
(1999) 02 CAL CK 0001

In the Calcutta High Court

Case No : Income-tax Reference No. 124 of 1995

Ledo Tea Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-02-1999

Acts Referred:

Income Tax Act, 1961 — Section 22, 256, 32, 40A(8)

Citation : (1999) 156 CTR 99 : (2000) 241 ITR 605

Hon'ble Judges : Satyabrata Sinha, J;Debi Prasad Sircar-I, J

Bench : Division Bench

Advocate : J.P. Khaitan and Anil Chowdhury, for the Appellant; P.K. Mallick and J.C. Saha, for the Respondent

Judgement

Satyabrata Sinha, J.—This reference u/s 256(1) of the Income Tax Act, 1961, has been made by the Income Tax Appellate Tribunal, E-Bench, Calcutta, for consideration of the following questions :

"(1) Whether, on the facts and in the circumstances of the case and in view of the provisions of Section 47 of the Indian Registration Act, the Tribunal was right in holding that the assessee was not owner of the assets which were purchased with effect from January 1, 1983, but the conveyance deed for which was registered on May 23, 1984, that is after the end of the previous year ?

(2) Whether, on the facts, and in the circumstances of the case, the Tribunal was right in holding that the assessee was not entitled to depreciation allowance and additional depreciation allowance in respect of the assets with effect from January 1, 1983, vide conveyance deed executed on May 23, 1984 ?

(3) Whether, on the facts, and in the circumstances of the case, the Tribunal was right in holding that the assessee was not entitled to depreciation allowance and additional depreciation allowance in respect of the labour houses constructed by the assessee during the previous year, on the land, conveyance deed for which was registered after the close of the previous year although the deed expressly

provided that the sale was with effect from January 1, 1983 ?

(4) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the directors and promoters cannot be called "agent" and that capital borrowed from them was not borrowed for the purpose of the assessee's business because it was used for acquisition of capital assets in the form of Ledo Tea Estate ?

(5) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that a part of interest was disallowable u/s 40A(8) in respect of the interest paid to director and promoters on their current account ?"

2. In relation to questions Nos. 1, 2 and 3 the facts of the matter are as follows :

3. The assessee had purchased various assets including land, tea plants, buildings, plant and machinery, furniture and fixtures from Duncan Agro Industries Ltd. It had been carrying on business in the tea estate with effect from January 1, 1983. All revenues generated during the period January 1, 1983 to March 31, 1984, were taken into account by the Assessing Officer for computing the taxable income of the assessee-company for the assessment year in question. The conveyance deed was, however, executed on May 23, 1984, which contained a stipulation that all assets of Ledo Tea Estate were sold by the vendor to the assessee with effect from January 1, 1983, and that the business of the said tea estate was carried on by the assessee-company with effect from the said date. The petitioner claimed depreciation on the abovementioned assets which were rejected. The said order was upheld by the Commissioner of Income Tax (Appeals).

4. An appeal was preferred by the petitioner and the Tribunal also rejected the same having opined that the assessee had rightly been denied allowance of depreciation and additional depreciation as regards construction and purchase of the machinery by the assessee during the year. The Tribunal also opined that as far as the constructions are concerned the assessee could not be treated as the sole owner since the land did not belong to it and unless the registration was complete, no depreciation was allowable on it.

5. So far as questions Nos. 4 and 5 are concerned the relevant facts are that the directors of the petitioner-company lodged advance loan for the purpose of purchase of the said tea estate. The Assessing Officer disallowed 15 per cent. of the total amount paid as interest u/s 40A(8) of the Act. While disallowing the interest, the Assessing Officer rejected the contention of the assessee that prior to incorporation the promoters had paid the amount to the vendors and the amount could not be taken as deposit received by the company. The appeal taken from the said order was dismissed. On further appeal, the Tribunal, on appreciation of facts and circumstances of the case, observed that the persons to whom the interest was paid could neither be called purchasing agents nor selling agents nor agents in terms of "other agents" since interest was not paid in the course of business but for acquiring the assets of the company. It was further

found that the directors cannot be said to have maintained a current account which demonstrated regular transactions during the year by way of withdrawals and deposits. In the case, certain amounts were advanced for purchase of the tea estate and no regular transactions were embodied therein.

Re. Questions Nos. 1 to 3 :

6. The question as to who would be the owner of the property within the meaning of Section 32 of the Income Tax Act is a vexed question. Various High Courts have held that a person who had been put in possession of the property on the basis of an agreement for sale in part performance of the contract as envisaged u/s 53A of the Transfer of Property Act is not an owner in relation to the property in question. See *Parthas Trust Vs. Commissioner of Income Tax*, ; *Commissioner of Income Tax Vs. Draupadi Pvt. Ltd.*, ; *Commissioner of Income Tax Vs. Sivanandha Mills Limited*, ; *Commissioner of Income Tax Vs. Hindustan Cold Storage and Refrigeration P. Ltd.*, and *Additional Commissioner of Income Tax Vs. Mercury General Corporation Pvt. Ltd.*, .

7. On the other hand, several High Courts have held that owner should be given a wider meaning. (See *Additional Commissioner of Income Tax Vs. U.P. State Agro Industrial Corporation Ltd.*, ; *Commissioner of Income Tax, Central-I Vs. Steelcrete (P.) Ltd.*, ; *Commissioner of Income Tax Vs. Shahney Steel and Press Works (P.) Ltd.*, and *Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd.*, .

8. However, recently a Division Bench of this court in *Commissioner of Income Tax Vs. General Marketing and Manufacturing Co. Ltd.*, , relying on or on the basis of the decisions of the apex court in *R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, and *Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd.*, :

"A question arose before this court as well as before the other courts about the meaning of the expression "owner". The Allahabad High Court in a decision in the case of *Additional Commissioner of Income Tax Vs. U.P. State Agro Industrial Corporation Ltd.*, , was called upon to consider a similar controversy. The view taken by the High Court was that for claiming the benefit of Section 32 of the Act it was not necessary that the assessee should be a complete owner. By the words "complete owner", what the Allahabad High Court meant, was a document of title--that title must have passed to the person claiming the benefit in the manner the law requires it to be. If an assessee is the person using a property otherwise also it can get its benefit. The court held that an assessee is nothing but the owner for the purpose of Section 32 of the Act even if it is not the owner enjoying the lawful title by obtaining a document. The Calcutta High Court was called upon to consider a similar controversy in the case of *Madgul Udyog Vs. Commissioner of Income Tax*, The Calcutta High Court agreed with the decision of the Allahabad High Court as above and also relied on the Supreme Court

decision in the case of R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, The view was that for all intents and purpose the person who is in possession of the property which is saved by Section 53A of the Transfer of Property Act was entitled to get the benefit of Section 32 of the Income Tax Act. This decision took into consideration, Section 9 of the old Income Tax Act (which is equivalent to Section 22 of the new Act). Reliance was also placed on another decision of the case of Commissioner of Income Tax Vs. Sahney Steel and Press Works (P.) Ltd., This was the decision of the Andhra Pradesh High Court. The Andhra Pradesh High Court held that the assessee who may not have the legal title is the owner of the property for the purposes of getting the benefit of Section 32 of the said Act. The relevant portion of the said decision is being quoted below (at page 814) :

"We are, however, not concerned with this controversy at the present moment. It has to be borne in mind that in interpreting the liability for wealth-tax, normally equitable considerations are irrelevant.

Therefore, it is not possible for us to depart from the principles laid down by the Supreme Court in R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, , while interpreting the meaning of the expression "owner" occurring in Section 22 of the Act which is in pari materia with Section 9 of the Indian Income Tax Act, 1922, for the purpose of determining the question whether the assessee is entitled to claim depreciation u/s 32(1) of the Act".

9. The point at issue, thus, is covered by the aforementioned Division Bench decision of this court.

10. Mr. Mallick, learned senior counsel appearing on behalf of the Revenue, however, submitted that the said decisions require reconsideration and in support of his aforementioned contention placed strong reliance on the Full Bench decision of the Kerala High Court in Parthas Trust Vs. Commissioner of Income Tax, .

11. Section 32 of the Income Tax Act provides for grant of depreciation in respect of buildings, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession.

12. The word "owner" has not been defined in the Income Tax Act, 1961. Section 27 of the Income Tax Act reads thus :

"(i) an individual who transfers otherwise than for adequate consideration any house property to his or her spouse, not being a transfer in connection with an agreement to live apart or to a minor child not being a married daughter, shall be deemed to be the owner of, the house property so transferred ;

(ii) the holder of an impartible estate shall be deemed to be the individual owner of all the properties comprised in the estate ;

(iii) a member of a co-operative society, company or other association of persons to whom a building or part thereof is allotted or leased under a house building scheme of the society, company or association, as the case may be, shall be deemed to be the owner of that building or part thereof ;

(iiia) a person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in Section 55A of the Transfer of Property Act, 1882 (4 of 1882), shall be deemed to be the owner of that building or part thereof ;

(iiib) a person who acquires any rights (excluding any rights by way of a lease from month to month or for a period not exceeding one year) in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in Clause (f) of Section 269UA, shall be deemed to be the owner of that building or part thereof ;

(iv) "annual charge" means a charge to secure an annual liability, but does not include any tax in respect of property or income from property imposed by a local authority, or the Central or a State Government ;

(v) "capital charge" means a charge to secure the discharge of a liability of a capital nature ;

(vi) taxes levied by a local authority in respect of any property shall be deemed to include service taxes levied by the local authority in respect of the property."

13. Under the general law undoubtedly a person derives right, title and interest in respect of an immovable property only when a registered instrument is executed in his favour but would that mean that the same meaning has to be adhered to in all situations ? The answer to the aforementioned question must be rendered in the negative. "Owner" has been defined in the Canadian Law Dictionary, at page 271, to mean :

"The person who is beneficially entitled to a right. However, the term is frequently used to denote a person who is beneficially entitled to a corporeal thing such as land, chattels, goods, animals, etc.

The term also has the extended meaning of denoting the person who has the dominion or control over a thing although the title to the same may be in another, such as a conditional sale's purchaser.

The term also has the extended meaning of a person whose right to a thing is short of entire beneficial ownership such as a lessee for a term of years."

14. In Black's Law Dictionary, the word "owner" has been stated to mean :

"The person in whom is vested the ownership, dominion, or title of property ; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some

agreement or covenant which restrains his right.

The term is, however, a nomen generalissimus, and its meaning is to be gathered from the connection in which it is used and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to land or the person occupying or cultivating it.

The term "owner" is used to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has "title" to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term "title" unlike "ownership", is a colorless word ; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as trustee. Restatement, Second, Trusts, ? 2, Comment (d) ; Restatement of Property, ? 10."

15. In Webster's New 20th Century Dictionary, second edition at page 1279, the word "owner" has been stated to mean--to possess, to hold as personal property.

16. Thus, the word "owner" is capable of being assigned a wider meaning.

17. It is true that in Parthas Trust Vs. Commissioner of Income Tax, the Kerala High Court has held that the said word should be used in the context of the provisions of the Transfer of Property Act and the Registration Act.

18. A mere right of user may not make the person using the property the owner thereof ; but in a case of this nature when the intention of the parties is absolutely clear and where even the vendor had admitted that they had sold the properties at the time of entering into the agreement for sale, a wider meaning should be attributed. It has not been disputed that vendors, in terms of the provision of the Income Tax Act, would be entitled to the benefits of capital gains tax in such a situation. The fact remains that the assessee had been carrying on business upon treating the assets as its own property and, thus, in that context whether in law such a title had vested in him or not may not be very relevant. If a strict construction to such word is made, in a case of defective title though the assessee is the holder of a registered deed, he would not be entitled to depreciation.

19. Registration of the deed alone does not make a person the holder of title if the same had been done in violation of any statute or if certain formalities as required under the statute had not been complied with, say for example, in a case where prior approval of the Government or an authority is necessary before the deed of sale is executed or similar such causes.

20. In R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, the apex court had the occasion to consider one of such questions where despite vesting of the property in custodian the same did not mean loss of ownership. In the context of Section 9 of the Indian Income Tax Act, 1922, the apex court referred to Stroud's

Judicial Dictionary and held that the meaning which is required to be given to the word "owner" must not be such as to make that provision capable of being made an instrument of oppression.

21. The Patna High Court in *Raja P.C. Lall Choudhary v. CIT* [1948] 16 ITR 123 held a receiver not to be an owner. The apex court also referred with approval to the decision of this court in *Nawab Bahadur of Murshidabad Vs. Commissioner of Income Tax, West Bengal, Calcutta, and Additional Commissioner of Income Tax Vs. U.P. State Agro Industrial Corporation Ltd.*, and upon considering various case law and dictionaries held that the expression "building owned by the assessee in Section 32 of the Income Tax Act, 1961" has not been used in the sense that a person will be considered to be an owner of the building u/s 32 if he is in a position to exercise the rights of the owner not on behalf of the person from whom the title vests but in his own rights.

22. As noticed hereinbefore, the other High Courts have also taken the same stand. Recently in *Commissioner of Income Tax, Bombay etc. Vs. M/s. Podar Cement Pvt. Ltd. etc.*, the apex court although was concerned with the scope of the word "owner" within the meaning of Section 22 of the Act, referred to *R.B. Jodha Mal Kuthiala Vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala*, and other decisions including the Division Bench decision of this court in *Commissioner of Income Tax Vs. General Marketing and Manufacturing Co. Ltd.*,

"It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

To the same effect and with a more vigorous impact is the subject dealt with by *Dias on Jurisprudence* (fourth edition, at page 400) :

"The position, therefore, seems to be that the idea of ownership of land is essentially one of the "better right" to be in possession and to obtain it, whereas with chattels the concept is a more, absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner."

Again, at page 404, the learned author says :

"Special attention should also be drawn to the distinction between "legal" ownership recognised at common law and "equitable" ownership recognised at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity".

23. It has further been observed (page 642) :

"Thus, the juristic principle from the view-point of each one is to determine the true connotation of the term "owner" within the meaning of Section 22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately--a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years ? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realising the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here."

24. As regards the person in possession of the property in part performance of the contract, it was held that he would be the owner. Upon noticing that the High Courts are sharply divided on the issue, it was held (page 653) :

"We are conscious of the settled position that under the common law, "owner" means a person who has got valid title legally conveyed to him after complying with the requirements of law such as the Transfer of Property Act, Registration Act, etc. But, in the context of Section 22 of the Income Tax Act, having regard to the ground realities and further having regard to the object of the Income Tax Act, namely, "to tax the income", we are of the view, "owner" is a person who is entitled to receive income from the property in his own right."

25. Although the aforementioned decision was rendered in the context of Section 22 of the Act, having regard to the underlying principles enumerated therein, we are of the view that the same principles would also apply in the matter of interpretation of Section 32 of the Act.

26. For the reasons aforementioned, the answers to questions Nos. 1, 2 and 3 are rendered in the negative, i.e., in favour of the assessee and against the Revenue.

Re : Questions Nos. 4 and 5 :

27. So far as questions Nos. 4 and 5, we may note that although elaborate arguments have been made by learned counsel appearing on behalf of the petitioner urging that a director is an agent of the company within the meaning of the provisions of the Companies Act relying on or on the basis of the decisions in R.K. Dalmia Vs. Delhi Administration, ; Globe Motors Ltd. Vs. Mehta Teja Singh

and Co., and Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, .

28. But it appears that a finding of fact had been arrived at by the Tribunal that the persons who had advanced loan were not the purchasing agents, selling agents or other agents within the meaning of Clause (vii) of Section 40A(8) of the Income Tax Act. It has been held :

"The persons to whom this interest was paid can neither be called as a purchasing agent or selling agent or they cannot be called as an agent in the terms of other agent because it was not paid in the course of the asses-see's business but for acquiring the assets of the company. The words "in the course of or for the purpose of the assessee's business" mean running of business of the company and not for acquisition of the asset to bring the company into existence. The case cited by learned counsel in the case of Commissioner of Income Tax Vs. Kalani Asbestos (P.) Ltd., is not applicable for this case. In that case it was held that if interest is paid for the current accounts of the company, Section 40A(8) of the Act does not apply. In this case it cannot be said that the directors had maintained a current account which connotes regular transaction during the year by way of withdrawals and deposits. In this case certain amounts were advanced for purchase of the estate of the company and no regular transactions are embodied therein."

29. As the findings recorded therein are pure findings of fact, questions Nos. 4 and 5 do not arise for consideration.

30. These references are answered accordingly. In the facts and circumstances of this case there will be no order as to costs.

31. Let a xeroxed copy of this judgment countersigned by A. R. (court) be forwarded to the Income Tax Appellate Tribunal.

Debi Prasad Sircar-I, J.

32. I agree.