
(1962) 09 AHC CK 0002

In the Allahabad High Court

Case No : Income-tax Reference No. 245 of 1958

NIRANJAN LAL RAM CHANDRA

APPELLANT

Vs

COMMISSIONER OF Income Tax, LUCKNOW.

RESPONDENT

Date of Decision : 17-09-1962

Acts Referred:

Income Tax Act, 1961 — Section 10, 36, 66

Citation : (1963) 49 ITR 177

Hon'ble Judges : M. C. Desai, C.J.; Fazl Ali, C.J.; Manohar Lall, J.; Brijlal Gupta, J

Bench : Full Bench

Judgement

M. C. DESAI C.J. - The question "whether on the facts and circumstances of the case the profits of Rs. 2,994 and Rs. 2,997 could be taxed u/s 10(2)(vii) of the Income Tax Act ?" has been referred to this court for its opinion by the Income Tax Appellate Tribunal, Allahabad Bench, u/s 66(1) of the Income Tax Act in the following circumstances :

The assessee is a registered firm carrying on the business of plying motor trucks and lorries on hire. It sells motor trucks and lorries which have outlived their utility and cannot be further hired. Accordingly on January 1, 1946, it sold two motor trucks, registered Nos. U. P. A. 1192 and 1193 at the profits of Rs. 2,994 and Rs. 2,997 respectively, i.e., for Rs. 2,994 and Rs. 2,997 plus their respective written down values. It has adopted the calendar year as the accounting or previous year; thus it made the profit of Rs. 5,991 on the very first day of the previous year relevant to the assessment year 1947-48. It closed its business on April 7, 1946. u/s 10(1) of the Income Tax Act, an assessee has to pay tax under the head "Profits and gains of business, profession and vocation" in respect of the profits and gains of any business, etc. carried on by him. Under sub-section (2) (vii) such profits or gains are to be computed after making an allowance in respect of "any such building, machinery or plant which has been sold or...., the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant.... is actually sold...". This is subject to several

proviso, proviso (2) being :

"... where the amount for which any such building, machinery or plant is sold exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place."

This was the proviso as it stood in the assessment year; it was amended in 1949, and the words "whether during the continuance of the business or after the cessation thereof" were added after the words "is sold", but we are not concerned with them. The difference between the original cost and the written down values of the two trucks are not known but they are admittedly greater than Rs. 2,994 and Rs. 2,997 respectively; in other words, the excess in respect of neither of the trucks exceeds the difference between the original costs and the written down value and consequently the whole of the excess in each case would be deemed to be the profit of the previous year relevant to the assessment year 1947-48, provided that his proviso was applicable. The assessee had made a profit from its business of hiring out trucks and the total profit including the sum of Rs. 5,991 came to Rs. 12,848. The Income Tax Officer assessed it on the whole of this amount, applying the provision of section 10(2)(vii) read with the second proviso. He rejected the assessee's contention that the second proviso was inapplicable because the trucks were sold on the very first day of the previous year and, therefore, could not be said to have been used during the previous year for the purposes of the business within the meaning of section 10(2)(iv), (v) and (vi). The assessee preferred an appeal which was dismissed by the Appellate Assistant Commissioner, who held that the second proviso as it stood prior to its amendment in 1949, governed the case. The assessee preferred a second appeal to the Appellate Tribunal on the only ground that the trucks having been sold on the first day of the previous year could not be said to have been "used" during the previous year for the purposes of the transport business and that consequently section 10(2)(vii) did not govern the case at all. The Tribunal dismissed the appeal holding that the mere fact that the trucks were sold on the first day did not necessarily mean that they were not kept available for use on that day and that "used" within the meaning of section 10(2)(iv), (v) and (vi) includes passive use also. Then at the instance of the assessee the Tribunal referred the question for the opinion of this court.

The provision in section 10(2)(vii) is not applicable to all buildings, machineries and plants which have been sold, discarded, demolished or destroyed; it refers to only allowances to be made for the amount of any premium paid "in respect of insurance against risk... of buildings machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation." Section 10(2)(v) provides for an allowance to be made on account of the amount paid "in respect of current repairs to such buildings machinery, plant or furniture"; the word "such" means that this provision is to apply when current repairs are made to buildings, machinery plant or furniture "used for the purposes of the business,

profession or vocation". "Such" means the buildings, machinery, plant or furniture referred to just before, and the buildings, machinery, plant or furniture referred to just before are the buildings machinery, etc., used for the purposes of the business, profession or vocation referred to in the immediately preceding provision of section 10(2)(iv). Next comes the provision for allowance on account of depreciation of "such buildings, machinery, plant or furniture"; again, the reference is to depreciation of the buildings machinery etc., used for the purposes of the business, profession or vocation. Next comes the provision of section 10(2)(via) and (vib) added in 1949 and 1958, respectively, in respect of depreciation of buildings newly erected or of machinery or plant being new and installed after a certain date and in respect of development rebate in respect of a new ship acquired or new machinery or plant installed after a certain later date. These provisions deal with allowances in respect of particular buildings, machinery, plant or ship mentioned in them. Then comes the provision under consideration, section 10(2)(vii), added in 1946, when the provisions of section 10(2)(via) and 10(2)(vib) did not exist. It deals with particular buildings, machinery and plant, they being the buildings, machinery or plant referred to in the earlier provisions, namely those contained in section 10(2)(iv), (v) and (vi). The provision immediately preceding section 10(2)(vii) relates only to ship, machinery or plant installed after March 31, 1954; the reference in section 10(2)(vii) to "such buildings, machinery or plant" cannot possibly be to the machinery or plant referred to in section 10(2)(vib), firstly, because it does not refer to buildings, secondly, because it did not exist when section 10(2)(vii) was enacted and, thirdly, because section 10(2)(vib) refers to ship acquired or machinery or plant installed after March 31, 1954, and, therefore, did not exist in 1946, when it was enacted. Therefore, we have to go to a provision earlier than section 10(2)(vib) in order to find the meaning of "such". For the reason on account of which the machinery or plant referred to in section 10(2)(vib) has been found to be not the machinery or plant referred to in section 10(2)(via), the building, machinery or plant referred to in section 10(2)(vii) and one must go still further to find the building, machinery or plant referred to in it. The next immediately preceding provision is that of section 10(2)(vi) which itself uses the phrase "such buildings, machinery, plant" and refers one to the earlier provision in section 10(2)(iv). The result is that section 10(2)(iv). Section 10(2)(v), 10(2)(vi) and 10(2)(vii) are similarly worded; all use the phrase "such buildings, machinery or plant" and must refer to the same buildings, machinery or plant, e.g. the buildings, machinery or plant referred to in section 10(2)(iv). In this interpretation. I am supported by Commissioner of Income Tax v. Dalmia Cement Ltd., Fazl Ali C.J. said :

"Sub-clause (vi) is obviously to be read with sub-clause (iv) as the words building, machinery, plant or furniture are preceded by the word such. When these two clauses are read together it becomes apparent that the words such buildings, machinery, etc. mean building, machinery etc., used for the purposes of the business, profession, or vocation."

In *Rohtak and Hissar District Electricity Supply Co. Ltd. v. Commissioner of Income Tax* Capoor and Grover JJ. accepted the contention that "such plant, machinery or building used for the purpose of business, profession or vocation. It is for this reason that the question arises whether the trucks, which are undoubtedly "plant" as defined in section 10(5), were used for the purpose of the business (viz. that of plying motor trucks and lorries on hire) in the previous year. The assessee's business consists of plying trucks on hire; what it actually does is to put the trucks into motion for the purpose of carrying goods from one place to another on payment of money. Though the business consists of putting trucks into motion it cannot be said that a truck is used in the business only when it is in motion and not when it is kept stationary, capable of being put into motion and is available for being, or waiting to be, put into motion. A truck which is put into motion for transporting goods on hire from time to time or periodically is as much used for the purposes of the business when stationary as a truck continuously in motion. In the words of Lord Sumner in *Birendra Kumar Ghosh v. Emperor*, "They also serve who only stand and wait." Though a telephone is meant for receiving sound from a distance, it is said to be used by a person even though the person is not actually receiving any sound with its help. A burglar alarm can be said to be in use at a given moment even though there is no burglar in the premises and the alarm is not ringing at the moment. An article which is meant for yielding a certain result and which yields the result not continuously but periodically as and when required, cannot be said to be not in use at a particular time simply because it is not yielding the result at that time. If it is capable of yielding the result and is available for producing the result, it is in use. It is only that article which is meant to go on yielding the result continuously that can be said to be not in use at a time when it is not yielding the result. A truck to be used for the purpose of the business of plying trucks and lorries on hire is not an article of this kind, not being meant to be used continuously without a break. Hiring is always for a certain time or for a certain distance and as soon as the time is over or the distance is covered the article hired must remain idle till it is to be hired again.

A person walking with a gun with intent to kill game uses it for that purpose without firing within the meaning of a statute that makes using a gun with that intent penal : see *Strouds Judicial Dictionary*, 3rd edition, vol. 4 page 3168. A house is used for purposes of betting within the meaning of a criminal provision, even though betting is done occasionally in it : *Tromans v. Hodgkinson* u/s 36 of the *Salmon Fishery Act* any person using any net for catching salmon is liable to penalty. R went with X in a river where salmon was usually caught, got out of his boat and walked along the bank of the river looking for salmon. The net was in the boat for the purpose of being put into the water when a salmon was seen near the surface; though it had not been put into the water, R was held to be guilty of using it for catching salmon : *Moses v. Raywood*. As the net was ready with him in the boat, it was used for the purpose of catching salmon. In *Counsel of the City of Newcastle v. Royal Newcastle Hospital*, land though not put in

active use was held by the Privy Council to be used; a tuberculosis hospital had acquired and kept it vacant in order to keep the hospital free from buildings in the immediate vicinity and to keep the surrounding air pure and clean, and this passive use of the land was held to be use of the land for the hospital. All these cases show that the statement that an article was in use at a particular time does not require that it was actively employed during the time in producing the result for which it was meant.

Once it is accepted that an article can be said to be in use in the interval between its two active users, the problem before us can be solved without any difficulty. The finding that an article was in use in the interval is not based upon its being put to active use at the end of the interval, but upon its availability for active use whenever required during the interval. Whether it was in use during the interval does not depend upon what happens to it at the end of the interval. Merely because it is sold while it is awaiting a call for active user and thereupon its being put in active use becomes impossible it cannot be said that it ceased to be in use since the last active user; the determination of the question whether it was in use during the interval or not cannot remain in suspension till it is put in active use (and then hold, with retrospective effect that it had been in use throughout the interval), or till its being put in active use becomes impossible on account of its being sold or lost or damaged in an accident (and then hold that it had not been in use since the last active user). It would have to be held to have continued to be in use after the last active user, even if it is sold or is lost, provided it was kept in a fit condition and was available for active use. The trucks in the instant case were admittedly in use during the accounting period ending on December 31, 1945, and were in running order on January 1, 1946, and capable of being put to active use. If there is no evidence that they were driven for hire on January 1, 1946, there is also no evidence that they were put out of use at the beginning of that day. If they were in use up to the midnight of December 31, 1945, nothing happened in order to put them out of use at the first moment of January 1, 1946, or at any subsequent time, but prior to their sale. They could not be used after the sale, and it may be said that the sale put them out of use, but this happened during the day of January 1, 1946, and the effect of the sale did not relate back to the first moment of January 1, 1946. If they were in use for any length of time of January 1, 1946, i.e., during a few hours, it is enough, the period of user being of no consequence u/s 10(2)(iv). They were available for being driven on hire, and therefore, were in use just before they were sold. When they had admittedly been in use up to a few hours before their sale and they were not put out of use, the sale must be held to be sale of plant used for the purposes of the assessee's business.

The words "used for the purposes of business" came in for discussion before the Supreme Court in *Liquidators of Purna Ltd. v. Commissioner of Income Tax and Das J.* observed at page 272 :

"The words used has been read in some of the pool cases in a wide sense so as

to include a passive as well as active user. It is not necessary, for the purposes of the present appeal, to express any opinion on that point on which the High Courts have expressed different views. It is, however, clear that in order to attract the operation of clauses (v), (vi) and (vii) the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If the machinery and plant have not at all been used at any time during the accounting year no allowance can be claimed under clause (vii) in respect of them and the second proviso also does not come into operation."

The Supreme Court thus left the question what is meant by "used" open. If the machinery in that case had not been used at all during the accounting year section 10(2)(vii) was held to be inapplicable. There must have been many occasions for working the machinery and plant for the purposes of the business during the accounting year and if still they were not worked they could be said not to have been used during the year. The same cannot be said of the trucks in the instant case; the interval between the commencement of the accounting year and their sale was so short that it is quite likely that they were not required during it to be driven on hire and if there had been no occasion for their being driven on hire and consequently they were not driven on hire (though they were available for this purpose) it cannot be said that they were not used for the purposes of the business.

Commissioner of Income Tax v. Viswanath Bhaskar Sathe is another case in which the word "used" employed in section 10(2)(iv) was interpreted. The assessee there owned a ginning factory and was a member of a pool with owners of other ginning factories. The various members of the pool worked their respective factories in rotation. It happened that during a particular year the assessee's factory was not employed in the work of ginning though it was kept in a running order and he received a share in the profits of the year. Beaumont C.J. with whom Blackwell J. agreed, held that the factory was in use within the meaning of the provision although it was not actually engaged in any ginning operation during the year. He said at page 625 :

"It is, no doubt, true, as the learned Advocate-General says, that it is possible to give the word used a more limited meaning and hold that it includes only the actual work of the machinery and it is urged that it is that working which occasions depreciation. But I think that the word used in this section may be given a wider meaning and embraces passive as well as active user. "Machinery which is kept idle may well depreciate, particularly during the monsoon season. It seems to me that the ultimate test is, whether, without the particular user of the machinery relied upon the profits sought to be taxed could have been made; and as I read the agreement in the case, the profits of the assessee during the year under assessment could not have been earned except by his maintaining his factory in good working order, and that involves the user of the factory and the machinery."

Bhikaji Venkatesh v. Commissioner of Income Tax was a similar case and Staples

and Niyogi, Assistant Judicial Commissioner, held that the assessee's ginning factory which was not worked at all during the year was not used by him during the year even though he received his share in the profits of the pool. There was no evidence in the case of any covenant by which the assessee was required to maintain the machinery in reserve ready for actual use during the year of assessment and on this ground Beaumont C.J. distinguished it. With great respect I am unable to agree with the learned Assistant Judicial Commissioner's statement that the plain meaning of the word "used" is "actually used" and not capable of being used" or "generally used". I have pointed out how one speaks popularly of having an article in one's use even though it is not actively employed for the purpose for which it is meant. One does speak of having in one's use books or clothes even though one is not actually reading them or wearing them. One does speak of railway trains as being in use even though they are standing empty in a yard. I respectfully do not agree with the reasons given by Beaumont C.J., for distinguishing the case of Bhikaji the existence of a covenant to maintain the machinery in reserve ready for actual use does not convert to non-user into user. The meaning of the word "used" does not depend upon the existence of such a covenant and the covenant has nothing to do with the act of using or even with the meaning of "used". That the word "used" in section 10(2)(iv) is used in the wider sense would be clear if one considers the object behind the provision. Premium paid for insurance against risk of damage of buildings, machinery, plant, etc. used for the purpose of the business is to be deducted when calculating the profits or gains from the business. The reason for deducting this is not that the buildings, machinery, plant, etc. are actively used for the purposes of the business throughout the previous year. Even if a machinery or a plant is worked only periodically, the premium paid in respect of insurance against its damage or destruction should be deducted. Similarly in section 10(2)(v) the money spent on repairs to buildings, machinery, plant etc., should be deducted even though at some time they were not in active use. If a machinery or plant requires it would normally be out of order and would not be in active use and the legislature by enacting this provision must have contemplated that the machinery or plant would not be in active use and yet treated it as being in use for the purposes of the business. The building, machinery or plant which is sold would normally not be in active use at the moment of its sale. Ordinarily it would be out of active use for some time before its sale and if the legislature applied the words "used for the purposes of the business" to it, it clearly meant that it need not have been in active use at the time of the sale.

Central Provinces Manganese Ore Co. v. Commissioner of Income Tax, is not very helpful in the instant case. What was decided in Nathmal Srinivas v. Commissioner of Income Tax, is that in order to attract the application of section 10(2)(vii) the machinery or plant must be such as was used for the purposes of the business for at least a part of the accounting year and that if it was not used at any time during the accounting year, no allowance can be claimed. Ramaswami and Ahmad JJ. held that the machinery was not used at any time

during the accounting year. When the business itself was not carried on there was no question of the machinery being used for the purposes of the business. It was nor used, not only actively but also passively. In the present case the assessee did not discontinue its business before the sale of the trucks.

Capoor and Grover JJ. laid down in Rohtak and Hissar Districts Electricity Supply Co. Ltd. v. Commissioner of Income Tax : "In order to attract the operation of clauses (v), (vi) and (vii) of section 10(2) the machinery and plant must be such as were used in whatever sense that word is taken, at least for a part of the accounting year", relying on the case of Liquidators of Pursa Ltd. v. Commissioner of Income Tax. The facts of the case are distinguishable from those of the instant case, there the business was closed down on December 31, 1954, and the machinery was sold; the sale could not have been the sale the machinery used for the purposes of the business in the accounting year commencing on January 1, 1955. When the business itself did not exist in the accounting year how could the plant be said to have been used for the purpose of the business ?

According to Fazl Ali C.J. and Manohar Lall, J. in Commissioner of Income Tax v. Dalmia Cement Ltd., the word "used" is to be understood in a wide sense so as to embrace passive as well as active user. The learned Chief Justice, speaking for the court, followed the case of Viswanath Bhaskar Sathe and said that depreciation may be allowed even though the machinery was not in active use and was kept idle. This case, however, is not of any great help because the machinery there was undoubtedly actively used for some time during the accounting year and, therefore, it was machinery used for the purposes of the business even though in a later part of the accounting year it was not in active use.

I, therefore, decide that section 10(2)(vii) together with the second proviso is applicable in the instant case and the question must be answered in the affirmative.

BRIJLAL GUPTA J. - I agree.

BY THE COURT. - We answer the question in the affirmative and direct that a copy of this judgment be sent to the Income Tax Appellate Tribunal under the seal of the court and the signature of the Registrar as required by section 66(5) of the Income Tax Act. We further direct that the assessee shall pay to the Commissioner of Income Tax his costs of the reference, which we assess at Rs. 200.

Question answered in the affirmative.