

Sultan Brothers Private Ltd.

Vs

Commissioner of Income-Tax, Bombay City II

Civil Appeal No. 63 of 1961

(A. K. Sarkar, M. Hidayatullah, K. C. Das Gupta JJ)

06.12.1963

JUDGMENT

SARKAR J. –

The appellant which is a limited company is the owner of a certain building constructed on Plot No. 7 on the Church Gate Reclamation in Bombay which it had fitted up with furniture and fixture for being run as a hotel. By a lease dated August 30, 1949, the appellant let out the building fully equipped and furnished to one Voyantzis for a term of six years certain from December 9, 1946, for running a hotel and for a certain other ancillary purposes. The lease provided for a monthly rent of Rs. 5,950 for the building and a hire of Rs. 5,000 for the furniture and fixtures. The question in this appeal is how the income received as rent and hire is to be assessed, that is, under which section of the Income-tax Act, 1922, is it assessable ? The appellant contends that the entire income should be assessed under section 10 as the income of a business or, in the alternative, the income should be assessed under section 12 as income from a residuary source, that is, a source not specified in the preceding s

For the assessment year 1953-54, the appellant was taxed under section 9 of the Income-tax Act in respect of the building and under section 12 in respect of the hire received from the furniture and fixtures. The Income-tax Officer held that the building had to be assessed under section 9 as it was the specific section covering it and there was, therefore, no scope for resorting to the residuary section, section 12, in respect of its income. The Appellate Assistant Commissioner held on appeal that the rent from a building could only be assessed under section 12 with the allowances mentioned in sub-section (4) where for the letting of the furniture and fixtures it was indispensable to let the building also and as that case here the building had been rightly assessed under section 9. The appellant then appealed to the Income-tax Appellate Tribunal. The Tribunal confirmed the decision of the authorities below holding that the allowances mentioned in sub-section (4) of section 12 could not be allowed as the sub-s

Thereafter, at the request of the appellant the Tribunal stated a case under section 66 (1) of the Act to the High Court at Bombay for decision of the following question :

"Whether, on the facts and circumstances of the case, the income derived from letting of the building constructed on Plot No. 7 is properly to be computed under sections 9, 10 or under section 12 of the Income-tax Act ?"

The High Court answered the question as follows :

"The income from the building will be computed under section 9, income from furniture and fixtures under section 12 (3) and that no part of the income is taxable under section 10."

The question framed is clearly somewhat inaccurate for what the appellant contends in the first place is that the entire income and not that from the building alone, should be assessed under section 10. This inaccuracy has not however misled anyone and the matter has been argued before us without any objection from the respondent on the basis as if the question was in terms of the appellant's contention.

Now, it is beyond dispute that the several heads of income mentioned in section 6 of the Act and dealt with separately in sections 7 to 12 are mutually exclusive, each head being specific to cover the income arising from a particular source and that it cannot be said that any one of these sections is more specific than another : see *United Commercial Bank Ltd. v. Commissioner of Income-tax*. Therefore a particular variety of income must be assignable to one or the other of these sections.

A broad reference to sections 9, 10 and 12 may now be profitably made. Section 9 provides for the payment of tax under the head "Income from property" in respect of the bona fide annual value of building or lands appurtenant thereto of which the assessee is the owner. Certain buildings are exempted but it is not necessary to refer to them. This section also sets out the method of calculation of the annual value of the property on which the tax is to be assessed. It is important to note here that under this section a building has to be assessed to tax on its annual value irrespective of the rent received from it, if any. Section 10 deals with profits and gains of business, profession or vocation. This section also provides the method of computing the income and the allowances that the assessee is entitled to deduct in making the computation. Section 12 is the residuary section covering income, profits and gains of every kind not assessable under any of the heads specified earlier. It follows that if the income

The first contention of the appellant, as already seen, is that the assessment should be made under section 10 as of income from a business. The reason for this preference is that under that section it would be entitled to much larger allowances as deductions in computation of the income than it would be under either section 9 or section 12. The appellant put the matter in this way. Letting out of a commercial asset is a business and what it did was to let out a commercial asset, namely, a fully equipped hotel building. It also said that the lessor's covenants in the lease showed that in making the lease, the appellant was carrying on a business and not letting out property. This is somewhat different from the way in which it was put before the Tribunal. The argument advanced before the Tribunal was not advanced in this court and need not, therefore, be considered. It is indeed not very clear.

A very large number of cases was referred to in support of this contention but it does not seem to us that much assistance can be derived from them. Whether a particular letting is business has to be decided in the circumstances of each case. We do not think that the cases cited lay down a test for deciding when a letting amounts to a business. We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in cases referred, to support the proposition that certain assets are

commercial assets in their very nature

The object of the appellant company no doubt was acquire land and buildings and to turn the same into account by construction and reconstruction, decoration, furnishing and maintenance of them and by leasing and selling the same. The activity contemplated in the aforesaid object of the company, assuming it to be a business activity, would not by itself turn the lease in the present case into a business deal. That would follow from the decision of this court in *East Indian Housing and Land Development Trust Ltd. v. Commissioner of Income-tax*, where it was observed that "the income derived by the company from shops and stalls is income received from property and falls under the specific head described in section 9. The character of that income is not altered because it is received by a company formed with the object of developing and setting up markets."

Now the cases on which learned counsel for the appellant specially relied were cases of the letting out of plant and machinery, in some instances along with the factory building in which they had been housed. In all of them, except one, which we will presently mention, the assessee had previously been operating the factory or mill as a business and had only temporarily let out as it was not convenient for him at the time to carry on the business of running the mill or factory. In these circumstances, it was held that by letting out the plant, machinery and building the assessee was still conducting a business though not the business of running the mill or factory.

In *Commissioner of Income-tax v. Mangalagiri Sri Umamaheswara Gin and Rice Factory Ltd.* the assessee who was the owner of a fully equipped rice mill which it had constructed for its own trade but had never worked it, decided to lease it out to another person. It was held that the income was income from business. The reason given by one of the learned judges, Krishnan J., was "the rent received is not only for the use of the mill but also to cover the necessary wear and tear" and the lease was of the mill as a working concern. Beasley J. agreed but perhaps with a certain amount of hesitation. In the later case of *Commissioner of Income-tax v. Bosotto Brothers Limited*, which concerned income from the letting out of a fully equipped hotel which had previously been run by the assessee himself as a hotel, Krishnaswami Ayyangar J. felt himself bound by the *Mangalagiri Gin and Rice Factory* case and apparently for that reason only decided to agree with his colleagues that the case might fall under section 10. Mocket

It seems to us that the *Bosotto Brothers Ltd.* case would have no application because it cannot be said in the case in hand that the appellant had let out any business undertaking. Admittedly it never carried on any business of a hotel in the premises let out or otherwise at all. Nor is there anything to show that it intended to carry on a hotel business itself in the same building even if it had the power under its memorandum to do so, as to which a great deal of doubt may be entertained. In the *Mangalagiri Gin and Rice Factory* case what appears to have been really let out was the plant and machinery and the case was decided on the basis of the wear and tear caused to them. Furthermore, in that case it does not appear at all to have been contended that section 9 had any application. Whether that case was rightly decided or not, is not a question that properly arises in this case for none of the considerations which led to the decision arrived at there, exists here; there is no question of any wear and tear t

Learned : counsel for the appellant also relied on certain clauses in the lease and a clause in the memorandum of the appellant company to show that the lease amounted to the carrying on of a business. We shall now turn to these provisions. Clause 3 (b) of the memorandum gave power to the appellant to manage land, buildings, and other property and to supply the tenants and occupiers thereof refreshment, attendants, messengers, light, waiting-room, reading room, meeting room,

libraries, laundry convenience, electric conveniences, lifts, stables and other advantages. The contention was that this clause in the memorandum gave the appellant a power to carry on a business of the nature of running a hotel. We do not think, it did. But, in any case, by the lease none of the objects mentioned in this clause was sought to be achieved. We find nothing in the lessor's covenants, to some of which we were referred, to bring the matter within clause 3 (b) of the memorandum. None of these clauses support the contention that

The next question is about sub-section (4) of section 12. The relevant part of section 12 may now be set out :

"12. (1) The tax shall be payable by an assessee under the head 'Income from other sources' in respect of income, profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads).....

(3) Where an assessee lets on hire machinery, plant or furniture belonging to him, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10.

(4) Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of sub-section (2) of section 10 in respect of such buildings."

To clear the ground it may be stated here that once section 10 is found inapplicable to the case, there is no dispute that the income from the hire of the furniture and fixtures was rightly assessed under section 12 after providing for the allowances mentioned in sub-section (3) of that section. The only dispute that then remains is whether the building is to be assessed under section 9 which of course will have to be on the basis of its annual value or whether the rent from the building has to be assessed under section 12 after the allowances mentioned in sub-section (4) have been deducted.

We have earlier said that section 12 can only apply if no other section is applicable, because it deals with the residuary head of income. Now sub-section (4) of section 12 only deals with certain allowances and it obviously proceeds on the basis that the income mentioned in it, namely, that from the building when inseparably let with plant, machinery or furniture, is not income falling under any of the specific heads dealt with by sections 7 to 11 and is, therefore, income falling under the residuary head contained in section 12. There a preliminary difficulty arises. In respect of buildings - and with them alone sub-section (4) of section 12 is concerned - as already seen, the owner is liable to tax under section 9 not on the actual income received from it but on its annual value and in fact quite irrespective of whether he has let it out or not. How then can it be said that the rent received from a building could at all come under section 12 ? In other words, why can it not be said that the specific secti

The next question is, does the present letting come within the terms of sub-section (4) of section 12 ? That provision requires two conditions, namely, that the furniture should be let and also buildings and the letting of the buildings should be inseparable from the letting of the furniture. Now here both furniture and building have no doubt been let. The question is : Are they inseparably let ? The High Court does not appear to have answered this question for it was of the view that not only must the two be inseparably let out but also that "the primary letting must be of the machinery, plant or

furniture and that together with such letting or along with such letting, there is a letting of buildings". The High Court held that the primary letting in the present case was of the building and, therefore, deprived the appellant of the benefit of section 12 (4). We may state here that the Tribunal had thought that by requiring that the letting of one should be inseparable from the letting of the other, the secti

Now the difficulty that we feel in accepting the view which appealed to the High Court and the Tribunal is that we find nothing in the language of sub-section (4) of section 12 to support it. No doubt the sub-section first mentions the letting of the machinery, plant or furniture and then refers to the letting of the building and further uses word "also" in connection with the letting of the building. We, however, think that this is too slender a foundation for the conclusion that the intention was that the primary letting must be of the machinery, plant or furniture. In absence of a much stronger indication in the language used, there is no warrant for saying that the sub-section contemplated that the letting of the building had to be incidental to the letting of the plant, machinery or furniture. It is pertinent to ask that if the intention was that the letting of the plant, machinery or furniture should be primary, why did not the section say so ? Furthermore, we find it practically impossible to imagine

What, then, is inseparable letting ? It is was suggested on behalf of the respondent Commissioner that the sub-section contemplates a case where the machinery, plant or furniture are by their nature inseparable from a building so that if the machinery, plant or furniture are let, the building has also necessarily to be let along with it. There are two objections to this argument. In the first place, if this was the intention, the section might well have provided that where machinery, plant or furniture are inseparable from a building and both are let, etc. The language however is not that the two must be inseparably connected when let but that the letting of one is to be inseparable from the letting of the other. The next objection is that there can be no case in which one cannot be separated from the other. In every case that we can conceive of, it may be possible to dismantle the machinery or plant or fixtures from where it was implanted or fixed and set up in a new building. As regards furniture, of cours

It seems to us that the inseparability referred to in sub-section (4) is an inseparability arising from the intention of the parties. That intention may be ascertained by framing the following questions : Was it the intention in making the lease - and it matters not whether there is one lease or two, that is, separate leases in respect of the furniture and the building - that the two should be enjoyed together ? Was it the intention to make the letting of the two practically one letting ? Would one have been let alone and a lease of it accepted without the other ? If the answer to the first two questions are in the affirmative, and the last in the negative then, in our view, it has to be held that it was intended that the lettings would be inseparable. This view also provides a jurisdiction for taking the case of the income from the lease of a building out of section 9 and putting it under section 12 as residuary head of income. It then becomes a new kind of income, not covered by section 9, that is, income

That takes us to the question, was the letting in the present case of the building and the furniture and fixtures inseparable in the sense contemplated in the sub-section as we have found that sense to be ? It is true that the rent for the building and the hire for the furniture were separately reserved in the lease but that does not, in our view, make the two lettings separable. We may point out that the Tribunal has taken the same view and the High Court has not dissented from it. In spite of the sums payable for the enjoyment of two things being fixed separately, the intention may still be that the two shall be enjoyed together. We will now refer to the provisions in the lease to see whether the parties intended that the furniture, fixtures and the building shall all be enjoyed together. Clause I of

the lessee's covenant, in our opinion, puts the matter beyond doubt and it is as follows :

"I. (a) To use the demised premises and the said furniture and fixtures for the purpose of running hotel, boarding and lodging house, restaurant, confectionery and such other ancillary businesses as are usually or otherwise can be conveniently carried on with the said business in the said premises such as providing show-cases show-windows, newspaper stall, dancing and other exhibition of arts, meeting rooms, etc., and not for any other purpose without the previous permission in writing of the lessors."

It is clear from this clause that the building and the fixtures and furniture were to be used for one purpose, namely, for the purpose of running a hotel, with them all together. Again clause 1 (h) of the lessee's covenant provided that the lessee is not to remove any article or thing from the premises except for the purposes of and in the course of the hotel business which latter would be for effecting repairs to them or for replacing them where it was the duty of the lessee to do so under the lease. We think, therefore, that the lease clearly establishes that it was the intention of the parties to it that the furniture and fixtures and the building should be enjoyed all together and not one separately from the other.

Before we conclude we think we should refer to two other covenants. First, there is a lessor's covenant No. II (b) to renew the lease of the demised premises which terms, it may be conceded, means the building only, for a further term of six years. This clause says nothing about the renewal of any lease in respect of furniture or fixtures. Likewise, clause III (2) provides that if the demised premises, that is to say, the building, be destroyed or damaged by fire it shall be the option of the lessee to determine the lease and in any event the rent shall be suspended until the premises shall again be rendered fit for occupation and use. Here also there is no mention of the furniture. It was said on behalf of the respondent that these two clauses indicate that the building and the furniture were being treated separately and therefore the lettings of them were not inseparable. We are unable to accept this contention. As regards renewal of the lease of the building, there is clause II (d) making substantially a

In the result we answer the question framed thus : The rent from the building will be computed separately from the income from the furniture and fixtures and in the case of rent from the building the appellant will be entitled to the allowances mentioned in sub-section (4) of section 12 and in the case of income from the furniture and fixtures, to those mentioned in sub-section (3), and that no part of the income can be assessed under section 9 or under section 10. The judgment of the High Court is set aside. The appellant will be entitled to the costs here and below.

Appeal allowed.

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