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WESTERN STATES TRADING CO. LTD.

v.

COMMISSIONER OF INCOME TAX, CENTRAL CALCUTTA

January 18, 1971

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[J. C. SHAH, C.J., K. S. HEGDE AND A. N. GROVER, JJ.]

Income Tax Act 1922, s. 10(2)(vii) and 24(2)—Appellant selling colliery after running it for part of the year—loss on sale written off—if allowable under s. 10(2)(vii)—Profits on shares forming part of stock-in-trade of appellant's share-dealing business—Whether could be set off against business loss of previous years.

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The assessee entered into an agreement with another company on November 29, 1954 for the sale of its colliery. It was provided in the agreement that pending completion of the sale or delivery of possession, the vendor was to carry on business on behalf of the purchaser and run the colliery as on and from September 1, 1954 on the account and at the cost of the purchaser. In the course of the appellant's assessment to income tax for which the accounting year was from September 1, 1954 to August 31, 1955, the Income Tax Officer, after making adjustment for certain assets which according to him were not entitled to depreciation, worked out the figure of loss at Rs. 11,257.00; however he rejected a claim to set off this loss against the appellant's other income on the view that the assessee did not carry on the business of the colliery during the year since the transfer took place with effect from September 1, 1954. The Appellate Assistant Commissioner upheld this order and, although the Tribunal, in appeal, accepted the assessee's contention that it carried on business till November 29, 1954, it did not allow the loss on the view that it had resulted from a closing down sale. In respect of the same year, certain dividends on shares received by the assessee were included in its income under s. 12 but its claim to set off this income against the loss in business for earlier years brought forward, was disallowed. The High Court, upon a reference made to it, held against the appellant on both these issues. On appeal to this Court,

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HELD: The Tribunal had, in clear and unequivocal terms, upheld the contention of the appellant that it had actually carried on the business till November 29, 1954. Section 10(2)(vii) provides that profits or gains shall be computed after making the allowances in respect of any such building, machinery or plant which had been sold etc., the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant is actually sold or its scrap value. The first proviso requires that such amount should actually be written off in the books of the assessee. It is difficult to see how all the conditions necessary for the allowance under the above provisions were not satisfied. The colliery business was carried on by the appellant during part of the relevant accounting year. The machinery and plant had been used for the purpose of the business. The sale of the colliery took place during the accounting year; and the loss of Rs. 11,237.00 was written off in the books of the appellant. [387 C-F]

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Once it is accepted that the colliery business was carried on for a part of the relevant assessment year, the assessee would be entitled to get a set off under s. 24(2) of the Act if the shares on account of which the dividends were received formed part of the assessee's trading assets. It was not disputed that the shares formed part of the stock-in-trade of the share-dealing business of the assessee. There could be no reason, therefore, for the assessee not being entitled to the set off claimed. [388 B-D]

C.I.T., Andhra Pradesh v. Cocanada Radhaswami Bank Ltd., 57 I.T.R. 306; *Commissioner of Income Tax Madhya Pradesh v. Shrikishan Chandmal*, 60 I.T.R. 303 and *Commissioner of Income Tax, Ahmedabad v. Bhavnagar Trust Corporation (P.) Ltd.*, 69 I.T.R. 278; referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 589 and 590 of 1967.

Appeals by special leave from the judgment and order dated May 7, 1965 of the Calcutta High Court in Income-tax Reference Nos. 183 and 238 of 1961.

C. K. Daphtary, *B. P. Maheshwari* and *N. R. Khaitan*, for the appellants (in both the appeals).

S. C. Manchanda, *S. K. Aiyar*, *R. N. Sachthey* and *B. D. Sharma* for the respondent (in both the appeals).

The Judgment of the Court was delivered by

Grover, J. These appeals by special leave from a judgment of the Calcutta High Court arise out of certain questions of law which were referred relating to the assessment for the assessment year 1956-57, the relevant accounting year being from September 1, 1954 to August 31, 1955.

The assessee owned a colliery called the Western Kajoria Colliery, hereinafter referred to as "colliery". It entered into an agreement with another company on November 29, 1954 to sell the colliery to it. According to this agreement the vendor was to sell and the purchaser was to buy as on and from September 1, 1954 all the underground rights etc of the colliery with the machinery and other articles detailed in the schedules annexed to the agreement. It is not necessary to give the details of the other stock-in-trade which the purchaser was to purchase. The sale was to be completed within one year from the date of the execution of the agreement. According to clause 7 of the agreement pending completion of the sale or delivery of possession of the premises to the purchaser the vendor was to carry on business on behalf of the purchaser and run the said colliery as on and from September 1, 1954 on the account and at the cost of the purchaser. The purchaser was to get all the profits and was liable for all the losses from that date.

A The price fixed for the colliery was Rs. 3,50,000. The book value of the assets was Rs. 4,80,290/-. In the relevant assessment year the loss of Rs. 70,290/- was claimed by the assessee. The Income tax Officer rejected the claim for deduction of the loss from the assessee's other income on the ground that during the accounting period the assessee did not carry on the business of colliery since the transfer took place with effect from September 1, 1954. After making adjustment for certain assets which, according to the Income tax Officer, were not entitled to depreciation he determined the figure of loss to be Rs. 11,257/-. This loss was also disallowed. The Appellate Assistant Commissioner upheld the order of the Income tax Officer. The Appellate Tribunal, however accepted the contention of the assessee that it carried on business till November 29, 1954 but did not allow the loss as the Tribunal was of the view that it had resulted from a closing down sale.

B There was another item of dividends received from certain shares held by the assessee during the relevant accounting year. The Income tax Officer included these dividends in the Company's income under s. 12 of the Income tax Act, 1922, hereinafter called the "Act". The assessee failed to satisfy the authorities that the income received on account of the dividends could be set off against the loss in business of earlier years brought forward. The Tribunal made a reference of the following two questions under s. 66(1) of the Act :

E "(1) Whether on the facts and in the circumstances of the case the sum of Rs. 11,257/- being a claim for loss on sale of assets on which depreciation was allowable in earlier years is allowable under Section 10(2)(vii) in computing the total income of the assessee?"

F "(2) Whether on the facts and in the circumstances of the case dividend income was to be taken as income, profits and gains of business of the company and set off against losses brought forward from earlier years under section 24(2)?"

G Since certain other questions had been sought to be referred by the assessee in respect of which the Tribunal declined to make a reference the assessee moved the High Court and the High Court directed that the following questions be referred :

H "(3) Whether in the facts and circumstances of the case, the interest income from Western Kajoria Collieries Ltd. is income taxable under Section 10 of the Indian Income tax Act or under Section 12 of the said Act?"

(4) Whether on the facts and circumstances of the case there was any material to hold that the loan of M/s. Shri Vijay Corporation Ltd. was an accommodation loan not advanced during the normal course of money lending business? A

(5) If the answer to question (4) is that the loan was a business loan whether the debt had become bad in the year of account and deductible in computation of the total income? B

(6) Whether in the facts and circumstances of the case the Tribunal was right in refusing to allow set off of earlier year's business losses under section 24(2)?" C

The two references were dealt with together by the High Court.

On the first question the High Court was of the view that the sale was a closing down sale and the net result of the transaction was that the assessee was working the colliery from September 1, 1954 for and on account of the purchaser. While recognising that the coal business was not stopped as from September 1, 1954 the High Court came to the conclusion that it was on account of the purchaser that the business was carried on and any profits or losses which might have resulted until the actual sale were to be those of the purchaser and the vendor was to get only the price fixed together with interest. The first question was answered against the assessee. The second question was also answered against the assessee on the view that no colliery business in the relevant year was carried on by it and therefore no question of set off could arise. The third and the fourth questions were answered in accordance with the findings of fact given by the Tribunal and against the assessee. The fifth question was not pressed and was not answered. The sixth question was covered by the second question and therefore no answer was returned with regard to it as well. D
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In the present appeals we are concerned with the first and the second question. It has been submitted on behalf of the appellant that the loss of Rs. 11,257/- was allowable under s. 10(2)(vii) of the Act in computing the total income of the appellant. The Tribunal had recorded a finding which was one of fact; that in the relevant accounting year the appellant did carry on the colliery business. The finding of the Tribunal had not been challenged by the department by raising an appropriate question and therefore it was not open to the High Court to go against the finding of the Tribunal and hold that the business was carried on for and on account of the purchaser. At any rate it was an un- G
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A disputable fact that the appellant carried on the business upto November 29, 1954 and it was only by virtue of the agreement made on that day that it agreed to treat the business as having been transferred to the purchaser with effect from September 1, 1954. By means of the agreement it was not possible to alter the actual state of affairs, namely, the carrying on of the business by
 B the appellant.

In our judgment there is a good deal of substance in the above contentions urged on behalf of the appellant. The Tribunal had, in clear and unequivocal terms, upheld the contention of the appellant that it had actually carried on the business till November 29, 1954. Section 10(2)(vii) provides that profits or gains shall be
 C computed after making the allowance in respect of any such building, machinery or plant which had been sold etc. the amount by which the written down value thereof exceeds the amounts for which the building, machinery or plant is actually sold or its scrap value. The first proviso requires that such amount should actually be writ-
 D ten off in the books of the assessee. It is difficult to see how all the conditions necessary for the allowance under the above provisions were not satisfied. The colliery business was carried on by the appellant during part of the relevant accounting year. The machinery and plant had been used for the purpose of the business. The sale of the colliery took place during the accounting year. The loss of Rs. 11,275/- was written off in the books of the appellant
 E The present case appears to be covered by the decision of this Court in *Commissioner of Income tax, Bombay City II v. National Syndicate*⁽¹⁾ in which all the above conditions for the applicability of s. 10(2)(vii) were held to be present. It was said that there was no other condition to be found in the section or in the Act which had to be complied with. There was nothing to
 F show that the business of the assessee should have been carried on for the whole year or that the machinery or plant should have been used for the whole of the accounting period or if the assessee worked only for a part of the year and then sold out the loss that he incurred was not a business loss. The decisions which were relied upon by the High Court are hardly of much assistance in the
 G matter and are distinguishable on facts. The first question should have been answered in favour of the assessee.

On the second question once it is accepted that the colliery business was carried on for a part of the relevant assessment year the assessee would be entitled to get a set off under s. 24(2) of the
 H Act if the shares on account of which the dividends were received formed part of the assessee's trading assets. It is well settled by the decisions of this Court (see *C.I.T. Andhra Pradesh v. Cocanada*

(1) 41 I.T.R. 225.

Radhaswami Bank Ltd.⁽¹⁾ that s. 6 of the Act classifies the taxable income under the several heads but the scheme is that income tax is one tax and s. 6 only classifies the taxable income under different heads for the purpose of computation of the net income of the assessee. While sub-s.(1) of s. 24 provides for setting off the loss under one of the heads mentioned in s. 6 against the profits under a different head in the same year sub-s.(2) provides for the carrying forward of the loss for one year and setting off the same against the profits or gains of the assessee from the business in the subsequent year or years. It was emphasised in the aforesaid decision that sub-s. (2) of s. 24 in contradistinction to sub-s. (1) is concerned only with the business and not with its heads under s. 6 of the Act. Dividends are included in the meaning of income under sub-s. (1A) of s. 12 which is the residuary head. Applying the principles adverted to before the amount of dividends would form a part of the income from business of the assessee if the shares were a part of the assessee's trading assets and the assessee would be entitled to a set-off as claimed against the loss from its business incurred during the previous years. It does not appear to have been disputed at any stage that the shares formed part of the stock-in-trade of the share dealing business of the assessee. There could be no reason, therefore, for the assessee not being entitled to the set off claimed. The High Courts have consistently taken the view that business loss carried forward from earlier years can be set off against dividend income derived from shares held as stock-in-trade. (vide *Commissioner of Income tax Madhya Pradesh v. Shrikishan Chandmal*⁽²⁾ and *Commissioner of Income tax, Ahmedabad v. Bhavnagar Trust Corporation (P) Ltd.*⁽³⁾) The second question, therefore, should have been answered in favour of the assessee.

In the result the appeals are allowed with costs in this Court and the decision of the High Court is set aside only with regard to questions 1 and 2, the answers to which are returned as already indicated. One hearing fee.

R.K.P.S.

Appeals allowed.

(1) 57 I.T.R. 306.

(3) 69 I.T.R. 278.

(2) 60 I.T.R. 303.