(1983) 33 CTR 137 : (1983) 143 ITR 378 : (1983) 13 TAXMAN 68

Bombay High Court

Case No: Income-tax Reference No. 164 of 1973

Oriental Fire and General Insurance Co. Ltd.	APPELLANT
Vs	
Commissioner of Income Tax, Bombay City-IV	RESPONDENT

Date of Decision: June 15, 1982

Acts Referred:

- Income Tax Act, 1961 - Section 199, 28, 30, 31, 32
- Income Tax Rules, 1962 - Rule 5
- Insurance Act, 1938 - Section 15

Citation: (1983) 33 CTR 137 : (1983) 143 ITR 378 : (1983) 13 TAXMAN 68

Hon'ble Judges: M.N. Chandurkar, J; Kania, J

Bench: Division Bench

Judgement

Chandurkar, J.
In this reference at the instance of the assessee, the following two questions have been referred to this court under s. 256(1) of the I.T. Act, 1961 :

"(1) Whether, on the facts and in the circumstances of the case, and on a proper construction of the First Schedule read with section 44 of the Income Tax Act, 1961, the assessee could claim that a sum of Rs. 21,26,932, representing the appreciation in value of some of its foreign assets consequent on the devaluation of the rupee was not assessable to Income Tax ?

(2) If the assessee could so claim, whether this amount of Rs. 21,26,932 was, on the facts and in the circumstances of the case, liable to tax as income under the Income Tax Act, 1961 ?"

2. The assessee-company, the Tribunal Oriental Fire and General Insurance Co. Ltd., Bombay, carried on the business of general insurance. The relevant assessment year is 1967-68, for which the previous year was the calendar year 1966. In the profit and loss account for 1966, an entry with regard to Rs. 21,26,932 was as follows :

"Profit on exchange (net) see note 3 - Rs. 21,26,932."

Note 3 referred to in the entry reads as follows :

"Incorporated in the accounts are the figures of the company''s foreign branches, agencies, treaties, etc., at the pre-devaluation rate in respect of transactions effected up to June 5, 1966. The assets and liabilities thereof (except estimated liability for outstanding claims) at the close of business on June 5, 1966, have been converted at the new rate of exchange. Estimated liability for outstanding claims of the foreign business as on June 5, 1966, was not ascertained. The amount of outstanding claims in respect of the foreign business as at December 31, 1965, was converted at the new rate of exchange."

3. While making a computation of the income for the assessment year in question, the assessee deducted the above mentioned sum of Rs. 21,26,932 on the ground that it did not represent income as there was no physical transfer o funds to him. The ITO held that the gain on devaluation of currency was profit which arose in the course of business carried on by the assessee and, therefore, such gain could not be excluded from the income.

4. In appeal before the AAC, details of the assets and liabilities were furnished to show that the appreciation in question was notional and unrealised and that the funds had never been transferred to India. It was also urged before the AAC that there were certain assets in Ceylon, Burma and Pakistan and there was no possibility of repatriation of those funds lying in those countries owing to the restriction on remittances. The case of the assessee also was that the assessee had stopped doing business in Burma and Ceylon in 1964 and in Pakistan in 1965 and the since the assets were immobilised in these countries, any appreciation in the value of such assets could not constitute the income of the assessee.

5. Relying on the decision of the Supreme Court in Commissioner of Income Tax, Mysore Vs. The Canara Bank Ltd., and the decision of the Bombay High Court in Commissioner of Income Tax, Bombay Vs. Mogul Line Ltd., Bombay, , the AAC held that the assessee was entitled to the relief claimed in respect of the assets in Burma, Ceylon and Pakistan and directed the ITO to exclude the amounts in question. The figures relating to Burma, Ceylon and Pakistan were as follows :

Country -	In the respective currencies	In Rupees

Burma	Kyarts	3,41,715.11	5,36,492.73
(Gain on exchange)			
Ceylon do.	C. Rs.	1,52,204.15	2,38,960.52
Pakistan	P. Rs.	8,894.70	13.964.68
(Loss on exchange)			

6. The operative order of the AAC directed that the total income of the assessee should be reduced by Rs. 23,73,819, which included the amount of Rs. 21,26,932 in question.

7. The Department filed an appeal against the order of the AAC and the contention raised was that the scheme of taxing the profits of insurance business is distinct and separate and that the ITO could not go beyond the limits of the rules prescribed in the First Schedule read with s. 44 of the I.T. Act, 1961. This contention was accepted by the Tribunal which held that the ITO could not travel beyond the annual accounts and treat some amount as balance of profits other than the balance of profits disclosed by the annual accounts furnished by the assessee under the Insurance Act. The order of the AAC was thus set aside and the order of the ITO was restored. The correctness of this order of the Tribunal is put in issue by the questions raised at the instance of the assessee in this reference.

8. Mr. Munim, appearing on behalf of the assessee, has contended that the surplus arising as a result of conversion of foreign currency into Indian currency is an accretion to fixed capital and not liable to tax and further that an entry in the balance-sheet of the assessee was not conclusive. According to the learned counsel, taxability could not be decided solely on the basis of the entry made by that assessee. His further contention was that the assessee-company did not carry on any business in Burma, Ceylon and Pakistan in the relevant assessment year and if there was any appreciation in the value of the assets of the company in those countries, the appreciation could not be treated as profits because it did not arise in the course of any trading operation. The learned counsel for the assessee has contended that neither the provisions of s. 44 of the I.T. Act, 1961, nor the provisions of r. 5 in the Schedule prevented the ITO from truly ascertaining the profits of the insurance business of the assessee. In other words, the contention was that the amount in question should not have been treated by the ITO as profits, even though that amount was expressly shown as profits in the accounts submitted to the Controller of Insurance, under the I.T. Act.

9. The question which has to be decided in this case is whether it is open to the ITO to go behind the accounts submitted by the insurance company (assessee) in which the accounts Rs. 21,26,932 is expressly shown in the profit and loss account as "profit on exchange". In that on context, the learned counsel for the assessee has placed reliance on the decision of this court in Commissioner of Income Tax, Bombay City II, Bombay Vs. New India Assurance Co. Ltd., . In that decision, which arose under the provisions of the Indian I.T. Act, 1922, in which s. 10(7) was the provision corresponding to s. 44 of the I.T.

Act, 1961, was construed and it was held that when r. 6 of the Schedule to the 1922 Act provided that "Profits and gains of any business of insurance (other than life insurance) shall be taken to be the balance of the profits disclosed.... ", the words "taken to be" would suggest that the tax officer is bound to accept the balance of the profits disclosed by the annual account, but it is not the same thing as saying that it shall be deemed to be profits and gains of any business of insurance. The Division Bench held that the provisions of s. 10(7) of the 1922 Act and r. 6 in the Schedule do not prevent the ITO from granting exemptions to which the assessee would be entitled and that "there is nothing to indicate in sub-section (7) of section 10 that the exemption u/s 15B and 15C and the exemption under Notification No. 39 issued u/s 16 or the deduction u/s 4(1) cannot be allowed.... " It was pointed out by the learned counsel for the assessee that this decision was followed by another Division Bench of this court, to which one of us was a party, in Life Insurance Corporation of India, Bombay Vs. Commissioner of Income Tax, Bombay City-III, , in which it was held that the deductions which were claimed by the assessee whose assessment is governed by s. 44 read with r. 2 of the First Schedule to the I.T. Act, 1961, were allowable.

10. Now, at the outset, we must refer to the provisions of s. 44 of the I.T. Act, 1961, which reads as follows :

"Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "Interest on securities", Income from house property, "Capital gains" or "Income from other sources" or in section 199 or in section 28 to 43A, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

11. If we go to the First Schedule, it deals with two categories of insurance business - life insurance business and other insurance business. The mode of computation of profits or gains of life insurance business is deal with by rr. 1 to 4. We are concerned with r. 5 which deals with computation of profits and gains of other insurance business. This rule reads as follows :

"The profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act. 1938 (4 of 1938), to be furnished to the Controller of Insurance, subject to the following adjustments :

(a) subject to the order provisions of this rule, any expenditure or allowance which is not admissible under the provisions of sections 30 to 43A in computing the profits and gains of a business shall be added back;

(b) any amount either written off or reserved in the accounts to meet depreciation of or loss on the realisation of investments shall be allowed as a deduction, and any sums

taken credit for in the accounts on account of appreciation of or gains on the realisation of investments shall be treated as part of the profits and gains :

Provided that the Income Tax Officer is satisfied about the reasonableness of the amount written off or reserved in the accounts, as the cased may be, to meet depreciation of or loss on the realisation of investments;

(c) such amount carried over to a reserve for unexpired risks as may be prescribed in this behalf shall be allowed as a deduction."

12. On its plain terms, s. 44 mandatorily requires that the profits and gains of any business of insurance shall be computed in accordance with the Rules contained in the First Schedule. In its earlier part, s. 44 has a non obstante clause and the effect of the non obstante clause is that in the case of a business of insurance, provisions relating to computation of income which is chargeable under the head "interest on securities", "income from house property", "capital gains" and "Income from other sources" will not apply but the profits and gains of business of insurance will have to be computed only in accordance with the rules contained in the First Schedule. Similarly, the provisions of s. 199 and ss. 28 to 43A also cannot be looked into for the purposes of computation of the profits and gains of the business of insurance. The bare reading of r. 5 will show that it mandatorily requires that the balance of profits disclosed by the annual account, copies of which are required under the Insurance Act, 1938, to be furnished to the Controller of Insurance, shall be taken to be the profits and gains of the business of insurance other than life insurance. A limited scope for adjustment of the balance of profits as disclosed in the annual accounts is permissible and could be made by the ITO as indicated in cls. (a), (b) and (c) of r. 5. None of these clauses are relevant for the purposes of the present case. Now it is difficult to accept the arguments of the learned counsel for the assessee that though the amount of Rs. 21,26,932 is shown as a part of the profits of the assessee in the annual accounts which are submitted to the Controller of Insurance as required by s. 15 of the Insurance Act, that amount should not really be treated as part of the profits. Such an argument would run counter to the provisions of r. 5.

13. The provisions of the First Schedule and r. 5 in the instant case being the only mode prescribed by the Legislature for determining the profits and gains of business of insurance other than life insurance and the mode being to look at the balance of profits disclosed by the annual accounts copies of which are required under the Insurance Act, 1938, to be furnished to the Controller of Insurance, and the permissible adjustments not being relevant in the instant case, no power can be found in the I.T. Act under the provisions of the Act to meddle with the balance of profits disclosed by the annual accounts. The question as to whether any particular amount is really profit or not is wholly irrelevant in a case to which r. 5 applies because the criterion for determining the profits and gains of the business of insurance other than life insurance is exclusively laid down in r. 5. This has nothing to do with the nature of the exemptions which were the subject-matter of the decision in Commissioner of Income Tax, Bombay City II, Bombay

Vs. New India Assurance Co. Ltd., or the Life Insurance Corporation of India, Bombay Vs. Commissioner of Income Tax, Bombay City-III, , cited supra. In these cases exemptions were claimed under certain provisions of the I.T. Act. It is not the case of the assessee that though the amount of Rs. 21 lakhs odd is in fact a part of the profits of the assessee-company, that amount is liable to be excluded for the purpose of taxability as being exempt under any specific provisions of the I.T. Act.

14. It may be pointed out that in Life Insurance Corporation Ltd. Vs. Commissioner of Income Tax, Delhi and Rajasthan, , the Supreme Court has laid down that the assessment of profits of an insurance business is completely, governed by the rules in the Schedule in the Indian I.T. Act, 1922, and that the ITO has no power to do anything not contained in it and there is no general right to correct any error in the case of insurance business. This view was reiterated in Pandhyan Insurance Co. Ltd. Vs. Commissioner of Income Tax, Madras, . In New Asiatic Insurance Co. Ltd. Vs. Commissioner of Income Tax, , a Division Bench of the Delhi High Court took the view that the character of the entries in the annual accounts furnished by an assessee-insurer to the Controller of Insurance cannot be gone into and the accounts as accepted by the Controller must form the basis of assessment in the case of insurers who fall within the ambit of the rules of the Schedule to the Indian I.T. Act, 1922. The question in that case was whether the amounts credited by the assessee, insurance company, to its profit and loss account for the relevant year, by transfers from the dividend equalisation fund and the general reserve account could be taken into consideration in computing its profits and the Division Bench held that the question must be answered in the affirmative. After referring to the provisions of s. 10(7) of the Indian I.T. Act, 1922, which corresponded to s. 44 of the I.T. act, the Division Bench observed as follows (p. 246) :

"It is on account of the wide powers conferred on the Controller of Insurance and the sanctity that is attached to the returns accepted by him that provision has been made in the Income Tax Act precluding any further investigation and the Income Tax Officer is required to accept, subject to any adjustment he may make so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of the Income Tax Act be allowed in computing the profits and gains of business, the accounts that have been submitted to the Controller of Insurance. Since that statute so provides, once the annual statements of accounts have been submitted by the assessee-insurance company, and the same have been accepted by the Controller of Insurance, the assessee cannot be heard to argue that the revenue receipts as shown in the statement of accounts were really not revenue receipts but had some other character."

15. This court has also taken the same view in South India Insurance Company Ltd. Vs. Commissioner of Income Tax, Bombay City-I, , in which dealing with s. 10(7) and rr. 3 and 6 in the Schedule to the 1922 Act, the Division Bench held that the intention of rr. 3 and 6 of the Schedule to the Indian I.T. Act, 1922, was that the balance of profits as disclosed by the accounts submitted to the Controller of Insurance shall be accepted by and binding on the ITO and it would not be open to the tax authorities to go behind the

balance of profits disclosed by the annual accounts as filed before the Controller of Insurance except to make any adjustment so as to exclude from it any expenditure other than expenditure which may under s. 10 be allowed in computing the profits and gains of a business.

16. It would, therefor, not be possible to accept the argument of the learned counsel for the assessee that the sum of Rs. 21,26,932 should not be treated as a part of the profits of the assessee.

17. It was then argued that at least the appreciation of the assets in Burma and Ceylon should be excluded from the computation of profits. This argument must be rejected on two grounds. Firstly, it was never argued before the Tribunal that in any case the appreciation in the value of the assets in Burma and Ceylon should be excluded from the profits shown in the annual accounts. It is no doubt true that in the statement of the case a reference to the figures of the appreciation of the assets in Burma and Ceylon has been made but the reference made is in the statement of the case in the course of recital of facts in the appeal before the AAC. The Tribunal was never called upon to deal with the question as to whether these amounts should be exclude upon to deal with the question as to whether these amounts should be excluded from the profits of the assessee-company. We do not know what view the Tribunal would have taken on the question and it was not permissible for the assessee now to agreeable the question that the assets were blocked or frozen in Burma and Ceylon and they had ceased to be stock-in-trade.

18. The second and more substantial ground on which this contention will have to be rejected is the view which we have taken earlier that once certain amounts have been shown as profits in the annual accounts it is not open to the ITO to go behind those figures. We are not, therefore, in a position to accept the alternative submission that at least the amount of appreciation of assets in Burma and Ceylon should be excluded from the profits of Rs. 21,26,932.

19. Consequently, in the view which we have taken, question No. 1 has to be answered in the negative and question No. 2 does not arise. The assessee to pay costs of the reference.