned in the first situation refereed to in sub-clause (a), the debt must have been advanced in the course of the company's business. In other words, it is unnecessary to decide as to whether in order to apply the first part of sub-caluse (a), the debt must have been advanced in the course of business of the company as it was never doubted that the amounts advanced in the present case constituted debt within the meaning of section 36(2).

13. With great respect, we must express our dissent from this view of the Andhra Pradesh High Court even as an exercise in the statutory

construction. We have earlier referred to the passage from Rowlatt J.'s judgment in *Curtis v. J. & G. Oldfield Ltd.* [1925] 9 TC 319 which has

been adopted by the Supreme Court, as reflecting, truly, the relevant statutory position, according to which a bad debt can only be a bad debt if it

is a trade debt and if it has gone to swell the assessee's profits in that trade. It is on the basis of this principle that the legislature drew up s. 10(2)

(xi) of the Indian I.T. Act, 1922, whose format is more or less reproduced although in different sections in the I.T. Act, 1961. We cannot now

deign to put a new constructions on the section merely because the expression ""and"" used by the legislature in s. 10(2)(xi) has been changed into

or"" in s. 36(2)(i)(a). It is, in our opinion, a matter of indifference whether ""or"" has to be read as a disjunctive or not. For, even if the expression

or"" has to be regarded as a disjunctive, it is implicit in the requirement laid down by the first limb of s. 36(2)(i)(a) that the debt ought to have been

taken into account in the computation of the assessee's income, which presupposes that it should have arisen in the course of the assessee's trade.

In this sense, the alteration of "and" into "or", when s. 36(2)(i)(a) was enacted, must be held to be quite immaterial.

14. For all the above reasons, we uphold the Departmental view as well as the Tribunal's affirmation of the Departmental view in this case as to

the construction as well as application of s. 36(2)(i)(a) of the Act to the facts of the case. We hold that the so-called bad debt of Rs. 90,771 was

rightly disallowed in the computation of the assessee's profits from the cloth and yarn trade. Our answer to the question, therefore, is against the

assessee and in favour of the Department. The assessee will pay the costs of the Department, Counsel's fee Rs. 500.