HIGH COURT OF MADRAS

Commissioner of Income-tax, Chennai

v.

Dr. M.A.M. Ramaswamy

R. SUDHAKAR AND R. KARUPPIAH, JJ.
T.C. (A) NO. 649 OF 2006
DECEMBER 10, 2014

T. Ravikumar, Senior Standing Counsel *for the Appellant.* **S. Sridhar** *for the Respondent.*

JUDGMENT

R. Sudhakar, J. - The Revenue has filed this appeal assailing the order dated 28.09.2005 passed by the Income Tax Appellate Tribunal, Madras 'A' Bench, in ITA No.1275/Mds/2001 and the same was admitted on the following question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in holding that the loss sustained in business can be set off against betting and gambling income, and only the net income is to be taxed under Section 115BB of the Income Tax Act?"

2.1. The facts in a nutshell are as under: The assessee is a breeder and owner of race horses. For the assessment year 1998-99, the assessee filed return of income declaring a total income of Rs.28,01,55,597/-. The return was processed under Section 143(1)(a) of the Income Tax Act on 1.12.1999.

2.2. Thereafter, notice under Section 143(2) of the Act was issued to the assessee. The details furnished by the assessee and objections raised were considered by the Assessing Officer. On the issue of "*Winnings from Betting*", the Assessing Officer noticed that the assessee has shown betting income of Rs.31,24,28,980/- and while computing the total income, the assessee has adjusted the losses suffered under the head "business" against the income earned under other heads, including betting income, and after setting off such losses, betting income of Rs.28,52,18,347/- was brought to tax by the assessee at the flat rate of 40% as prescribed under Section 115BB of the Act, as against the total betting income of Rs.31,24,28,980/-.

2.3. The Assessing Officer refused to accept the manner in which betting income was computed by the assessee and held that the total winnings are to be taxed under Section 115BB of the Act and losses cannot be set off against such income. Accordingly, the total winnings from betting were brought to tax at the rate of 40% as envisaged under Section 115BB of the Act.

2.4. Aggrieved by the said order, the assessee appealed to the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) observed that that only the net income of betting receipts, namely, after adjustment thereof against the business loss, can be subjected to tax at the rate of 40% as contemplated under Section 115BB of the Act and accordingly, directed the Assessing Officer to charge tax at the rate of 40% on the net betting receipts.

2.5. Calling in question the said order, the revenue went on appeal before the Tribunal. The Tribunal, while confirming the order passed by the Commissioner of Income Tax (Appeals), held as follows:

> "12. The last issue to be considered is the one in ITA No.1275 (Mds)/2001 for the assessment year 1998-99 regarding the quantification of income for the purpose of tax on races including horse races.

The relevant section 115 BB of the Income Tax Act, 1961, reads as under:

'115BB. Where the total income of an assessee includes any income by way of winnings from any lottery or crossword puzzle or race including horse race (not being income from the activity of owning and maintaining race horses) or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, the income-tax payable shall be the aggregate of—

(*i*) the amount of income-tax calculated on income by way of winnings from such lottery or crossword puzzle or race including horse race or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, at the rate of thirty per cent; and

(*ii*) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

Explanation :- For the purposes of this section 'horse race' shall have the same meaning as in Section 74A.'

13. Section 58 (4) with its proviso clause does not apply to the assessee's case, the assessee being the owner of horses maintained by him for running in horse races. On a consideration of the rival submissions we are of the view that the order of the Commissioner (Appeals) is perfectly justified where the assessee was allowed to adjust the losses suffered under the head business against the income earned under other heads including betting income. The CBDT Circular No.721 dated 13.09.1995 also supports the case. A combined reading of Section 115-BB and the proviso to Section 58(4) along with the CBDT circular No.721 dated 13.09.1995 fortify the action of the Commissioner (Appeals) and we see no justification to interfere with the orders of the Commissioner (Appeals) on this issue. Therefore, we decide this ground against the Revenue and in favour of the assessee."

2.6. Challenging the above said order passed by the Tribunal, the Revenue is before this Court by filing the present appeal.

3. Heard Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the Revenue and Mr.S.Sridhar, learned counsel appearing for the respondent/assessee.

4. The contention of the Revenue is that Section 115BB of the Act makes it clear that in respect of the total income of the assessee, including income by way of winning from lottery or crossword puzzle or race including horse race or card game and other game of any sort or from gambling or betting in any form or nature whatsoever, income tax is payable at the aggregate in the manner provided under clauses (i) and (ii) of the said provision and not otherwise, and, therefore, the Tribunal erred in confirming the order of the Commissioner of Income Tax (Appeals) directing levy of tax at the rate of 40% on the net betting receipts, as against the total winnings from betting.

5. On the contrary, it is the plea of the learned counsel for the assessee that while computing the "total income" as required under Section 115BB of the Act, set off as prescribed by the provisions of Sections 70 to 80 of the Act has to be given and only the balance income can be brought to tax at the rate stipulated under Section 115BB of the Act.

6. Before adverting to the merits of the matter, it would be useful to have a look at the provisions referred to by the Tribunal and the authorities below. For better clarity, the said sections are extracted hereunder:

"Section 58. Amounts not deductible.-

(1) to (3)** ** **

(4) In the case of an assessee having income chargeable under the head "Income from other sources", no deduction in respect of any expenditure or allowance in connection with such income shall be allowed under any provision of this Act in computing the income by way of any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature, whatsoever:

Provided that nothing contained in this sub-section shall apply in computing the income of an assessee, being the owner of horses maintained by him for running in horse races, from the activity of owning and maintaining such horses.

Section 115BB. Where the total income of an assessee includes any income by way of winnings from any lottery or crossword puzzle or race including horse race (not being income from the activity of owning and maintaining race horses) or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, the income-tax payable shall be the aggregate of—

(*i*) the amount of income-tax calculated on income by way of winnings from such lottery or crossword puzzle or race including horse race or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, at the rate of thirty per cent; and

(*ii*) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause

(*i*)** ** **

Explanation:- For the purposes of this section 'horse race' shall have the same meaning as in Section 74A."

7. Sub-section (4) to Section 58 of the Act was inserted by the Finance Act, 1986 with effect from 1.4.1987 and the purport of the said amendment is to disallow any expenditure from winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort, or from gambling or betting of any form or nature, whatsoever which are deemed as income for the purposes of levy of income tax under Section 2(24)(ix) of the Act.

8. By the Finance Act, 1986, with effect from 1.4.1987, the legislature while inserting Section 115BB of the Act, thought it fit to delete Sections 74A(1) and 74A(2) of the Act. The scope and effect of these amendments was explained by the Board in Circular No.461, dated 9.7.1986. The relevant portion of the said circular reads as under:

Section 115BB of the Act:

"Provision of a flat rate of tax on winnings from lotteries, crossword puzzles, races, including horse races, etc.

31.1. Under the existing provisions, any income by way of winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever is chargeable to tax under the head 'Income from other sources' along with the other income of an assessee. *By inserting a new section 115BB in the Income-tax Act, it has been provided that any income of a casual and non-recurring nature of the type referred to above, shall be charged to income-tax at a flat rate of 40 per cent. This provision will, however, not apply to income from the activity of owning and maintaining race horses. For this purpose, a new sub-section has been added to section 58 to provide that no deduction shall be allowed in respect of any expenditure or allowance in computing the income from the aforesaid sources*. What has to be borne in mind is that apart from the general exemption of Rs. 5,000 under

section 10(*3*), no further allowances or deductions are admissible against the gross winnings except in cases where there is a diversion by overriding title as in the case of certain lotteries where a certain percentage has to be foregone to the Government/agency conducting the lotteries. Consequential amendment has also been made in section 197(1)(*a*) of the Income-tax Act.

31.2. These amendments will apply in relation to the assessment year 1987-88 and subsequent years.

Sections 74A(1) and 74A(2):

"Modification of the provisions relating to losses from certain specified sources falling under the head 'Income from other sources'.-

32.1. As mentioned above, winnings from lotteries, crossword puzzles, races including horse races, card games, other games or from gambling or betting is chargeable to tax under the head 'Income from other sources'. *Section 74A(1) provides that the losses from the aforesaid sources will be allowed to be set off only against income from the same source and the losses not so set off relating to these sources incurred during a year are not allowed to be carried forward for set off against any income of a subsequent year*. Under the provisions of section 74A(3) of the Act, however, losses arising from the activity of owning or maintaining race horses for running in horse races are entitled to be carried forward and set off against the income from the source including horse races, in a subsequent year. The benefit of carry forward and set off of such losses is allowed for four assessment years next following the assessment year for which the loss was first computed. *In view of the insertion of a new section 115BB in the Act levying a flat rate of tax on winnings from lotteries, crossword puzzles, races including horse races, etc., sub-sections (1) and (2) of section 74A of the Act have been deleted. Sub-section (3) has been amended to provide that in the case of a taxpayer, being the owner of horses maintained by him for running in horse races the amount of loss incurred in the activity of owning or maintaining such race horses in any assessment year shall not be set off against income, if any, from any other source and shall be allowed to be carried forward to the four assessment years next following the assessment year for which such loss was first computed for being set off against income, if any, from the same activity*.

32.2. These amendments will apply in relation to the assessment year 1987-88 and subsequent years."

(*emphasis supplied*)

9. A bare reading of the above circular and the provisions makes it clear that Section 115BB of the Act envisages taxation at the flat rate of 40% on the total amount of winnings from betting etc., and the losses from the same source also cannot be set off against such income.

10. The above view is fortified by the Board Circular No.14 of 2001, dated 12.12.2001 explaining the intent of the legislature in amending Section 115BB of the Act by reducing the rate of tax from 40% to 30% with effect from 1.4.2001, as amended by Finance Act, 2001, dated 1.4.2002.

"Tax on winnings from lottery, crossword puzzle, etc.

60.1. Under the existing provisions of clause (*i*) of section 115BB, any income by way of winnings from any lottery or crossword puzzle or race including horse race (not being income from the activity of owning and maintaining race horses) or card game and other game of any sort or from gambling or betting of any form or nature whatsoever, is chargeable to tax at the rate of 40%.

60.2. As a measure of rationalization, the Act has reduced the rate of tax on such winnings from forty per cent to thirty per cent.

60.3. The amendment will take effect from 1st April, 2002, and will, accordingly, apply in relation to

the assessment year 2002-2003 and subsequent years."

(*emphasis supplied*)

11. From the above, it is clear that the intent of the legislature, as a measure of rationalization, was to reduce the rate of tax on such winnings from 40% to 30%, with effect from 1.4.2002. Even though the said amendment is not applicable to the case of hand, what can be deduced from the same is the fact that the higher rate of tax as applicable to winnings from betting, etc. has been brought down to 30%, on a par with the rate applicable for other incomes as a measure of rationalization. Therefore, the intent of the legislature to levy tax at the rate of 40% for the relevant assessment year on the winnings from betting, etc. is apparent as otherwise, the very existence of the said provision in the Act would be meaningless.

12. On a careful perusal of the above provisions of law and the legislative intent, this Court is not inclined to accept the view as propounded by the Tribunal and the Commissioner (Appeals), as Section 115BB of the Act is a standalone special provision, which makes it clear that income of an assessee, not being income from activity of owning and maintaining race horses, would fall under Section 115BB of the Act. In view of the specific provision contained in Section 115BB of the Act under Chapter XII of the Act, which provides for determination of tax in certain special cases, the special rate of tax is applicable for the entire income of winnings from horse racing and should be subject to tax at the special rate provided therein. It is not the case of the assessee that the income being brought to tax is earned from owning and maintaining the horses. Therefore, in our considered opinion, the provisions of Section 58(4) of the Act will not come into play.

13. The methodology of computing tax on Long Term Capital Gain vis-a-vis Section 112 of the Act for which the assessee relied on the CBDT Circular No.721 dated 13.9.95, though found favour with the Commissioner of Income Tax (Appeals), this Court is not inclined to accept the same for the simple reason that whenever tax is levied based on special provisions envisaged under the Act, the method of calculating tax has to be strictly in accordance with such provisions and not otherwise. If the circular relied on by the assessee is taken into consideration, then what is envisaged by the statute would be given a go-by and the purport and intent of the Parliament in enacting that special provision in the statute would become a futile exercise. Therefore, the reliance placed on the said circular by the Commissioner of Income Tax (Appeals) as also by the Tribunal is misconceived and does not stand legal scrutiny.

14. Further, it is curious to note that the Tribunal, in the penultimate paragraph of its order, while observing that "*Section 58(4) with its proviso clause does not apply to the assessee's case, the assessee being the owner of horses maintained by him for running in horse races*", has held that the "*A combined reading of Section 115BB and the proviso to section 58(4) along with the CBDT circular no.721 dated 13.09.1995 fortify the action of the Commissioner (Appeals) and we see no justification to interfere with the orders of the Commissioner (Appeals) on this issue*". We are at a loss to understand as to how the Tribunal concurred with the decision of the Commissioner of Income Tax (Appeals), while making a diametrically opposite observation that Section 58(4) of the Act is not applicable.

15. We are, therefore, of the considered view that the total winnings from betting of the assessee should be brought to tax at the rate of 40% as contemplated under Section 115BB of the Act. The order passed by the Tribunal, which affirmed the order of the Commissioner of Income Tax (Appeals), is liable to be set aside. Accordingly, the order passed by the Tribunal is set aside.

For the foregoing reasons, this appeal is allowed answering the question of law in favour of the Revenue and against the assessee. However, there shall be no order as to costs.

■■