R. B. Seth Moolchand Suganchand

Vs

Commissioner of Income-Tax, New Delhi

Civil Appeal No. 2020 of 1972

(P. Jagmohan Reddy, H. R. Khanna JJ)

19.09.1972

JUDGMENT

JAGANMOHAN REDDY J. -

1. This appeal is by special leave against the judgment of the High Court of Rajasthan in an income-tax reference under section 66(1) by which it answered the two question referred to it in the negative. Before this appeal was filed, Appeal No. 1238 of 1969 had been filed on a certificate, but that was dismissed because this court had in several cases held that in an income-tax reference if the High Court does not give any reasons while grating the certificate, the certificate can be revoked.

The assessee, a firm carrying on mining business at Udaipur with a branch at Mandal, had, pursuant to an invitation to tender for mica mining in accordance with the terms and conditions prescribed in the Mineral Concession Rules, tendered for certain areas for Rs. 1,57,150 of which Rs. 3,360 was payable towards the mica scrap lying on the surface. The lease was for 20 years and the areas which were offered had been worked by other private companies for 15 years. This offer of the appellant was accepted and the lease was granted to it. In the relevant assessment year 1952-53 for which the previous year for the head office ended on October 30, 1951, and for the branch ended on March 30, 1952, the appellant claimed Rs. 7,857 being the 1/20th of the tender money as revenue expenditure incurred during that year. The claim of the assessee was rejected by the Income-tax Officer on the ground that the money was paid for the value of the land which it had acquired because the mine granted to the assessee had already been worked by the private companies. In an appeal against this order, the Appellate Assistant Commissioner confirmed the disallowance of the expenditure as, in his view, it was of a capital nature expended for the acquisition of a capital asset. Against this order, an appeal was filed to the Appellate Tribunal. The Tribunal, however, allowed Rs. 3,360 paid for mica scrap lying on the surface as a revenue expenditure incurred in the acquisition of stock-in-trade, but disallowed the claim for the balance of Rs. 1,53,800 which was paid under the tender as a capital expenditure.

The assessee had also claimed Rs. 3,200 as the fee paid by it at the rate of Re. 1 per acre per year for prospecting licence. The Income- tax Officer disallowed this amount under section 10(2)(xv) of the Indian Income-tax Act, 1922 (hereinafter called "the Act"), on the ground that the licence was obtained by the assessee only that year, that the fee was paid in addition to the royalty payable on the value of the emeralds excavated and sold and that it was an initial expenditure for procuring a right to prospect mines. The Appellate Assistant Commissioner in an appeal by the assessee negatived the claim on the ground that under that licence the assessee had a right to win and commercially exploit the minerals which the assessee actually carried out. The Tribunal, while dismissing the appeal filed against the order of the Appellate Assistant Commissioner, observed that

the prospecting licence fee cannot be equated to a payment made for the purchase of stock-in-trade, that it was not based on any quantity of minerals, that the minerals had to be won and extracted from the earth and the term "prospecting licence" shows that the mine had not yet started working as a mine and that the payment was to initiate the business. It also held that the period of one year for which the licence was obtained cannot justify the fee paid as a revenue expenditure. The assessee, thereafter, filed an application under section 66(1) of the Act and, as in its opinion a question of law did arise, the Tribunal referred the following two questions to the high Court for its opinion :

> "1. Whether, on the facts and in the circumstances of the case, the prospecting licence fee of Rs. 3,200 is allowable as revenue expenditure ?

2. Whether, on the facts and in the circumstances of the case, the appropriate part of Rs. 1,53,800 was allowable as revenue expenditure ?"

Taking the second question first, it is contended before us by the learned advocate for the appellant that Rs. 1,53,800 paid for pillars of mica standing in the land leased out after the other private companies had worked it was a revenue expenditure because the tender which was given and accepted was on the basis of the calculations in the Indian Mining Hand Book for a specific quantity of mica in the mines which was the assessee's stock-in-trade. The revenue, however, submits that the amount of the lease was a capital outlay incurred for the initiation of the business, and that the pillars of mica cannot be stock-in-trade unless the mica was excavated and brought to the surface. A large number of cases decided in this country and in England, dealing with different topics, were referred to and arguments addressed before us, dealing with many analogies of one kind or other, tendu leaves, mangoes, apples sand, brick-earth, lime and other commodities all with a view to persuade us to ascertain what is true test to be applied to the particular facts of this case. We do not, however propose to refer to cases dealing with variety of topics except perhaps to determine the nature of the expenditure incurred in this case by the assessee.

This court in Pingle Industries Ltd. v. Commissioner of Income-tax had occasion to examine exhaustively the relevant Indian and English cases for determining what is a capital expenditure and what is a revenue expenditure. That was also a case of mining where the assessee obtained leases for excavating Shahabad stones for a period of 12 years for which an annual payment of Rs. 28,000 was agreed upon. The majority of judges, Kapur J. and Hidayatullah J. (as he then was) (S. K. Das J. dissenting) held that the assessee acquired by his long-term lease the right to win stones, that the stones in situ were not its stock-in-trade in a business sense but a capital asset from which after extraction it converted the stones into its stock-in-trade. It was also held that the payment was neither rent nor royalty but a lump payment in instalments for acquiring a capital asset of enduring benefit to its trade; the amounts being outgoings on capital account, were therefore not allowable deductions. The proposition as qualified by Lord Cave in Atherton v. British Insulated and Helsby Cables Ltd. that, in the absence of any special circumstances leading to the opposite conclusion, when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, has been applied, explained and varied from time to time as the circumstances of the particular case required. The application of these principles to the various cases and the conclusions reached by courts in those cases often lead to irreconcilable results. It is because the topic itself is a troublesome one and is not rendered any the less difficult by resorting to principles. "It is not always easy", observed Romer L.J. in Golden Horse Shoe (New) Ltd. v. Thurgood, "to determine whether a particular asset belongs to the one category or the other" nor does it depend in any way "on what may be the nature of the asset in fact or in law". In our own court this difficult has been put very tersely, if we may say so with respect,

by Hidayatullah J. (as he then was) in Abdul Kayoom v. Commissioner of Income-tax when he said :

> "..... none of the tests is either exhaustive or universal. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decided cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. What is decisive is the nature of the business, the nature of the expenditure, the nature of the right, acquired, and their relation, inter se, and this is the only key to resolve the issue in the light of the genera principles, which are followed in such cases."

The determining factor will depend largely on the nature of the trade in which the asset is employed. The several cases which do not deal with the mining leases but are concerned with different assets are of little help in the same way as in Mohanlal Hargovind v. Commissioner of Income-tax, cases relating to the purchase or leasing of mining quarries or deposits of brick earth were considered not to be of assistance by the Privy Council in the case of a contract for collecting and removing tendu leaves. The principles enunciated for determining the nature of the expenditure have been sought to be applied to different situations arising on the facts of each case, but the difficulty in matching them with the seeming irreconcilability are perhaps explicable only on the ground that the determination in any particular case is dependent on the character of the lease or agreement, the nature of the asset, the purpose for which the expenditure was incurred and such other factors as in the facts and circumstances of that case would indicate. If we confine our attention to the mining leases, what appears to us to be an empirical test is that where minerals have to be won, extracted and brought to surface by mining operations, the expenditure incurred for acquiring such a right would be of a capital nature. But, where the mineral has already been gotten and is on the surface, then the expenditure incurred for obtaining the right to acquire the raw material, that is, the mineral, would be a revenue expenditure laid out for the acquisition of stock- in-trade. An expenditure incurred for acquiring a right to take away sand from the surface of river beds has been treated as if the sand was stock-in-trade - M. A. Jabbar v. Commissioner of Income-tax in the same way as tendu leaves have been treated by the Privy Council in Mohanlal Hargovind's case. In the former case, Bhargava J. indicated a number of factors which led to the conclusion that the expenditure incurred by the assessee in obtaining the lease was revenue expenditure for the purpose of obtaining the stock-in-trade and not capital expenditure which were : (1) that the lease was for a very short period of 11 months only; (2) that the sole right which was acquired by the assessee under the lease deed was to take away the sand lying on the surface of the leased land where no question of raising, digging or the excavating for the sand before obtaining it was involved. In other words, no operations had to be performed on the land itself and "is not a case where the gravel in any true sense" as pointed out in Golden Horse Shoe (New) Ltd's case "was won from the soil ....it is merely shovelled up where it lies." In the latter case the Privy Council said that the leases for the right ot collect and revome tendu leaves under which a certain sum was payable by instalments as a consideration for the grant of that right was a revenue expenditure. It pointed out that the contracts were short term contracts, that the picking of the leaves had to start at once or practically at once and to proceed continuously and that under the contract it is tendu leaves and nothing but tendu leaves that are acquired. At page 478, while comparing that case with the case of Kauri Timber Co. Ltd. v. Commissioner of Taxes, where the company's business consisted in cutting and disposing of timber and it had in some cases acquired timber-bearing lands and in other cases it purchased the

standing timber, the lease itself being for 99 years, the Privy Council observed :

> "In the present case the trees were not acquired : nor were the leaves acquired until the appellants had reduced them into their own possession and ownership by picking them. The two cases can, in their Lordships' opinion, in no sense be regarded as comparable. If the tendu leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed."

The analogy referred to in the above passage is sought to be applied to the facts of this case but in our view there is hardly any justification for such a conclusion having regard to the findings of the Tribunal and the income-tax authorities.

The learned advocate for the assessee contends that the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal, each of them had given different findings for coming to the conclusion that the expenditure was of a capital nature while the High Court gave yet another reason to answer the question against the assessee. Inasmuch as the correctness or otherwise of the order depends greatly upon what has been found as facts of this case, it would be useful to examine the respective orders.

The Income-tax Officer, as we have earlier stated, held that the money was paid for the value of the land which the assessee had acquired because the mine granted to the assessee has already been worked by other private companies. This finding, according to the learned advocate, is contrary to the facts set out in the statement of the case by the Tribunal in which a reference was made to paragraph 5 of the invitation to tender. It reads :

> "As the area has been worked by a private company during the past fifteen years, all the known mines and quarries and prospecting pits have acquired a value which can be determined on the principles of 'mine valuation. Intending applicants are therefore requested to visit the area before April 15, 1950, and assign their own value and offer it....."

According to the assessee, as already pointed out, it had offered Rs. 1,57,150 after the mica had been valued on the principles of mine valuation which represented a payment of stock-in-trade. The Appellate Assistant Commissioner has rejected the claim of the assessee with these observations :

> "On merits the appellants' claim cannot be sustained because the circumstances detailed above clearly indicate that the payment of tender money was for the acquisition of capital asset and not, as sought to be made out, for the stock or ores. The stock was not here on the surface but it was still embedded with the only difference that its availability could be more definitely gauged than in the case of an unworked area. It would not make any material difference whether the miner acquires a lease on ordinary terms for an area which does not give a clear indication of the possible existence of ore or he acquires on more expensive terms an area which is in such a condition that it gives definite indication about the possibility of existence of ore therein and also broadly the extent thereof. Acquisition in either case would be of a capital asset and payment therefor, small or large, a capital

expenditure."

Earlier the Appellate Assistant Commissioner had stated that when the lease was allotted to the appellant by the mining department "it was made clear that any mica scrap left by the predecessor, exploiters, M/s. Duduwala & Co., on the surface would be removed either by these exploiters within three months or if not so removed it would stand forfeited to the Rajasthan Government; in any case it was not to come to the appellants". In the light of what has been stated, it is clear that the Appellate Assistant Commissioner made a distinction between mica that has been excavated and brought to the surface and the mica which was still embedded and had to be excavated even though it was more easily available because of the labour already expended in the working out of the mine by the other private companies.

The conclusion of the Tribunal are set out in the following passage :

> "In our opinion, the amount paid cannot be equated to payment for raw materials. The raw materials have to be won and extracted before they could be said to be stock-in-trade. The sum represents the price that was paid by the assessee for obtaining the right to extract and win emerald and mica in an area which had already been worked and developed by a predecessor for 15 years. If the assessee had to start running a mine, it had to incur similar expenditure. In this case, the amount had been incurred and was paid for the assessee. Thus, this amount in our opinion represents capital expenditure incurred for the purpose of obtaining certain benefits of a capital nature. This is not in the nature of any royalty or rent paid by the assessee to the authorities. In this connection, reference was made on behalf of the assessee to the provisions of rule 51 of the Mineral Concessions Rules which prohibits premium being paid for obtaining such alicence. This rule occurs in chapter 5 which applies to grant of mineral concessions by private persons and we do not consider that the rule is relevant for considering the question in issue before us where the grant is by the State. We do not also think that this is in the nature of any premium. This is merely for the purpose of getting benefits of certain structures and other works carried out in the area which had already been worked as a mine previously. This cannot be equated to a premium that is contemplated by rule 51. We, therefore, agree with the authorities below in holding that the assessee has not made out the claim for deduction of the amount."

The finding of the Tribunal given in the above excerpt is clear and consistent with that given by the Income-tax officer and the Appellate Assistant Commissioner in that all of them distinguished between raw materials which had already been extracted and brought to the surface and those that have still to be extracted. Apart from the objection that no question was formulated by which the findings of the Tribunal were challenged on any admissible grounds, there are, in our view, no contradictions in finding of the Tribunal as submitted by the learned advocate for the assessee, because what the Tribunal was dealing with in the latter part of the passage cited above, were the contentions urged on behalf of the assessee, firstly, that the amount was a royalty or rent paid to the authorities and, secondly, what was paid was in the nature of premium. While rejecting these contentions, the Tribunal gave its reasons, but that is not to say that the conclusion that the amount was a capital expenditure was not based on the finding that mica had to be extracted and brought to the surface before it could be considered as the assessee's stock-in-trade.

In our view the principles which have been applied in the Pingle Industries case are equally

applicable to the facts and circumstances of this case. The test for ascertaining whether the amount spent is of a capital nature is, whether it was spent for obtaining a right of an enduring character which in the case of mining leases is to acquire rights over land for winning the mineral. In other words, where the mineral is part of the land and some mining operations have to be performed to extract it from the earth, the amount paid to acquire a right over or in the land to win that mineral is of an enduring character and, hence, a capital expenditure. In this case the mica pillars which have been exposed by the mining operation of other private companies had no doubt enhanced the value of the right which was leased to the appellant but none the less the appellant still had to carry out some mining operations to extract the mineral from the pillars which was embedded in the land. If the private companies before the mica was exposed had taken the lease, they would have paid a much lesser amount which none the less would have been a capital expenditure. It is the labour and expense which the private companies expended that has enured for the benefit of the Government and enhanced the capital value of the lease. This is not a case, as is contended, of mica having been gotten so as to form part of the stock- in-trade of the assessee in the case of Golden Horse Shoe (New) Ltd. v. Thurgood. In that case the company had acquired rights in certain dumps of "tailings" or residuals that remained after the extraction of gold from ore taken from certain gold mines. It was contended on behalf of the revenue that the company's rights in tailings and dumps were part of the undertaking which the company was formed to acquire and any sum paid therefor was capital expenditure, and that the company's rights in the dump was the purchase of a wasting asset. This contention was negatived and it was held that the purchase price of the tailings was an admissible deduction in computing the company's profits for income-tax purposes. Lord Hanworth M. R., at page 298, observed :

> "After careful consideration of the present case, in the course of which my mind has fluctuated on either side, I think it is to be decided upon its own facts - that none of the tests suggested affords a strict rule of guidance. It seems, then, that the company bought these dumps - which were no longer in a natural but in an artificial condition; which were in such a state that they would not have passed under a lease of 'beds opened, or unopened, or minerals', see Boileau v. Heath for the purpose of treating them as their stock-in-trade, lying stored and ready to their hand, at a fair price of pounds 122,750, and their intention was to use them up and make what they could of them by and after treatment. They had not to win them from the soil; they been gotten already. If the metaphor of working a mine be applied, it might be said that the purchase of the dumps was a capital outlay. If the metaphor of making gas or coke from coal, or of a miller making flour from wheat, be applied, it may be said that it was an outlay to be placed in the profit and loss account. But metaphors do not provide exact definitions and are often misleading. It is safer to give an interpretation to the facts of this case as found in the case stated, and upon the law relevant to them."

This passage at once indicates the difficulties which he in common with other judges have felt when called upon to determine the nature of the expenditure.

The lease in this case was for a long period : it conferred a right to excavate the mica because on the findings of the Tribunal mica had to be extracted from the mine though the earlier working out of those mines by other companies had made it much easier to perform the final operations and because of it a higher amount had to be paid. None the less the amount paid was for acquiring a right of enduring nature to extract and remove the mica to bring it to the surface, grade it and pay royalty to the Government in accordance with the quality of each grade of mica extracted. We,

accordingly, hold that the expenditure incurred is a capital expenditure and that the second question has been rightly answered.

On the first question whether the prospecting licence fee of Rs. 3,200 is allowable as revenue expenditure, the contention on behalf of the assessee is that it is a licence fee, not a lease amount nor does it create an interest in the land. The Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal have all held that the fee paid for prospecting licence was not of a revenue nature. It was submitted before the Tribunal that under a prospecting licence issued under Chapter 3 of the Mineral Concession Rules, 1943, the licence had a right to win and carry away the minerals for commercial purposes, and for that reason the amount should be treated as in the nature of a purchase price of a stock-in-trade. In support of this contention the provisions of rule 23 were referred to but the Tribunal rejected that contention because it its view the amount was paid, as and by way of prospecting fees which was for initiation of a business as in the case of other minerals and that the character of the licence did not change merely because the licence had certain rights over the minerals obtained under the prospecting licence nor was it based on any quantity of minerals. The minerals had to be won and extracted from the earth and the term "prospecting licence" shows that the mine has not yet started working as a mine. It was a fee paid irrespective of the quantity of minerals obtained which demonstrated clearly that the object of the payment was to initiate the business. That apart, the period for which the licence was obtained, viz., one year, does not also make it a revenue payment and consequently, it held that the authorities rightly disallowed the amount. The finding by the income- tax authorities as well as the Tribunal that it was payment for initiating the mining operations was a finding of fact. In our view, also, the fee was paid to obtain a licence to carry out, investigate, search and find the mineral with the object of conducting the business of extracting ore from the earth. It is, therefore, clear that the fee was paid for initiating the business and is of a capital nature. By no stretch of argument can the fee paid for a prospecting licence by equated to a payment made for the purposes of stock-in-trade. We think that the income-tax authorities, the Tribunal and the High Court are right in coming to that conclusion. Our answer to the first question is, therefore, also in the negative. The two questions having been answered against the assessee, the appeal is dismissed with costs.

Appeal dismissed.

</html