Supreme Court of India
B. R. Ltd vs V. P. Gupta, C.I.T., Bombay on 3 May, 1978
Equivalent citations: 1978 AIR 1320, 1978 SCR (3) 877
Author: Y Chandrachud
Bench: Chandrachud, Y.V. ((Cj)

PETITIONER:
B. R. LTD.

Vs.

RESPONDENT:
V. P. GUPTA, C.I.T., BOMBAY

DATE OF JUDGMENT03/05/1978

BENCH:
CHANDRACHUD, Y.V. ((CJ)
BENCH:
CHANDRACHUD, Y.V. ((CJ)
TULZAPURKAR, V.D.

CITATION:
1978 AIR 1320 1978 SCR (3) 877
1978 SCC (3) 70

ACT:
Income Tax Act, 1922, S. 24(2) as it stood prior to its amendment by the Finance Act, 1955-Interpretation of the expression "same business" occurring in S. 24(2)-Decisive tests to show the "same business" for the purpose of "set off" of loss in previous year.

HEADNOTE:
The appellant used to carry on business in (i) general insurance (ii) brokerage and commission and (iii) import and sale of woollen fabrics, leather beltings, hardware, toilet goods, chemicals and cotton fabrics etc. The business of import and sale was closed by the appellant towards the end of the calendar year 1952, corresponding to the assessment year 1953-54. In that year, the appellant suffered an accumulated business loss of Rs. 56,488/-. From the assessment year 1954-55 i.e. from the commencement of the calendar year 1953, the appellant started exporting textiles instead of importing woollen fabrics. "The appellant claimed that the loss of Rs. 56,488/- incurred by it on the import and sale of articles should be set off against the profits made by it during the assessment years 1954-55, 1955-56 and 1956-57. The Income Tax Officer and the Appellant Assistant Commissioner rejected the claim on the

ground that the business of importing and selling goods was distinct and separate from the business of exporting goods; that the import and export business did not constitute the "same business"; and that as the import business was discontinued and did not exist in the assessment years 1954-57 the unabsorbed loss could not be set off against the profits in the export business. The revision applications filed before the Commissioner were rejected.

Allowing the appeals by special leave the Court

HELD,: 1. Under Section 24(2) of the Income Tax Act, 1922, an unabsorbed loss could be carried forward to be set off against the profits of a subsequent year or years, only if such profits accrued to the assessee from the same business and not otherwise. In law, the two words "same' and "similar" connote different concepts and, therefore, the carrying on of a similar business will not meet the requirements of the section. The business has to be the same as before. But though this is so, it is not possible to evolve a satisfactory test of universal application for determining whether, the business which an assessee carries--on in a year in which he has made profits against which a carried forward loss could be set off is the same business which he was carrying on in the year in which he incurred the loss. The determination of the question whether an assessee is carrying on in two different accounting periods the same business depends essentially on the facts of each particular case, though the decision whether an assessee is carrying on the same business is a mixed question of law and fact.[881 H, 882 A-D]

Satabganj Sugar Mills Ltd. v. Commissioner of Income Tax, Central, Calcutta, 41 I.T.R. 272; followed.

2. The objective tests or the "fairly adequate tests" as laid down by the decisions of Courts, for determining whether the two businesses constituted the same business" within the meaning of S. 12B(1) of the Act, 1922 are

(i) Whether there is any inter-connection, any inter-lacing, inter-dependency, any unity at all embracing the two businesses of the assessee.

(ii) Whether there is in-existence a common management, common fund and a common place of business.

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(iii) Complete unity of control and not the nature of the two lines of business should be the deciding factor and;

(iv) Non existence of any element of diversity or distinction or separateness in regard to both the businesses. [882 G, 883 G-H, 884 F]

Scales v. George Thompson & Co. 13 Tax Cases 83; Commissioner of Income Tax, Madras V. Prithivi Ins. Co. Ltd., 63 I.T.R., 632; Hooghly Trust (P) Ltd. v. Commissioner

of Income Tax, West Bengal, 73 I.T.R. 685; Produce Exchange Corporation Ltd., v. Commissioner of Income Tax (Central) Calcutta 77 I.T.R. 73; Standard Refinery and Distillery Ltd. v. Commissioner of Income Tax (Central), Calcutta, 79 I.T.R. 589; followed.

3. In the instant case

(a) The Commissioner was wrong in taking the view that the business which the appellant was doing in the relevant assessment years was not the same business which it was doing when it incurred the unabsorbed loss. A common management, a common business organisation, a common administration, a common fund and a common place of business show in the instant case the inter-lacing and interdependence of the businesses carried on by the appellant. [884 F-G]

(b) The Commissioner relied on the circumstances that "there is a distinct and marked difference in the nature of goods dealt with" by the appellant and, "the procedure involved in the import of articles from foreign countries and the export of articles manufactured in India to different foreign countries is entirely different". These circumstances are not by themselves sufficient to establish that the business of import which the appellant was doing is not the same business as that of export. The decisive test, as held by this Court in Produce Exchange Corporation; is unity of control and not the nature of the two lines of business. [884 H, 885 A-B]

(c) The Commissioner also fell into the error of supposing that, apart from the fact that the two activities must form an integral part of the entire business, the "main consideration which has to prevail is whether, "notwithstanding the fact that the assessee may close one activity, it does not interfere in carrying on of the other activity". The fact that one business cannot conveniently be carried on after the closure of the other may furnish a strong indication that the two businesses constitute the same business. But the decision of this Court in Prithvi Insurance Co. shows that no decisive inference can be drawn from the fact that after the closure of one business, another may or may not conveniently be carried on.[885 B-C]

(d) The Commissioner also overlooked that in the report dated June 6, 1962, which the Income-Tax Officer made in the revision

application filed by the appellant, it was expressly stated that it was true that "there was a common control and common management of the same Board of Directors" of the business of import and export. Thus the unity of control and the other circumstances adverted to above show that there was dovetailing or inter-lacing between the business of import and the business of export carried on by the assesses and that they constitute the same business. [885 C-D]
and (e) The appellant is entitled to set off the unabsorbed loss of the assessment year 1953-54 against the profits of the assessment years 195455, 1955-56 and 1956-57. [885 E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1594-1596 of 1972.

From the Judgment and Order dated 18-1-1972 of the Commis- sioner of Income Tax at Bombay in Revision Petition B.C. No. RP/ V/Nos. 374-376 of 1960.

Ravinder Narain, K. J. John and Talat Ansari for the Appellant.

R. M. Dhebar, K. C. Dua and A. Subhasini for the Respondent. The Judgment of the Court was delivered by CHANDRACHUD, C.J.-The appellant which is a public limited company incorporated under the Indian Companies Act is authorised by its memorandum and articles of association to carry on business, inter alia, as importers, exporters and insurance agents.

We are concerned. in these appeals with the assessment years 1954-55, 1955-56 and 1956-57 corresponding to the accounting years 1953, 1954 and 1955. The appellant used to carry on business in (i) general insurance, (ii) brokerage and commission, and (iii) import and sale of woollen fabrics, leather beltings, hardware, toilet goods, chemicals, cotton fabrics, etc. The business of import and sale was closed by the appellant towards the end of the calendar year 1952 corresponding to the assessment year 1953-1954. In that year the appellant suffered an accumulated business loss of Rs. 56,488/-.

From the assessment year 1954-55, that is to say, from the commencement of the calendar year 1953, the appellant started exporting cotton textiles instead of importing woollen fabrics which, as stated earlier, it had ceased to do towards the end of the calendar year 1952. The appellant claimed that the loss of Rs. 56,488/- incurred by it on the import and sale of articles mentioned above should be set off against the profits made by it during the assessment years 1954-55, 1955-56 and 1956-57.

The Income-tax Officer and the Appellate Assistant Commissioner rejected and appellant's claim on the ground that the business of importing and selling goods was distinct and separate from the business of exporting goods; and since the import business which the appellant was doing till the commencement of the assessment year 1953-54 and the export business which it commenced in the assessment year 1954-55 did not constitute the same business and as the business of import in which the loss was suffered was discontinued or did not exist in the assessment years 1954- 55 to 1956-57, the unabsorbed loss of the assessment year 1953-54 could not be set off against the profits realised from the other business in subsequent years. Instead of filing an appeal to the Income-tax Appellate Tribunal, the appellant filed revision applications to the Commissioner of Income-tax against the orders of the Appellate Assistant Commissioner, under section 33A of the Income-tax Act, 1922. The revision applications were filed on June 15, 1960 but it was on January 18, 1972 that they were disposed of by the Commissioner, Bombay City-V, Bombay. The reason for the delay seems to be that the Commissioner was awaiting the decision of a case which, it seems, was ultimately withdrawn.

It was urged on behalf of the appellant before the Commissioner that the business of import and export was one and the same business as both activities involved purchase and sale of goods and that the place where the goods were purchased or sold would not make any material difference as far as the nature of business was concerned. In his order dated January 18, 1972 the Commissioner observed that apparently this argument was well-founded but a detailed scrutiny of the nature of the two businesses would show that the nature of the articles imported was entirely different from the nature of the articles exported and the procedure involved in the import and export of articles was also entirely different. The Commissioner found that whereas until the commencement of the assessment year 1954-55 the appellant was dealing in woollen fabrics and other articles, it started dealing in cotton textiles only with effect from the assessment year 1954-55. Relying upon a judgment of the Calcutta High Court in Shree Ramesh Cotton Mills Ltd. v. C.I.T. Calcutta(1) the Commissioner held that the business of import of certain articles in one year and the export of other articles in other years were not dovetailed into one another and there was no inseparable link between the two activities. The fact that the same capital and the same management looked after the businesses in the different ventures would not, according to the Commissioner, make the import and export businesses carried on in different years the same business. The Commissioner's attention was drawn to a judgment of this Court in Produce Exchange Corporation Ltd. v. C.I.T. (Central) Calcutta(2) but he felt that the decision was distinguishable since the appellant therein was carrying on business in diverse commodities in the same year and the import business was stopped in subsequent years. Consequently, the Commissioner rejected the revision applications pertaining to the three assessment years. These appeals by special leave are directed against the orders passed by the Commissioner.

Section 6 of the Indian Income-tax Act, 1922, which corres- ponds to section 14 of the Act of 1961, classified all income for the purposes of charge of income-tax and computation of total income under six heads, the fourth being "profits and gains of business, profession or vocation". Section 10(1) of the Act of 1922 taxed the profits of business, profession or vocation carried on by the assessee. By section 24(1) of that Act any assessee who sustained a loss of profits or gains for any year under any of the heads mentioned in section 6 was entitled to have the amount of the loss set

off against his income, profits or gains under any other head in that year. Section 24(2), prior to its amendment by the Finance Act, 1955, read thus "Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 3 1 st day of March, 1940, in any business, profession or voca-

(1) 64 ITR 317.

(2) 77 ITR 739.

tion, and the loss cannot be 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 other head of income shall be carried forward 'to the following year and set off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year;

Section 16 of the Finance Act, 1955, in so far as relevant, substituted the following sub- section for the original sub-section (2) with effect from April 1, 1955 :

"Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, in any business, profession or vocation, and the loss cannot be wholly set off under subsection (1), so much of the loss as is not so set off or the whole loss where the assessee had no other head of income shall be carried forward to the following year, and

(ii) where the loss was sustained by him in any other business, profession or vocation, it shall be set off against the profits and gains if any, of any business, profession or vocation carried on by him in that year, provided that the business, profession or vocation in which the loss was originally sustained continued to be carried on by him in that year; and The Commissioner's orders which are impugned in these Appeals show that the revision applications were argued before him on the footing that sub-section (2) of section 24 as it stood before its amendment in 1955 governs the matter. The appeals before us were argued on the same basis and, therefore, our decision must turn on the interpretation of the expression "same business" which occurs in section 24(2) as it stood then. We may, however, add that even under the amended provision, the consideration whether in the year of profit the assessee was carrying on the same business which he was carrying on in the year in which the unabsorbed loss, occurred is not irrelevant. Indeed, it is not even irrelevant for the purposes of section 72 of the Income-tax Act, 1961, which corresponds to section 23(2) of the 1922 Act. After the amendment of section 24(2) in 1955 and under section 72 of the Act of 1961, the right to carry forward an unabsorbed loss depends upon whether the assessee still carries on the business in which the loss was incurred. That involves consideration of the question whether the business carried on by the assessee is the same which he was carrying on when he suffered a loss.

Under section 24(2) of the Act of 1922, an unabsorbed loss could be carried forward to be set off against the profits of a subsequent year or years, only if such profits accrued to the assessee from the same business and not otherwise. It is elementary that in law, the two words 'same' and 'similar' connote different concepts and therefore the carrying on of a similar business will not meet the

requirements of the section. The business has to be the same as before. But though this is so, it is not possible to evolve a satisfactory test of universal application for determining whether, the business which an assessee carries on in a year in which he has made profits against Which a carried forward loss could be set off, is the same business Which he was carrying on in the year in which he incurred the loss. Decided cases to which we will presently refer show that the determination of the question whether an assessee is carrying on in two, different accounting periods the same business depends essentially on the facts of each particular case though, the decision whether an assessee is carrying on the same business is, as held by this Court in Setabganj Sugar Mills Ltd. v. Commis- sioner of Income-tax, Central, Calcutta(1), a mixed question of law and fact as the question has to be decided on the application of various tests in so far as they may be applicable. Since legal principles are required to be applied to the facts found and legal inferences are required to be drawn from those facts, the question assumes the form of a mixed question of law and fact and ceases to be a mere question of fact.

In Scales v. George Thomson & Co.,(2) the respondent company was incorporated in 1905 to take over as a going concern the business of George Thompson & Co., shipowners, ship and insurance brokers, underwriters and merchants. The question regarding the computation of income-tax liability of the company concerned the underwriting activities carried on by the company. The Revenue contended that the whole of the operations of the company constituted one trade, profession or vocation only while the company contended that the underwriting was a separate trade, profession or vocation, from that of shipowning and that on the cessation of the underwriting activities in 1920 the results of these activities in the years 1918, 1919' and 1920 should not be included in computing the income-tax liability of the company for the year ending April 1922. For answering the question whether the operations of the company constituted one trade, profession or vocation, Rowlatt, J. formulated the following test "I think the real question is, was there any inter-connection, any interlacing, any inter- dependence, any unity at all embracing those two businesses".

Applying this test the learned Judge held that the business, of the company as shipowners was different from its business as underwriters because the two businesses were not interlaced or dovetailed into each, other. (1) 41 ITR 272.

(2) 13 Tax Cases 83.

In Commissioner of Income-tax, Madras v. Prithvi Insurance Co. Ltd.,(1) the respondent company carried on the business of life insurance as well as general insurance. Both life insurance and general insurance businesses were attended to by its branch managers and agents without any distinction. There was one common administrative Organisation and the expenses incurred both for administration and for heads of expenditure such as salary of the staff, postage, staff welfare fund and general charges, were common. The question was whether the unabsorbed losses of the respondent company for the assessment year 1950-51 and earlier years in respect of life insurance business could be set off against its profits of the general insurance business for the assessment years 1951-52 to 1954-55 under section 24(2) of the Indian Income-tax Act, 1922. Speaking for the Court, Shah, J. adopted the test evolved by Rowlatt, J. as a "fairly adequate test" for determining

whether the two businesses constituted the same business and held : "That inter- connection, interlacing, inter-dependence and unity are furnished in this case by the existence of common management, common business Organisation, common administration, common fund and a common place of business". The Court rejected the Commissioner's argument that whether one of the businesses can be closed without affecting the conduct of the other business was a decisive test in determining whether the two constituted the same business within the meaning of section 24(2). If one business cannot be conveniently carried on after the closure of the other, said the Court, there would be a strong indication that the two businesses constituted the "same business" but, no decisive inference could be drawn from the fact that after the closure of one business another may conveniently be carried on.

In Hooghly Trust (Private) Ltd. v. Commissioner of Income- tax, West Bengal,(2) the question was whether the cloth business and the business in the general section carried on by the assessee constituted the same business within the meaning of section 24(2). Adopting the test formulated by Rowlatt, J., this Court set aside the judgment of the High Court and upheld the one of the Tribunal that the cloth business never assumed the proportion or stature of a distinct and separate business and that there was sufficient evidence to show dovetailing of the two business. In Produce Exchange Corporation Ltd., v. Commissioner of In- come-tax (Central), Calcutta, (supra) the appellant carried on business as a dealer in diverse commodities and also in stocks and shares. In the accounting year 1949, it suffered a loss in the sale of shares which it claimed to carry forward and set off against the profits of the subsequent years from transactions in other commodities. The Tribunal found that there was complete unity of control and shares were one of a number of commodities in which the company dealt with in the ordinary course of business and that there was no element of diversity or distinction of separateness about the transaction in shares. Differing from the Tribunal the High Court held that the (1) 63 ITR 632.

(2) 73 ITR 685.

essential matter to be considered was the nature of the two lines of business and not merely their unity of control and therefore the entire trading activity of the company did not constitute one business. Reversing the decision of the High Court it was held by this Court that the decisive test was unity of control and not the nature of the two lines of business and therefore the Tribunal was right in its decision that the share business and other businesses carried on by the company constituted the same business within the meaning of section 24(2) as it stood before its amendment in 1955. This conclusion was reached by the Court by applying the test in Scales, (Supra).

There is only one other judgment to which we would like to refer and that is reported in Standard Refinery and Distillery Ltd. v. Commissioner of Income-tax (Central), Calcutta.(1) The appellant which owned a distillery and had acquired a sugar refinery, obtained on lease a sugar and gur refining company with effect from June- 1, 1945. The appellant purchased a certain number of shares of that company in 1 946 and sold them in 1947 at a loss. A part of this loss was unabsorbed and the question which arose for consideration was whether the appellant could carry forward that loss and set it off against the income from sugar manufacturing and distillery for the subsequent year. Hegde, J. speaking for the.Court observed that the concepts of inter-connection and

inter-lacing, inter-dependence and unity were not free from ambiguity but that this Court had laid down in Prithvi Insurance Co. (Supra) and Produce Exchange Corporation (Supra) certain objective tests for finding out the existence of inter-connection, inter-lacing, interdependence and unity between two or more business. On an application of those objective tests, to which we have already referred, the Court set aside the judgment of the High Court and upheld the view of the Tribunal that the activities of the company constituted the same business since there was complete unity of control, shares were one of a number of commodities in which the company dealt in the ordinary course of business and since there was no element of diversity or distinction or separateness in regard to the transaction in shares qua the other trading activities of the company-

In the light of the objective tests evolved in these decisions, not forgetting of course the basic formulation of Rowlatt, J. in Scales, we are of the opinion that the Commissioner was wrong in taking the view that the business which the appellant was doing in the relevant assessment years was not the same business which it was doing when it incurred the unabsorbed loss. A common management, a common business Organisation, a common administration, a common fund and a common place of business show in the instant case the interlacing and inter-dependence of the businesses carried on by the appellant.

In support of his conclusion that the two businesses are different, the Commissioner relies on the circumstances that "there is a distinct and marked difference in the nature of goods dealt with" by the appel-

(1) 79 ITR 589.

lant and, "the procedure involved in the import of articles from foreign countries and the export of articles manufactured in India to different foreign countries is entirely different". These circumstances are not by themselves sufficient to establish that the business of import which the appellant was doing is not the same business as that of export. The decisive test, as held by this Court in Produce Exchange Corporation, (Supra) is unity of control and not the nature of the two lines of business. The Commissioner also fell into the error of supposing that, apart from the fact that the two activities must form an integral part of the entire business, the "main consideration which has to prevail is" whether, "notwithstanding the fact that the assessee may close one activity, it does not interfere in carrying on of the other activity". The fact that one business cannot conveniently be carried on after the closure of the other may furnish a strong indication that the two businesses constitute the same business. But the decision of this Court in Prithvi Insurance Co., (Supra) shows that no decisive inference can be drawn from the fact that after the closure of one business, another may or may not conveniently be carried on, The Commissioner also overlooked that in the report dated June 6, 1962, which the Income-tax Officer made in the revision applications filed by the appellant, it was expressly stated that it was true that "there was a common control and common management of the same Board of Directors" of the business of import and export. Thus the unity of control and the other circumstances adverted to above show that there was dovetailing or interlacing between the business of import and the business of export carried on by the assessee and that they constitute the same business. For these reasons, we set aside the orders passed by the Commissioner and hold that the appellant is entitled to set off the, unabsorbed loss of

the assessment year 1953-54 against the profits of the assessment years 1954-5S, 1955-56 and 1956-57. The appellant will get its costs of the appeals in one set from the respondent.

S.R. Appeals allowed.