Wilh, Wilhelmsen

Vs

Commissioner of Income Tax, West Bengal-I

Civil Appeal No. 1206 of 1978

(S. B. Majmudar, B. P. Jeevan Reddy JJ)

09.07.1996

JUDGMENT

B. P. JEEVAN REDDY, J. –

1. This appeal is preferred by the assessee on the basis of a certificate of fitness issued by the Calcutta High Court under Section 66-A(2) of the Indian Income Tax Act, 1922 (the Act). Three questions were referred under Section 66(2) of the Act at the instance of the Revenue. The questions are:

> "1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was entitled to get depreciation allowance under Rule 8 of the Income Tax Rules even in respect of ships which had formed part of the assessee' s fleet for more than twenty years?
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> 2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in deleting the addition of Rs 55,280 made by the Appellate Assistant Conimissioner on account of excess depreciation in respect of the vessel 'Tortugas'?
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> 3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in deleting the enhancement of Rs 97,547 to the total income made by the Appellate Assistant Commissioner on account of wrong deduction of unabsorbed depreciation allowed by the Income Tax Officer ?"

2. The Calcutta High Court answered Question 1 in the negative, i. e., in favour of the Revenue. Question 2 was answered in the affirmative, i. e., in favour of the assessee, while Question 3 was answered in the negative, i. e., in favour of the Revenue and against the assessee. On an application filed by the assessee for issuance of a certificate under Section 66-A(2), the High Court (a different Division Bench) issued the certificate observing that the case raises certain important questions of law which require to be considered by this Court. The questions so indicated are:

> "The issue involved in this reference concerns the interpretation of the circular and the instructions issued by the Central Board of Revenue vis-gvis the applicability of Rule 33 of the Income Tax Rules. The answers involve the question of vital importance for the assessment of shipping companies up to the Assessment Year 1976-77 and how Section 44-B would be applicable. The reference dealt with the question whether a shipping company is entitled to depreciation under Section 10(2) (vi) of the Income Tax Act, 1922 in view of the instructions issued by the Central

Board of Revenue. This reference was also involved with the question whether the assessee would become disentitled to such depreciation in view of the said instructions contained in the circular of the Central Board of Revenue. It is true that the scope and effect of the circular of this type have been considered by the Supreme Court in the case of Ellennan Lines Ltd. v. CIT[(1972) 4 SCC 474 : 1974 SCC (Tax) 304 : (1971) 82 ITR 913 and Navnit Lcrl C. Javeri v. K. K. Sen2, but the question here is to what extent a circular which curtails the right of the assessee under the Act or the Rule can be given effect to as against the assessee. It is true, as was noted by the Supreme Court in the cases referred to hereinbefore as also in the instant case that circulars merely provide a method of the application of Rule 33, but by providing that method if the circular attempts to curtail the right to depreciation by the assessee then the jurisdiction of such circulars to curtail right granted either by the Act or the Rule framed by the Act would require consideration. Furthermore also on the interpretation of the circular there is a substantial question involved - what does the expression 'fleet' in the instructions issued by the Central Board of Revenue mean. For the aforesaid reasons we are of the opinion that this case involves substantial and important questions of law which require to be considered by the Supreme Court."

3. The appellant-assessee is a Norwegian Shipping Company. The assessment year concerned is 1958-59 for which the accounting year was the calendar year 1957. The relevant facts, as stated in the judgment of the High Court, are the following :

(i) Instead of furnishing the annual accounts for its world business for the Assessment Year 1958-59, the assessee furnished separate complete annual accounts for its Indian trade, that is to say, for all-round voyages of each ship to and from the Indian ports. The assessment was made under the third method contained in Rule 33 of the Indian Income Tax Rules, 1922 and the Instructions issued thereunder. The profits that were brought to tax ultimately were the net Indian profits of each ship employed in the Indian trade in the Accounting Year 1957.

(ii) Following the Instructions aforementioned, the Income Tax Officer disallowed depreciation of eight ships mentioned in his order on the ground that the said ships in the assessee's fleet were of more than twenty years.

(iii) There was an unabsorbed depreciation of about Rs 3,31,493 in the Assessment Year 1953-54. An amount of Rs 2,49,093 was set off against the assessee's income for the Assessment Year 1957-58. The unabsorbed depreciation of Rs 97,547 for the Assessment Year 1953-54 pertained to seven ships, which did not come to India in the accounting year relevant to the Assessment Year 1958-59. In the books of the assessee, the said sum of Rs. 97,547 was shown as a business loss brought forward from the earlier years. The Income Tax Officer allowed the assessee to set off the said amount against the profits for the accounting year relevant to Assessment Year 1958-59. (we are not stating the facts relating to Question 2 since it was answered by the High Court in favour of the assessee and because there is no appeal by the Revenue against it.)

(iv) On appeal, the Appellate Assistant Commissioner affirmed:ttre ordtaof the Income Tax. Officer. Before the Appellate Assistant Commissioner, the Income Tax Officer contended tbat allowing tfie set- off of Rs. 97,547 by him 7was a mistake.

The assessee accepted the said contentiop, Accordingly, the Appellate Assistant Commissioner enhanced the assessment by disallowing the said sum of Rs 97,547.

(V) The assessee appealed to the Tribunal where it contended that the Instructions insofar as they provide for disallowance of depreciation on the said eight ships (which did not come to India during the accounting year relevant to Assessment Year 1958-59) were ultra vims proviso (c) to Section 10(2) (vi) of the Act and Rule 8 of the Indian Income Tax Rules, 1922. It contended that it is entitled to depreciation in respect of all these ships under the provisions contained in Section 10(2) (vi) proviso (c) and Rule 8. It submitted further that the words "company's fleet" occurring in Instructions were referable only to those ships of the assessee which were employed in its Indian trade.

4. The Tribunal did not go into the question whether the Instructions were ultra vims the statutory provisions aforesaid but held that the Appellate Assistant Commissioner has misunderstood the said Instructions. It allowed the assessie's appeal on the following reasoning :

"When the depreciation is allowed under the Indian Income Tax Act it follows that in the matter of calculating the overall or total depreciation for the purpose of proviso (c) to Section 10(2) (vi) one has also to take into account only such depreciation as has been actually allowed under the Indian Income Tax Act. As such we are not concerned with any notional depreciation or depreciation which might have been provided, in the accounts other than those relevant for the purpose of assessment under the Indian Income Tax Act. This, to our mind, seems to be the most patent and obvious interpretation of Section 10(2) (vi). In the case of the present assessee which is assessed on the round voyage method, a particular ship might have called at the Indian port some 25 years back and may be employed for the company's Indian trade for the second time only in the 26th year. That does not mean that the company will not be entitled to depreciation in the 26th year because in the intervening 25 years the ship was evidently not used for purpose of the round voyage via India and as such no depreciation had been allowed under the Indian Income Tax Act except for the first year.

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In the case of a foreign shipping company like that of the appellant company there may be ships which are home more than 20 years on the total world fleet and many of the ships might not have been used at ail in. the Indian waters but there is no prohibition under the Indian Income Tax Act against allowing depreciation on such ships simply on the ground that the ship had formed a part of the company's fleet for more than 20 years. We, therefore, hold in favour of the appellant company viz. that depreciation allowance as provided in Rule 8 should be allowed on all ships employed in connection with the company's Indian trade subject only to the limitation imposed under proviso (c) to Section 10(2) (vi).

5. The Tribunal further held that the said Instructions which may have been valid when issued, became obsolete in view of the introduction of Section 24(2) in the Act by the Finance Act, 1955. It found that inasmuch as the assessee carried on the same business in the relevant assessment year as was carried in the previous relevant years, the assessee is entitled to set off the unabsorbed

depreciation of Rs 97,547 against the profits of the Assessment Year 1958-59.

6. We may now set out the opinion of the High Court on the three questions referred. On the first question, the High Court held that the Instructions are not inconsistent with the provisions of the Act or the Rules. They provide for assessment of total income of a foreign shipping company where it furnishes annual accounts for the whole of its business, Indian and foreign, as well as where it furnishes the accounts only in respect of its Indian trade. By following the latter method, the foreign shipping company cannot get depreciation allowance more than it is entitled to in the former method. The Instructions are clear. There is no ambiguity therein. Depreciation on a ship is allowed only when it is actually employed in the trade or business. From Appendix-A to Rule 8, it appears that for the purposes of depreciation allowance, the legislature has contemplated twenty years to be the normal expectation of the life of a ship. The order passed by the Income Tax Officer is consistent with the said provisions. The instructions merely clarify the rule position. Whether statutory or not, they are binding upon the Income Tax authorities, having been issued under sub-section (8) of Section 5 of the Act.

7. On Question 3, the High Court held that inasmuch as ships in respect of which the unabsorbed depreciation was sought to be carried forward did not come to India during the accounting year relevant to Assessment Year 1958-59 the said amount of Rs 97,547 cannot be set off against the profits of the said assessment year. (We are not setting out the opinion of the High Court on Question 2, since the said question is not in issue before us.)

8. For a proper appreciation of the questions arising herein, it is necessary to set out the relevant provisions of law.

9. Sub-section (8) of Section 5 of the Act empowered the Central Board of Revenue to issue orders, instructions and directions which were binding upon all officers and persons employed in the execution of the Act. The sub-section read as follows :

> "5. (8) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :
>
> Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions."

10. The provision is clear. It requires no elaboration. It is, however, evident that the power so conferred on Central Board of Revenue has to be exercised for the purposes of and within the four corners of the Act.

11. Sub-section (2) of Section 10 provided the allowances to be made while ascertaining the profits and gains of business, profession and vocation. Clause (vi) of sub-section (2) provided for depreciation on buildings, machinery, land or furniture being the property of the assessee. Proviso (c) appended to clause (vi) provided that "the aggregate of all allowances in respect of depreciation made under this clause and clause (vi-a) or under 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". 12. Rule 33 of the Indian Income Tax Rules read as follows:

> "33. In any case in which the Income Tax Officer is of opinion that the actual amount

of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income tax may be calculated on such percentage of the turnover so accruing or arising as the Income Tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income Tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income Tax Officer may deem suitable."

13. Now, coming to the Instructions issued under Rule 33, and which are the main subject-matter of debate herein, they read thus :

"This Rule (Rule 33) provides the manner of ascertaining the income, profits or gains of a non-resident person, when the actual amount of his income, profits or gains chargeable to tax in British India cannot be arrived.

In respect of foreign shipping companies carrying on business in British India the following method will be followed for the purpose of calculating their income from shipping business in respect of assessment for the year 1939-40 and for earlier years :

" (i) If a company furnishes annual accounts for the whole of the business, Indian andforeign, the second method provided by Rule 33 will reasonably be applied. Depreciation has only to be considered in calculating the world profits. These are to be calculated according to the Indian Income Tax Act. Pr6fits calculated according to the United Kingdom Act will, therefore, require certain adjustments. Deductions permitted in the United Kingdom but not permitted in India will have to be added back and deductions permissible in India but not permissible in the United Kingdom will have to be allowed. If any company, however, prefers to claim the depreciation allowed by the United Kingdom Income Tax authorities, the Commissioners of Income Tax may adopt that figure. Otherwise, depreciation will have to be calculated according to the Indian rules. What follows applies to the calculation of depreciation according to the Indian rules. For this purpose, a complete depreciation record has to be maintained for the entire fleet. Depreciation begins to run from the first year in which the company is assessed in India that is, the first year in which its profits or loss were determined for the purpose of deciding whether it was liable to Indian Income Tax. Unabsorbed depreciation i. e. any balance of depreciation which cannot be allowed in any year owing to the profits not being sufficient to cover the full amount permissible under the Indian rules will be carried forward and allowed as far as possible in calculating the world profits according to the Indian method in the following year and if necessary in subsequent years provided that unabsorbed depreciation for 1938-39 and earlier years cannot be set off against an assessment for 1939-40 or any subsequent year.

The proportion of Indian receipts to total receipts is applied to the world profits

calculated according to the Indian method (if there are any such profits) and the result is the Indian income liable to tax. No further deduction is permissible from the amount thus arrived at on account of depreciation (unabsorbed or otherwise) or anything else. The due proportion of all allowances permissible is automatically set off against the Indian profits by the above method.

This method is equally applicable whether a company works out the profits for each voyage or follows any other method of account provided that it prepares complete annual accounts for the whole business, Indian and foreign, and furnishes the accounts of gross receipts, Indian and foreign.

Some lines do notfumish complete annual accountsfor their world business. They keep separate complete annual accountsfor their Indian trade that is, for all-round voyage to andfrom Indian ports. The proper course is then to apply the methodjust described treating the profits of the Indian trade and the gross receipts of the Indian trade as though they were the world profits and the world receipts respectively. Infact, the business other than the Indian trade is ignored.

(ii) A difficulty sometimes arises in such cases owing to the fact that the ships employed in the Indian trade are constantly being changed. Unless United Kingdom depreciation is accepted as indicated above, a depreciation record will have to be kept for every ship employed at any time in the Indian trade. Depreciation must be allowed on each ship employed in the Indian trade in a given year and the allowance must be a proportion of the annual rate calculated with reference to the number of days spent in the Indian trade whether at sea or in harbour. Any unabsorbed depreciation in any year must be distributed among the ships in the Indian trade in that year in proportion to the capital cost of each and the unabsorbed depreciation thus allotted to any ship can only be allowed in any subsequent year against the same ship.

The allowance should cease :

(a) on ships which were included in the fleet in the first year in which the company becomes liable to assessment in India (irrespective of whether it was actually found to have a taxable income in that year or not), after the twentieth year beginning with that year;

(b) on ships subsequently added to the company's fleet, after they have been borne on the fleet for 20 years.

In both cases the period may be extended proportionately where the United Kingdom depreciation is allowed in calculating the profits of the Indian trade which take the place as already explained of the world profits. Obsolescence cannot be allowed in these cases.

British Shipping Companies - Assessment of: when assessing British Shipping Companies, the Income Tax Officer should accept a certificate granted by the Chief Inspector of Taxes in the United Kingdom stating (1) the ratio of the profits of any accounting period as computed for the purposes of the United Kingdom income tax

computed without making any allowance for wear and tear to the gross earnings of the company's whole fleet, and their ratio of the United Kingdom allowance for wear and tear to the gross earnings of the whole fleet, or (2) the fact that there were no such profits. The expression 'gross earnings' of the company's whole fleet means the total receipts of the shipping company excepting only receipts from nontrading sources, such as income from investments. Assessmentfor 194041 onwards -The above instructions should also befollowed in respect of the assessment offoreign shipping companies for 1940-41 onwards. These instructions inter alia allow a foreign shipping company furnishing annual accounts for the whole of its business, Indian and foreign, to adopt the U. K. wear and tear allowance in lieu of the depreciation allowance under the Indian Income Tax Act for the purpose of the computation of its income in accordance with the second method provided by Rule 33, and also allow a British shipping company to elect to be assessed on the basis of a ratio certificate granted by the U. K. authorities regarding the income or loss and the wear and tear allowance." (quoted from the Paper-Book) 14. It would be evident from a perusal of the above provisions that Section 10(2) (vi) does not specifically provide for allowance of depreciation on foreign ships trading with India. Rule 33 also does not specifically provide for the situation except that the last portion of the rule empowers the Income Tax Officer to arrive at the actual amount of income, profits or gains accruing or arising to any person residing outside taxable territories in such other manner as he deems suitable where such ascertainment cannot be done according to the first two methods indicated therein. It is precisely to provide for certain specific situations that the Central Board issued the aforesaid Instructions under Rule 33. The Instructions specifically lay down the method and the manner in which depreciation has to be worked out on ships owned by a foreign shipping line carrying on business in British India. In this case, it is admitted that the appellant-company did not prepare and furnish the complete annual accounts for its entire business, Indian and foreign, along with an account of its gross receipts, Indian and foreign. It kept a separate annual account in respect of its Indian trade and submitted the same to the Income Tax authorities. The Instructions provide inter alia for such a situation as well. The Instructions issued by the Central Board under Rule 33 merely elucidate and elaborate the manner in which the business income of-such foreign shipping lines are to be ascertained. These Instructions are relatable to the last/third alternative provided by Rule 33. We are, therefore, in agreement with the High Court that the aforesaid Instructions do not run counter to Rule 33 or for that matter to Section 10(2) (vi). Evidently, these Instructions were issued in view of the problems faced and experience gained by the department and to meet situations not expressly provided for by the Act or the Rules. They are in the nature of guidance to the assessing officers. We are also in agreement with the High Court that the Instructions are clear and unambiguous and that the Income Tax Officer was bound to follow them. The Instructions specifically provided that depreciation must be allowed on each ship employed in the Indian trade in a given year and that the allowance must be a proportion of the annual. rate calculated with reference to the number of days spent in the Indian trade whether at sea or in harbour. They further provided that any unabsorbed depreciation in any year must be distributed among the ships in the Indian trade in that year in proportion to the capital cost of each ship and that the unabsorbed depreciation thus allotted to any ship can only be allowed in any subsequent year against the same ship. The Instructions also provide clearly that the

allowance shall cease on ships after the expiry of twenty years. It is not disputed by the learned counsel for the assessee before us that the Instructions have been correctly understood or followed by the Income Tax Officer. The complaint rather is that the Instructions themselves are inconsistent with the statutory provisions. Since we have held that the Instructions are not inconsistent with nor can be said to be outside the purview of Rule 33 read with Section 5(8) of the Act, no further question arises. Accordingly, we affirm the answer given by the High Court to Question 1.

15. So far as Question 3 is concerned, the answer to it also depends upon the validity and applicability of Instructions aforesaid. It has been found by the High Court that the seven ships, the unabsorbed depreciation whereof was sought to be set off in the Assessment Year 1958-59, did not come to India in the Accounting Year 1957 relevant to the Assessment Year 17958-59. According to the Instructions, the unabsorbed depreciation in respect of a particular ship. can only be allowed against that particular ship in a subsequent year provided that it was employed in the Indian trade in the subsequent year. Accordingly, we affirm the answer given by the High Cohrt to Question 3 as well.

16. The learned counsel for the appellant brought to our notice the subsequent decision of the Calcutta High Court in CIT v. Swedish East Asia Co. Ltd. where the Division Bench criticised certain observations in the judgment under appeal with respect to the scope of the power conferred upon Central Board under Section 5(8). Since we have held that the Instructions concerned herein are relatable to Rule 33, it is not necessary to go into the question whether the power conferred upon the Central Board to issue instructions can be employed for issuing instructions contrary to the Act and the Rules. Obviously it can't be so used - an aspect already dealt by us hereinabove. The learned counsel also brought to our notice that the decision of the Calcutta High Court in Swedish East Asia Co. Ltd.' has been followed by the Bombay High Court in CIT v. Minerva Maritime Corpn. 4 For the reasons given above, this submission does not carry the appellant's case any further.

17. Now, a word about the order of the High Court granting certificate. The order granting certificate raises certain questions which do not directly arise from the judgment of the High Court. The order granting certificate seems to assume that the Instructions are inconsistent with the statutory provisions which assumption, in our respectful opinion, is not warranted, as has been indicated by us hereinabove.

18. For the above reasons, the appeal fails and is dismissed with costs. Advocate's fee rupees ten thousand consolidated.