Commissioner of Excess Profits Tax, Bombay City Vs. Bhogilal H. Patel, Bombay

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Court : Mumbai

Decided On : Aug-30-1951

Reported in : [1952]21ITR72(Bom)

Judge : Chagla, C.J. and ;Tendolkar, J.

Acts : Excess Profits Tax Act, 1940 - Sections 5

Appeal No. : Income-tax Reference No. 8 of 1951

Appellant : Commissioner of Excess Profits Tax, Bombay City

Respondent : Bhogilal H. Patel, Bombay

Advocate for Def. : R.J. Kolah, Adv.

Advocate for Pet/Ap. : G.N. Joshi, Adv.

Judgement :

Chagla, C.J.

1. The assessee suffered a loss of Rs. 59,129 in a business of buying and selling cotton at Wadhwan. In the sake year, he made a profit of Rs. 15,992 in a cotton business which he carried on in Bombay. The loss suffered by the assessee was allowed to be set off against his profits in Bombay for the purpose of income-tax. And the question that arises in this reference is whether the assessee is entitled to the same relief for the purposes of the excess profits tax for the chargeable accounting period 1943. The Tribunal took the view that he was entitled to that relief, and in coming to that conclusion the Tribunal relied on a decision of this Court in Commissioner of Income-tax, Bombay City v. Murlidhar Mathurawalla Mahajan Association . In that case, the facts were that the assessee was carrying on two distinct and separate business, one in Bombay and the other at Indore. During the year of account, there was a profit in Bombay and a loss at Indore, and the Income-tax authorities held that the assessee could not set off the loss at Indore against the profit in Bombay in view of the first proviso to section 24. We came to the conclusion that he was so entitled to set off by reason of Section 10 of the Income-tax Act, because Section 10 provided that all business, whenever carried on, constituted one head, and in order to determine what were the profits and gains under that head the assessee was entitled to show all his profits and set off against those profits losses incurred by him under the same head. Now, the question is whether the principle of this decision applies to the Excess Profits Tax Act.

2. Now, the Excess Profits Tax Act has been often construed, and it has been pointed out more than once that this Act taxes an assessee in respect of his business : although the assessee is an individual, he is not taxed in respect of his various activities which may yield profits, but he is taxed only in respect of one specific activity, namely, carrying on of business. Therefore, the unit, as far as taxation is concerned, is the business. But even so, when the business is taxed, the person liable to pay the tax and the assessee for the purpose of the Act is the individual who carries on the business. It has also been observed that the Excess Profits Tax Act is supplementary to the Income-tax Act, the intention of the Legislature being to tax further the profits which are also liable to tax under the provisions of the Indian Income-tax Act. Now, Section 5 of the Excess Profits Tax Act provides that the Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of Section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section. Therefore, as the section itself stands, every business of which the profits accrued or arose outside British India would also come within the ambit to the Act. Therefore, the business carried on by the assessee at Wadhwan, which was outside British India, would come within the scope of this Act. But there is an important proviso which has got to be considered in this connection, and that is the third proviso to the section. And that proviso lays down as follows :-

'Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State; and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State.....'

3. Therefore, the scheme of the proviso is that certain businesses are excluded from the application of this Act : in the first place, those businesses the whole of the profits of which accrue or arise in an Indian State; and secondly, those business where the profits of a part of the business accrue or arise in an Indian State, and such part of the business, by legal fiction, where the profits accrue outside British India, is deemed to be a business the whole of the profits of which accrue or arise in an Indian State. Now, in this case, it is clear that, if the Wadhwan business had made any profits, it must be looked upon as a separate business for the purposes of the proviso. And as a separate business, the profits of which accrued outside British Indian, it would be a business to which the Act would have no application. Therefore, Mr. Joshi's contention is that, whatever might have been the position under Section 10 of the Indian Income-tax Act, where all the businesses are within the purview of the Act and where in respect of every business a return had to be made by the assessee and the assessee has to show either his profits and gains or losses, the position under the Excess Profits Tax Act is entirely different; that, under Section 5 of the Excess Profits Tax Act, he has got to exclude the business referred to in the third proviso, and for the purposes of the Excess Profits Tax Act such a business does not exit at all. Now, as against this, Mr. Kolah's contention is that the proviso applies only to the profits of the business and not to the losses. In other words, Mr. Kolah argues that, when there are profits of a business carried on outside British India, those profits must not be taken into consideration for the purposes of the excess profits tax; but if there are losses, then Section 10 of the Indian Income-tax Act would continue to apply and the proviso does not extend to the losses incurred by a business carried on outside British India. This contention of Mr. Kolah is based on the language used in the proviso,

namely, that 'this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State.' Now, this contention is obviously fallacious, because the proviso does not say that the Act shall not apply to the profits of a business which accrue or arise in an Indian State. What the proviso is that the Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State. The expression 'the whole of the profits of which accrue to arise in an Indian State' is an expression which indicates the nature of the business which is excluded from the purview or ambit of the Act. The further contention of Mr. Kola is that, if that is the true construction, then the proviso only applies when a particular business yields profits, but if the business does not yield profits then the proviso does not apply at all. And, therefore, Mr. Kola says that, as in the chargeable accounting period the business at Wadhwan did not yield any profits, the proviso did not apply to that business, the business at Wadhwan was not excluded from the scope of the Act, and, therefore, the assessee was entitled to set off the losses of the Wadhwan business against the profits made in the business in British India. Mr. Kola further relied on Schedule I to the Excess Profits Tax Act. Now, that schedule lays down the rules for the computation of profits for the purposes of the excess profits tax, and it provides that the profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under Section 10 of the Indian Income-tax Act, 1922. It is, therefore, suggested that, unless we find something in Schedule I which provides for the profits of a business being calculated otherwise than as laid down in the Indian Income-tax Act, we must apply the same principles which govern the taxing of profits under the Indian Income-tax Act. Now, in my opinion, although, the Legislature has not expressly states that the schedule is subject to the provisions of the Act itself, we must, according to the ordinary canon of construction, read the schedule as being governed by the provisions of the main statute of which it is merely a schedule. It would be impossible to hold that a schedule can override the substantive provisions of a statute. Therefore, Rule 1 must be read to mean that the schedule is to operate subject to all the provisions of the statute itself and also subject to the provisions of the schedule. Therefore, we must really come back to the proper interpretation of the third proviso to Section 5.

4. Now, in my opinion, the expression ' the whole of the profits of which accrue or arise in an Indian State', as I said before, is a descriptive expression describing the nature of the business which is sought to be taken out of the purview of the Act. This description does not so much emphasize the fact that in a particular year profits did accrue or arise in an Indian State. But what it emphasizes is that the business should be such that, if that business were to make profits, those profits would accrue or arise in an Indian State. There is no attempt at drawing a contrast between profits and losses. The attention of the Legislature was rather focussed upon the nature and type and the character of the business which it wanted to exclude from the operation of the Excess Profits Tax Act. There is another consideration which should also weigh with us in giving this interpretation to the third proviso to Section 5. It is clear that the whole object of the Excess Profits Tax Act was to take a standard period and to ascertain the profits of that standard period, to compare those profits with the profits made by the assessee during the chargeable accounting period, and if, after such a comparison, it was found as laid down under the Act that the profits during the chargeable accounting period were in excess of the profits made during the standard period, then the excess profits were liable to tax. Now, in order to determine whether there were excess profits or not, the same standard must be applied for determining

the profits during the standard period as must be applied for determining the profits during the chargeable accounting period. Like has to be compared with like; and it is only when that is done that a proper result can be arrived at by which it will be possible to determine whether there were excess profits or not. Now, if Mr. Kola's construction were to be accepted, it would result in this extraordinary situation, that, if for the purpose of the standard period there were two business of the assessee, one in British India and the other in an Indian State, and both the business made profits, then by reason of the third proviso to Section 5 the profits made in the business in the Indian State would be excluded and only the profits made in the business in British India would be taken into consideration. But when we come to the chargeable accounting period, with regard to those very two businesses, if the business in the Indian State were to make a loss and the business in British India were to make a profit, then the loss made by the business in the Indian State would have to be set off against the profit made in the business in British India. On other words, for the purpo se of the standard period, in this particular case, only one business would be considered as falling within the ambit of the Excess Profits Tax Act, whereas for the chargeable accounting period both the businesses would be considered as falling within the ambit of the Act. Now, that is obviously not the scheme of the third proviso. The scheme of the third proviso, according to me, is totally and for all purposes to excluded the business of the nature described in that proviso, and as I said before, that business is a business in which, if it made profits, such profits would accrue or arise in an Indian State.

5. Therefore, in my opinion, the Tribunal was not right in coming to the conclusion that the principle which is deductible from our decision in Commissioner of Income-tax, Bombay City v. Murlidhar Mathurawalla Mahajan Association was applicable to a case that fell under the Excess Profits Tax Act. The two Acts, although in a sense they are complementary to each other, are based on different principles. And in view of the third proviso to Section 5, the principle of that decision does not apply to a case falling under the Excess Profits Tax Act.

6. The result is, we will answer the question in the negative.

7. Assessee to pay the costs.

Tendolkar, J.

8. I agree.

9. Reference answered in the negative.