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Commissioner of Income-tax, Bombay City Ii Vs. London Hotel

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Court : Mumbai

Decided On : Sep-08-1967

Reported in : [1968]68ITR62(Bom)

Judge : Kotwal, C.J. and ;V.S. Desai, J.

Acts : Income Tax Act, 1922 - Sections 10(2)

Appeal No. : Income-tax Reference No. 68 of 1962

Appellant : Commissioner of Income-tax, Bombay City Ii

Respondent : London Hotel

Advocate for Def. : S.J. Mahaispurkar, Adv.

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

Judgement :

Kotval, C.J.

1. The following question of law has been referred for our decision at the instance of the Commissioner of Income-tax, Bombay City II :

'Whether, on the facts and in the circumstances of the case, the assessee is entitled to the allowance under section 10(2) (vii) in respect of demolition of a part of the building, even though the loss is not actually written off in the books of the assessee ?'

2. The question has arisen with reference to the assessment year 1957-58, and upon the following facts : Messrs. London Hotel, Bombay, are a firm and they run a hotel called 'London Hotel'. The premises in which this hotel was being run were originally purchased by the three partners of Messrs. London Hotel on 7th September, 1945, for a sum of Rs. 1,15,000. They contributed to the consideration equally and when the London Hotel was started they treated the premises as being let out to the firm, the proprietary right vesting in the three partners jointly. The rent paid by the firm to the three individuals was debited in the books of the firm and the firm claimed the amount as a deduction in the years 1946-47 and 1947-48, and the deduction was allowed. Thus the property was treated as the private property of the three persons who had purchased it, although they were partners in that firm.

3. This position, however, was not accepted by the department in the assessment year 1948-49. The Income-tax Officer held that the premises in which the business of

Messrs. London Hotel was being run were really a business assets of that firm and was liable to assessment as such in the hands of the firm. Consequent upon this order, depreciation on the property was being granted to the firm from the assessment year 1948-49 onwards under section 10 as a business asset of the assessee. However, so far as the account books of the assessee-firm were concerned, the asset was not shown as part of their assets, because the three partners of the firm always regarded it as their personal asset.

4. During the financial year ending 31st March, 1957, a portion of the building, which has been found by the tax authorities to be a two-thirds of it, was demolished and the land underneath which thus became vacant was let out to Messrs. Burmah Shell for the erection of a petrol pump on a monthly rental of Rs. 2,100. The rent received from the Burmah Shell has been added by the authorities as the business income of the assessee-firm.

5. We are concerned in this reference with a claim made by the assessee firm in the respect of the balancing payment due to them under section 10(2) (vii) of the Indian Income-tax Act and that claim was made on the basis of the following facts : The written down value of the building, according to the previous assessment orders, at the beginning of the relevant previous year was Rs. 91,580. When a part of the building was demolished the value realised on the sale of the materials or scrap after demolition was Rs. 12,300. The assessee claimed that out of the written down value two-thirds will have to be allocated to the portion of the building thus demolished and after giving an adjustment for the realisation of the scrap value, namely, Rs. 12,300, the balance would come to Rs. 48,754. They claimed that that amount should be allowed to them as a deduction under section 10(2) (vii).

6. Section 10(1) and (2), clause (vii), run as follows :

'10. (1) The tax shall be payable by an assessee under the head 'Profits and gains of business, profession or vocation' in respected of the profit and gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances namely : -.....

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value :

Provided that such amount is actually written off in the books of the assessee.'

7. With the rest of the provisions of the sub-section we are not here concerned.

8. The Income-tax Officer disallowed the assessee's claim on two grounds. He first of all held that, having regard to the proviso to section 10(2) (vii), the assessee had not complied with it because 'the said loss is not at all entered in the books of accounts' and therefore the assessee was disentitled to claim the balancing allowance altogether. Secondly, the Income-tax Officer held that the loss was not one which fell under section 10(2) (vii) for the reason that the building had not been fully demolished and only two-thirds of it had been demolished. The reasoning on this part

of the case of the Income-tax Officer was :

'The assessee-firm has not completely demolished the whole building. But some part is pulled down in order to let out the ground to Burmah Shell. Exact portion of the building so pulled down is also not determinable. In order to earn more income the same has been done and hence it cannot be said that there is a loss under section 10(2) (vii). While computing the total income, this amount of Rs. 48,754 claimed as loss under section 10(2) (vii) is disallowed.'

9. The assessee appealed, and the Appellate Assistant Commissioner negatived both the above grounds raised by the Income-tax Officer. As to the second ground mentioned in his order, he observed :

'Regarding the contention of the Income-tax Officer that the demolition of a part of the property does not entitle the appellant to claim loss under section 10(2) (vii), I have not been able to find any provision to this effect in the Income-tax Act. If any asset or part of an asset is sold, discarded, demolished or destroyed, the assessee is entitled to the benefits of section 10(2) (vii). The fact that in this particular case a part of the property has been demolished so that the appellant could earn more income is not at all relevant in determining the loss under section 10(2) (vii).'

10. Taking this view, the Appellate Assistant Commissioner proceeded to determine the amount of the loss under section 10(2) (vii) and he arrived at the allowable loss at Rs. 33,490. It is unnecessary for the purpose of this reference to mention the details of the computation as contained in paragraphs 7 and 8 of his order, because neither the figure arrived at by the Appellate Assistant Commissioner nor the mode of his computation is at all in dispute upon the question referred.

11. As regards the first ground in the order of the Income-tax Officer that the loss was not entered in the books of accounts of the assessee, the Appellate Assistant Commissioner pointed out that there was a clear explanation why the loss could not be entered in the books of accounts of the assessee as follows :

'From what has been stated above it will be seen that the partners had treated the property as not a business asset. The Income-tax Officer treated the property as a business asset and allowed depreciation from 1948-49. In these circumstances the property was not shown as an asset in the balance-sheet of the appellant-firm. Therefore, there cannot be any question of the loss on account of the demolition of the property being shown in the books of the firm. In these circumstances I hold that the appellant could not be expected to write off the loss in the books of accounts as there is no entry regarding the assets in the books.'

12. The department took the matters in appeal to the Income-tax Appellate Tribunal and before the Tribunal the above grounds were reagitated. As to the ground that since only a part of the building had been demolished the assessee could not claim the allowance under section 10(2) (vii), the decision in Maneklal Vallabhdas Parekh was relied on. The Tribunal distinguished it and pointed out that there was no direct authority for the proposition that, when the words were used in the section 'in respect of any such building', the building must be taken as a whole and if only a part of the building was demolished, the provisions of section 10(2) (vii) would not come into operation at all. They also referred to the provisions of section 10(3) in this connection and observed :

'It was faintly suggested that only a part of the 'building' is demolished and it will be extremely difficult to ascertain the written down value attributable to it so as to arrive at the correct amount of allowance to be made under the substantive part of section 10(2) (vii). If that is the grievance of the department, it is a factual one and can only mean that the amount of Rs. 33,000 odd as determined by the Appellate Assistant Commissioner was not correctly determined by him.'

13. As to the first point in the order of the Income-tax Officer that the figure of loss was not shown in the books of the assessee, the Tribunal observed somewhat harshly :

'We believe that in taking this contention, the department is trying to strain at a gnat when it had already swallowed a camel. It was the partners' case all along in the past that particular building that was used for the partnership hotel business did not belong to the partnership as such though there was identity amongst the co-owners of the property and the three partners of the assessee-firm carrying on the business of London Hotel. Nevertheless, when it suited the department, it took the view that the particular building was a business asset and used by the firm as such for the purpose of its business. It was on that footing that from 1948-49 assessment year onwards, it allowed depreciation in respect of the said building and now comes the time to allow the claim under section 10(2) (vii). The departmental representative did not go to the length of taking an inconsistent position in regard to the ownership of the asset, viz., the said building, but he merely submitted that the amount was not actually written off in the account books of the assessee. In the circumstances of the case, the assets account could not be found in the books of the assessee-firm for the reasons given by the Appellate Assistant Commissioner in paragraph 5 of his order. We see no reason to differ from the view taken by him. Quite apart from this, this objection is extremely technical and it could have been got over by making suitable entries in the account books if the assessee-firms was so minded. We, therefore, reject the first of these two submissions.'

14. Though the question referred to us is one, both the contentions which were throughout advanced before the income-tax authorities and the Income-tax Tribunal are clearly reflected in it. The first ground is reflected in the question by the 'words whether. . . . . the assessee is entitled to the allowance under section 10(2) (vii) in respect of demolition of a part of the building' and the second question is reflected by the words '. . . . . even though the loss is not actually written off in the books of the assessee. ' Really, there should have been two separate questions but the question as framed sufficiently reflects the nature of the contentions and the controversy between the parties. Both these contentions were pressed before us by Mr. Joshi on behalf of the Commissioner.

15. Turning to the first contention, namely, that since only a part of the building was demolished in the instant case, clause (vii) of section 10(2) would not be attracted, stress was laid upon the words in the clause 'in respect of any such building' and it was said that when the clause says 'building' it was the intention of the legislature to annex the allowance only to the completed building and not to any part of it. Normally, where a whole is mentioned the part would be included in it, but since this is a taxing statute it is necessary to go a little further and examine this clause in the context of its total provisions. The clause speaks of the balancing allowance 'in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed'. In the context there is no distinction made so far as the

grant of this allowance is concerned between building, machinery or plant and whether it is sold, discarded, demolished or destroyed. It is plain that machinery or plant in use in a business is never wholly discarded but, in almost every case, is discarded piece-meal. Indeed the very purpose of this allowance is to compensate the assessee when machinery becomes old and has to be discarded and it is clear that all machinery cannot become obsolete or unusable and be discarded at one and the same time. Yet the clause makes no distinction in the generality of its words between building,, machinery and plant, which has been sold, discarded, demolished or destroyed. In the context of machinery or plant to be discarded, obviously, the clause can have no meaning if it is confined to the whole of the machinery or plant. The word building is used in the same context. We, therefore, think that necessarily in the context in which the word 'building' is used it must also include part of the building.

16. The second ground upon which we think that this is the only possible interpretation to be put upon this sub-clause is the use of the word 'destroyed' in the context of building, machinery or plant. Obviously, where a case is contemplated of destruction of a building, machinery or plant, the provision would make no sense if we were to confine its operation to the whole or total destruction of the building, machinery or plant. On the other hand, having regard to the fact that this is a business allowance and granted as a balancing payment to an assessee running a business, it would be available to the assessee even though part of the building, machinery or plant was destroyed.

17. Curiously enough, there is no decision on the question whether within the meaning of the word 'building' in clause (vii) of section 10(2) a part of a building is included or not. But so far as plant and machinery are concerned, there is some authority. In Commissioner of Income-tax v. Mir Mohammad Ali, a diesel oil engine was fitted to a motor vehicle in replacement of an already existing engine on that motor vehicle and the question was whether the additional depreciation contemplated in clause (via) of section 10(2) in respect of new buildings erected or newly installed machinery or plant could be granted. The deduction claimed was disallowed on the ground that the installation of the new engine was an accretion of a capital nature and the Supreme Court pointed out that the very meaning of 'machinery' was 'mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and inter-dependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result'. (See page 171.) From the Privy Council decision in Corporation of Calcutta v. Chairman, Cossipore and Chitpore Municipality. No doubt the latter case was not a tax case, but their Lordships applied that definition for purpose of the Income-tax Act also. Upon that definition a part of a machine would be included in machinery, with the result that even if a part of a machine be destroyed or discarded, it would still be machinery that was destroyed or discarded. Some reference was also made to a decision of this court in Akbar . v. Commissioner of Income-tax, but there the contention raised by counsel was of a different nature. The contention there raised was that under the relevant proviso to section 10(2) (vii) if the undertaking is sold as a whole, then the proviso has no application. That contention was not accepted. We do not think that that decision can be of much use here.

18. We have referred to these authorities merely by way of analogy. We have no doubt, however, upon a plain construction of section 10(2) (vii) and considering that section 10(2) refers to allowances to be made in computing acts of profits and gains

of business that the word 'building' in clause (vii) of section 10(2) would include a part of the building. The Appellate Assistant Commissioner and the Tribunal, therefore, were right so far as this point was concerned.

19. Then we turn to the second ground upon which it is said that the assessee is disentitled to deduct the balancing allowance, namely, that he has not complied with the proviso to clause (vii) of section 10(2). The proviso merely says : 'Provided that such amount is actually written off in the books of the assessee'. Before we turn to consider this contention, we must reiterate the findings of fact of the authorities below. The Income-tax Officer merely said that since the assessee had not entered the loss in his books of accounts he was disentitled to the allowance under section 10(2) (vii). The Appellate Assistant Commissioner explained the circumstances under which the loss could not be shown by the assessee in his books and the circumstances were that the three partners of the assessee-firm who owned the premises of the London Hotel always treated that property as their personal property owned by them in co-ownership. The department had indeed accepted that position for the years 1946-47 and 1947-48, but it was only in the assessment year 1948-49, that by an order of the Income-tax Officer these premises came to be treated as belonging to the firm and used by it for purposes of its business. The Appellate Assistant Commissioner held that in these circumstances the property was not shown in the balance-sheet of the appellant-firm and therefore there could not be any question of any loss on account of the demolition of the property being shown in the books of the firm. He, thus, came to the conclusion :

'I hold that the appellant could not be expected to write off the loss in the books of accounts as there is no entry regarding assets in the books'. This finding was further confirmed by the Income-tax Appellate Tribunal by observing :

'In the circumstances of the case, the assets-account could not be found in the books of the assessee-firm for the reasons given by the Appellate Assistant Commissioner in paragraph 5 of his order. ' The Tribunal, however, added two more reasons by observing :

'Quite apart from this, this objection is extremely technical and it could have been got over by making suitable entries in the account books if the assessee-firm was so minded. ' Now no doubt we are in agreement with the remark of the Tribunal that the objection was extremely technical because the department is attempting to rely upon the strict letter of the law as contained in the proviso, but we are unable to accept the second reason added by the Tribunal, namely, that 'the objection could have been got over by making suitable entries in the account books if the assessee-firm was so minded'. That was clearly not a relevant consideration, when judging whether the requirements of section 10(2) had been fulfilled or not. It seems to us that the conclusion which the Appellate Assistant Commissioner came to was the more appropriate that such entries could not be made in the books of the assessee-firm for the simple reason that the premises were never the asset of the assessee-firm and never regarded as such by its three partners who claimed that asset as their own personal property. If the asset was not the property of the assessee-firm at all and was never entered in the books, we wonder how it could be possible for the assessee-firm to write off part of it or claim the allowance under clause (vii) of section 10(2).

20. On behalf of the Commissioner another point of construction of the relevant provisions of clause (vii) has been raised. It is urged that when the proviso says :

'Provided that such amount is actually written off in the books of the assessee' it amounts to a condition precedent to the grant of the balancing payment contemplated by the parent provision in sub-clause (vii) of section 10(2) and that unless the condition precedent is first fulfilled there is no question of an assessee being permitted to claim or being entitled to the balancing allowance under that clause.

21. Apart from the authorities (we shall presently discuss the few cases which were cited on either side), it seems to us that in order to arrive at the proper construction of this clause, it is necessary to look to the other provisions of section 10 and some other provisions of the Act which bear upon the subject and the context in which this clause occurs. Section 10(1) lays down the charge of tax in respect of profits and gains of business, profession or vocation and then sub-section (2) deals with the allowances that have to be made in order to compute such profits or gains. Section 10(2) contains as many as 15 clauses and each clause is concerned with a particular type of allowance. The scheme of the provisions is first to state the nature of the allowance and then state the limitations by enacting suitable provisos. When one considers the manner of statement of these provisos it is clear that not all the limitations placed by these provisos upon the allowances granted are conditions precedent. On the other hand, a consideration of the provisos which so to say limit the extent of the allowance in each case or qualify them shows that in some cases the proviso does lay down what counsel categorised as condition precedent, but there are several provisos attached to the definition of each allowance which can hardly be called conditions precedent. They are more in the nature of provisos which mention the terms upon which the allowance is available or are in the nature of a qualification upon the definition of the allowance. The distinction is brought especially into focus if one considers the provisos to section 10(2) clause (iii), 10(2) clause (vib) and section 10(2), clause (xiv), and particularly section 10(2), clause (vib), which are analogous to the allowance contemplated by clause (vii) to section 10(2).

22. We have already shown that clause (vii) with which we are concerned deals with the balancing allowance which is granted to an assessee whose building, machinery or plant is sold or discarded or demolished or destroyed. Clause (vib) deals with what is termed in the sub-clause as a development rebate and it runs as follows :

'(vib) in respect of machinery or plant being new, which has been installed after the 31st day of March, 1954, and which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of installation equivalent to twenty-five per cent. of the actual cost of such machinery or plant to the assessee :

Provided that no allowance under this clause shall be made unless the particulars prescribed for the purpose of clause (vi) have been furnished by the assessee in respect of such machinery or plant.'

23. The development rebate and the balancing allowance are both allowances and the different grounds upon which those allowances are granted by the law should not for the purpose of the point before us make any difference. The contrast between the proviso to clause (vib), and the proviso to clause (vii) is noticeable. In the case of clause (vib) the legislature has by the use of the words 'no allowance under this clause shall be made unless' made its intention clear beyond doubt that, if the particulars prescribed by the parent clause (vib) are not furnished, 'no allowance

under this clause shall be made', but such is not the case in clause (vii). There is no reference to what would be effect of the amount not being written off in the books of the assessee. The proviso to clause (vib) could as well have been worded as the proviso to clause (vii) has been worded : 'Provided that the particulars prescribed for the purpose of clause (vi) have been furnished by the assessee in respect of such machinery or plant', in which case it would be in pari materia with the proviso to clause (vii). It will thus appear that in the different parts of section 10 itself the legislature has advisedly used different words in laying down the condition or the qualification as the case may be to the grant of a particular allowance and where the legislature intended to say that the non-fulfillment of a particular condition will result in the non-grant of the allowance altogether, it has in unequivocal term said so, whereas in other clauses it has merely stated what has to be done with regard to the right or allowance as a simple qualification.

24. The other provisos in section 10 on a par with the proviso to clause (vib) are the provisos to sections 10(2) (iii) and 10(2) (xiv). In each of these provisos the legislature has unequivocally provided that the right to the allowance itself shall be denied if the particular condition is not fulfilled, whereas in the provisos to clause (vib), (vii) (the one with which we are concerned), (x) and (xi) the only thing mentioned is that a certain act should be done. In our opinion, the difference in the language employed in the two cases we have set forth above is so marked that it is impossible to avoid its significance. In the one case (vib) and other clauses) the legislature has clearly spoken its mind that the non-fulfilment of the terms mentioned in the proviso will result in the allowance itself being lost, while in the case of clause (vii) and other clauses the legislature has not thus indicated the consequences or penalty attached to the non-fulfillment of the term mentioned in the proviso. In our opinion, this makes a marked difference in the first place, but another consequence also follows from the difference in the terminology of the two provisos. To take again the first of the provisos to clause (vib), by the use of the words 'no allowance under this clause shall be made unless' the legislature in essence enjoined or gave a mandatory direction to the assessing officer not to grant the allowance under the clause unless the requirements of the proviso were fulfilled, but by the contrast the proviso to clause (vii) merely states a qualification and the injunction or direction is totally absent. In other words, the difference in the language used shows that it is merely a qualification or term of the allowance granted.

25. This construction which commends itself to us is a construction which is in consonance with the accepted rules of construction. In section 9 entitled 'Construction of provisos' of Chapter 10 of Craies on Statute Law, 6th edition, the rule as to construction of provisos is thus stated :

'The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it.'

26. Therefore, the purpose of a proviso is two-fold. It may in the first place be truly what a proviso is intended to be, namely, an exception carved out of the preceding portion of the proviso or it may merely be an additional qualification upon something enacted in the parent clause to which it is an exception. It seems to us that the sharp contrast which is to be found in the several provisos to the different clauses in section 10 is there because these provisos are either true exceptions to the rules stated in the proviso or merely qualifications upon the earlier part of each clause of section 10(2).

In clause (vii), with which we are concerned, it is merely a qualification while as we have shown upon the terms of the proviso in clause (vib) it is a condition or exception. Considerable argument was advanced on either side to urge, on the part of the department that the proviso to clause (vii) is mandatory and on the part of the assessee that it is merely directive. In our opinion, nothing much turns upon whether the proviso is mandatory or directive. The question is what is the true construction of that proviso irrespective of the fact whether its enforceability is mandatory or directive.

27. The proper effect, therefore, of the proviso with which we are concerned would, in our opinion, be that it does not provide that in every case as a matter of law wherever 'such amount' is not actually written off in the books of the assessee, the assessee would be invariable disentitled to the allowance of the balancing payment contemplated by the parent clause (vii). No doubt it is a term or qualification for claiming the balancing payment but if in a given case it appears to the assessing officer that the amount could not be written off in the books of the assessee in spite of his best efforts, it is still open to the assessing officer to grant the allowance under clause (vii). The contention on behalf of the department has been that as a matter of law in every case wherever an amount is not actually written off in the books of the assessee, the allowance can never be granted. We do not think that the proviso to clause (vii) intended to go as far as that and if it was intended to carry that meaning, surely the legislature could have said as they have said in case of clause (vib) : 'Provided that no allowance under this clause shall be made unless such amount is actually written off in the books of the assessee. ' But that has not been stated.

28. While there is no direct authority upon the construction of this clause, we are fortified in the view which we have taken by a consideration of some of the authorities, one of which does show that, in spite of the amount not being shown in the books of the assessee, the question was considered whether it could be granted or not. See Muthukaruppan Chettiar v. Commissioner of Income-tax. In that case no entry was made in the relevant year of account in respect of certain mortgaged property which had been sold in the year 1930-31, but the mortgage debts were written off as bad only in March 1934. The question was whether the assessee was entitled to the initial depreciation allowance contemplated in clause (vi) of section 10(2). The clause (a) to the proviso to that clause was :

'Provided that, (a) the prescribed particulars have been duly furnished;'

29. The Full Bench held that, when claiming an allowance in respect of the depreciation, the assessee must give the particulars required by clause (a) of the proviso to section 10(2) (vi) and if he does not do so, the authorities would be justified in disallowing the claim. The Madras High Court held that the disallowance was proper. The fact that the question of the propriety of the allowance was gone into itself shows that it is not as a matter of law that the assessee would be disentitled to the allowance in every case where no entry is made in the books of account. On behalf of the department, reliance was placed on the passage appearing at page 89 of the report in the judgment of Chief Justice Leach :

'With regard to the disallowance of the sum of Rs. 1,875 in respect of depreciation of machinery in the Wakema rice-mill, the Income-tax Officer wrongly held that the deduction claimed was not allowable in law. It was disallowed because the mill had been worked by the lessee and not by the owner. The disallowance was nevertheless

proper. When claiming a deduction an assessee must give the particulars required by proviso (a) of section 10(2). This he admittedly failed to do and, therefore, he was not in a position to claim the deduction. The answer to the second question is that in the circumstances the assessee is not entitled in law to the deduction.'

30. It seems that in this passage the learned Chief Justice has in the clearest possible language indicated that in that case upon the circumstances the assessee was not entitled to the deduction that in law, that is to say, the circumstances can be taken into account and it is not a pure question of law whether the assessee would by the mere fact of not showing the particulars in his account books be disentitled to the allowance. We do not think that the decision in the Madras case goes counter to the construction that we have placed upon clause (vii) and the proviso thereof. On the other hand, it supports it. To the same effect is the decision in Rao Bahadu S. Ramanatha Reddiar v. Commissioner of Income-tax.

31. Strong reliance was placed on behalf of the department on a decision of the supreme Court in Commissioner of Income-tax v. National Syndicate In that case the Supreme Court were no doubt to directly concerned with section 10(2) (vii) as in the present case. In that case the accounting period was from 11th January, 1945, to 28th February, 1946. The assessee had acquired a tailoring business in January, 1945, but had found it difficult to continue it and closed it in August, 1945. On 16th August, 1945, and 14th February, 1946, the assessee had sold all its sewing machines at a loss of Rs. 41,998 and a motor lorry at a loss of Rs. 3,700. In its assessment to income-tax for the assessment year 1946-47, the assessee claimed deduction of these two amounts under section 10(2) (vii) of the Income-tax Act. The Supreme Court upheld the right of the assessee to the deduction and pointed out that all the requirements of the clause were fulfilled. In analysing the clause, however, the Supreme Court used a particular expression-the word 'condition' in the following passage on which great reliance was placed on behalf of the department. The passage occurs at page 234 :

'If the profits or gains of a business for a particular year are to be taxed they must be computed for the whole year taking into account losses incurred during the same year. Now, the first condition precedent appears to be that the business must have been 'carried on by the assessee.' This is to be found in the first sub-section of section 10. The second condition is that the building, machinery or plant must have been 'used for the purposes of the business.' This is to be found in clause (iv) of the second sub-section of section 10. The third condition is that, the sale, etc., should have taken place during the year of account. This follows from the nature of the tax which is assessed and levied on the profits of the working of the previous year. The fourth condition is that the loss should have been brought into the books of the assessee and written off. This is provided by the first proviso. There is no other condition to be found expressly in the section or in the Act.'

32. Mr. Joshi urged that by the words 'underlined' by us the Supreme Court itself has ruled that the requirement of the proviso to clause (vii) of section 10(2) is a condition precedent to the grant of the allowance mentioned in the parent clause and, therefore, this interpretation of the proviso is the correct interpretation.

33. Now no doubt the Supreme Court used the word 'condition', but we notice that it is not said that it is 'condition precedent'. On the other hand, it has used the word 'condition' throughout to describe the ingredients granted. The word 'condition' in

normal parlance could as well imply an absolute term or a condition precedent on the breach of which the right cannot be granted as that may merely mean a stipulation or one of the terms or requirements of the allowance. We think that it was in the latter sense that the Supreme Court used the word 'condition' in that passage. Indeed on a reading of the entire decision of the Supreme Court and especially their decision on the question No. 2 which arose in the reference, it is clear that the question as it has been raised before us was not before the Supreme Court. The question which has arisen before us as to the construction of the proviso to clause (vii) was not argued before the Supreme Court. On the other hand, it was assumed in the question itself which was referred that the proviso could not as a matter of law in every case bar the allowance if the amount is not actually written off in the books of the assessee. The question posed in that case is mentioned at page 228 as : 'Whether on facts and circumstances of the case, the Income-tax Appellate Tribunal was justified in law in not allowing the sum of... on the machines and.. on the sale of lorry as a deduction from the total income of the applicant. ' So both the assessee as well as the department assumed that the facts and circumstances of the case had to be taken into account and it was in the light of the facts and circumstances of that case that the Supreme Court upheld the allowance granted to the assessee. That case, therefore, cannot be authority for the proposition now canvassed before us that as a matter of law in every case where the amount is not actually written off in the books of the assessee, the allowance of the balancing payment under clause (vii) can never be granted.

34. There is little or nothing to be found in the authorities as to what was the true object or purpose of incorporating this proviso in clause (vii) of section 10(2), but it was pointed out by Mr. Joshi on behalf of the department that by insisting upon the writing off of 'such amount' (that is to say the difference between the written down value and the scrap value), the legislature intended to crystallise or fix two facts pertaining to the grant of the allowance, namely, (a) the time at which the balancing payment has to be made; and (b) the amount, so that the assessee cannot claim more than that amount. Even assuming that that is the purpose or object of this proviso, we cannot see this particular object or purpose being served by its being held that where the amount is not actually written off in the books of the assessee in every case the allowance of the balancing payment should not be allowed to the assessee. In fact, the present is a remarkable instance where upon the findings of the authorities it was impossible for the assessee to have made the entries required by the proviso. The facts found by the Appellate Assistant Commissioner are to be found mentioned in paragraph 5 of his order :

'From what has been stated above it will be seen that the partners had treated the property as not a business asset. The Income-tax Officer treated the property as a business asset and allowed depreciation from 1948-49. In these circumstances the property was not shown as an asset in the balance-sheet of the appellant firm. Therefore, there cannot be any question of the loss on account of the demolition of the property being shown in the books of the firm. In these circumstances, I hold that the appellant could not be expected to write off the loss in the books of accounts as there is no entry regarding the assets in the books. ' The Tribunal affirmed these findings of fact in paragraph 3 of the order :

'In the circumstances of the case, the assets-account not be found in the books of the assessee-firm for the reasons given by the Appellate Assistant Commissioner in paragraph 5 of his order.'

35. Therefore, there was a positive finding of fact in the present case that it was for no fault of the assessee that he could not actually write off the amount in his books. On the contrary, the default if any arose simply because long after the accounts of the relevant years were closed the Income-tax Officer chose to take the view that the assets in respect of which an allowance was claimed were not the personal property of the partners as the partners always treated it, but was the business assets of the firm of which the three co-owners were the partners. If in such a case we were to hold that still as a matter of law the assessee would not be entitled to the allowance because the amount is not actually written off in the books of the assessee, we think we would be perpetrating a clear injustice and since as we have shown that was not the intention of the law, we must hold that the view taken by both the Appellate Assistant Commissioner and the Tribunal in the present case was a correct view.

36. In the result, the answer to the question referred is in the affirmative. The Commissioner will pay the costs of the assessee.

37. Question answered in the affirmative.

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