Aluminium Corporation of India Ltd.

Vs

Commissioner o Income-Tax, West Bengal.

Civil Appeal No. 394 of 1969

(H. R. Khanna, K. S. Hedge, P. Jagmohan Reddy JJ)

29.08.1972

JUDGMENT

HEGDE J. -

1. This is an assessee's appeal by certificate under section 66A(2) of the Indian Income-tax Act, 1922 (to be hereinafter referred to as "the Act"). The Income-tax Appellate Tribunal, Calcutta "B" Bench, as per the directions given by the High Court in an application under section 66(2), submitted the following question for ascertaining the opinion of the High Court :

> "Whether, on the facts and in the circumstance of the case, the Tribunal was right in holding that the sum of Rs. 1,56,806 was wholly and exclusively laid out for the purpose of business and as such allowable as a business expenditure ?"

The High Court has answered that question in the negative and in favour of the revenue. The correctness of the decision of the High Court is challenged before us by the assessee.

The question referred to the High Court for its opinion proceeds on the basis that the facts and circumstances of the case as found by the Tribunal are not in dispute but what is disputed is the legal effect of the facts and circumstances found by the Tribunal. As held by this court in the earlier decisions that when a question refers to the facts and circumstances in the case, it means the facts and circumstances as found by the Tribunal. If any party wants to challenge the correctness of the findings given by the Tribunal either on the ground that the same is not supported by any evidence on record or is based on irrelevant or inadmissible evidence or is unreasonable or perverse, a question raising any one of those grounds must be sought for a and obtained. It is needless to say that the jurisdiction of the High Court in a reference under section 66 is only an advisory jurisdiction. That being so it can only pronounce its opinion on the questions referred to it. It is trite to say that it cannot sit as an appellant court over the decision of the Tribunal. Bearing these facts in mind, let us now proceed to set out the facts as found by the Tribunal.

The controversy in this case related to the assessment of the assessee for the assessment year 1955-56, the corresponding previous year being the financial year ending on March 31, 1955.

By an agreement dated December 30, 1949, the assessee-company appointed M/s. J. K. Alloys Ltd. as their selling agents for selling its aluminium products. The agreement was effective for a period of 5 years from April 1, 1950. The relevant clauses of the agreement are 1, 2, 6, 8, 9, 14 and 15. They read thus :

"1. That the Agents shall act as the Selling Agents of all Aluminium Ingots, Sheets, Circles, Expanded Metal, Shots, Utensils and Anodised and alloy goods manufactured by the Principal.

2. That this agreement shall commence from the 1st day of April, 1950, and shall continue, unless otherwise determined by mutual consent of the parties, till the 31st day of March, 1955.

6. That the principal will allow the agents discount in the manner indicated here under on sale of all products of the principal effected by the agents either by themselves or through sub-agents appointed by them or directly by the principal themselves :

#Aluminium Ingots 1 1/2%Aluminium Sheets & Cycles 1 1/2%Aluminium Expanded Metal 12 1/2%Aluminium Utensils & anodised and alloy goods 17 1/2%Aluminium Shots 5%##

Provided always that the rates of discount above mentioned or any of them may be varied by mutual consent of the parties.

8. That the agents shall be responsible for payment of the price and all other moneys to the principal immediately after the goods leave the principal's works or godown. Such payment will be made on presentation of necessary papers or documents by the principal to the agents and not later than a fortnight after the date the goods shall have been despatched. In default of payment as aforesaid the principal will be entitled to charge interest until realisation at the rate of six per cent. per annum on the balance for the time being outstanding.

9. That the agents will be responsible for the due fulfillment of all contracts made by them whether for ready or forward sales and also for the consequences of any breach of contract by any customer and for all losses and damages arising therefrom to the principal provided there shall been default on the part of the principal when manufacturing or giving delivery of any goods required or sold under any contract in compliance with the stipulation thereof.

14. That the parties may by mutual consent agree to continue after the expire of the 31st day of March, 1955, on the same terms and conditions as are herein contained or any modification thereof as they may decide in which case the agency business shall be terminated by either party giving to other not less than three months' notice in writing sent by registered post and such notice shall be deemed to have been given seven days after the same has been posted.

15. Notwithstanding anything contained in any of the foregoing clauses if the agents shall fail to make any payments as herein provided or commit any breach of any covenant herein contained and on the part of the agents to be observed and performed the principal shall have right at any time to terminate this agreement by giving to the agents one month's notice in respect thereof."

In the relevant year of account, the assessee paid to Messrs. J. K. Alloys Ltd. Rs. 1,56,806 as selling agency commission in accordance with the terms of the agreement. the Income-tax Officer disallowed the claim for deduction of that amount on the ground that the payment had not been made on business considerations. On appeal, the Appellate Assistant Commissioner agreed with the conclusion reached by the Income-tax Officer that the payment had been made for some extra-commercial considerations; but the further held that the agreement had not been acted upon. On a

further appeal, the Income-tax Appellate Tribunal opined that it was unable to concur with the view taken by the income-tax authorities that the agreement had not been acted upon and the payment had been made for some extra-commercial considerations. In the course of its order, it observed : "There is no dispute that the amount in question was actually paid as commission to Messrs. J. K. Alloys Ltd. It is also common ground that all the sales during the year were effected directly by the appellant and no sales were effected by the selling agents. On these facts, the Appellate Assistant Commissioner concluded that the agreement had not been acted upon and that the payment was made for some extra commercial considerations. We are afraid, we are unable to concur with the Appellate Assistant Commissioner. The mere fact that no sales were effected during the year of account by the selling agents themselves does not, necessarily, mean that the agreement was not acted upon. In fact,clause 6 of the agreement quoted above explicit refers to the fact that the agents shall be entitled to the payment of the discount even if all the sales were effected directly by the principals themselves. The agreement has not been impugned by the department as a sham and collusive transaction; in fact the entire selling agency commission paid to Messrs. J. K. Alloys Ltd had all along been allowed by the department as an admissible expenditure in the hands of the assessee up to the assessment for the year 1954-55. Evidently, the agreement in question had been entered into bona fide and had been acted upon."

The only ground on which the Income-tax Officer as well as the Appellate Assistant Commissioner disallowed the commission paid was that during the accounting year all the sales were effected directly by the assessee and no sales were effected by the selling agents. But those authorities failed to take note of the fact that apart from the fact that the selling agents were entitled to discount even respect of the sales directly made by the assessee, the agents were responsible for the payment of the price due from the purchases immediately wager the goods left the principal's works or godown. Such payment had to be made on presentation of necessary papers or documents by the assessee, not later than a fortnight after the date the goods were dispatched. In default of payment as aforesaid, the assessee was entitled to charge interest until realization at the rate of six per cent. per annum on the balance for the time being outstanding. Under clause (9) of the agreement, the agents were also responsible for due fulfilment of all contracts made by them whether for ready or forward sales and also for the consequences of any breach of to the assessee provided there was on default on the part of the assessee in manufacturing or giving delivery of any goods required or sold under any contract in compliance with the terms of the agreement. The Income-tax Officer and the Appellate Assistant Commissioner also overlooked the fact that in the previous years, the commission paid by the assessee to the selling agents has been considered as deductible expenditure. From this it follows that from 1950 to 1954, the agents did function in accordance with the terms of the agreement. It was contended before the Appellate Assistant Commissioner that even though the sales were directly effected by the assessee, they werer canvassed by the selling agents. Neither the income-tax Officer nor the Appellate Assistant Commissioner has held against that plea. Under these circumstances, the Tribunal rightly came to the conclusion that the commission paid was an expenditure expended wholly and exclusively for the purpose of the assessee's business, as provided in section 10(2)(xv).

The only reason that persuaded the High Court to come to the conclusion that the expenditure in question was not expended for the purpose of the assessee's business was that in the accounting year all sales were directly effected by the assessee and no sale was effected by the selling agents. But the High Court overlooked clauses 6, 8 and 9 of the agreement referred to earlier. It also overlooked the significance of the fact that in the earlier years the commission paid to the selling agents had been considered as deductible expenditure. It also did not take notice of the contention of the assessee that through the sales were directly effected by the assessee, they were all canvassed by the selling

agents.

It is true that under section 10(2)(xv), it is for the Income-tax Officer to decide whether any remuneration paid by an assessee to his selling agents was wholly or exclusively expanded for the purpose of his business. It is also true that by the mere fact that the assessee establishes the existence of an agreement between him and his agents and the fact of actual payment, the discretion of the Income-tax Officer to consider whether the expenditure was made exclusively for the purpose of the business is not taken away - see the decision of this court in Swedish Cotton Mills Co. Ltd. v. Commissioner of Income- tax. The expenditure incurred must be for commercial expediency. But, as observed by this court in Commissioner of Income-tax v. Walchand & Co. Private Ltd. in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue. In J. K. Woollen Manufacturers v. Commissioner of Income- tax, after applying the rule laid down in Walchand & Co.'s case that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, resemblances of the expenditure has to be adjudged from the point of view of the businessman and not of the income-tax department, this court proceeded to observe :

> "It is, of course, open to the Appellate Tribunal to come to a conclusion either that the alleged payment is not real or that it is not incurred by the assessee in the character of a trader or it is not laid out wholly and exclusively for the purposes of the business of the assessee and to disallow it."

In the instant case, it is not the case of the revenue that the assessee did not pay to commission in question nor is its case that the expenditure in question was not incurred by the assessee in the character of a trader. Therefore the only question that remains to be considered is whether it was not expended wholly or exclusively for the purpose of the business of the assessee. The Tribunal after taking into consideration the various terms of the agreement as well as the significance of the deduction given in the earlier assessment years came to the conclusion that the Income-tax Officer and the Appellate Assistant Commissioner erred in their opinion that the expenditure was not incurred for any commercial expediency or that the agreement was not in force in the relevant accounting year. The Tribunal has given good reasons in support of its conclusion. The primary facts found by the Tribunal and the factual inferences drawn therefrom were not open to review by the High Court.

The High Court erroneously thought that the facts of this case fell within the ration of the decision of this court in Swadeshi Cotton Mills' case. The facts if that case were as follows :

The appellant company was managing agents whose remuneration was an office allowance of Rs. 5,000 per month and 10% of the net profits of the company. Under article 118 of the articles of association of the company, its directors were each entitled to a remuneration of Rs. 100 per month. At an extraordinary general meeting of its shareholders article 118 was amended to provide for the payment to the directors of a commission of 1% of the net profits of the company in addition to their monthly remuneration and as a result the five directors of the company became entitled to a sum of Rs. 28,218 each for the calendar year 1948. The Tribunal found that the payment of the commission to the directors was for extra commercial reasons on the grounds : (1) that they did not render any special service in that year; (ii) that the management of the company was done by the managing agents and very litile was done by the directors; (iii) that the remuneration of Rs. 100 per

month was not considered by the directors to be inadequate in earlier years; (iv) that the increase in the company's profit by about Rs. 30 lakhs was due to the control of cloth having been lifted and not to any special exertion of the directors. On the basis od those findings which were all findings of fact, the Tribunal came to the conclusion that the commission paid to the directors cannot be considered as expenditure incurred wholly and exclusively for the purpose of the business. The High Court as well as this court accepted the findings reached by the Tribunal. From the facts of that case, it is clear that the payment of commission made to the directors was not because of any commercial expediency but for collateral reasons. Hence the rule laid down in that decision is inapplicable to the facts of the present case.

In the result we allow this appeal, set aside the judgment of the high court and answer the question referred under section 66(2) in the affirmative and in favour of the assessee. The revenue shall pay the costs of the appellant both in the High court and in this court.

Appeal allowed.

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