
(1961) 08 MP CK 0014
In the Madhya Pradesh High Court
Case No : Mis. C.C. No. 304 of 1960

Commissioner, Income Tax

APPELLANT

Vs

Straw Products Ltd. Bhopal

RESPONDENT

Date of Decision : 22-08-1961

Acts Referred:

Income Tax Act, 1961 — Section 66(1)

Citation : (1961) JLI 1231

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : M. Adhikari, A.G. and R.J. Bhawe, for the Appellant; R.S. Pathak and V.S. Dabir, for the Respondent

Judgement

Pandey, J.—This is a reference u/s 66(1) of the income tax Act at the instance of the Commissioner of income tax, Madhya Pradesh, Nagpur and Bhandara. The question formulated and referred to this Court for opinion is as follows:-

Whether, on the facts of the case and having regard to the provisions of paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, and clause 8 of the Agreement made on 20th September, 1938, between the assessee and the State of Bhopal, the correct basis for computing the written down value of the depreciable assets as at 1-11-1948 is the one which is adopted by the Income tax Officer or the one adopted by the Appellate Assistant Commissioner ?

2. The assessee is a public limited company. It was incorporated in the erstwhile State of Bhopal in 1938 and it commenced business on 30 May 1939. The company had obtained under an agreement dated 20 September 1938 made between it and the then Government of Bhopal several concessions. One of these is contained in clause 8 (a) of the agreement which reads as follows:-

During the period of 10 years from the date on which the said Company take 3 over the land for its business purposes, the said Company shall not be liable to

pay any sum by way of taxation to the State.

In view of this immunity, which the company enjoyed for 10 years ending on 31 October 1948, it was not subjected to any tax under the income tax Act, 1936, which was in force in the State of Bhopal. Indeed, throughout this period neither it was required to submit any return of its income nor was its income assessed under that Act. On 1 August 1949, that State merged in the Union of India and was constituted a Chief Commissioner's Province. By the Taxation Laws (Extension to Merged States and Amendment) Act, 1949, the Indian income tax Act, 1922 (hereinafter called the Act), was extended to the merged State of Bhopal. The company was first assessed to tax for the assessment year 1949-50 on the total income for the period 1 November 1948 to 31 December 1948. There were subsequent assessments for the years 1950-51, 1951-52, 1952-53 and 1953-54. In all these assessments, depreciation on machinery, buildings and other assets was allowed on the basis of the original cost in accordance with paragraph 2 of the Taxation Laws Merged States) (Removal of Difficulties) Order, 1949.

3. It transpired that subsequently the income tax Officer, Bhopal, read about a decision of the Bombay High Court and formed the opinion that in these cases excessive depreciation was allowed. Thereupon, he initiated action u/s 34 (1) of the Act for the assessment years 1952-53 and 1953-54 and issued notice to the company, which, appearing in response to the notices, raised without any success several objections. Ultimately, by two separate orders dated 4 March 1958, the income tax Officer reduced the depreciation allowance for the assessment year 1952-53 from Rs. 2,71,961/- to Rs. 1,29,883/- and for the year 1953-54 from Rs. 2,87,285/- to Rs. 1,72,673/-. This is what the income tax Officer stated:-

It has thus been asserted on behalf of the company that no depreciation was ever actually allowed to the company during the period it was exempt from Bhopal income tax Act. Thus whatever depreciation has been claimed by the company in the subsequent years on original cost of assets is correct. The argument of the company appears to ignore one important fact and it is that what was exempted from tax under the Bhopal income tax Act was the net income of the company. Thus the depreciation due under that Act should be taken to have been allowed. It has to be remembered that the exemption which was conferred upon the company by the Bhopal Government was an exemption from tax, that is to say, the Act was applicable to the assessee company but even if there was any profit during the period of 10 years mentioned in the agreement, the tax to be demanded was to be nil. It has also to be borne in mind that assessability of income and liability to pay tax are two different conceptions. In this case, the company's income was assessable even during the period of 10 years mentioned in the agreement and the Bhopal income tax Act was applicable to it, but under the agreement no tax was to be demanded even though there might have been profits during this period of 10 years. Thus in

computing the net income of the company which was exempt from tax. it will have to be presumed that all admissible depreciation under the Bhopal income tax Act was actually allowed

4. The company preferred two separate appeals which the Appellate Assistant Commissioner allowed by a consolidated order dated 1 September 1958. He took the view that if there was exemption from taxation, there could be no question of depreciation having been actually allowed at any time because the expression "actually allowed" would not imply depreciation allowed by a mental process or one deemed to have been allowed.

5. The Department appealed against the order of the Appellate Assistant Commissioner, but the Tribunal affirmed the view taken by him. In its order dated 21 September 1959, the Tribunal inter alia stated:-

Regarding the second contention, clause 8 of that agreement states that during the period of 10 years from the date on which the assessee company takes over the land for its business purposes the said company shall not be liable to pay any sum by way of taxation to the State. It may at once be stated that under the Sovereignty vested in the then Nawab of Bhopal he could grant any exemption or immunity from the operation of the provisions of any Act taxation or otherwise. This position is not controverted by the Department either. Therefore, the only question now is what is the scope of this clause 8 (a). The assessee has been defined in the Bhopal income tax Act, Section 2 (2) as under:-

"assessee" means a person by whom income tax is payable.

Applying this definition, if we read this sub-clause, it would mean that during the period of 10 years this company shall not be assessed to tax. It may mean that this company for a period of 10 years shall not be subjected to the process of assessment, levy or collection of any tax as the liability is consequential to such assessment, levy or collection. There is also the fact that for the period of these 10 years the Nawab or his "Government had not issued any notices or taken any steps to call upon the company to submit its return or make assessments under the Act.

6. The learned Advocate General proceeded to support the reference in this manner. By enacting the income tax Act, 1936, the Ruler of Bhopal had restricted his own power to grant, save by legislation, exemption from the liability to pay tax on income and he could do so only u/s 65 of that Act. It was not shown that there was any firman or legislative order exempting the company from the liability to pay tax on income. The agreement, by itself, was not, and could not be, such an order more particularly because, as recently indicated by the Supreme Court in *The Nandlal Bhandari Mills Ltd vs. The State of Madhya Bharat* (now Madhya Pradesh) (Civil appeals Nos 344 to 346 of 1960 dated 17 July 1961). a legislative order should be a general order emanating from the Sovereign Ruler and promulgated in the same manner as any other rule. In the circumstances, so the learned Advocate General further submitted, a notification

in the Jarida u/s 65 (1) of the Bhopal Act was likely to have been issued to sustain the exemption granted by the agreement. In this view, the company all the while remained subject to the provisions of the Bhopal Act and, although no depreciation was actually allowed, it must be deemed to have been so allowed on the principle underlying a provision in *pari materia*, namely the Explanation under clause 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950.

7. Having heard the counsel at some length, we find it difficult to accept the argument advanced by the learned Advocate General. As we have indicated earlier, both parties accepted before the Tribunal that the agreement dated 20 September 1938 was valid, without raising any dispute about the basis on which it has to be so regarded. It is also obvious that there is now a serious controversy about that basis involving questions of fact, one party claiming that the immunity from taxation was granted in the exercise of the sovereign powers of the Ruler and the other explaining it as an exemption attributable to a notification issued u/s 65 (1) of the Bhopal Act. Since this aspect of the matter was not raised before, or investigated by, the Taxing Authorities it cannot be permitted to be raised before us for the first time. In dealing with this reference, we would proceed on the accepted basis that there was a valid agreement dated 20 September 1938 and that, under one of its terms, the company was not liable to pay for 10 years any sum by way of taxation of the State.

8. The charging Section 3 of the Bhopal Act subjected to tax the total income of an assessee, who, according to clause (2) of Section 2 of that Act was a person by whom income tax was payable. Since the company was, in virtue of the agreement dated 20th September 1938 not liable to pay any tax, it was not an assessee within the meaning of the charging section and was not, therefore, subject to the provisions of the Act. This by itself is a sufficient answer to the contention put forward on behalf of the Department.

9. Even if we accept that, notwithstanding the agreement dated 20 September 1938; the company continued to be governed by the provisions of the Bhopal Act, we are of the view that, in this case, the depreciation had to be calculated on the basis of the actual cost. Under the relevant provision of the Act governing computation of the written down value, "the actual cost to him when he first acquire 1 these assets Jess all depreciation actually allowed to him under this Act or under any Act repeated thereby or under executive orders issued when the Indian income tax Act, 1836 (II of 1886 was in force "had to be taken into account for allowing depreciation. This has been partially modified by clause 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, which reads as follows:

In making any assessment under the Indian income tax Act, 1922, all depreciation actually allowed under any laws or Rules of a merged State relating to income tax and super-tax, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-cause (c) of the proviso to

clause (vi) of sub section (2), and the written-down value under clause (b) of sub-section (5), of Section 10 of the said Act;

Provided that where in respect of any asset, depreciation has been allowed for any year both in the assessment made in the merged State and in British India, the greater of the two sums allowed shall only be taken into account

It is obvious that the only modification introduced by the clause is that all depreciation actually allowed under any law or rules of a merged State relating to income tax and super-tax and not merely those under the Act must be taken into account. Now, the expression "actually allowed" is unambiguous and connotes the idea that the allowance was actually given effect to: Commissioner of Income Tax, Catcutta vs. Kamla Mills Ltd Catcutta XVII (1949) ITR 130. It must be contra-distinguished from what is deemed to be actually allowed as provided by the Explanation under clause (c) of Section 10 (5) of the Act. Since it is accepted that, in this case, no depreciation was actually allowed before 1 November 1948, clause 2 of the order is of no avail to the Department.

10. It is, however, urged that clause 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, should be construed in the light of the Explanation under clause 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. That Explanation is as under:

Explanation.-For the purpose of this paragraph, the expression all depreciation actually allowed under any laws or rules of a Part B State" means and shall be deemed always to have meant the aggregate allowance for depreciation taken into account in computing the written-down value under any laws or rules of a Part B State or carried forward under the said laws or rules.

We are unable to accept this contention for two reasons. In the first place, unless it was intended not to apply the principle underlying the Explanation, we see no good reason for not introducing it under clause 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, secondly, it may be a case of casus omissus. In Shrimati Hira Devi and Others Vs. District Board, Shahjahanpur, , the Supreme Court pointed out that it is certainly not the duty of the Court to fill in gaps and omissions in an Act by stretching the words therein used. Much less can this be done by importing a fiction intended expressly for another similar order concerning income tax in Part B States.

11. In the view we have taken of this case, our answer to the question referred to us must be that, in the circumstances of this case, the correct basis for computing the written-down value of depreciable assets of the company is the one adopted by the Appellate Assistant Commissioner. We also direct that the Department shall pay all costs of this reference. Hearing fee Rs. 75.