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Akhouri Banwari Prasad, Mukhtar, In re

Courtney Terrell, C. J., James and Manohar Lall, JJ.

We think, therefore, that the mukhtar should be visited with the utmost penalty and he should be removed from the rolls.

The civil revision application is rejected.

J. K.

Order accordingly.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

1937.

November, 15.

Before Courtney Terrell, C. J. and Agarwala, J.

MULCHAND HIRA LAL

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 10—*assessee, if entitled to deduction on account of loss by theft.*

An assessee is not entitled to deduction on account of loss by theft under section 10 of the Income-tax Act, 1922.

Jagarnath Therani v. *Commissioner of Income-tax*(1) and *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras* (2) (judgment of Ayyar, J.) distinguished and doubted.

Statement of case under section 66(3) of the Income-tax Act, 1922.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C. J.

Mrs. Dharmashila Lall and *G. C. Das*, for the assessee.

S. M. Gupta, for the Income-tax Department.

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* Miscellaneous Judicial Case no. 10 of 1935. *In re* Statement of Case under section 66(3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, dated the 15th July, 1935.

(1) (1925) I. L. R. 4 Pat. 385.

(2) (1930) I. L. R. 53 Mad. 904.

COURTNEY TERRELL, C. J.—This is a case stated by the Commissioner of Income-tax by direction of the Court. The assessee carries on business as a shop-keeper where he sells retail groceries and he also carries on business by selling goods on commission, the two businesses being in fact separate. He has made, however, a return of his entire income, and he claims allowance in respect of two separate items. The first item is composed of two separate sums, respectively, Rs. 313 and Rs. 700, and the assessee claims to be entitled to deduct the amount of these two items from his assessment in the following circumstances. In the accounting year 1931-32 it would appear that in making up his accounts he confused the accounts in respect of the shop business with the accounts in respect of the commission business in the matter of two items. Certain goods had been sent to him to be sold on commission, but the accounts in respect of two of the parcels of goods sent to him for sale on commission were as a matter of fact entered as having been made in respect of the shop business, and he put down in the accounts the two items of goods Rs. 313 and Rs. 700 as being goods purchased by him, and in making up the accounts for that year these were taken upon the assets side of the account and figured in the profit for the year. They should have gone into that account which deal with the commission business, in which case they would not have been put down as coming into the business as assets at all. The result was that for the year 1931-32, if the statement of facts be correct, he had to pay income-tax on a sum which had been arrived at by accounting these two items as receipt, and so he paid income-tax on a sum of Rs. 313 and Rs. 700 which he need not have paid if he had made up his books correctly. After the closing of the account for 1931-32 and the payment of income-tax, he discovered his mistake and now seeks to deduct those sums in the present account for 1932-33, and the ground upon which he claims to be entitled to deduct

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them is that if he paid tax on them he would be paying tax twice over. This argument is not tenable. On a proper application to the Commissioner of Income-tax, the Commissioner of Income-tax would be entitled to find that in respect of the year 1931-32 the assessee had paid more tax than he should have paid, and in making up the account for 1932-33 (which is the year under consideration) he need not include these sums at all; but he cannot do it both ways. His proper remedy should have been to go to the Commissioner in the matter of the accounting year 1931-32, show to the satisfaction of the Commissioner that in respect of that year he had made a mistake in making up his accounts and get a refund of the income-tax in respect of the assessment for 1931-32. He cannot recover it in the accounting for 1932-33. The Commissioner was right in our opinion in his finding, and to the question "Whether the disallowance of the claim for deductions of two sums, namely, Rs. 313 and Rs. 700, is legal", I would answer it, in agreement with the Commissioner, in the affirmative.

The second item in respect of which the assessee claims a deduction from the amount upon which he is to be assessed is in respect of some money that appears to have been stolen from him. In the accounting year 1931-32 he was sending some of his money to the bank and sent it by a messenger in his employ. The money disappeared, and the assessee seems to have been under the impression that the employee had embezzled the money, with the result that there was a criminal trial. The criminal court held that the money had not been in fact embezzled by the employee but had been stolen from him by a coolie. In my opinion, the decision of the Commissioner that the loss did not occur in the year of accounting (1932-33) is one of the facts which is fatal to the contention of the assessee. But quite apart from this, a loss, in my opinion, whether by embezzlement or whether by theft, is not one of the allowances which is available to the assessee under section 10 of

the Act. It is true that there is a decision of this Court in *Jagarnath Therani* v. *Commissioner of Income-tax*(1) in which the facts were that the loss was produced by embezzlement, and the learned Judges there held, and I am at some difficulty to understand the reasoning upon which the decision was based, that the loss was incidental to the conduct of the business and allowance ought to be made on that basis. In my opinion the decision in that case was erroneous, but the whole decision was based upon the fact that the loss in that case was by embezzlement and it can be distinguished from this case very clearly, because in this case the loss was by theft, and not by embezzlement. The test of whether a claimed allowance is or is not allowable is to be found by referring to the Act itself, and section 10 sets forth a list of permissible allowances. They are specified in sub-section *(2)*. Paragraphs *(i)* to *(viii)* of that sub-section admittedly do not apply and this particular loss cannot be classified under any of the items in that particular sub-section. Paragraph *(ix)* is as follows:

> " any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

Now, I have failed altogether to understand how a theft can be considered as expenditure, and in any case the reference to the " expenditure incurred solely for the purpose of " must refer to the mind of the person who is claiming allowance. It cannot refer to the mind of the thief. When money is stolen, the person from whom such money is stolen is parting with the money unwillingly or unknowingly and he cannot be said to lose the money for the purpose of earning such profits or gains. A theft therefore clearly is outside this paragraph, and it was on this paragraph alone that the claim to the allowance was based. Mrs. Lall has in support of her argument quite reasonably, in my opinion, said that if an embezzlement was rightly to be considered as an expenditure the same reasoning by which it was

(1) (1925) I. L. R. 4 Pat. 385.

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so held would also apply to a theft and therefore urged that the decision to which I have referred ought to be considered as much an authority in favour of a claim for allowance by theft as it expressly was for an allowance by embezzlement. I think this argument is sound, and for that reason I am of opinion that the decision of Ross, J. was erroneous. But the decision itself was based on a case of embezzlement and it was reasoned on the basis of embezzlement and therefore it is not an authority for the proposition that loss by theft is equally allowable. I would make the same observation in respect of the dissenting judgment of Ayyar, J. in the case of *Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*(1). In that case there had been a loss which was incurred by theft of money in a money-lending business, and it was held by the majority of the learned Judges that that could not be allowed for in computing the income-tax. The dissenting judgment of Ayyar, J. was on somewhat the same lines as the decision of this Court in *Jagarnath Therani* v. *Commissioner of Income-tax*(2) and is to my mind equally open to objection. Should a case arise in which a claim to loss by embezzlement is made, it will be necessary to reconsider the decision in *Jagarnath Therani* v. *Commissioner of Income-tax*(2).

In my opinion the Commissioner of Income-tax was right in disallowing this claim, and the answer to the second question "Whether in the circumstances the sum of Rs. 2,365 should be lawfully deducted from the assessee's returns" should, in my opinion, be in the negative. The assessee having failed must pay the costs of the Department, which we assess at rupees one hundred and fifty.

AGARWALA, J.—I agree.

J. K.

Order accordingly.

(1) (1930) I. L. R. 53 Mad. 904.
(2) (1925) I. L. R. 4 Pat. 385.