Associated Stone Industries (Kotah) Ltd.

Vs

Commissioner of Income- Tax, New Delhi

Civil Appeals Nos. 1968 and 1969 of 1968

(Hegde JJ)

25.08.1971

JUDGMENT

HEGDE J. -

These appeals by certificate arise from the decision of the High Court of Delhi in a reference under section 66 (1) of the Indian Income-tax Act, 1922, which will be hereinafter referred to as "the Act".

The controversy in these appeals relates to the assessment of the assessee-appellant for the assessment years 1948-49 and 1949-50. The assessee was taxed as a non-resident. The assessee is a company incorporated on January 17, 1945, as a public company with its head office at Ramganjmandi in the State of Kotah - an Indian State at that time. The Maharaja of Kotah granted to the assessee-company a monopoly for excavating kacha stone slabs in the Nizamat, Chechat and Ramganjmandi in the State on May 2, 1945. Clauses 18 and 19 of the agreement entered in to between the Maharaja and the assessee are relevant for the present purposes. Clause 18 says :

> (i) In consideration of concessions and privileges granted by the grantor and in lieu of income-tax, super-tax and excess profits tax, the grantee covenant to pay to the grantor royalty on the stone excavated at the rate of rupee one per 100 sq. ft. subject to the minimum amount of Rs. 1,50,000 per financial year. Provided that the aforesaid rate of Re. 1 per 100 sq. ft. will be operative so long as the selling rate of unpolished slabs does not exceed Rs. 10 per 100 sq. ft. In the event of the selling rate going above this figure the royalty per 100 sq. ft. shall be increased by 25% of the excess over ten rupees.
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> (ii) The minimum royalty will be payable in four equal instalments in advance every quarter. Provided that if in any quarter the royalty payable calculated at the rate mentioned in sub-para. (1) exceeds the instalments of minimum royalty paid in advance for that quarter, the balance shall be made up within the next quarter.
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> 19. In addition to the royalty mentioned in clause 18 the grantee have expressly covenanted to pay royalty on polished stone at the rate of Re. 1 per 100 sq. ft. payable every quarter."

So far as the minimum royalty is concerned both the Appellate Assistant Commissioner as well as the Tribunal have come to the conclusion that the same is deductible allowance under section 10 (2) (xv) of the Act. But as regards the excess royalty, they held that the same cannot be given deduction to in view of section 10 (4) of the Act on the ground that it was given in lieu of income-tax, super-

tax and excess profits tax.

At the instance of the assessee the Tribunal submitted the following question to the High Court of Delhi under section 66 (1) of the Act :

> "Whether the payment of royalty in excess of the aforesaid minimum is deductible under section 10 ?"

This question has to be understood in the light of the controversy between the parties before the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal. That controversy, as mentioned earlier, was whether the excess royalty paid could not be given deduction to in view of section 10 (4) though they opined that but for that section it would have come under section 10 (2) (xv). The High Court answered this question against the assessee proceeding on the basis that the expenditure incurred is a capital expenditure and that being so, the same was not a permissible allowance. This approach of the High Court was impermissible in view of the stand taken by the parties before the Income-tax Officer, the Appellate Assistant Commissioner as well as the Tribunal. All that the High Court had to decide was whether the deductions claimed was impermissible in view of section 10 (4) of the Act.

It is conceded at the Bar that there was no law imposing income-tax or super-tax or excess profits tax in the State of Kotah during the relevant years. That being so, there was no question of the excess royalty being made to pay in lieu of income-tax or super-tax or excess profits tax. If that is so then the excess royalty paid cannot be in lieu of income-tax, super-tax or excess profits tax. It was merely payable under the terms of a contract, though the reason given for that payment in the agreement is an erroneous one. Hence section 10 (4) of the Act cannot be attracted to that payment. That being so, the said payment is a permissible allowance under section 10 (2) (xv). Further, we see no basis to hold that payment as a capital expenditure. The nature of that payment is no different from the minimum royalty paid. That payment was not made for getting some additional capital asset or even any enduring benefit. It was paid on the basis of commercial expediency.

For the reasons mentioned above, we allow these appeals, discharge the answer given by the High Court and answer in favour of the assessee. The assessee is entitled to its costs in this appeal in this court. One hearing fee.

Appeals allowed.

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