



value of six buses was not disputed and the only point agitated related to the assessability of the amount of Rs. 49,288 as business profit under the second proviso. The Tribunal was of the opinion that the buses had been plied by the assessee for part of the previous year and the profit on the sale of these buses was taxable under the said pr

The assessee moved the Tribunal for making a reference to the High Court and the following question was referred :

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 49,288 was assessable as profit under the provisions of section 10(2)(vii) ?"

Although the Tribunal had given no finding that the whole of the bus service business had been wound up during the relevant period, the High Court proceeded to answer the question on that assumption. It is difficult to see how the High court was justified in saying that the Tribunal had apparently accepted the contention that the sale was a closing down or a realisation sale. In such a situation we might have followed the course which commended itself in Commissioner of Income-tax v. R. R. Ramakrishna Pillai but we are of the opinion that even on the assumption that the sale of the buses was closing down or a realisation sale it would none the less of the buses was a closing down or a realisation sale it would nonetheless be taxable sine the sale was made after the amendment of the second proviso by Act 67 of 1949. The High Court in the present case referred to the observations in Commissioner of Income-tax v. Express Newspapers Ltd. and to the three conditions laid down therein for bringing the sale proceed

Now the second proviso was in the following terms :

"Provided further that where the amount for which any such building, machinery or plant is sold (whether during the continuance of the business or after the assertion thereof), exceeds the written down value, so much of the excess as does not exceed the different 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."

The words within brackets did not exist before the amendment made by Act 67 of 1949 and were inserted by that Act. In Liquidators of Pursa Ltd. v. Commissioner of Income-tax the controversy arose out of the proceedings relating to the assessment of Pursa Limited for the assessment year 1945-46. Attempts had been made from 1942 onwards to sell the entire business of the company but without success. In December, 1943, an agreement was excited whereby the assessee agreed to sell all the lands, buildings, machinery, plant, etc., used in connection with the sugar factory which was being run by the company. On the date of the sale the company assessed sugar stocks valued at Rs. 6 lakhs which the company continued to sell up to June, 1944. The Income-tax Officer held that the profits of the sale of machinery and plant were liable to assessment under section 10(2) (vii). The Appellate Assistant commissioner and the Income-tax Appellate Tribunal affirmed that order. After the matter had been taken to the High Court i

"(1) during the entire previous year or a part of it the business shall have been carried on by the assessee :

(2) the machinery shall have been used fin the business; and

(3) the machinery shall have been sold when the business was being carried on and not for the purpose of closing it down or winding it up."

There can be no doubt that, according to the law laid down by this court, the view of the High Court would have been sustainable if the sale in the present case had been effected ruling the assessment year prior to the amendment of the proviso by Act 67 of 1949. The critical word which were inserted by that proviso, namely, "whether during the continuance of the business or after the cessation thereof", must be given their property meaning. It is quite plain that, if the building machinery or plant is sold during the continuance of the business or after the business ceases, the sale proceeds would be liable to tax in accordance with that proviso. The only question, therefore, is whether when a sale is made for the purpose of closing down the business or effecting its cessation the proviso would be inapplicable. When the legislature clearly provided that the proviso would apply even if the sale was made after the cessation of the business it is difficult to conceive that it was intended to be excluded from the

"The words 'whether during the continuance of the business or after the cessation thereof' were not present in the unamended proviso. In the two decisions cited earlier, in the absence of such words, this court held that to attract the said proviso the machinery shall have been sold before the business was closed down. This clause omits that condition for the exigibility of the tax".

The above observations clearly show that the amending words in the proviso eliminated the third condition which had been laid down for its applicability in the previous decision, namely, that the machinery shall have been sold when the business was being carried on and not for the purpose of losing it down or winding it up. One that condition disappears as a result of the amendment, only the first two conditions remain and all that has to be seen is whether during the entire previous year or a part of it that business had been carried on by the assessee and that the machinery has been used in the business. Both these conditions, according to the finding given by the Tribunal, exist in the present case. The result would be that the profits arising out of the sale of buses in question as determined by the Income-tax Officer would be chargeable to tax in accordance with the second proviso to section 10(2) (vii).

The answer to the question referred in the present case has to be in the affirmative and against the assessee. The appeal is consequently allowed with costs and the answer returned by the High Court is discharged.

We are informed at the Bar that K. B. Kalikutty, one of the legal representatives of the assessee, had died before special leave was granted. It will be open to the Tribunal to decide the effect of death of the said legal representative and to non-impleadment of the legal representative of the deceased at the hearing under section 66(5) of the Act.

Appeal allowed.

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