[1996] 221 ITR 18 (Madras), [1996] 135 CTR 347 (Madras) ,[1996] 89 Taxman 262 (Madras)

HIGH COURT OF MADRAS

Commissioner of Income-tax

v.

K.S. Venkatasubbiah Reddiar

ABDUL HADI AND SATHASIVAM, JJ.
TAX CASE NO. 624 OF 1980
JANUARY 18, 1996

V. Subramaniam *for the Appellant.*

ORDER

Hadi, J. - In this tax case by revenue under section 256(1) of the Income-tax Act, 1961 ('the Act'), the questions of law referred to us are as follows :

> "*1*. Whether, on the facts and in the circumstances of the case, the assessee could be stated to be carrying on a business in racing ?
>
> *2.* Whether, on the facts and in the circumstances of the case, the assessee was entitled to a deduction of a sum of Rs. 60,779 from the total income for the assessment year 1972-73 ?"

In other words, the real question that has to be considered is whether the activities carried on by the respondent/assessee (HUF) would constitute a 'business' as defined under section *2*(*13*)of the Act. Even according to the learned counsel for the revenue, the activities carried on by the assessee consist of acquiring race horses, maintaining and training them and employing them in different races conducted in different centres, after taking necessary assistance from other persons for running the said horses in the races and after paying requisite fees to the Race Clubs, which conduct the races and invite betting from the members of the public. Further, according to him, when the assessee's horse or horses win in the races, the assessee would get prize money, which would be a substantial one, and when the assessee's horses do not win, the assessee would not get such prize money, and for the various expenditures incurred by it for maintaining and training horses and making them run in the races there may not be any return.

2. In the present case, two such horses of the assessee became useless and hence deduction of Rs. 18,750 under section 36(1)(*vi*) of the Act has been claimed. That apart, general loss is also claimed, with reference to the abovesaid activities, to the extent of Rs. 42,029. The total loss thus claimed is Rs. 18,750 + Rs. 42,029, namely, Rs. 60,779. The abovesaid deduction of

Rs. 18,750 could be claimed under the Act, only if the assessee's income or loss comes under the head 'Profits and gains of business or profession'. Likewise with reference to the abovesaid loss of Rs. 42,029 according to the counsel, carry forward could be claimed under this said Act only if it comes under the said head. So, the assessee claimed that his activities constitute 'business'. On the other hand, the contention of the revenue is that they do not constitute 'business' and the income or loss of the assessee would only fall under the head 'Income from other sources'.

3. The case before us is with reference to the assessment year 1972-73. Admittedly, for all the six or seven earlier assessment years, similar activities of the assessee have been treated by the department itself only as 'business' and his income or loss was assessed only under 'Profits and gains of business or profession'.

4. In the assessment year 1972-73, though originally the ITO has held that the assessee's activities could not be treated as 'business', the first appellate authority and subsequently the Tribunal have held that the said activities would constitute 'business' and that, hence, the assessee's claim should be accepted.

5. The learned counsel for the revenue also relied on the decisions (*i*) *Lala Indra Sen, In* re [1940] 7 ITR 187 (All.); (*ii*) *Janab A. Syed Jalal Sahib* v. *CIT* [1960] 39 ITR 660 (Mad.) and (*iii*) *CIT* v. *S.S. Thiagarajan* [1981] 129 ITR 115 (Mad.) in support of his contention.

6. Respondent remains unrepresented.

7. It is clear to us that the abovesaid decisions, cited by the learned counsel for the revenue, would not support his contention. Before referring to those decisions, we shall first refer to the definition of the term 'business' under section *2*(*13*). It runs thus :

> "(*13*) 'business' includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;"

Thus, the Act defines the term 'business' only inclusively. We also find similar definition under section *2*(*d*)of the Tamil Nadu General Sales Tax Act prior to the amendment made in 1964, which runs as follows :

> "(*d*) 'business' includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not any profit accrues from such trade, commerce, manufacture or adventure or concern."

Similar definitions were also found in other State enactment, dealing with sales tax.

8. In that connection, while dealing with the same question under Hyderabad General Sales Tax Act, the Supreme Court in *State of Andhra Pradesh* v. *H. Abdul Bakshi & Bros.* [1964] 15 STC 644 observed as follows :

> ". . .The expression 'business' though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with profit motive, and not for sport or pleasure. . . ." (p. 647)

It is, therefore, clear that the two essential requirements for an activity to be considered as 'business' are (*i*) it must be a continuous course of activity and (*ii*)it must be carried on with a profit motive. In the present case, admittedly the assessee carries on continuous course of activity, not only in the assessment year in question, but also in the earlier assessment years.

9. In this connection, paragraph 24 onwards of the order of the Tribunal make it clear that the assessee carries on continuous course of activity in carrying on his avocation of employing horses in races as stated above. No doubt, regarding the abovesaid profit motive, there is no express refer ence in the Tribunal's order, but it could be easily implied from the order of the Tribunal that the abovesaid activities were carried on only with a profit motive. In this connection, the following observations of the Tribunal may be looked into :

> "Looking to the nature of the activities, which does not include betting, and is only confined to racing, the number of horses purchased, sold and the average size of the stable, the number of events in which the horses have participated and the number of centres in which they have run, the quantum of stake money received from year to year and the manner in which the assessee has found finances for carrying on the activity, we consider that while no one feature may be conclusive, the sum total of all factors leaves the clear impression that the racing activity of the assessee as far as the facts show is clearly a *business*activity." [Emphasis supplied]

Since the Tribunal has held in the passage extracted above, that the activity of the assessee is clearly a business activity, it could be easily inferred that the profit motive element was also there, particularly when it is nobody's case that the assessee carried on the said activities not for sport or pleasure.

10. Now, we shall refer to the decisions cited by the learned counsel for the revenue. In *Janab A. Syed Jalal Sahib's* case (*supra*), the real question was whether the relevant amounts indicated therein were taxable income or were casual and non-recurring receipts and, therefore, exempt from tax under

section 4(3)(*vii*) of the Indian Income-tax Act, 1922 and this Court answered the said question by holding that the amounts indicated were only casual and non-recurring receipt and hence exempted from tax. In that case, the assessee carried on the business of manufacturing and selling beedies. In addition, he also attended horse races regularly every year and indulged in betting and acquired horses of his own and some of them in partnership with others. From the abovesaid facts and on the actual question involved therein, it is clear that the said decision is distinguishable and cannot be applied to the present case. Further the following observation therein is also significant:

> "We have no hesitation in holding that there was *no material on record* which would justify a conclusion, that it was income from the business of the assessee. . . ." [Emphasis supplied] (p. 672)

On facts, it was found therein that the activity in question was not 'business'.

11. Likewise, the decision in *S.S. Thiagarajan's* case (*supra*)is also distinguishable. There, the assessee was maintaining race horses for the purpose of running them at horse races winning stake money and breeding race horses. He was also spending money on feeding the horses and training them in training establishments run commercially. The horses were sent by the assessee to the stud for being reared. He also bet on horses occasionally, but the result thereof was a small loss. In respect of the racing activities, the assessee incurred losses during the assessment years in question and claimed deduction of the loss from his income from other sources. This claim was disallowed by the officer on the ground that the assessee was indulging in the racing activity only as a hobby or sport and not as a business proposition. The Tribunal, however, held that the income referable to this activity would be 'income from other sources' and hence the losses might be set off against the income arising from other sources in each of the years. On a reference, this Court held that though the receipts arising from betting and racing would be income falling under the head 'Income from other sources' they would be of a casual and nonrecurring mature exempt from taxation during the relevant years and that since the income was not taxable, the losses arising from such activity could not also be set off against income from a different source under a different head. It must also be noted here that in the abovesaid decision, the assessee himself did not claim that the income in question was from any 'business'. So, strictly speaking the present question did not arise there.

12. Even the decision in *Lola Indra Sen's* case (*supra*) will not help the revenue in the present case. The majority judgment, no doubt, held on the facts found that the maintenance, management and running in races of race-horses by the assessee during the year of assessment and the betting

of the assessee during that year did not in law constitute 'business' of the assessee. On the other hand, the minority judgment therein held that there was no material on the record on which it could be found that (*a*) the maintenance of the racing stable and (*b*) the series of betting transactions did constitute business of the assessee. The minority judgment also referred to the decisions of the Privy Council in *CIT* v. *Shaw Wallace & Co.* 1932 ALJ 588 and *Rogers Pyatt Shellao & Co.* v. *Secretary of State for India* ILR 52 Cal. 1, which emphasise that the word 'business' means "almost anything which is an occupation or a duty requiring attention as distinguished from sport or pleasure and used in the sense of an occupation continuously carried on for the purpose of profits". Further, the said minority judgment also observed :

> "It would appear from these judicial pronouncements that the word 'business' has been used in the Act to denote the continuous any systematic exercise of an occupation or profession with the object of making income or profit...." (p. 204)

These pronouncements in the abovesaid minority judgment and *Rogers Pyatt Shettao & Co. 's* case (*supra*) and *Shaw Wallace & Co. 's* case (*supra*) are also thus in consonance with the decision of the Supreme Court referred to above.

13. The net result is that the questions referred to us are answered in the affirmative and against the revenue. No costs.