Jogta Coal Co. Ltd.

Vs

Commissioner of Income-Tax, West Bengal.

Civil Appeals Nos. 337 to 341 of 1956

(B. P. Sinha, J. L. Kapur, M. Hidayatullah JJ)

02.03.1959

JUDGMENT

KAPUR, J. -

These five appeals pursuant to special leave are directed against the order of the Income-tax Appellate Tribunal by which five appeals before it, two in regard to income-tax assessment for 1947-48 and 1948-49 and the other three against business profits tax assessment for the three chargeable accounting periods covered by the same accounting periods, were disposed of. By the Income-tax Officer and by the Appellate Assistant Commissioner the matter was decided in the income-tax assessment appeal relating to the year of assessment 1947-48. The question in all these appeals is common and it relates to depreciation under section 10(2)(vi) of the Income-tax Act (hereinafter termed the Act.) The appellant before us is the Jogta Coal Co. and the respondent, the Commissioner of Income-tax, West Bengal. The appellant company was incorporated on September 14, 1945.

The facts leading up to these appeals are that two brothers E. C. Agabeg and A. A. Agabeg were lessees of a coal mine situate in village Jogta in the Jharia coal field area which belonged to the Raja of Jharia. The two brothers installed on the land leased to them plant and machinery and erected buildings and inclines and started working the coal mine. On April 10, 1935, the two brothers constituted themselves into a private limited company called Agabeg Brothers Ltd. On July 19, 1945, Agabed Brothers Ltd. agreed to transfer to S. K. Bajpai all its right, title and interest in the leasehold property with other mokarari Pottahs (perpetual leases) and a decree, which was passed in its favour, together with all appurtenances including houses, huts, and other erections belonging to the vendor, all machinery, plant, stores, furniture etc. and "the benefit of the uncompleted balance of all orders and contracts for the supply of coal existing at the date of the completion of the sale." To this agreement were attach

The accounting periods were the two years ending December 31, 1946, and December 31, 1947, and the assessment years were 1947-48 and 1948- 49. The point in controversy before us is the amount on which the appellant was entitled to calculate deduction allowance for purposes of depreciation under section 10(2)(vi) of the Indian Income-tax Act.

The Income-tax Officer held that the appellant paid the whole of the price as recited in the deed of sale, that is, Rs. 23,00,000 but he was of the opinion that the allocation of this sum on the different assets as mentioned in the sale deed was not correct and that a portion of the consideration was for the purchase of the goodwill. In his order he said :

> "The colliery was well established and had its own clientage which the assessee company secures without much effort. For such reasons it is only essential that some part of consideration may be apportioned under the head goodwill";

And he estimated the value of the goodwill at Rs. 7,50,000 and the rest he valued as follows :

#Land including shafts and inclineswhich are estimated at Rs. 80,000 ... Rs. 10,00,000Buildings ... 2,00,000Plant and Machinery ... 3,50,000 ---------- 15,50,000##

The appellant went in appeal to the Appellate Assistant Commissioner who also accepted the estimate made by the Income-tax Officer and dismissed the appeal. The matter was taken to the Appellate Tribunal and in a short order the Tribunal held that consideration paid was Rs. 23,00,000 but it put its own estimated value on the different kinds of assets which were purchased. It held :

> "The cost price of the various assets, in the circumstances, has necessarily to be estimated with reference to the prevailing market conditions :

#(1) Land and buildings ... 9,20,000-0-0(2) Shafts and inclines ... 80,000-0-0(3) Buildings ... 3,00,000-0-0(4) Plant and machinery ... 6,00,000-0-0(5) Goodwill ... 4,00,000-0-0"##

Against this order the appellant applied for a reference to be made to the High Court under section 66(1) of the Income-tax Act but the Tribunal was of the opinion that no question of law arose and dismissed the application. The appellant then applied to the High Court under section 66(2) and raised seven questions of law. The High Court held that the case did not fall under section 66(2) of the Act and therefore the Tribunal could not be directed to make a reference and it discharged the rule. As stated above the Tribunal decided all the appeals of the appellant by one order. Five appeals have therefore been brought in this court by special leave, and the question involved in all the appeals is what is the amount on which the depreciation under section 10(2)(vi) of the Act is to be calculated.

Counsel for the appellant contended that once it was accepted by the Tribunal that the total value of the lands, buildings, shafts and inclines was Rs. 13 lakhs and Rs. 23 lakhs had actually been paid it was not open to the Income-tax authorities or the Appellate Tribunal to vary the amount paid by the appellant as the price of plant and machinery and to hold that Rs. 10 lakhs included the price of another asset also. He conceded that it was open to the Appellate Tribunal to hold that the amount stated to have been paid was fictitious and that something less than Rs. 23 lakhs was as a matter of fact paid but it was contended that the Tribunal had no jurisdiction to hold that although the amount was actually paid, it was not the price of the assets purchased by the appellant but was paid for something else also. In the contract to sell and in the final sale deed there is no mention of the sale of any goodwill. The amount of Rs. 10 lakhs is shown in the contract of sale as the value of machinery, stores, furni

> "The benefit arising from connection and reputation which includes the probability of the old customers going to the new firm which has acquired the business; but this last phrase is not of itself adequate. That which the purchaser of a goodwill actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of 'holding out' and to represent himself to former customers as

the successor to that business."

There is no doubt that there is no specific mention of the sale of goodwill in the sale deed but counsel for the respondent submitted that in the resolution for liquidation which was passed by Agabeg Brothers Ltd. on October 15, 1945, the sale of Jogta Colliery was mentioned. The resolution was : "That the sale of Jogta Colliery for Rs. 23 lakhs be and the same is hereby approved" and therefore what was sold to the appellant was amongst other things the goodwill. Goodwill is a commercial term and is well understood in business and is an asset which is capable of valuation. In the sale deed it is not mentioned as such. This raises two questions : (i) Was the amount of Rs. 10 lakhs paid by the appellant only for the asset which he purports to have purchased or was it for something else also ? (ii) Is it open to the Tribunal to disregard the price which the appellant actually paid for the assets he purchased as evidenced by the sale deed and hold that this price although paid was not for those assets only but a

It was contended that it is a question of law as to whether the Tribunal has jurisdiction to go into the question and reduce the price which the appellant is proved to have paid and say that the price paid was not only for the asset purchased but also for something else. In other words is it within the jurisdiction of the Tribunal to conjecture as to what should be the cost of the asset to the assessee.

The section of the Income-tax Act which applies for the purpose of depreciation and which is the subject-matter of discussion in this appeal is section 10(2)(vi) which is as follows :

> "Such profits or gains shall be computed after making the following allowances, namely :-
>
> "(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent, where the assets are ships other than ships ordinarily plying inland waters to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed."

The words which require to be considered are "on the original cost thereof to the assessee". It has been held by the Privy Council in Commissioner of Income-tax v. Buckingham & Carnatic Co. Ltd., that the word assessee in section 10(2)(vi) refers to the person who owns the property in question and who is being assessed and not the predecessor and depreciation allowance is to be based on the original cost of such property to such person (i.e., assessee) and therefore the cost to be considered for the purpose of calculating the depreciation allowance is the original cost of the purchaser who is being assessed and not the written down value to his predecessor. We do not think that there is any doubt on the wording of the section or on the interpretation that has been put upon those words that the cost to be calculated for the purpose of depreciation allowance is the cost to the assessee and not to the person who makes the sale but still the question remains whether the Appellate Tribunal has the jurisdiction to

Counsel for the appellant referred to Craddock v. Zevo Finance Co. Ltd. where it was held that in determining the profits made by the company the correct figure of costs of investments made by the company is not the market value of the goods but the actual price paid by the company. This matter was taken to the House of Lords by the Revenue but the appeal was dismissed. It does not appear from the report as to the reasons for it : See Craddock v. Zevo Finance Co. Ltd. In Konstam's

Income Tax, 12th Edition, paragraph 126, the law is stated thus :

> "If a finance company acquires securities by purchase, the initial figure at which these should be entered for the calculation of profits is not their estimated market value at any given date, but their cost."

Counsel for the Commissioner relied on the judgment of the Lahore High Court in Pindi Kashmir Transport Co. Ltd. v. Commissioner of Income- tax. In that case certain business concerns carrying on business of road transport were amalgamated and formed into a private limited company which took over from their predecessor vehicles and route permits in consideration of allotting to them fully paid up shares. The company sold some of the vehicles and claimed to have incurred a loss. The income-tax authorities in computing the original cost to the company for the purpose of making a depreciation allowance held that they were not bound to accept the nominal value of the share transferred as the actual cost of the vehicles to the company for the purpose of making a depreciation allowance held that they were not bound to accept the nominal value of the shares transferred s the actual cost of the vehicles to the company inasmuch as the value of the vehicles had been unduly inflated. It is not necessary for us to say wh

Whether the law applicable should be as laid down in the English cases or in the cases decided by the Lahore High Court it is not necessary to decide because we think that the following two questions of law arise out of the order of the Appellate Tribunal and a reference should have been made to the High Court. These two questions were sought to be raised by the appellant under section 66(1) of the Act and again before the High Court under section 66(2) of the Act :

> "(1) Whether on the interpretation of the sale deed it can be said that any good-will was purchased by the assessee ?.....
>
> (7) Whether in view of the said proviso to section 10(5)(a) the Income-tax Officer on the facts and circumstances arising out of this case was competent to go behind the conveyance and fix a valuation of his own in the way he has done ?"

Question No. 1 was not allowed by us to be argued because the matter was not taken in the statement of case on behalf of the appellate and the only question which survives for consideration is the second one, i.e., No. 7, and this question, as it is or with modifications, should have been referred to the High Court.

We therefore direct that the question with the necessary modification, if any, be referred and the case stated in accordance with section 66(1) of the Income-tax Act. As to costs, in the event of the case being decided in favour of the appellant it will be entitled to the costs incurred in this court but if it fails in the High Court it will have to pay the costs of the Commissioner in this court. The case is therefore remitted with the direction that the Tribunal should proceed in accordance with law and the directions given above.

</html