Straw Products Ltd.

Vs

Income-Tax Officer, Bhopal & Ors.

Civil Appeal No. 303 of 1967

(M. Hidayatullah, V. Bhargava, C. A. Vaidialingam, R. S. Bachawat, G. K. Mitter, V. Ramaswami-I JJ)

20.10.1967

JUDGMENT

SHAH, J. -

This case is a sequel to the judgment pronounced by this Court on December 3, 1965 : Commissioner of Income-tax, Madhya Pradesh v. Straw Products Ltd. [[1966] 2 S.C.R. 881.].

The assessee was incorporated in August 1935 with its Head Office in the Indian State of Bhopal, and commenced business as a manufacturer of wrapping paper in 1939. The assessee entered into an agreement with the Ruler of Bhopal under which the assessee was exempted from payment of all taxes to the State for a period of ten years expiring on October 31, 1948.

The State of Bhopal merged with India on August 1, 1949. The territory was constituted into a Chief Commissioner's Province, and was later merged with the State of Madhya Pradesh under the States Reorganisation Act, 1956. The Governor-General of India issued the "Taxation Laws (Extension to Merged States) Ordinance" 21 of 1949 to make certain taxation laws applicable to the merged States. By cl. 3 of the Ordinance, amongst other Acts, the Indian Income-tax Act, 1922 and all the orders and rules issued thereunder were extended to the merged States, and by cl. 7 the corresponding laws in force in the merged States were repealed. By cl. 8 the Central Government was invested with the power to make provisions or give directions, which appeared to the Government to be necessary, for removing any difficulty arising in giving effect to the provisions of the Ordinance.

Ordinance 21 of 1949 was repealed and replaced by the "Taxation Laws (Extension to Merged States and Amendment) Act" 67 of 1949. Section 3 of the Act extended with effect from April 1, 1949, to the merged States, amongst other Acts, the Indian Income-tax Act and the orders and rules made thereunder, and by s. 7 the laws in force in the merged States corresponding to the Acts mentioned in s. 3 stood repealed. Section 6 provided :

> "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."

The relevant provisions of the Indian Income-tax Act 1922 which have a bearing on the determination of depreciation in respect of buildings, machinery, plant and furniture used by the

assessee in carrying on business were these :

> S. 10 "(1) The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation, carried on by him.
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> (2) Such profits or gains shall be computed after making the following allowances, namely :-
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> (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 on 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....
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> "Provided that -
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> #(a).....(b).....##
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> (c) the aggregate of all such allowances made under this Act or any Act repealed hereby, or under the Indian Income-tax Act, 1886, shall, in no case, exceed the original cost to the assessee of the buildings, machinery, plant, or furniture, as the case may be;"

The expression "written down value" was defined in s. 10(5) which insofar as it is material provided :

"In sub-section (2) ... 'written down value' means -

> (a) in the case of assets acquired in the previous year, the actual cost to the assessee :
>
> Provided.....
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> (b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act or any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886, was in force :
>
> Provided.....
>
> Provided.....

The taxation laws in the merged States were not repealed by the Indian Income-tax Act : they stood repealed by the Taxation Laws (Extension to Merged States and Amendment) Act 67 of 1949. In the application of the scheme of the Income-tax Act 1922 for computing the depreciation allowance difficulties clearly arose. On the plain words of the Income-tax Act, in the computation of the taxable income of an assessee the depreciation actually allowed under the Act, or Acts repealed thereby or under executive orders issued under the Indian Income-tax Act, 1886, could alone be taken into account : depreciation allowed under the State laws could not be taken into account. The

Central Government therefore in exercise of its authority under cl. 8 of Ordinance 21 of 1949 issued the "Taxation Laws" (Merged States) (Removal of Difficulties) Order, 1949". By cl. 2 of that Order, it was provided :

> "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."

Ordinance 21 of 1949 was repealed by sub-s. (1) of s. 34 of the Taxation Laws (Extension to Merged States and Amendment) Act 67 of 1949, but by virtue of sub-s. (2) of that section, the Removal of Difficulties Order remained in force. The Order was clearly intended to provide that depreciation "actually allowed" under the Merged State Acts was to be taken into account for determining the written down value of assets of an assessee in bringing into effect the Indian Income-tax Act to the assessees in the merged States. In computing the profits and gains of the business carried on by the assessee for determining the tax payable by him for the assessment year 1949-50, depreciation allowed under s. 10(2)(vi) was taken as a percentage of the original cost to the assessee of the buildings, machinery, plant and furniture, and in the four subsequent assessment years the written down value of the asse's admissible for depreciation was determined on that footing. The Income-tax Officer, Bhopal thereafter commenced proceedings for re-assessment under s. 34(1)(b) of the Indian Income-tax Act, 1922, against the assessee in respect of the assessment years 1952-53 and 1953-54 and by order dated March 3, 1958, recomputed the taxable income on the footing that since the commencement of the business the assessee must be deemed notionally to have been allowed depreciation under the Bhopal Income-tax Act. The Appellate Assistant Commissioner and the Income-tax Appellate Tribunal disagreed with the Income-tax Officer and restored the original assessment. On a reference made by the Appellate Tribunal, the High Court of Madhya Pradesh held in favour of the assessee.

During the pendency of an appeal filed by the Commissioner of Income-tax in this Court, the Central Government in exercise of the power conferred by s. 6 of the Act 67 of 1949 issued an Order called the "Taxation Laws (Merged States) (Removal of Difficulties) Amendment Order, 1962", and added the following Explanation to cl. 2 of the Removal of Difficulties Order, 1949 :

> "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 :
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> (a) the aggregate allowance for depreciation taken into account in computing the written down value under any laws or rules in force in a merged State or carried forward under the said laws or rules, and
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> (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."

This Court held in the appeal filed by the Commissioner of Income-tax that the expression "actually allowed" in the Removal of Difficulties Order, 1949, meant allowance actually given effect to, but by virtue of the Explanation added by the Taxation Laws (Merged States) (Removal of Difficulties) Amendment Order 1962, the correct basis for computing the written down value of the depreciable assets for the relevant period was the one adopted by the Income-tax Officer. Counsel for the assessee challenged the validity of the Taxation Laws (Merged States) (Removal of Difficulties) Amendment Order, but the Court declined to consider that plea holding that an authority or court administering the Act cannot permit a challenge to be raised against the vires of the Act : K. S. Venkataraman & Co. (P) Ltd. v. State of Madras [[1966] 2 S.C.R. 229].

The assessee then moved in the High Court of Madhya Pradesh a petition under Art. 226 of the Constitution, inter alia, for a writ declaring the 1962 Order ultra vires the Central Government, and for injunction restraining enforcement of the Order. The High Court rejected the petition, and the assessee has appealed to this Court with certificate granted by the High Court.

In this appeal counsel for the assessee raised the following contentions :

(1) that s. 6 of Act 67 of 1949 makes the "arising of difficulty" a condition of the exercise of the power to issue an order contemplated thereby, and since no difficulty in fact is proved to have arisen, the Central Government had no power to issue the impugned Order;

(2) that under s. 6 of Act 67 of 1949, the Central Government is authorised to make an order which is consistent with the scheme and the essential provisions of the Income-tax Act, 1922, and since the impugned Order operates to amend the scheme and essential provisions of the Income-tax Act, it is ultra vires the provisions of s. 6 of the Act;

(3) that if s. 6 is construed to invest a power authorising the Central Government to make orders amending or altering the Income-tax Act, it is void, for it amounts to excessive delegation of legislative power;

(4) that after the repeal of the Income-tax Act, 1922, by the Income-tax Act 43 of 1961, the power to remove difficulties arising in the application of the former Act can be exercised only under sub-s. (2) of s. 298 of the Income-tax Act, 1961; and

(5) that the orders of assessment made by the Income-tax authorities or intended to be made by them are violative of Art. 14 of the Constitution.

Since we are of the view that the 1962 Order is invalid, because no "difficulty" is proved to have arisen justifying the invocation of the power under s. 6 of Act 67 of 1949, we do not propose to express our opinion on the remaining contentions.

By cl. 8 of the agreement with the Ruler of Bhopal, the assessee was excluded from the operation of the taxation laws of the State. Accordingly no return was filed by the assessee, no proceedings for assessment were taken, and no depreciation was allowed to the assessee for the purpose of the Bhopal Income-tax Act. This Court in Commissioner of Income-tax v. Straw Products Ltd. [[1966] 2 S.C.R. 881] observed that the expression "all depreciation actually allowed under the laws or rules

of a Merged State" in paragraph 2 of the 1949 Order could not be given an artificial meaning. It did not mean depreciation allowable under the provisions of any law or rules : it connoted an idea that the allowance was actually given effect to.

By the extension of the Income-tax Act, 1922, the rules and the orders made thereunder to the areas of the merged States, undoubtedly numerous difficulties arose, for the Income-tax Act, the rules and the orders made thereunder contemplated situations peculiar to the conditions prevailing in British India which were not and could not be prevailing in the merged States. It was necessary therefore to devise machinery for removing those difficulties. This was sought to be achieved by conferring power upon the Central Government to make orders for that purpose. The power was, however, to be exercised by making provisions or giving directions as may appear to be necessary for removal of difficulties and no more. By s. 10(2)(vi) proviso (c) read with s. 10(5) of the Income-tax Act, 1922, the depreciation allowable in computing the profits and gains of an assessee from business carried on by him had to be computed by aggregating all such allowances made under the Indian Income-tax Act, or under any Act repealed thereby or under executive orders issued when the Indian Income-tax Act, 1886 was in force. On the express terms of the Act, for determining the written down value in any assessment year only that much depreciation was to be taken into account as was actually allowed under the Indian Income-tax Act, or under any Act repealed thereby or under executive orders issued under the Indian Income-tax Act, 1886, and since the Income-tax Acts of the merged States were repealed not by the Indian Income-tax Act, 1922, but by Ordinance 21 of 1949 and by Act 67 of 1949, in computing the written down value of the buildings, machinery, plant and furniture of an assessee in a merged State, allowances of depreciation under the Merged States Acts could not be taken into account. This gave a benefit to the assessees in the merged States which was inconsistent with the scheme of the Income-tax Act. The Central Government therefore issued the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, and thereby all depreciation actually allowed under any laws or rules of a merged State relating to Income-tax and super-tax was to be taken into account in computing the aggregate depreciation allowance referred to in sub-cl. (c) of the proviso to cl. (vi) of sub-s. (2). The language of the Order was clear. If under the laws of a merged State relating to Income-tax and super-tax any depreciation was actually allowed, it was to be taken into account in determining the written down value. The depreciation actually allowed did not connote depreciation which might, if the assessee had been subjected to tax under the State law, have been allowed but was not in fact allowed. It was so held by this Court in Commissioner of Income-tax v. Straw Products Ltd. [[1966] 2 S.C.R. 881.]. The expression "depreciation actually allowed" was also so interpretated in a case in which an assessee who under an agreement with the Ruler of a Part B State was exempted from payment of Income-tax, and the Central Government after the merger of the State gave effect to the agreement by a notification under s. 60A of the Income-tax Act, 1922 : Commissioner of Income-tax, Bombay v. Dharampur Leather Cloth Co. Ltd. [(1966) 2 S.C.R. 859.]. It had also been held by the Courts in India - And in our judgment the view is right - that in determining the written down value of assets, the depreciation not allowable but actually allowed was to be taken into account under s. 19(2)(vi) of the Indian Income-tax Act, 1922, after that clause was amended by Act 23 of 1941 : Commissioner of Income-tax v. Kamala Mills Ltd. [(1949) 17 I.T.R. 130.]. Vankadam Lakshminarayana v. Commissioner of Income-tax, Andhra Pradesh [(1961) 43 I.T.R. 526.].

The expression "depreciation actually allowed" therefore connotes under s. 10(2)(vi) of the Income-tax Act, under cl. (2) of the Removal of Difficulties Order, 1949, and the notification under s. 60A of the Income-tax Act, depreciation taken into account in assessing the income of an a assessee arising from carrying on business, and does not mean depreciation merely allowable or applicable under the taxing provision.

But the impugned Order seeks to alter the connotation of that expression. The assessee contends that no difficulty arose or could arise in giving effect to the provisions relating to the allowance of depreciation under the Indian Income-tax Act to the merged states after the promulgation of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949, and the Central Government assumed, in issuing the impugned Order under s. 6 of Act 67 of 1949, powers which were not invested by the Act, and on that account the Order is invalid. The Union of India resists that plea. The High Court of Madhya Pradesh held that the Central Government having issued the 1962 Order, it must be deemed to be held that difficulties had arisen in giving effect to the provisions of Act 67 of 1949 and the opinion of the Central Government in that behalf was conclusive. The Court observed :

> "The language of the section clearly shows that it is for the Central Government to decide, as a pure act of administration, whether an obstacle or impediment exists in giving effect to the provisions of the Act, Rule or Order referred to in s. 6 which calls for an order for surmounting the obstacle or removing the impediment. No doubt s. 6 does not expressly say that the Central Government should be satisfied as to the "existence of any "difficulty" for the removal of which the making of an Order is necessary. But it is implicit in the language of s. 6 that the Central Government should be satisfied that a difficulty exists in giving effect to the provisions of any Act, Rule or Order extended by s. 3 to the Merged States. If the existence of any "difficulty" depends on the satisfaction of the Central Government, then it follows that the condition about the existence of any difficulty, for the removal of which the Central Government is empowered to make an Order, is a subjective condition incapable of being determined by any one other than the Central Government which has to take action in the matter."

In so observing, in our judgment, the High Court plainly erred. Exercise of the power to make provisions or to issue directions as may appear necessary to the Central Government is conditioned by the existence of a difficulty arising in giving effect to the provisions of any Act, rule or order. The section does not make the arising of the difficulty a matter of subjective satisfaction of the Government : it is a condition precedent to the exercise of power and existence of the condition if challenged must be established as an objective fact.

The observations made by this Court in Commissioner of Income-tax, Hyderabad v. Dewan Bahadur Ramgopal Mills Ltd. [[1961] 2 S.C.R. 318.] on which reliance was placed by the High Court do not support the view that "the arising of a difficulty" is a matter for the subjective satisfaction of the Central Government. In Dewan Bahadur Ramgopal Mills case [[1961] 2 S.C.R. 318]. This Court was called upon to consider the validity of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950. On behalf of the assessee it was contended in that case that the notification No. S.R.O. 1139 dated May 8, 1956 issued under s. 12 of the Finance Act of 1950, which was couched in terms substantially the same as s. 6 of Act 67 of 1949, was invalid. This Court rejected the contention observing that in applying the provisions of cl. (b) of sub-s. (5) of s. 10 of the Income-tax Act to an assessee in a Part B State there was an initial difficulty, because the laws in force in the Part B States were repealed not by the Indian Income-tax Act, but by the Finance Act 1950, and to remove that difficulty the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, was passed. That Order was amended by an Explanation issued by the Central Government in exercise of the powers under s. 60A of the Income-tax Act, but the amendment was declared ultra vires by the High Court of Hyderabad, and thereafter another Removal of Difficulties Order was issued in 1956 re-enacting the Explanation. This Court held that

by the Removal of Difficulties Order, 1950 and anomalous result followed, and the depreciation allowance allowed to the assessee under the Indian Income-tax Act was more than the depreciation allowance under the Hyderabad Income-tax Act, and it was necessary to issue the Removal of Difficulties Order, 1956. In the view of the Court, in that case the condition precedent to the exercises of the power did exist. After recording that a difficulty requiring removal by an Order under s. 12 of the Finance Act had arisen, the Court proceeded to observe at p. 327 :

> "Furthermore, the true scope and effect of section 12 seems to be that it is for the Central Government to determine if any difficulty has arisen and then to make such order, or give such direction, as appears to it to be necessary to remove the difficulty. Parliament has left the matter to the executive; but that does not make the notification of 1956 bad."

The High Court of Madhya Pradesh held, relying upon these observations, that the decision of the Central Government that a difficulty had arisen was a matter of subjective satisfaction of the Government and that it was not open to the Courts to investigate that question. We are unable to hold that the observations made by this Court are susceptible of that interpretation. It is clear from the sequence of the observations made by this Court that the Court was satisfied that in fact a difficulty had arisen and that difficulty had to be removed had for removing the difficulty the Order of 1956 was issued.

It was expressly averred in the petition filed by the assessee that "no difficulty had arisen in giving effect to the provisions of either the Indian Income-tax Act, 1922, or the provisions of the first order and as such there was no question of the exercise of any power under s. 6 of the Merged States Act for the purpose of passing he second Order." The only reply to this plea in the affidavit filed on behalf of the respondents was that "the contention raised on behalf of the petitioner is unsound and is therefore denied". The learned Solicitor-General appearing on behalf of the respondents read out before us a "noting" made by the Secretary of the Finance Department on which the Central Government was persuaded to issue the 1962 Order. But that "noting" merely recited that the High Courts in India had not accepted the contention of the Income-tax Department that in cases where the depreciation had to be computed in respect of buildings, machinery, plant and furniture used for the purpose of the business by an assessee who had, under an agreement with the Ruler of an Indian State, been exempted from payment of Income-tax, a notional computation of depreciation which would have been allowed, if he had been assessed to pay the tax should be taken into account for determining the written down value of the assets at the date on which the Income-tax Act was made applicable. Refusal of the Courts to accept a contention raised on behalf of the Revenue arising contrary to the plain words of the statute cannot be regarded as a difficulty arising in giving effect to the provisions of the Act. They difficulty contemplate by the Order is not merely the inability of the Central Government to collect tax which the tax-payer could, in the view of the Government, have been made to pay but which has not been imposed by adequate legislation.

The Solicitor-General; contended that on the terms of s. 10 sub-s. (5)(b) a difficulty arose in the application of the Income-tax Act to merged States, because no written down value of the assets acquired by assesses in the merged States before the previous year relevant to the year in which the Indian Income-tax Act was applied for the first time could be determined. Relying upon the definition of "assessee" in s. 2(2) and s. 10(1) under which tax is payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him, counsel submitted that since under cl. (a) of sub-s. (5) of s. 10 in respect of the assets acquired in the previous year, the actual cost to the assessee

would be the written down value, and under cl. (b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under the Act would be the written down value, a person to be entitled to claim depreciation allowance in the computation of his taxable income must have been an assessee under the Income-tax Act prior to the previous year in which he was being assessed under the Indian Income-tax Act : if he was not an assessee no written down value under cl. (b) of sub-s. (5) of s. 10 could be determined. Counsel submitted that the impugned. Order was issued by the Central Government to remove that difficulty in the administration of the Act. In our judgment, the argument is wholly misconceived. Sub-section (5) of s. 10 is merely a definition clause : it does not deal with the determination of the quantum of depreciation "Depreciation" in respect of specified assets is allowed under s. 10(2)(vi) of the Income-tax Act. That clause was applied to the merged States subject to the modification made by the 1949 Order, and the amount actually allowed under the law of the merged State was to be taken into account in determining the written down value, and the depreciation allowance referred to in cl. (c) of the proviso to cl. (vi) of s. 10(2). It is impossible, on the words used in s. 10(5) cl. (b) read with the 1949 Order, to hold that the written down value of the assets of the assessee in a merged State could not be determined, and with a view to remove that difficulty the impugned Order was promulgated. The fact that the assets were acquired by a person at a time when he was not an assessee under the Indian Income-tax Act or under the State Act will not disable his, when he is assessed to tax on the profits of the business, from, claiming the benefit of the depreciation allowance on those assets if used for the purpose of the business.

Section 6 of Act 67 of 1949 authorises the Central Government to make provisions or to give directions as may appear to be necessary for removal of difficulties which had arisen in giving effect to the provisions of any Act, rule or order extended by s. 3 to the merged States. By the application of the Indian Income-tax Act to the merged States a difficulty did arise in the matter of determining the depreciation allowance under s. 10(2)(vi). That difficulty was removed by the enactment of the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1949. Even by that Order all depreciation actually allowed under any laws or rules of a merged State relating to Income-tax was to be taken into account in computing the aggregate depreciation allowance. Thereafter there survived no difficulty in giving effect to the provisions of the Indian Income-tax Act or the rules or orders extended by s. 3 to the merged States.

To sum up : the power conferred by s. 6 of Act 67 of 1949 is a power to remove a difficulty which arises in the application of the Income-tax Act to the merged States : it can be exercised in the manner consistent with the scheme and essential provisions of the Act and for the purpose for which it is conferred. The impugned Order which seeks, in purported exercise of the power, to remove a difficulty which had not arisen was, therefore, unauthorised.

We do not in the circumstances think it necessary to determine to what extent, if any, it would be open to the Central Government by an order issued in exercise of the power conferred by s. 6 of Act 67 of 1949 to make a provision which is inconsistent with the provisions of the Indian Income-tax Act. We also need not express any opinion on the other contentions raised by the assessee, i.e. whether the Order, if any should have been issued under s. 298 of the Indian Income-tax Act, 1961, or whether by reason of the enactment of the impugned order the guarantee of equality before the law was violated.

The appeal is allowed and the order passed by the High Court is set aside. It is declared that cl. (b) of the Explanation in the Taxation Laws (Merged States) (Removal of Difficulties) Order, 1962, is ultra vires the Central Government when exercising the power under s. 6 of Act 67 of 1949 and the

Revenue authorities are not entitled to levy tax on the basis of depreciation allowance computed in accordance with that clause in the Order. The assessee will get its costs from the respondents in this Court and the High Court.

Appeal allowed.

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