Commissioner of Income-Tax, Madhya Pradesh, Nagpur and Bhandara

Vs

Straw Products Ltd

Civil Appeals Nos. 893 and 894 of 1964

(K. Subha Rao, J. C. Shah, S. M. Sikri JJ)

03.12.196

JUDGMENT

SIKRI J. -

These appeals by special leave are directed against the judgment of the High Court of Madhya Pradesh in a reference made to it by the Income-tax Appellate Tribunal, under section 66(1) of the Indian Income-tax Act, 1922, hereinafter referred to as "the Act". The Tribunal referred the following question to the High Court :

> "Whether, on the facts of the case and having regard to the provisions of paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, and clause 8 of the Agreement made on 20th September, 1938, between the assessee and the State of Bhopal, the correct basis for computing the written down value of the depreciable assets as at 1st November, 1948, is the one which is adopted by the Income-tax Officer or the one adopted by the Appellate Assistant Commissioner ?"

The relevant facts are these. The respondent, M/s. Straw Products Ltd., Bhopal, hereinafter called "the assessee", is a public limited company. It was incorporated in the erstwhile State of Bhopal in 1939 and was given the certificate of commencement of business on May 30, 1939. On September 20, 1938, the assessee entered into an agreement with the Government of Bhopal. Under the agreement the assessee obtained certain concessions and facilities. The assessee not only got exclusive licence to manufacture card-board articles of all kinds but also got land on lease on favorable terms. It was also exempted from payment of customs and other duties payable to the municipality. Clause 8 of the Agreement is relevant for the purpose of these appeals and is in the following terms :

> "8. Subject to and so far as the State shall not become or become obliged by any Instrument of Accession or Supplementary Instrument under the Government of India Act, 1935, in respect of any Federal Taxation, it is hereby agreed as follows :-
>
> (a) During the period of 10 years from the date on which the said company takes over the land for its business purposes the said company shall not be liable to pay any sum by way of taxation to the State....."

It is common ground that this agreement was acted upon and for a period of 10 years the assessee was not called upon to submit any returns of income and no assessment was made on the assessee under the Bhopal Income-tax Act. This period of ten years expired on October 31, 1948. On August

1, 1949, Bhopal merged in India and was formed into a Chief Commissioner's Province.

For the assessment year 1949-50 the assessee was assessed under the Indian Income-tax Act, 1922, on the total income of the period November 1, 1948, to December 12, 1948, as the assessee made up its accounts on the 31st December each year. For the assessment years 1952-53 and 1953-54, the assessment years which are the subject-matter of this reference (previous years calendar years 1951 and 1952, respectively), the Income-tax Officer, by orders dated November 27, 1952, and September 30, 1953, allowed depreciation on the machinery, buildings and other assets owned by the assessee on the basis of the original cost, i.e. the cost paid in 1939. Subsequently noticing a report in the Times of India, dated March 15, 1957, giving the view taken by the Bombay High Court in the case of Dhrangadhra Chemical Works Ltd. the Income-tax Officer initiated action under section 34(1) of the Act in respect of these two assessment years. In the Dhrangadhra Chemical Works case the Bombay High Court had held that the written down

The Appellate Assistant Commissioner, disagreeing with the Income-tax Officer, held on appeal that the assessee had not been allowed excess depreciation allowance as per the original assessment and there was no basis for initiating proceedings under section 34. He was of the view that the expression "actually allowed" could not imply depreciation allowed by a mental phenomenon. The Appellate Tribunal upheld the order of the Appellate Assistant Commissioner and directed the computation of the allowance on that basis. On a reference the High Court by its judgment dated August 22, 1961, answered the question as follows :

> "In the circumstances of this case the correct basis for computing written down value of depreciable assets of the company is the one adopted by the Appellate Assistant Commissioner."

On August 20, 1962, in exercise of the powers conferred by section 6 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (LXVII of 1949), the Central Government made the following order to amend the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949. The order was called the Taxation Laws (Merged States) (Removal of Difficulties) (Amendment) Order, 1962 (hereinafter referred to as the 1962 Order). The relevant part of paragraph 2 is in the following terms :

> "2. In the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, after the proviso to paragraph 2, the following Explanation shall be inserted, namely :
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> "Explanation. - For the purpose of this paragraph, the expression 'all depreciation actually allowed under any laws or rules of a Merged State' means and shall be deemed always to have meant -...
>
> (b) in cases where income had been exempted from tax under any laws or rules in force in a Merged State or under any agreement with a Ruler, the depreciation that would have been allowed had the income not been so exempted."

Paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, reads as follows :

> "2. Computation of aggregate depreciation allowance and the written down value. - In making any assessment under the Indian Income-tax Act, 1922, all depreciation actually allowed under any laws or rules of a merged State relating to income-tax and

> super-tax, shall be taken into account in computing the aggregate depreciation allowance referred to in sub-clause (c) of the proviso to clause (vi) of sub- section (2), and the written down value under clause (b) of sub- section (5) of section 10 of the said Act :
>
> Provided that where in respect of any asset, depreciation has been allowed for any year both in the assessment made in the merged State and in British India, the greater of the two sums allowed shall only be taken into account."

This order was made in exercise of the powers conferred by section 8 of the Taxation Laws (Extension of Merged States) Ordinance, 1949 (XXI of 1949). The Ordinance, which applied to Bhopal, by section 3(1) extended, inter alia, the Indian Income-tax Act, 1922, and all rules and orders made thereunder were extended and brought in force in all the merged Stated on April 1, 1949. Section 8 of the Ordinance provided as follows :

> "If any difficulty arises in giving effect to the provisions of this Ordinance, the Central Government may by order make such provisions, or give such directions, as appear to it to be necessary for removal of the difficulty."

The Taxation Laws (Amendment) (Second) Ordinance, 1949 (XXXIII of 1949), inter alia, made various amendments in the Indian Income-tax Act, 1922.

These Ordinances were replaced by the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (LXVII of 1949). Section 3 of this Act is similar to section 3 of the First Ordinance. Section 6, which took the place of section 8 of the First Ordinance, reads as follows :

> "If any difficulty arises in giving effect to the provisions of any Act, rule or order extended by section 3 to the merged States, the Central Government may, by order, make such provisions or give such directions as appear to it to be necessary for removal of the difficulty."

Section 34 repealed Ordinance XXI of 1949 and Ordinance XXXIII of 1949, but by sub-section (2), inter alia, provides as follows :

> "......anything done or any action taken in the exercise of any power conferred by any of the Ordinances referred to in this section shall for all purposes be deemed to have been done or taken in the exercise of the powers conferred by this Act as if this Act were in force on the day on which such thing was done or action was taken."

Mr. A. V. Viswanatha Sastri, the learned counsel for the Revenue, urges before us that the High Court was wrong in answering the question in favour of the assessee. He urges that the expression "actually allowed under any laws or rules of a merged State" occurring in paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, meant allowable under the provisions of the said laws or rules. He says that if the in come of an assessee is exempted from taxation for a certain number of years, assessee must be deemed to have claimed depreciation and deemed to have been allowed depreciation according to the provisions of the said laws or rules. He further says it does not matter whether the assessee made a claim or not because it is fair that when the Indian Income-tax Act is applied the assessee should be brought at par with the assessees who had suffered taxation under the Act.

We are unable to give such an artificial meaning to the expression "all depreciation actually allowed under any laws or rules", and we agree with the High Court that the expression "actually allowed" is unambiguous and connotes the idea that the allowance was actually given effect to. If it was intended to include any allowances was actually given effect to. if it was intended to include any allowances which are not actually allowed then the Central Government would have added a deeming provision as the legislature did in the Explanation to section 10(5) of the Act.

In the alternative, he relies on the 1962 Order set out above. He says that the order has explained the expression "actually allowed" to mean the depreciation that would have been allowed had the income not been exempted under an agreement with a Ruler. He further says that this Order is retrospective because it expressly says that the expression "all depreciation actually allowed under any lays or rules of a merged State shall be deemed always to have meant...."

Mr. Desai, the learned counsel for the respondent, objects to this order being relied on by Mr. Sastri on various grounds. He further says that on a true interpretation of the Order it does not apply to the case of the assessee. The question then arises whether we are entitled to take into consideration the 1962 Order. The learned counsel has cited various cases and has argued that this being an appeal by special leave from a reference, we should not take the Order into consideration. It is unnecessary to refer to the cases because the point is concluded by a judgment of this court in Commissioner of Sales Tax v. Bijli Cotton Mills. Shah J., speaking for the court, observed as follows :

> "Undoubtedly the Tribunal called upon to decide a taxing dispute must apply the relevant law applicable to a particular transaction to which the problem relates, and that law normally is the law applicable as on the date on which the transaction in dispute has taken place. If the law which the Tribunal seeks to apply to the dispute is amended, so as to make the law applicable to the transaction in dispute, it would be bound to decide the question in the light of the law so amended. Similarly, when the question has been amended with retrospective operation, it would be the duty of the High Court to apply the law so amended if it applies. By taking notice of the law which has been substituted for the original provision, the High Court is giving effect to legislative intent and does no more than what must be deemed to be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of sufficient amplitude to cover an inquiry into the question in the light of the amende

Therefore, following this judgment, we must hold that Mr. Sastri is entitled to rely on the 1962 Order and it is our duty to answer the reference in accordance with the amendment made by the Order, unless the question referred is not couched in terms of sufficient amplitude to cover an inquiry into the question in the light of the amended law.

Mr. Desai then raises two questions in respect of the Order. First he says that it is the first time that the Order is being relied on in these proceedings and he is entitled to urge before us that the Order is bad. He has given a number of reasons in support of his plea that the Order is ultra vires, but in view of the decision of this court in K. S. Venkataraman & Co. v. State of Madras we refused to allow how to develop these objections. We may mention that he seeks to distinguish Venkataraman's case on the ground that the Supreme Court and the High Court are not creatures of the Order which he was impugning. He further says that the Appellate Tribunal would also have been entitled to go into question of the validity because the Order is not part of the Income-tax Act, and it is not the creature of the Order in the sense mentioned in Venkatataman's case We are not able to sustain the distinction

sought to be made by Mr. Desai. The Order is in effect an amendment of the Indian Income-tax Act in so far as i

Mr. Desai then contends that the 1962 Order did not apply to this case because the income of the assessee had not been exempted under the agreement with the Ruler. He says that the words "exempted from tax" in the 1962 Order means that the assessee must have been liable to pay tax and then exemption granted. He points to the definition of the world "assessee" in the Bhopal Income-tax Act, 1936 (VIII of 1936), which has been defined as "a person by whom income-tax is payable." Then he refers to the charging section, the relevant part of which reads as follows :

> "3. Where by a notification in the jarida the Government declares that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax...."

He says that the respondent was not an assessee because under the agreement no income-tax was payable by it and for this reason no notice or assessment had been made under the Bhopal Income-tax Act. We are unable to sustain this contention. The definition of "assessee" must mean a person by whom income-tax is payable under the Bhopal Act. If it had not been for the agreement, the respondent would have been liable to pay tax and it is the agreement alone which exempted it from taxation.

Mr. Desai then contends that the 1962 Order is not retrospective and does not apply to assessments made before the Order came into force. We see no force in this contention because the terms of the Order are plain and if it is deemed, as directed by the Order, that the expression "actually allowed under any laws or rules of a merged State" should have the meaning ascribed to it by the Explanation, as from December 3, 1949, when the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, came into force, the Explanation must apply to the assessments for the years 1952-53 and 1953-54.

Lastly, Mr. Desai contends that the question referred to the High Court in this case is not couched in terms of sufficient amplitude to cover the points he has tried to make, namely, whether the Order dated August 22, 1962, is retrospective and whether the assessee is covered by the terms of clause (b) of the Explanation. Looking at the question it seems to us that the substance of the question which was referred was whether the view held by the Income-tax Officer or the Appellate Assistant Commissioner was right, and the words "having regard to" occurring in the question did not have the effect of restricting the laws that could be considered for answering the question. It may also be said that when paragraph 2 of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, is referred to, it would include paragraph 2 as amended retrospectively. We must, therefore, overrule Mr. Desai's objection and hold that the question framed by the Appellate Tribunal is wide enough to include a discussion of

In conclusion, applying the 1962 Order to the facts of this case it is clear that the answer to the question referred must be that the correct basis for computing the written down value of the depreciable assets as on November 1, 1948, is the one which was adopted by the Income-tax Officer. In the result, the appeals are accepted. The judgment of the High Court is set aside and the question answered as indicated above. In the circumstances of the case the parties will bear their own costs.

Appeals allowed.

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