

H. D. DEVASIA & CO., KERALA

v.

COMMISSIONER OF INCOME TAX, KERALA

May 4, 1979

[N. L. UNTWALIA, R. S. PATHAK AND E. S. VENKATARAMIAH, JJ.]

Income Tax Act, 1961, Sections 73 and 75—Scope of—Losses in speculation business—A registered firm is not entitled to have its losses in speculation business carried forward for set off against future profits in speculation business. Any such loss shall be apportioned between the partners of the firm and they (the partners) alone shall be entitled to have the amount of the loss set off and carried forward for set off under Section 73.

The assessee-appellant is a registered firm carrying on business at several places in the State of Kerala. Apart from its regular trade in various commodities, the assessee was also carrying on a business in speculation.

In respect of the losses during the assessment years 1964-65, 1965-66 and the profit during the assessment year 1966-67, the Income Tax Officer apportioned the aforesaid losses and profits amongst the partners and rejected the assessee's contention that the losses in speculation business should be carried forward and set off against the profit in the said business made in the assessment year 1966-67. But the Appellate Assistant Commissioner, following the decision of this Court in *C.I.T., Gujarat v. Kantilal Nathuchand Sami*, [1967] 1 SCR 813 accepted the assessee's stand. The Tribunal on second appeal answered in favour of the Revenue and the High Court also answered the reference against the assessee.

Dismissing the appeals by special leave the Court,

HELD: 1. The case of *Kantilal Nathu Chand* was decided on a true interpretation of Section 24(1) of the Income Tax Act 1922 and the two provisions appended thereto. But the provisions of law contained in Chapter VI of the 1961 Act have made a considerable departure from the corresponding provisions of the 1922 Act. [1274A, B-D]

It is clear from the provisions of Section 73 of the 1961 Act that the assessee's loss in speculation business cannot be set off except against profits and gains, if any, of another speculation business. [1275B]

2. For the purpose of set off it is permissible to carry forward the losses to the following assessment year or years subject to the limit of eight years as provided in Section 73 of the 1961 Act. [1275C]

3. The provision contained in Sub-section (2) of Section 73 of the 1961 Act is "subject to the other provisions of this Chapter", which includes section 75. Under section 75 where the assessee is a registered firm, for the purpose of set off and carry forward of the loss apportionment between the partners of the firm has got to be made and they alone are entitled to have the amount of the loss set off and carried forward for set off. The matter is put beyond any

- A** pale of doubt and challenge in sub-section (2) of section 75 when it says that nothing contained in sub section (2) of section 73 shall entitle any assessee, being a registered firm to have its loss carried forward and set off under the provisions of Section 73(2). [1275D-E]

C.I.T., Gujarat v. Kantilal Nathu Chand, 63 ITR 318=[1967] 1 SCR 813; distinguished.

- B** *C.I.T., Gujarat III v. Dhanji Shamji*, 97 I.T.R. 173 *Chowdary Cotton Ginning and Processing Factory v. C.I.T., Punjab* 109, I.T.R. p. 6; approved.

M. G. Devasia & Co. v. C.I.T., Kerala, 90, I.T.R. 523; affirmed.

- C** CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2716-2718 of 1972.

Appeals by Special Leave from the Judgment and Order dated the 14-7-1972 of the Kerala High Court in Income Tax Reference Nos. 100, 101 and 102 of 1970.

WITH

- D** CIVIL APPEAL NOS. 365-367 of 1978.

From the Judgment and Order dated the 24th May, 1977 of the Kerala High Court in I.T.R. Nos. 55, 56 and 57 of 1975.

- E** *J. L. Nain and Mrs. Saroja Gopalakrishnan* for the Appellant in all the appeals.

P. J. Francis, S. P. Nayar and Miss A. Subhashini for Respondent in all the appeals.

The Judgment of the Court was delivered by

- F** UNTWALIA J.—These six appeals have been heard together as a common question of law in relation to the assessment of the same assessee arises in them. Civil Appeals 2716-2718 of 1972 relate to the assessment years 1964-65, 1965-66 and 1966-67. The assessee appellant is a registered firm carrying on business at several places in the State of Kerala. Apart from its regular trade in various commodities, the assessee was also carrying on a business in speculation. Apropos the speculation business of the assessee the Income-Tax Officer determined a loss of Rs. 40,510/-; a loss of Rs. 598/- and a profit of Rs. 1,36,264/- for the assessment years 1964-65, 1965-66 and 1966-67 respectively.

- H** In apportioning the assessee's income amongst its partners under section 67 of the Income Tax Act, 1961, hereinafter referred to as the Act, he also apportioned the losses in speculation business in

the two assessment years 1964-65 and 1965-66. The profit in speculation business as computed for the assessment year 1966-67 was also apportioned by the Income-Tax Officer amongst the partners. The assessee contended before the Income-Tax Officer that the losses in the speculation business could not be apportioned between the partners but should be carried forward and set off against the profit in the said business made in the assessment year 1966-67. The Income-Tax Officer rejected this contention. But the Appellate Assistant Commissioner in appeal following the decision of this Court in *Commissioner of Income-Tax, Gujarat v. Kantilal Nathluchand Sami*(¹) accepted the assessee's stand. The department took the matter in second appeal before the Income Tax Appellate Tribunal. The Tribunal pointed out the distinction between the provisions of section 24 of the Income-Tax Act, 1922 under which the case of *Kantilal Nathluchand* (supra) had been decided and those of sections 73 and 75 of the 1961 Act. It, therefore, allowed the department's appeal. On being asked by the assessee to state a case and make a reference to the High Court, the Tribunal referred the following question of law for its opinion :—

“Whether, on the facts and in the circumstances of the case, and on a true interpretation of the various provisions of the Income-tax Act, 1961, the Tribunal was correct in holding that a registered firm was not entitled to have its losses in speculation business carried forward for set off against future profits in speculation business.”

The High Court of Kerala on a consideration of the relevant provisions of the Act contained in Chapter VI has answered the reference in favour of the Revenue and against the assessee. The decision of the High Court is reported in *M. D. Devasia & Co. v. Commissioner of Income-Tax, Kerala*-(²) Civil Appeals 2716 to 2718 of 1972 have been filed in this Court by special leave.

Identical questions arose in respect of the assessment years 1967-68, 1968-69 and 1969-70. The High Court answered the references made in respect of those three years also against the assessee by its judgment and order dated the 24th May, 1977. Civil Appeals 365 to 367 of 1978 have been preferred from the said decision of the High Court.

(1) 63 I. T. R. 318=[1967] 1 S. C. R. 813.

(2) 90 I. T. R. 525.

A In the case of *Kantilal Nathuchand* (supra) the question for consideration was whether on a true interpretation of the various provisions of the Indian Income Tax Act, 1922 speculation losses of the assessee firm for the assessment years 1958-59 and 1959-60 should be set off against its speculation profit in its assessment for the assessment year 1960-61. The provisions contained in section 24(1) and the two provisos appended thereto were not very clear and some apparent conflict arose between the first and the second proviso. On a consideration of the same this Court held that speculation losses of a registered firm kept apart under the first proviso to section 24(1) in computing its total income for one year could not be apportioned between the partners, and the registered firm could claim to carry forward such losses and have it set off against speculation profits of the firm of a later year in accordance with section 24(2).

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D But the provisions of law contained in Chapter VI of the Act have made a considerable departure from the corresponding provisions of the 1922 Act. In these cases we are only concerned with the question of set off of speculation losses against the profits of any other speculation business. In this connection it would suffice to read only the relevant provisions of sections 73 and 75 as they stood at the relevant time. They are as follows :—

E “73. Losses in speculation business—(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.

F (2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

G (i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

H (ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.”

“75. Losses of registered firms—(1) Where the assessee is a registered firm, any loss which cannot be set off against

any other income of the firm shall be apportioned between the partners of the firm, and they alone shall be entitled to have the amount of the loss set off and carried forward for set off under sections 70, 71, 72, 73 and 74.

(2) Nothing contained in sub-section (1) of section 72, sub-section (2) of section 73 or sub-section (1) of section 74 shall entitle any assessee, being a registered firm, to have its loss carried forward and set off under the provisions of the aforesaid sections."

On reading the above provisions of section 73 it is manifest that the assessee's loss in speculation business cannot be set off except against profits and gains, if any, of another speculation business. For the purpose of set off it is permissible to carry forward the losses to the following assessment year or years subject to the limit of 8 years as provided in sub-section (4) of section 73. But it is to be noticed that the provision contained in sub-section (2) is "subject to the other provisions of this Chapter", which includes section 75. In the latter section it is clearly provided that where the assessee is a registered firm, for the purpose of set off and carry forward of the loss apportionment between the partners of the firm has got to be made and they alone are entitled to have the amount of the loss set off and carried forward for set off under section 73. The matter is put beyond any pale of doubt and challenge in sub-section (2) of section 75 when it says that nothing contained in sub-section (2) of section 73 shall entitle any assessee, being a registered firm, to have its loss carried forward and set off under the provisions of section 73(2). The Tribunal and the High Court, therefore, were right in holding that the ratio of the decision of this Court in *Kantilal Nathuchand's* case (*supra*) cannot be applied in respect of the assessment made under the Act. Identical views have been expressed by the High Court of Gujarat in *Commissioner of Income-Tax, Gujarat III v. Dhanji Shamji*⁽¹⁾ and the High Court of Punjab and Haryana in *Choudhary Cotton Ginning and Pressing Factory v. Commissioner of Income-Tax, Punjab*.⁽²⁾

For the reasons stated above, we dismiss all the appeals with costs. Hearing fee one set only.

V.D.K.

Appeals dismissed.

(1) 97 I.T.R. 173

(2) 109 I.T.R. 6