

(1978) 04 CAL CK 0035

In the Calcutta High Court

Case No : Income Tax Reference No. 349 of 1972

Disergarh Coal Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 24-04-1978

Acts Referred:

Hyderabad Income Tax Act, 1357 — Section 12(2)

Income Tax Act, 1922 — Section 10(2)

Income Tax Act, 1961 — Section 256(1)

Citation : (1980) 122 ITR 902

Hon'ble Judges : Sudhindra Mohan Guha, J;S.C. Deb, J

Bench : Division Bench

Advocate : R.N. Bajoria and Dilip Dhar, for the Appellant;Ajit Sengupta and P. Majumdar, Advs, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—This reference u/s 256(1) of the Income Tax Act, 1961, by the Income Tax Tribunal at the instance of the assessee relates to the assessment years 1962-63 and 1963-64, for which the relevant previous years ended on 31st March, 1962, and 31st March, 1963, respectively.

2. The assessee-company is engaged in the business of raising and selling coal. The company by an agreement dated October 5, 1959, appointed Selected Satgram Collieries (P.) Ltd. as its raising contractor in respect of its colliery. Under the terms of this agreement this was to remain in force for a period of 15 years. The raising contractor was to be given a flat remuneration at the rates mentioned in the said agreement. The ITO disallowed sums of Rs. 92,500 and Rs. 40,970 in the two years, respectively, on the ground that these amounts spent by the assessee-company were to be borne by the raising contractor who was to reimburse the former.

3. The assessee being aggrieved by the order filed an appeal before the AAC. The AAC found that the assessee-company was appointed a raising and selling contractor by M/s. New Beerbhum Coal Co. Ltd. by an agreement dated

December 1, 1960, for an area of 1,547.87 bighas. The contract was to remain in force in the first instance for a period of 15 years and it could be terminated thereafter subject to 12 months' notice from either side. Under Clause 3 of the said agreement, the right, title and interest in the properties covered by the contract were to continue to vest entirely in the New Beerbhum Coal Co. Ltd. Under Clause 8 of the agreement, the said M/s. New Beerbhum Coal Ltd. continued to remain responsible for the payment of all rent and royalties, cesses, taxes and any other imposition but all these payments were to be reimbursed by the assessee-company. Clause 16 of the agreement provided that a sum of Rs. 1,54,787 by way of advance profits on coal to be raised from the area covered by the contract was to be paid by the assessee-company by monthly instalments of Rs. 7,500 each. In addition, the company also had to pay what was described as a net profit of 0-8-0 (eight annas) per ton on all coal actually raised from the Disergarh seam subject to a minimum tonnage of 5,000 tons per month and also ten annas per ton on all coal raised from the seams above the Disergarh seam subject to a minimum tonnage of 3,000 tons per month. The second payment was to commence only on the expiry of six months from the date on which the work was actually commenced in the respective seams. According to the agreement, the sums of Rs. 90,000 and Rs. 33,967 were paid in the course of the assessment years 1962-63 and 1963-64 by the assessee-company to M/s. New Beerbhum Coal Co. Ltd. The actual working of the mines, however, started only in June, 1960, and before that there was no raising of coal by the assessee-company from the mines covered under the contract. So, the AAC disallowed the above payments of Rs. 90,000 and Rs. 33,967 in the two years, respectively, on the ground that they were in the nature of capital expenditure which the assessee-company incurred in order to acquire a right to a source of income which was to remain in existence for a period of 15 years. He also noted that this payment was not royalty on the actual coal to be raised, but was in fact calculated on the basis of Rs. 100 per bigha of the area under the contract. It was, accordingly, held by him that this was in the nature of a premium paid for the acquisition of a valuable right and a benefit of enduring nature and as such a capital expenditure.

4. Then, the assessee again came in appeal before the Tribunal. It was contended on behalf of the assessee that the payments in question were in fact an advance price paid for the coal to be raised by the assessee-company at a future date. So it was urged that the payment should be treated as revenue expenditure.

5. The department, on the other hand, contended that these payments were not royalty on the extraction of coal and that they were lump sum payments in instalments. The nature of the payment was said to be in the nature of a premium, paid for the right of operating the mines for a period of 15 years. It was the case of the revenue that this payment was not for purchase of stock-in-trade and that it had to be made irrespective of the quantity of coal to be extracted from time to time.

6. The Tribunal upheld the contentions of the department by observing that in this case the assessee-company had acquired a source of income by becoming the raising and selling contractor of the collieries within the specified areas for a period of 15 years and that the payment was calculated on the basis of the area and in any case it had no relationship with the raw material which was contemplated to be raised under the contract. It was also observed by the Tribunal that on the date of contract or at the time of payment of these amounts the quantity of the raw material to be extracted was not known and on reading Clause 16 of the agreement it would be apparent that the payments in respect of the actual raising were separate from the lump sum payment which was to be paid before the commencement of the actual mining operation and was by way of a premium and in consideration of the new source of income which had been acquired by the assessee-company. Thus, it was concluded by the Tribunal that the amounts of Rs. 90,000 and Rs. 33,987 could not be deducted as revenue expenditure in computing the business income of the assessee.

7. On the aforesaid facts, the following question of law has been referred to this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sums of Rs. 90,000 and Rs. 33,987 were capital expenditure for the assessment years 1962-63 and 1963-64, respectively, under the Income Tax Act, 1961 ?"

8. The point in dispute hinges on the interpretation of Clause 16 of the agreement between New Beerbhum Coal Co. Ltd. and Disergarh Coal Co. Ltd. dated May 27, 1960. Under this clause, the assessee was to pay a sum of Rs. 1,64,987 by way of advance profits on coal, to be raised by it from the area covered by the contract, to M/s. New Beerbhum Coal Co. Ltd. in twenty instalments of Rs. 75,000 per month with effect from the 1st of December, 1960, and a final instalment of Rs. 4,787 to be paid in August, 1962 ; in addition thereto the assessee was to pay to the said Coal Co. a net profit of annas eight per ton on all coal actually raised by it from the Disergarh seam and seams below it subject to a minimum tonnage of 5,000 tons per month being raised from such seams and also ten annas per ton on all coal raised from the seams above the Disergarh seam subject to a minimum tonnage of 3,000 tons per month being raised from such seams provided, however, that the above provision relating to the said minimum raisings of 9,000 tons and 3,000 tons, respectively, would come into operation on the expiry of six months from the date on which work is commenced in the respective seams. Having regard to the provisions made under Clause 16 it has to be ascertained whether the sum of Rs. 92,500 and Rs. 40,970 paid in the years under assessment respectively were, in fact, an advance price paid for the coal to be raised by the assessee at a future date and whether such payment should be treated as revenue expenditure or whether such amounts had been paid as premium for the right of operating the mines for a period of 15 years and whether such payments were in the nature of capital

expenditure.

9. The decision of the Supreme Court in the case of Pingle Industries Ltd., Secunderabad Vs. Commissioner of Income Tax, Hyderabad, seems to be very relevant for the purpose of answering the question referred to us in the present reference. In this case, the assessee carried on the business of selling flag stones which were obtained from a jagirdar under a contract. This contract conferred upon the assessee the right to extract stones from quarries situated in specified places for a period of 12 years on the annual payment of Rs. 20,000. To ensure such annual payment a sum of Rs. 96,000 was paid in advance as security of which Rs. 8,000 was to be adjusted annually against the annual payment and the balance of Rs. 20,000 was payable in monthly instalments of Rs. 1,666-10-8. Under the contract, the assessee had only the right to excavate stones from the area.

10. There was another similar lease obtained from the Government of Hyderabad for a period of 6 years under which the assessee had to pay Rs. 9,000 per year in monthly instalments of Rs. 760 per month. The question which arose for determination was whether the amounts paid by the assessee to the jagirdar and the Government each year were revenue expenditure allowable under the Section 12(2)(xv) of the Hyderabad Income Tax Act, corresponding to Section 10(2)(xv) of the Indian I.T. Act, 1922. It was held by the Supreme Court that the assessee had acquired an asset of an enduring character and of a capital nature.

11. The amount paid every month was not in any sense a payment for acquisition of any right from month to month. It was really the entire sum chopped into small payments for his convenience. Nor can the amount be described as a business expense, because the outgoings every month were not to be taken as spent over purchase of stones but in discharge of the entire liability to the jagir.

12. The Supreme Court further held "that in this case the assessee acquired, by his long term lease, a right to win stones, and the lease conveyed to him a part of the land. The stones in situ were not his stock-in-trade in a business sense but a capital asset from which after extraction the stones were converted into stock-in-trade. The payment, though periodic in fact, was neither rent nor royalty but a lump payment in instalments for acquiring a capital asset of enduring benefit to his trade. The decision in this case applies on all fours.

13. The Tribunal appears to have considered the judgment of the Rajasthan High Court in the case of R. B. SETH MOOLCHAND Vs. COMMISSIONER OF Income Tax., . This was subsequently considered by the Supreme Court in R.B. Seth Moolchand Suganchand Vs. The Commissioner of Income Tax, Delhi, . In this case, the assessee-firm paid the sum of Rs. 1,83,860 to acquire loans of certain areas of land bearing mica for a period of 20 years. These areas had already been worked for 16 years by other lessees. The question was whether a proportionate part of the amount was allowable in the relevant year as business

expenditure. It was held by the Supreme Court that the amount was paid for acquiring a right of an enduring nature to extract and remove the mica and bring it to the surface. The expenditure incurred was capital expenditure and the proportionate part of the sum of Rs. 1,53,800 was not allowable as revenue expenditure.

14. In the case of Commissioner of Income Tax (Central) Vs. Assam Oil Company Ltd., , a Division Bench of this court had occasion to consider the nature of royalty and whether it was capital or revenue expenditure. It was held that what the assessee claimed under the lease was undoubtedly an asset of an enduring nature, namely, the right to excavate and win petroleum from a demised source for a long period. It was also decided whether the royalty payable under the lease was exclusively referable to the enduring benefit so obtained. It was found that a royalty normally is never considered to be an expenditure of capital nature but where under a lease a benefit of enduring nature is obtained, the very same lease can provide for other payments which will not be considered to be of capital nature but of a revenue nature as found in the analogy given by the Supreme Court in the case of M.A. Jabbar Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad, .

15. The learned counsel for the revenue also refers to the decision of this court in Hirji and Co. Private Ltd. Vs. Commissioner of Income Tax, . In this case, the assessee was not a dealer in shares. The shares were purchased and held by the assessee as not its stock-in-trade but as investment in the nature of capital. Thus, the loss incurred in selling these shares was found to be capital loss. It was also held that the assessee by the acquisition of controlling interest in the company, acquired a source of supply and this source was held to be a benefit of an enduring nature and hence a capital asset.

16. It has already been pointed out that Clause 16 of the agreement in this case provided that a sum of Rs., 1,54,767 by way of advance profits on coal to be raised from the area covered by the contract was to be paid by the assessee. The assessee-company acquired a source of income by becoming raising and selling contractors of the collieries within specified areas for a period of 15 years. The payment was calculated on the basis of the area and in any case it had no relationship with the raw material which was contemplated to be raised under the contract. The payment in respect of actual raisings had no connection with the lump sum payment which was to be paid before the commencement of the actual mining operation. So, such payment was in the nature of premium. Thus, it was apparent that the payment was made for acquisition of the area for extracting and owning coal.

17. Having regard to the facts and the circumstances of the case and the decisions discussed above we are of the opinion that the Tribunal was perfectly justified in holding that the sums of Rs. 90,000 and Rs. 33,987 were capital expenditure for the assessment years 1962-63 and 1963-64, respectively. Thus, the question is answered in the affirmative and in favour of the revenue.

18. Each party will pay and bear its own costs.

Deb J.

19. The contract before us. Inter alia, provides that the assessee shall pay a net profit of .6 annas per ton on all coal to be raised by the assessee from Disergarh Seams and a further sum of Rs. 1,54,767 in instalments described as advance profits on coal to be raised from the said seams within the area of 1,547.87 bighas of lands. The contract is for 15 years. It does not provide for adjustment of Rs. 1,54,787 with the net profit. It also does not provide for its repayment.

20. The relevant facts found and stated by the Tribunal may now be briefly stated. Rs. 1,54,767 was the premium paid by the assessee at the rate of Rs. 100 per bigha for 1,547.87 bighas of lands of the said colliery. Out of this amount, Rs. 90,000 and Rs. 33,987 were paid in the relevant accounting years and by incurring the aforesaid expenditure the assessee had brought into existence a new source of income and a benefit of an enduring nature.

21. The contract, read as a whole, conclusively shows that the aforesaid amounts were paid by the assessee as premium for the acquisition of a new source of income as found by the Tribunal. This expenditure has also brought into existence a benefit of an enduring nature and accordingly it must be held that the aforesaid expenditure is not a revenue expenditure but a capital expenditure.

22. In the premises, I do not propose to deal with the cases cited at the Bar. I agree with the answer given by my learned brother and also with the order as to costs.