Supreme Court of India
M/S. Maddi Venkataraman & Co. (P) ... vs The Commissioner Of Income Tax on 2 December, 1997
Author: Sen
Bench: Suhas C. Sen, S. Saghir Ahmad

PETITIONER:
M/S. MADDI VENKATARAMAN & CO. (P) LTD.

Vs.

RESPONDENT:
THE COMMISSIONER OF INCOME TAX

DATE OF JUDGMENT: 02/12/1997

BENCH:
SUHAS C. SEN, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

THE 2ND DAY OF DECEMBER, 1997 Present:

Hon'ble Mr.Justice Suhas C.Sen Hon'ble Mr.Justice S.Saghir Ahmad Ramesh P.Bhatt, Sr.Adv. M.N.Shroff, Ms. Ragini Singh, Advs. with him for the appellant Ranvir Chandra, C.V.Rao, S.R.Tardol, Nagpal, and B.K.Prasad, Advs. for the Respondent J U D G M E N T The following Judgment of the Court was delivered: SEN, J.

The Tribunal referred the following question of law to the Andhra Pradesh High Court under Section 256 (1) of the Income Tax Act, 1961.

> "1. Whether on the facts and in the circumstances of the case, a sum of Rs 2.95,000/- has to be taken into account in computing the income of the assessee from business under the provisions of Section 28 of the Income Tax Act, 1961?
>
> If the answer to the above question is in the negative-
>
> Whether on the facts and in the circumstances of the case, the claim of Rs 2,95,000/- is covered by sub-rule (J) of Rule 6-DD, framed under Section 40-A(3) of the Income

Tax Act, 1961?"

2. "Whether on the facts and in the circumstances of the case, the sum of the Rs. 19.695/- incurred as quest-expenses is allowable as deduction?"

The assessee, to start with, was a partnership consisting mostly of family members, in 1965, it was converted into a public company to carry on the business of export of tobacco. The first directors appointed at the time of incorporation were to hold office during their lifetime or until they resigned voluntarily.

On the basis of the information received, a search was conducted by the Enforcement Directorate in the assessee's business premises. A number of latters and other documents were seized which disclosed that the assessee had indulged in transactions in violation of the provisions of Foreign Exchange (Regulation) Act (for short `FERA'). It was found that the assesee had remitted to a private party in Singapore in violation of law. Proceedings were taken against the assessee for infringement of Sections 4(2) and 5(1)(e) of FERA and ultimately a penalty of Rs. 35,000/- was imposed under Section 23 (1)(a) read with Section 23-c of the Act. The assessee in its income tax return for the assessment year 1970-71 claimed deduction of Rs. 2.95,000/- as business expenditure/loss. According to the assessee in course of carrying on of its business by the year 1966. It had accumulated 329.2 tonnes of sub-standard quality, tobacco which it could not export over the last three years. Since the accumulated stock of tobacco was of sub-standard quality, it could not be sold at the floor price fixed by the Government of India for such tobacco. According to the assessee, it had no alternative but to sell the tobacco at a discount of 20% to a Singapore party. On paper, the full sale price was paid by the Singapore party but in reality 20% of the price paid by the party was remitted back to him through one Shamsuddin. In pursuance of this agreement tobacco was sold and the full floor price was received by the assessee from the Singapore party. The assessee paid a sum of Rs. 2.88,000/- to Shamsuddin who remitted the equivalent amount in Singapore currency to the Singapore party. Thus, according to the assessee, it had no alternative but to enter into such a ******** with a view to dispose of the sold unsold stock of inferior quality of tobacco. In these facts of the case. It was claimed by the assessee that the amount of Rs. 2,88,000/- paid to Shamsuddin ought to be deducted as business expenditure or treated as business loss.

The Income Tax Officer however, disallowed the claim. According to him. Payment was not genuine and it contravened the provisions of Section 40-A(3) of FERA. It was further held that the payment did not fall within any of the exceptions to Rule 6-DD. The appellant Assistant Commissioner affirmed the order of the Income Tax Officer. On further appeal, the Tribunal made the following findings.

(a) A sum of Rs. 2,95.000 was paid by this assessee company to Shamsuddin which consisted of an amount payable to him for his services and also a sum of Rs. 2,88,000/- to be remitted to the Singapore party. The amount paid to Singapore party was difference of 20% of the floor price of tobacco fixed by the Government.

(b) The assessee was knowingly a party to the above transaction and it violated the provisions of FERA. The Tribunal also took the view that the assessee's income from export to the Singapore party in reality was not the full price shown to have been received from the Singapore party i.e., 8.86,702.89. The figure had to be reduced by a sum of Rs. 2,95.000/- because this was the sum which was really received by the assessee. It was of the view that it was unnecessary to go into the question whether the sum of Rs. 2,95,000/- was to be created as a deduction and if so under which Section and further whether it attracted Section 40- A(3) of the Act.

(c) The Tribunal held that even otherwise, the said payment did not attract Section 40-A(3) since it was covered by sub- rule (j) Rule 6-DD inasmuch as the said payment to Shamsuddin was made in cash due to exceptional and unavoidable circumstances.

In the Department's contentions that the payment made to Shamsuddin was illegal and could not be taken into account for any purpose were unsustainable in law. The income tax law did not distinguish between legal and illegal income or between legal and illegal expenditure.

The High Court was of the view that the Tribunal was in error in coming to the conclusions that it had reached. The High Court pointed out that expenses tainted with illegality could not be allowed as business expenditure under Section 37 or as business loss or on any other basis. The High court was of the further view that the assessee could not be allowed to achieve the same result by invoking Section 28. The High Court also expressed the view that the assessee's contentions that its real income from export of tobacco was not Rs. 6.86,702.89 paise which was paid to it but its real income was that amount minus Rs. 2,95.000/- which he had subsequently repatriated in Singapore dollars. It was only a facade to realise the true price of the transaction which was 80% of the floor price. Therefore, the invoice which showed the floor price was not the true reflection of the real transaction between the two parties. The High Court rejected this contention by holding that the very agreement to receive 80% of the floor price which was the invoice value of the tobacco was illegal. The High Court pointed out that in law, there could not have an agreement to agree to take anything less than the invoice price. The agreement that tobacco was of the sub-standard quality was no answer. An exporter was not supposed to export sub-standard tobacco.

The High Court was of the view that the sum of Rs. 2,88,000/- had not been repatriated in a straight forward manner but has been sent to Singapore through an illegal channel. It is not a case of money being diverted under an overriding legal obligation. The High Court ultimately concluded that the agreement being illegal and contrary to law, cannot be recognised by a court of law nor can entering into such transaction be a normal incidence of carrying on business. The High court further held that argument based on real price was of no substance. If a contractor received an amount of Rs. lakhs under a contract entered into with the Government he cannot claim that in reality, the amount was Rs. 9 lakhs because at the time to awarding the contract he had an understanding with the authority to pay a sum of Rs. one lakh by way of bribe.

The High Court referred to a large number of decisions where it has been held that payments tainted with illegality cannot be claimed as deduction under the income Tax Act. However, if an assessee is penalised under one Act, he cannot claim that amount to be set off against his income under another

Act because that will be frustrating the entire object of imposition of penalty.

One exception to this rule which has been recognised by the Courts is where the entire business of the assessee is illegal and that income is sought to e taxed by the Income Tax Officer then the expenditure incurred in the illegal activities will also have to be allowed as deduction. But if the business is otherwise lawful and the assessee resorts to unlawful means to augment his profits or reduce his loss, then the expenditure incurred for these unlawful activities cannot be allowed to be deducted. Even if the assessee had to pay fine or penalty because of an inadvertent infraction of law which did not involve any moral obliquity, the result will be the same. Even in such cases, deduction will not be permitted of the amounts paid as penalty of fine or of the value of the goods confiscated by the statutory authority as expenditure wholly and exclusively incurred for the purposes of carrying on the trade. It has been consistently held by the English Courts that fines or penalties payable for violation of law cannot be permitted as deduction under the Income Tax Act. That will be against public policy. Even though the need for making such payments arose out of trading operation the payment were not wholly and exclusively for the purpose of the trade. One can carry on his trade without violating the law. In fact, Section 37 presumes that the trade will be carried on lawfully.

The English Courts have consistently held that penalty or fine or money paid to compound and offence under another statute cannot be allowed as a deduction under the Income Tax Act. For the application of these principles, consideration of moral obliquity was quite immaterial.

In the case of the Commissioners of Inland Revenue vs. E.C.Warnes 12 Tax Cases 227, the Company had to pay a penalty under the provisions of the Customs (Consolidation) Act, 1876 in respect of a consignment of oil shipped by it to Norway. The action was settled by consent on the agreement of the company to pay a mitigated penalty of Rs. 2,000 and on all imputations as to the Company's morel culpability being withdrawn. It was declared that there was no intention from the beginning to the end of the transaction that the Company had by connivance or consent been taking part in trading with the enemy but had only been culpable of carelessness. In defending the penalty proceedings, the Company had incurred legal costs amounting to 560 18s 10d. These two amounts incurred on payment of the penalty and also legal cost have been taken for the computation of Excess Profits Duty purposes, On behalf of the company. if was contended that both the penalty and costs should be allowed as losses arising out of and incidental to trade. It was pointed out that the penalty and the costs were solely connected with and arose out of the trace carried on by them and as such were detectable in the same manner that bad debts are deductible in computation of profits. Lastly, it was argued that profits must be taken in their commercial sense. In that sense this was loss which an ordinary prudent commercial man would and could only write off against the profits of the business. The Commissioners who heard the appeal held in favour of the company. When the matter came before the High Court Rowlatt, J. recognised that the provision of law under which the penalty was imposed is "one of very great and startling stringency; but of course the liability it creates can only be regarded as a liability of penal character" and held.

> "It seems to me that a penal liability of this kind cannot be regarded as a loss connected with arising out of a trace. I think that a loss connected with or arising out

> of trade must, at any race, amount to something in the nature of a loss which is contemplable and in the nature of a commercial loss.....but I do not think it is possible to say that when a fine, which is what it comes to has been inflicted upon a trading body. It can be said that is "a loss connected with or arising out of" the trade within the meaning of this Rule."

This decision of Rowlatt, J. was cited with approval by the court of Appeal in the case of The Commissioners of Inland Revenue vs. Alexander Von Glehn & Co., Ltd, 12 Tax Cases 232. In that case Lord Sterndale noted that the assessee was a firm of high standing. A great part of its trade consisted in the exporting of goods to Russia and Scandinavia Some goods were exported to Russia at a time when the Customs (War Powers) Act, 1915 was in force and the goods of the assessee had ultimately gone to the enemy territory Proceedings were taken for infraction of law because the assessee was not able to prove that he had taken all reasonable steps to secure that the ultimate destination of the goods was the destination mentioned in the declaration. The assessee agreed to pay a fine of 3000 and now the question was whether this amount padi as penalty was admissible as deduction from the income of the assessee's Company.

Lord Sterndale held that the customs proceedings were not technically criminal proceedings; but he stated.

> "I do not think that matters. They certainly are proceedings in which a penalty is being sued for by the Attorney-General as representing the Crown, for an infraction of the law, whether technically criminal for the purpose of appeal seems to me to be immaterial. The money which is paid is money paid as a penalty, and it does not matter in the least that the Attorney-General has elected to take treble the value of the goods, nor does it matter that it may be called in the Information a forfeiture."

Lord Sterdale stated that it was a hard case and observed :

> "It may be so, and it may seem hard, because it was agreed that there was no moral obliquity to use the expression which is used in all these cases, to be attributed to the Appellants, But is seems to me that those are matters which we cannot into consideration, and injustice to both the learned Counsel who argued the case for the Appellants, they did not est their case upon any such basis as that, but they rested it upon the broad principle that it does not matter whether the expense is included it consequence of an infraction of the law or whather it is a penalty for doing an illegal act. So long as it is something which reduces the amount which comes into the trader's pockets as the result of his trading."

Lord Sterndale has, however, held that the payments for infraction of law could not called to be for the purpose of the trade. Relying upon the remarks of Lord Davey n the case of Strong vs. Woodifield 5 Tax Cases 215. It was held that the disbursements permitted as deductions must be for the purpose of the trade. It was not enough that the disbursement was made in the course of or arose out of or was connected with the trade or was made out of the profits of the trade.

Dealing with the question that the disbursements were connected with the trade. Lord Sterndale observed:

> "Of course, as Mr. Justice Rowlatt said, in a sense you may say that it has been connected with the trade. because if the trade has not been carried on the penalty would not have been incurred there would not have been an opportunity for the breach of the law which took place but in the sense in which the words are used in the Act. I do not think that this was connected with or arising out of such trade, manufacture, adventure or concern and still less do I think hat it was a disbursement under the First which applies to the first two cases, that is to say. "money and exclusively laid out or expanded for the purposes of such trade".....It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading for that reason I think that both the decision of Mr. Justice Rowlatt in this case and his former decision in Inland Revenue Commissioners v. Warnes 12 T.C. 227, which he followed were right, and I think this appeal should be dismissed with costs."

Warrington. L.D. who agreed with Lord Sterndale observed as under :

> "Now it cannot be said that the disbursement in the present case is made in any way for the purpose of the trade or for the purpose of earning the profits of the trade. The disbursement is made, as I have already said and the same remark applied to this Rule as to the Other because the individual who is conducting the trade has not from any moral obliquity but has unfortunately been guilty of an infraction of the law."

In the case of Cattermole (H.M. Inspector of Taxes) vs. Borax & Chemicals Ltd 31 Tax Cases 202, the question was whether fines imposed in the United States of America upon the company and upon its managing Directors for infringement of anti trust legislation of the United State of America should be allowed as deductions in computing the amount of Company's profits. The fine was imposed in very unusual circumstances. It was doubtful whether the Company and its Managing Director could have been proceeded against the American Law but they decided to submit voluntarily to the jurisdiction of the California Court. It was done out of the supposed business necessity because the English Company was subsidiary of An American Company. If the English Company and its Managing Director alongwith the American Company did not submit to the jurisdiction of the California Court the result would be that its supplies would have been stopped altogether and it would have been unable to carry on the business with the American Company. the Company was extremely anxious to settlement. It was argued that it was a matter of vital importance to the American Company that the English Company and Mr. Hatchley should appear in this suit. The matter was ultimately settled. One of the terms of the settlement was that the English Company would pay a fine of 10,000 U.S.Dollars and the Managing Director would pay a fine of 6.000 US dollars.

The Commissioners took the view that the amount was deductible as business expenditure because it was paid to ensure the supplies. Croom-Johnson, J. held that the amount was not paid wholly and exclusively for the purposes of carrying on the trade. It may have been one of the reasons but manifestly it was not the only reason. "One of the reasons was to get as cheaply as possible a settlement with the American authorities, paving something by way of compromise-agreeing with one's adversary while one is in a way with him. That is really what happened hence."

The Indian Courts have also consistently held that payments tainted with illegality cannot be treated as money spent wholly and exclusively for the purpose of business. A long line of decisions was noted in the judgment under appeal. It is not necessary to refer to all of them. We shall refer to three cases decided by this Court.

In the case of Hail Aziz and Abdul Shakoor Bros. v. Commissioner of Income Tax Bombay City II. 41 ITR 350 a bench of three Judges of this Court held that the expenses which were permitted as deduction were such as were made for the purpose of carrying on the business. It was enough that the disbursements are made in the course of or arose out of or were connected with the trade. No deduction can be allowed if the expenditure fell on the assessee in some character other than that of a trader. If a sum has to be paid by an asseessee because in conducting his business, he had acted in a manner which had rendered liable for penalty for infraction of law, it could not be claimed as a deduction because it could not be called in commercial sense as incurred in carrying on the business. It was emphasised in that judgment by Kapoor, J. that infraction of law is not a normal incidents of business.

The point that the expenditure incurred for the purpose of unlawful activity must be allowed to find out the commercial profits of the Company was specifically argued and raiected in the case of The Commissioners of Inland Revenue vs. F.C.Warnes (supra). If a penalty is imposed for contravention of any statutory provision it cannot be said that the commercial loss had fallen on the assessee as a trader. Illegal activity cannot be created as a tradition activity at all. As Lord Sterndale held that it was not enough that the disbursement was made in the course of or arose out of or was connected with the trade or was made out of the profits of the trade. Only if it could be shown that it was spent for the purpose of the trade that the deduction can be permitted unless the entire trade was unlawful.

The case of Haji Aziz Abdul Shakoor Bros. (supra) it important for another reason. It was categorically held in this case that no distinction can be made in this regard between a personal liability and a liability of any other kind. So long as the payment has to made for infraction of law, it cannot be said that it was made in course of carrying out of the trade.

In that case of Commissioner of Income Tax V. S.C. Kothari 82 ITR 794. It was held that the loss which had actually been incurred in carrying on a legal business must be deducted before the true figure relating to profits which had to be brought to tax could be computed or determined. If a business was illegal, neither the profits earned nor the loss incurred would be enforceable in law but that did not take the profits our of the taxing stature. Similarly the taint of illegality of the business could not detract from the loss baing taken into account for computing the amounts which had to be

subjected to tax. The Tax Collector cannot be heard to say that he will bring the gross receipts to tax he could tax the profits of a trade or business. That cannot be done without taking the loss and the legitimate expenses of the business.

In the case of Commissioner of Income tax, West Bengal v. H.Hirjee 23 ITR 427, a bench of four Judges of this Court dealt with a case of an assessee who was carrying on the business as selling agent of a Company, he was prosecuted under Section 13 of the Hoarding and Profiteering Ordinance, 1943 on a charge of selling the goods at prices higher than a reasonable price in contravention of the provision of the Section 6 of the Act. A part of the stock of goods was seized and taken away. The persecution however, ended in acquittal. The assessee claimed deduction of a sum of money spent in defending the case. The Income Tax Appellant Tribunal found that the expenditure was incurred solely for the purpose of maintaining the assessee's name as a good businessman and to save his stock from being undersold if the Court held that the prices charged by him were unreasonable. The High Court rejected the reference application on the ground that the decision of the Tribunal was based on finding of fact. On appeal this Court held that the findings of the Tribunal were vitiated by its failure to consider the possibility of criminal proceedings terminating in the conviction and imprisonment of the assessee. It was held that the deductibility such expenses must depend upon the purpose and nature of legal proceedings and could not be affected by the final outcome of the proceedings. It was also pointed out that the Income Tax assessment had to be made for every years and could Tax assessment had to be made for year and could not be held up until the final result of the legal proceedings which pass through several Courts was announced.

In the instant case, the asseesee had indulged in transactions in violation of the provision of Foreign Exchange (Regulation) Act. The assessee's plea is that unless it entered into such a transaction, it would have been unable to dispose of the unsold stock of inferior quality of tobacco. Another words, the assessee would have incurred a loss. Spur of loss cannot be a justification for contravention of law. The assessee was engaged in tobacco business. The asseessee was expected to carry on the business in accordance with law. If the asseesee contravenes the provision of FERA to cut down its losses or to make larger profits while carrying on the business, it was only to be expected that proceedings will be taken against the asseesee for violation of the Act. The expenditure incurred for evading the provisions of the Act and also the penalty levied for such evasion cannot be allowed as deduction. As was laid down by Lord Sterndale in the case of Alexander Von Glehn (supra) that it was not enough that the disbursement was made in the course of trade. It must be for the purpose of the trade. The purpose must be a lawful purpose.

Moreover, it will be against public policy to allow the benefit of deduction under one statute of any expenditure incurred in violation of the provisions another stature or any penalty imposed under another statute. In the instant case, if the deductions claimed are allowed, the penal provisions of FERA will become meaningless. It has also to be borne in mind that evasion of law cannot be a trade pursuit. The expenditure in this case cannot, in any way, be allowed as wholly in this case cannot, in any, way be allowed as wholly and exclusively laid out for the purpose of assessee's business.

We are in agreement with the view expressed by the High Court in this case. The appeal is dismissed. There will be no order as to costs.