

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.02.2015

CORAM

**THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH**

T.C.A. NO. 407 OF 2008

Commissioner of Income Tax
Chennai.

.. Appellant

- Vs -

Dr. M.A.M. Ramaswamy

.. Respondent

Appeal filed under Section 260-A of the Income Tax Act against the order dated 08.05.07 passed by the Income Tax Appellate Tribunal, Madras 'A' Bench, made in ITA No.671/Mds/2004.

For Appellant : Mr. T.Ravikumar

For Respondent : Dr.Anitha Sumanth

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in dismissing the appeal filed by it, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 25.06.2008, admitted the appeal on the following substantial 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 u/s 115BB?"

2. The facts, in a nutshell, are as follows :-

The assessee is a breeder and owner of race horses. For the assessment year 2000-2001, the assessee claimed income from betting amounting to Rs.18.02 Crores. The losses suffered by the assessee under the head "business" were adjusted against other heads, including betting income and the balance betting income was alone shown as being taxable at the flat rate of 40% under Section 115-BB and other CBDT circulars. The assessing officer held that as per the provisions of Section 115-BB, what is envisaged is the total winning, and deduction of losses under the other heads cannot be set off against it and, therefore, recalculated the income under Section 115-BB on the entire income from betting.

3. Aggrieved against the same, the assessee preferred appeal before the CIT (Appeals). The issue was held in favour of the respondent/assessee by the CIT (Appeals), and, thereafter, by the Tribunal, wherein, the Tribunal held as follows :-

"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."

Aggrieved by the abovesaid order passed by the Tribunal, the Revenue is before this Court by filing the present appeal.

3. Heard Mr.Ravikumar, learned standing counsel appearing for the appellant/Department and Dr.Anitha Sumanth, learned counsel appearing for the respondent/assessee.

4. It is fairly stated by the learned counsel on either side that similar issue has been decided by this Court in favour of the appellant/Revenue in the assessee's own case for the assessment year 1998-1999 in T.C.A. No.649 of 2006 dated 10.12.2014.

5. This Court, while considering a similar issue in the case of the very same assessee in the above appeal, while analyzing Section 115-BB and Section 58 (4) of the Act, held as follows :-

"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."

5. A perusal of the abovesaid decision reveals that the issue as also the facts in the present appeal are identical to the one as was decided by this Court in the case of the very same assessee in the abovesaid appeal, wherein, this Court, while considering Section 115-BB and 58 (4) of the Act, held the matter in favour of the Revenue, holding that Section 115-BB of the Act will apply. In view of the above, the ***substantial question of law is answered in favour of the Revenue and against the assessee.*** Accordingly, the appeal is allowed. However, in the circumstances of the case, there shall be no order as to costs.

(R.S.J.) (R.K.J.)

24.02.2015

Index : Yes/No

Internet : Yes/No

GLN

To

1. Commissioner of Income Tax
Chennai.

2. The Income Tax Appellate Tribunal
'A' Bench, Chennai.

R.SUDHAKAR, J.
AND
R.KARUPPIAH, J.

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