A reference may also be made to a decision of our High Court, *Commissioner of Income-tax, Bombay* v. *Metro-Goldwyn Mayer (India), Limited.*[1] Beaumont C. J. was also considering what proper construction should be put upon the expression "business connection," and at p. 383 he points out that

> "...I think, there must be some element of continuity in the relationship between the parties, and in every case one has to look at the particular facts of the case to see whether it falls within s. 42."

Therefore, in my opinion, the non-resident, Haji Mahomed Sayed Alberbary, had a business connection in India within the meaning of s. 42 (*1*) of the Act and the assessee was rightly treated as an agent of the non-resident for the accounting years 1942-43, 1943-44, 1944-45 and 1945-46.

The result, therefore, is that we answer the questions submitted to us as follows:

No. 1:—In the affirmative.

No. 2:—In the affirmative.

No. 3:—In the negative.

No. 4:—This question has been withdrawn by the Solicitor General and we therefore do not answer this question.

The additional question raised on the supplementary statement of the case will be answered in the affirmative.

Assessee to pay three-fourths of the costs of the reference.

Attorneys for applicants: *Amarchand & Mangaldas.*

Attorneys for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

[1] (1938) 41 Bom. L. R. 379.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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Mar. 26

THE AMBIKA SILK MILLS CO., LTD., (APPLICANTS) *v.* THE COMMISSIONER OF INCOME TAX, BOMBAY CITY, (RESPONDENT).*

Indian Income-tax Act (XI of 1922), ss. 10 (2) (VI)—Proviso 17 (7): 6, 10, 24 (1)—Allowable deduction on account of depreciation exceeding business profits for the accounting year—Total income of assessee including item of capital gains—Whether depreciation not absorbed by

* Income Tax Reference No. 37 of 1951.

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business profits to be carried forward to succeeding years—Whether such depreciation to be set-off against capital gains—Expression "profits and gains" used in proviso (b) to s. 10 (2) (VI): true interpretation of—Principles guiding the construction of a proviso to a section and of provisions of All-India fiscal statute—Rebate of Super-tax under s. 17 (7)—Whether such rebate to be allowed on capital gains after setting-off business losses or on the total amount shown as capital gains—Rebate allowed never to be more than Super-tax paid by the assessee.

The assessee company had in respect of the assessment year made a business profit of Rs. 37,703. The depreciation allowable to the assessee was Rs. 52,985. Deducting Rs. 52,985 from the business profits of Rs. 37,703, there resulted a business loss of Rs. 12,282. In the same year the assessee had made a capital gain of Rs. 90,800.

On the question whether the unabsorbed depreciation, viz., Rs. 15,882 should be carried forward to succeeding years until it is absorbed by the profits of the particular business in respect of which the depreciation is allowed, or whether it should be set-off against capital gains of the assessee in the accounting yyear.

Held, that the expression "profits or gains" used in the proviso (b) to the s. 10 (2) (VI) of the Indian Income-tax Act, 1922, includes all profits or gains which may accrue or arise under any of the heads of income referred to in s. 6 of the Act and not merely those which accrue or arise from the particular business in respect of which depreciation is allowed or from any business conducted by the assessee.

In re Laxmichand Jaiporia Spinning and Weaving Mills,[1] *The Commissioner of Income-tax, Madras* v. *A. Supan Shettiar and Company and another*[2] and *Ballarpur Collieries* v. *The Commissioner of Income-tax, Central Provinces,*[3] followed.

Held, therefore, that the unabsorbed depreciation viz. Rs. 15,282 could be set-off against the capital gains of Rs. 90,400.

A proviso is not to be construed in a manner which would nullify the effect of the main section. A proviso may sometimes be of assistance in construing a section when the construction of the section itself is ambiguous. But when the section is clear and the scheme which the Legislature had in mind is also clear, the proviso must not be so construed as to defeat the scheme which the Legislature intended to carry out.

There should be as far as possible uniformity amongst the different High Courts in the matter of construing an All-India Statute.

It is a well-settled principle in construing fiscal statutes that when two interpretations are possible the Court should prefer the one which favours the assessee to that which favours the taxing department.

[1] (1950) 18 I. T. R. 919.

[2] (1930) 53 Mad. 702 s. c. 4 I. T. C. 211.

[3] (1929) 4 I. T. C. 255 s. c. [1930] A. I. R. Nag. 183.

The assessee claimed rebate in respect of Super-tax under s. 17 (7) of the Act on Rs. 90,400 being his income chargeable under head "Capital gains". On the contention that the assessee was entitled to rebate not on Rs. 90,400 but on Rs. 90,400 less Rs. 15,282 to be set-off in respect unabsorbed depreciation (as indicated above), that is to say, on Rs. 75,118 only—

Held, that the relief to which the assessee was entitled in respect of Super-tax under s. 17 (7) of the Act was on that amount which was included as income chargeable under the head "Capital gains", for, so far as the assessment of the assessee was concerned the assessee's income under the head "Capital gains" was Rs. 90,800 and for the purposes of s. 17 (7) any set-off that may result by reason of the operation of s. 24 (*1*) of the Act, could not be taken into consideration.

Held, therefore, that the assessee was entitled to a rebate under s. 17 (7) of the Act on the amount of Rs. 90,800.

Held, further, that what the assessee was entitled to was a reduction in the amount of Super-tax which the assessee was liable to pay. Therefore, the assessee could never get under that section anything more than the assessee had actually paid for Super-tax.

The Ambica Silk Mills Co., Ltd., (Applicants) sold in the relevant year of account (the assessment year being 1948-49) machinery for a sum of Rs. 1,31,900. A sum of Rs. 90,400 was ascertained to be capital gains of the assessee in respect of the sale. The total assessable profits of the assessee before providing for depreciation in respect of the relevant year amounted to Rs. 37,703. The total depreciation allowable amounted to Rs. 52,985. Thus the assessee's business loss was ascertained to be Rs. 15,882. The Taxing Department wanted to set-off Rs. 15,882 against the assessee's capital gains viz. Rs. 90,400 and allow the assessee rebate in respect of Super-tax under s. 17 (7) of the Indian Income-tax Act not on Rs. 90,400 but on Rs. 75,118, that is, Rs. 90,400 less Rs. 15,882. On the other hand the contention of the assessee was that depreciation, which was not absorbed by the profits of the business in respect of which that depreciation was allowed in the year of account, had to be carried forward to succeeding years until it was absorbed by the profits of that particular business and could not be set off against the assessee's income under head "capital gains." The assessee's further contention was that rebate under s. 17 (7) in respect of Super-tax must be allowed to the assessee on the total amount of Rs. 90,400 and not on the lesser amount of Rs. 75,118 as contended for by the Department.

The Income Tax Appellate Tribunal at the instance both of the applicants and respondents referred the matter to the High Court under s. 66 (*1*) of the Indian Income-tax Act.

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The reference was heard.

K. T. Desai for the applicants.

C. K. Daphtary, Solicitor-General, with *G. N. Joshi* for the respondent.

CHAGLA C. J. The facts giving rise to this reference are these:

The assessees, the Ambika Silk Mills Co., Ltd., were assessed for the assessment year 1948-49. They had made a business profit of Rs. 37,703. Under s. 10 (*2*) (*vi*) the depreciation that was allowable to them was Rs. 52,985. In the same year the assessee company had made a capital gain of Rs. 90,400. Deducting Rs. 52,985 from the business profit of Rs. 37,703 there would be a business loss of Rs. 15,282; and the first question that arose for the consideration of the Tribunal, and which has been referred to us now, was whether this business loss of Rs. 15,282 can be set off against the capital gain of Rs. 90,400.

Now, frankly speaking, the sections which we have to consider cause considerable difficulty, by reason of the language used by the Legislature, in giving a proper interpretation to them. But the best way to approach the matter is first to consider the scheme underlying the various sections and then to give an interpretation, which, as far as possible, fits in with that scheme. Turning first to s. 10 it deals with one of the heads of income referred to in s. 6. It provides that tax shall be payable by an assessee under that head in respect of profits and gains of any business carried on by him. These profits and gains are to be computed as indicated by sub-s. (*2*); and they are to be computed after making various allowances which are set out in the various clauses that follow, and one of the allowances is in respect of depreciation which is dealt with in cl. (*vi*). Therefore, it is clear that as far as s. 10 itself is concerned profits or gains of business are arrived at after giving credit for the various allowances referred to in sub-s. (*2*). It is also clear that as a result of various allowances in the year of account a business may work at a loss rather than at a profit in which case the assessee would show a loss as a result of the working of the business and not a profit. Although the language used in sub-s. (*2*) is that "profits and gains are to be computed," it cannot be disputed that what was intended by the Legislature was that the result of the working of the business should be arrived at by taking into consideration the various permissible allowances and then

determining whether the business had worked at a profit or at a loss. Then, we turn to s. 24 (*1*) which provides for a set off of loss in computing the aggregate income, and it provides that where an assessee sustains a loss of profits or gains in any year under any of the heads mentioned in s. 6, he shall be entitled to set off the amount of the loss against his income, profits or gains under any other head in that year. Therefore, if the assessee sustains a loss in his business under s. 10 [and as I have just pointed out that loss would be arrived at after taking into consideration all the allowances mentioned in s. 10 (*2*)] then the assessee would be entitled to set off that loss against the profits under any other head. Therefore, when an assessee sustains a loss, the loss would include depreciation under s. 10 (*2*) (*vi*). Then we turn to s. 24 (*2*) which provides that when the loss cannot be wholly set off under sub-s. (*1*) of that section, it can be carried forward to the following year, but then the loss can only be set off not against any other head but it can be set off only against the profits in the same business, and even with regard to this the Legislature has fixed a period, and that is a period of six years during which the loss can be carried forward, so that it can be set off against the same business. Now, to this extent there is no difficulty in understanding the scheme of the Legislature. But the difficulty is created by the proviso to s. 10 (*2*) (*vi*) and that proviso is as follows (I will quote only relevant words):—

> "where full effect cannot be given to any such allowance in any year ...owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance,... the allowance or part of the allowance, to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be allowance for that year, and so on for the succeeding years;..."

So that in substance what the proviso provides is that an unabsorbed depreciation may be carried forward from year to year until it has been absorbed.

Now, what is contended by Mr. Desai on behalf of the assessee is that the proviso contains a separate and independent provision with regard to depreciation, and that whereas a loss other than a loss represented by depreciation can be set off under s. 24, sub-s. (*1*) or (*2*), depreciation as such can only be carried forward from year to year and can only be absorbed when there are profits in the particular business in

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respect of which depreciation has been allowed. Emphasis has also been placed upon the language of s. 24 (*2*) (*b*) which provides that "where depreciation allowance is, under cl. (*b*) of the proviso to cl. (*vi*) of sub-s. (*2*) of s. 10, also to be carried forward, effect shall first be given to the provisions of this sub-section." Therefore, in the first place a loss has to be set off under s. 24 (*1*) and only after setting off the loss contemplated by s. 24, the depreciation which has not already been absorbed would be absorbed. Now, Mr. Desai is right in emphasizing the language used by the Legislature in the proviso. The language used is, "there being no profits or gains chargeable for that head," and what is contended is that the profits or gains referred to are the profits or gains of the business in respect of which depreciation is claimed. Now, whichever way one looks at this proviso it creates difficulty. If the plain natural meaning is to be given to the expression "profits or gains", then it would include depreciation which has got to be calculated in order to arrive at profits or gains within the meaning of s. 10 and that quite obviously cannot be the meaning of "profits or gains" used in this proviso. Therefore, whatever other view is possible it is clear that "profits or gains" in this context means profits or gains without taking into consideration the depreciation referred to in cl. (*vi*). Now, even so construing the term "profits or gains" is capable of three different constructions. It may mean profits or gains of the business in respect of which depreciation is claimed under cl. (*vi*): it may mean profits or gains in respect of all businesses which come under the head of s. 10; or it may mean profits or gains derived from the head of business or derived from any source whatsoever. Now, in placing the construction that we are going to place upon this proviso we are actuated by three powerful considerations. The first is that a proviso should never be construed in a manner which would nullify the effect of the main section to which it is merely a proviso. Sometimes a proviso may be of assistance in construing a section when the construction of the section is ambiguous; but when the section itself is clear and the scheme which the Legislature had in mind is also clear, then the proviso must not be so construed as to defeat the scheme which the Legislature intended to carry out. The second consideration is, as I shall presently show, that three different High Courts in fact have taken the same view as to the proper construction to be put upon this proviso and this High Court has consistently laid down that as far as possible in construing a statute which is

an all-India statute there should be uniformity amongst the different High Courts. The third consideration is that the interpretation which we are giving is a more favourable one to the assessee than the construction contended for by Mr. Desai. It is also a well-settled principle in construing fiscal statutes that when two interpretations are possible, the court should give that interpretation which is of help and assistance to the assessee rather than the one which would help the taxing department. In our opinion the only proper interpretation that should be placed upon the expression "profits or gains" is "profits or gains, not merely from the particular business in respect of which depreciation is claimed, nor profits or gains from any business conducted by the assessee, but the profits or gains which may accrue or arise to the assessee under any of the heads referred to in s. 6." Therefore, if the assessee has been assessed to income under the head capital gains as he has been in this case, viz. to the extent of Rs. 90,400, and if depreciation has been absorbed only to the extent of Rs. 52,985, he is entitled to set off the balance of Rs. 15,282 against the capital gains of Rs. 90,400, thus showing his total income at the figure of Rs. 75,118. Therefore, by enacting s. 10 (*2*) (*vi*) and the proviso and s. 24 (*2*) (*b*) what the Legislature has in mind was this: If a business was worked at a loss in any particular year, the loss can be set off against any other head under s. 24 (*1*); if the loss cannot be fully set off, then it can be carried forward to the next year, but then it can be only set off against the profits of that particular business and that set off would be permissible to the assessee for a period of six years only. After six years the right to set off would come to an end. But in the case of depreciation and to the extent that the loss was caused by depreciation being not fully absorbed, there would be no limit to the carrying forward of that depreciation, and that depreciation can be set off at any time so long as the business showed a profit in the future. Any difficulties of construction apart, the scheme that we are suggesting is a consistent scheme which fits in with the other provisions of the Act.

Turning to the authorities there is a judgment of the East Punjab High Court, *Laxmichand Jaiporia Spinning and Weaving Mills, In Re.*[1] In that case the assessee was a registered firm and the profits and gains were not sufficient to cover the full depreciation allowance under s. 10 (*2*) (*vi*), and the claim

[1] (1950) 18 I. T. R. 919.

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made was that the portion of depreciation not set off against profits should be apportioned amongst the partners in their individual assessments under proviso to sub-s. (2) of s. 24 and that claim was allowed by the Lahore Court. To the same effect is the judgment of the Madras High Court in *Suppan Chattiar and Co.* v. *Commissioner of Income-tax, Madras.*[1] There also the profits and gains of the business were insufficient to cover the depreciation allowance under s. 10 (2) (*vi*) and the excess depreciation was allowed to be set off against the profits and gains of other businesses and even from other sources. The emphasis placed by the Madras High Court (as indeed was also placed by the Lahore High Court) was on the fact that the depreciation under cl. (*vi*) must be put upon the same footing as the other allowances referred to in s. 10 (2), because if depreciation could not be set off under s. 24 (*1*), the result would be that a different situation would arise with regard to an allowance under s. 10 (2) (*vi*) from what would arise with regard to other allowances under s. 10 (2). The Nagapur High Court has also taken the same view in *Ballarpur Collieries* v. *Commissioner of Income-tax, C. P.*[2] There also, as in the East Punjab case, there was a depreciation which could not be fully absorbed by the profits of the business and the excess was allowed to be set off against the other income of the members of the firm under s. 24 of the Income-tax Act. Therefore, in our opinion the Department was right when it contended that the sum of Rs. 15,282 which could not be set off against the business profits could be set off against the capital gains, viz. Rs. 90,400.

It may seem surprising why the Department has raised this question. The Department has raised this question not in order to give any relief to the assessee but because in this particular case the view taken by the Department would be more favourable to it so far as this particular assessment is concerned because the question as to the liability of the assessee to pay Super-tax under s. 17 arises. The assessee claims a rebate under s. 17 (7) and the rebate in respect of super-tax is to be given where in the total income of a company is included any income chargeable under the head "capital gains" and the contention of the assessee is that its income under the head "capital gains" is Rs. 90,400 and the assessee is entitled to a rebate on that amount. The contention of the Department on the other hand is that rebate must be restricted, not to Rs. 90,400 but to

[1] (1929) 4 I. T. C. 211. [2] 1929) 4 I. T. C. 255.

Rs. 90,400 less Rs. 15,282 set off in respect of the business loss and therefore the Department contends that the assessee is entitled to rebate only on Rs. 75,118. It will now be appreciated why the Department contends that Rs. 15,282 should be set off against Rs. 90,400, because in that view of the case the relief to the assessee in respect of the super-tax would be less if Rs. 15,282 were so set off. But the error into which the Department has fallen is that in construing s. 17 (7) we are not concerned with any set off arrived at as a result of s. 24 (*1*). The relief to which the assessee is entitled in respect of super-tax is on the amount which is included as income chargeable under the head of "capital gains" and, therefore, when the assessee makes its return it must in its return show Rs. 90,400 as income derived from capital gains. It is only after its other income is looked at and computations are made that the question of set off would arise under s. 24 (*1*). But all that we are concerned with under s. 17 (7) is whether in the total income of the assessee there is any income which actually falls under the head "capital gains", and if there is such income which falls under the head "capital gains," then the assessee is entitled to a relief. It is clear that as far as the assessment of the assessee is concerned his income under the head "capital gains" is Rs. 90,400 and not Rs. 75,118 as the Department contends. Rs. 75,118 is only arrived at after a set off is allowed under s. 24, but as we pointed out we are not concerned for the purposes of s. 17 (7) with any set off which may result by reason of the operation of s. 24 (*1*). Therefore, the assessee must succeed in the reference to the extent that it contends that it is entitled to a rebate for the purpose of super-tax on the amount of Rs. 90,400.

The Solicitor-General is apprehensive that by reason of the rebate the assessee may get something more than what is actually paid for super-tax. The provisions of s. 17 make it perfectly clear that what the assessee is entitled to is a reduction in the amount of super-tax which the assessee is liable to pay. Therefore the rebate can only be something less than what the assessee would have been liable to pay but for the provisions of s. 17 (7).

The Commissioner has taken out a notice of motion asking us to direct the Tribunal to raise certain questions which according to the Commissioner arise on the statement of the case. We agree with the Solicitor General that the questions raised by

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the Tribunal are not properly framed and they do not bring out the real controversy between the parties. However, we do not think it is necessary to send the matter back to the Tribunal because we have got all the facts and the materials before us. All that we are going to do is to reframe the questions as suggested by the Commissioner. The questions when reframed will be:

1. Whether under the circumstances of the case the depreciation of Rs. 15,282 which could not be wiped off owing to the insufficiency of the business income could not be set off against the capital gains for that year?

The answer to this question will be in the affirmative; it could be set off against Rs. 90,400.

2. Whether when the total income in any year of a company consists entirely of a residue of capital gains remaining after set off against the total capital gains of that year of loss from business the amount by which the super-tax payable by them should be reduced should be computed on the total amount of the capital gains or only on the residue mentioned above.

The answer to this question will be, "On the total amount of the capital gains."

The assessee has raised a question, whether the provisions of s. 12B of the Indian Income-tax Act are *ultra vires* the Indian Legislature. We have already decided this question on earlier references and, therefore, we answer that question in the negative.

There will be no order as to the costs of the reference.

Attorneys for appellant: *Dikshit, Maneklal & Co.*

Attorneys for Commissioner: *N. K. Petigara.*

Answer accordingly.

P. M. P.