
(1998) 03 KL CK 0002

In the High Court Of Kerala

Case No : Income-tax Reference No"s. 44 of 1994 and 54 and 55 of 1995

Commissioner of Income Tax

APPELLANT

Vs

Hotel Luciya

RESPONDENT

Date of Decision : 11-03-1998

Acts Referred:

Income Tax Act, 1961 — Section 32, 43(3)

Citation : (1998) 2 ILR (Ker) 682 : (1998) 231 ITR 492

Hon'ble Judges : Om Prakash, C.J;S. Marimuthu, J;J.B. Koshy, J

Bench : Full Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; M. Pathrose Mathai and Mariam Mathai, for the Respondent

Judgement

Om Prakash, C.J.—I. T. R. No. 44 of 1994.-- At the instance of the Revenue, the Income Tax Appellate Tribunal, Cochin Bench, referred the following questions relating to the assessment year 1985-86 for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that the hotel building is a plant ?

(2) Whether, on the facts and in the circumstances of the case, the assessee is entitled to depreciation at the rate applicable to a plant ?"

2. The reference came up for hearing before a Division Bench of this court. Whereas, the Revenue in support of its case that the Tribunal was wrong in holding that hotel building is "plant", relied on the decision of this court in I. T. R. No. 155 of 1991 (Commissioner of Income Tax Vs. Damodar Corporation,), the assessee relied on Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, , in which the Supreme Court relying on the classic dictum of Lindley L. J. in Yarmouth v. France [1887] 19 QBD 647 (CA) and the dictum of Lord Reid in IRC v. Barclay, Curle and Co. Ltd. [1970] 76 ITR 62 , amongst others, laid down certain tests to find out as to what is "plant" and contended that the tests laid down by the Supreme Court are fulfilled in this case

and, therefore, the hotel building is "plant" entitled to depreciation applicable to "plant". The Division Bench, which was in seizin of the reference, noticed a marked inconsistency between the decision of this court in I. T. R. No. 155 of 1991 Commissioner of Income Tax Vs. Damodar Corporation,) and the decision of the Supreme Court in Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, .

I T. R. Nos. 54 & 55 of 1995 :

One of the common questions referred for the opinion of this court in these references, at the instance of the Revenue, is as follows:

"Whether, on the facts and in the circumstances of the case, the theatre building can be considered as a plant ?"

3. Before a Division Bench of this court, counsel for the Revenue contended that the question is squarely covered by the decision dated September 3, 1996, of the Division Bench of this court in I. T. R. Nos. 100, 101, 111 and 112 of 1992 Commissioner of Income Tax Vs. Sasidhara Shenoy and Brothers,). Counsel for the assessee, on the other hand, pointed out that in I. T. R. No. 44 of 1994, the correctness of the decision in I. T. R. No. 155 of 1991 (Commissioner of Income Tax Vs. Damodar Corporation,), which was relied on by the Division Bench of this court in I. T. R. No. 100 of 1992 Commissioner of Income Tax Vs. Sasidhara Shenoy and Brothers,) and connected cases, was questioned and then the Division Bench in I. T. R. No. 44 of 1994 referred the similar questions to a larger Bench.

4. This is how the two Division Benches referred the above reproduced two questions in I. T. R. No. 44 of 1994 and one common question in I. T. R Nos. 54 and 55 of 1995 for consideration to a larger Bench, which have come up for hearing before us.

5. First, we take up the question whether the hotel building is "plant" entitling to depreciation at the rate applicable to plant. Section 32, sub-section (1), Clause (ii) of the Income Tax Act, 1961 (briefly "the Act"), provides that in respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purpose of the business, deduction shall be allowed at such percentage on the written down value thereof as may be prescribed.

Section 43, Clause (3), gives an inclusive definition of the word "plant" as follows :

"(3) "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession ;"

6. From the inclusive definition one cannot readily discern as what is plant and what is not and, therefore, it is nothing but necessary to find out what are the tests laid down under the law for determining "plant". Lindley L. J. in Yarmouth v. France [1887] 19 QBD 647 (CA) held that a cart-horse was plant within the

meaning of Section 1(1) of the Employer's Liability Act, 1880, observing as follows (page 658) :

"There is no definition of plant in the Act: but in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business -- not his stock-in-trade which he buys or makes for sale ; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

7. According to Lindley L. J. any apparatus used by a businessman for carrying on his business is included in the definition of "plant".

8. In *IRC v. Barclay, Curie & Co. Ltd.* [1970] 76 ITR 62 the House of Lords, speaking through Lord Reid, held that a dry dock is a plant. The function of a dry dock is to lower ships into a position where they can be securely held exposed out of the water and inspected and repaired and to raise them again to a level where they are free to sail away. The valves, the machinery for the provision of electricity and the pumps were taken as an integral part of the dock as a functioning entity. The remainder of the dock would have been useless to the company without them and, similarly, they would have been useless without the remainder of the dock. Relying on the classic definition of "plant" given by Lindley L. J. in *Yarmouth's* case [1887] 19 QBD 647 (CA), *inter alia*, the House of Lords concluded as follows (page 66) :

"The dry dock was in our view not the mere setting or premises in which ships were repaired. It was different from a factory which housed machinery, for in the operation of the dock, the dock itself played a part in the control of water and enabled the valves, pumps and electricity generator, which were an integral part of its construction, to perform their functions. The dock was not a mere shelter or home but itself played an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river."

9. The principle that can be deduced from this authority is that if a building is merely a setting or place to accommodate some apparatus, then that will not be held as "plant", but if a building is such which does not merely accommodate something or which cannot be regarded merely as a setting or premises, but if that plays an important role in carrying on the business, then that would fall within the inclusive definition of the "plant".

10. The question for consideration, therefore, will be whether the hotel building is merely a setting or premises or whether that plays an important role in running the hotel, meaning thereby, whether the building is such without which the business of hotel cannot be conceived. If a building is an integral part of the hotel business, that is, something more than merely a place, accommodating some requisites of hotel, then that would partake of the character of "plant". The hotel building, in our opinion, cannot be equated with a residential building, which provides shelter to the people living therein. The building is essential to run the business of hotel. Without a befitting building, it is idle to think of a hotel

business. A good hotel requires amenities and a building, which is so erected as to fulfil the requisite norms of a hotel. A building simply accommodating machinery or other apparatus to run a factory is different from the hotel building, which is specially designed, suiting the hotel requirements. So a specially erected building cannot be said to be a mere setting or premises. No hotel can function without a suitable building satisfying the norms of hotel.

11. Building and plant are not mutually exclusive. When a dry dock, a concrete dry structure can be held a plant, because the whole dock was used for carrying on the entire operation, we fail to understand why the hotel building, specially erected for that purpose, cannot be held as "plant". As a specially erected building for hotel is used for carrying on the hotel operations, it must come within the inclusive definition of "plant". The submission of learned senior standing counsel is that Section 32(1) of the Act refers to buildings, plant, machinery or furniture and, therefore, each item is mutually exclusive and what falls under the head "Building" could not be treated as "plant" and vice versa. In *Barclay, Curie & Co.*'s case [1970] 76 ITR 62, Lord Guest indicated a functional test in these words (page 75) :

"In order to decide whether a particular subject is an "apparatus" it seems obvious that an inquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary."

12. In brief the test would be : Does the article fulfil the function of a plant in the assessee's trading activity ? Is it a tool of his trade with which he carried on his business ? If the answer is in the affirmative, -it will be a plant *Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh,).* Considering the peculiar nature of hotel business and applying the aforesaid test, we are of the view that the hotel building is a tool of the assessee's business.

13. "Plant" cannot necessarily be confined to an apparatus which is used for mechanical operations or process or is employed in mechanical or industrial business. In *Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh*, the appellant-company which manufactured scientific instruments and apparatus, entered into two separate collaboration agreements with a Hungarian company, one for the manufacture of theodolites and the other for the manufacture of microscopes. In those agreements, the foreign collaborator agreed for consideration in each case to supply the appellant all the technical know-how required for the manufacture of those instruments. The appellant claimed depreciation on "library"--a compendious name for designs, drawings, etc., on the ground that the payment had been made for the outright purchase of designs, drawings and other literature. Then the question arose before the Supreme Court whether the appellant was entitled to depreciation on the voluminous designs, drawings and other literature described as "library". The Supreme Court held that drawings, designs, charts, plans, processing data and other literature comprised in the "documentation service" fell within the definition of "plant" in Section 43(3), because the purpose of rendering such

documentation service was to enable the appellant to undertake its trading activity of manufacturing theodolites and microscopes and these documents had a vital function to perform in the manufacture of these instruments.

14. When documentation service can be held as plant because that is essential to carry on the business of manufacturing scientific instruments, we see no good reason why the hotel building, specially designed to run the hotel, should not be held as "plant".

15. In *S.P. Jaiswal Estates (P.) Ltd. Vs. Commissioner of Income Tax*, the Calcutta High Court held that the hotel building owned by the assessee and used for the purpose of carrying on its hotel business was an apparatus with which the assessee's hotel business was carried on and therefore, the hotel building was to be treated as "plant" for the purpose of depreciation u/s 32. To come to such a conclusion, the Calcutta High Court observed as under (page 151) :

"The question, therefore, is whether having regard to the assessee's business of hotel, the building can be treated as a "plant". In other words, was the building a tool of the assessee's trade or the setting in which the assessee's business was carried on. The assessee's hotel rooms had to be let out in the course of the assessee's business. The entire building has to be used by the assessee for carrying on its hotel business. The business of the assessee is of a nature where the building has to be treated as a tool of his trade. The building is not a setting or a canopy under which the assessee carries on its business."

16. The Revenue vehemently relied on *Commissioner of Income Tax Vs. Lake Palace Hotels and Motels Pvt. Ltd.*, in which the Rajasthan High Court took the contrary view that neither hotel building nor theatre building is "plant" within the meaning of Section 43(3). Though the Rajasthan High Court referred to all the above important cases, yet, without giving cogent reasons to differ from the view taken by the Supreme Court and the House of Lords in the aforementioned cases, it chose to take the contrary view, Bereft of the critical analysis and the cogent reasons, we are afraid that the decision of the Rajasthan High Court does not possess persuasive force and lay down a good law on the point in issue. Similarly, the Division Bench of this court in *Commissioner of Income Tax Vs. Damodar Corporation*, held that a hotel in its entirety is not a plant for the purposes of depreciation. The Division Bench stated reasons as under (para 11 at page 702):

"A perusal of the said statutory provision of Section 32A of the Act would show that the words "machinery and plant" have been used separately with an exclusive character from each other finds place in the concerned enactment of the section. The statutory provision also speaks of other requirements for entitlement to investment allowance on the count".

17. The view taken by the Rajasthan High Court and the Division Bench of this court, in our view, is too narrow and devoid of logic. Applying the tests laid down in the English decisions and in *Scientific Engineering House (P) Ltd. Vs.*

Commissioner of Income Tax, Andhra Pradesh, , it must be held that the terms "building" and "plant", occurring in Section 32(1), are not mutually exclusive and a building depending on its nature and peculiarity can be held as "plant".

18. In Commissioner of Income Tax Vs. Dr. B. Venkata Rao, , the Karnataka High Court holding that a nursing home is "plant" entitled to depreciation, applicable to plant, observed as under (headnote) :

"A "nursing home" is not an ordinary building. A building used as a nursing home is not comparable with an ordinary building having regard to the number of persons using it, the manner of its use and the purpose for which it is used. The building is used not only to house the patients and nurse them, but also to treat them for which various equipment and instruments are installed. It should have an operation theatre, a pathological laboratory, X-ray room, plant for sterilisation of clothes, plant for sterilisation of other surgical instruments, an air-conditioning room, etc. Therefore, a nursing home building is plant. . ."

19. We, therefore, hold that the Income Tax Appellate Tribunal was right in holding that the hotel building is "plant" entitled to depreciation applicable to plant under the rules framed under the Act.

20. What holds good for the hotel building, that equally applies to a theatre building. In S.K. Tulsi and Sons Vs. Commissioner of Income Tax, , the Allahabad High Court, taking the view that the theatre building is "plant" and relying on Commissioner of Income Tax Vs. Kanodia Warehousing Corporation, , held that in order to find out whether a building or structure or a part thereof constitutes "plant", the court must apply what is called "the functional test". If it is found that the building or structure constitutes an apparatus or a tool of the taxpayer by means of which the business activities are carried on, it would amount to "plant" but where the structure plays no part in the carrying on of those activities but merely constitutes a place within which they are carried on, the building cannot be regarded as a "plant". We entirely agree with the view taken by the Allahabad High Court.

21. An SLP was filed by the Department against the judgment dated December 20, 1993, of the Allahabad High Court in ITA No. 132 of 1993 rejecting a reference application on the question whether the assessee's building was "plant" entitling it to depreciation and that was dismissed by the Supreme Court by a judgment dated January 4, 1995 (see [1995] 212 ITR 58). However, an authoritative decision is still awaited from the Supreme Court, as the decision dismissing the SLP does not form a precedent.

22. It is to be borne in mind that Section 43(3) of the Act gives only an inclusive definition of the word "plant". This being so, it would be proper to hold that the word "plant" is of wider amplitude and that cannot be construed in a narrower fashion. The inclusive definition u/s 43(3) is indicative of the fact that the terms "buildings", "machinery" and "plant" are not mutually exclusive.

23. In the result, we are of the view that hotel building and theatre building are "plant" within the meaning of Section 43(3) of the Act and accordingly they are entitled to depreciation applicable to plant.

24. Records of these cases be sent down to the respective Division Benches to enable them to dispose of the Income Tax references finally.