ALLAHABAD HIGH COURT

Hira Lal Phoolchand

Vs

Commissioner of Income-Tax

(Braund, J.)

24.04.1946

JUDGMENT

Braund, J.

1. This is a case stated under Section 66 of the Indian Income-tax Act, by the Income-tax Appellate Tribunal. The facts are extremely simple.

The assessees were a joint Hindu family which carried on a family business at Aligarh of publishing and selling books. It dealt, if not exclusively, at any rate to some extent, in school and college books and it was its practice to make agreements with authors to produce a book for the assessees which the assessees, in due course, would publish.

What has happened in the present case is that two gentlemen named Gopi Lal Mathur and Anand Narain Mathur were the authors of a school book entitled the "Hindustani Reader." This book was published by the assessees and it appears that the Education Department of the United Provinces Government prescribed the book as a text-book for use in the provincial schools. This was in or about the year 1937. For these reasons in the course of the next three years, the sales of the book were substantial and it was claimed by the authors that they were entitled to three years royalties amounting in all to approximately thirteen thousand rupees. This was disputed by the assessees and in 1941 or thereabouts, which is the accounting year in this case, an agreement was reached between the assessees and the authors. It is the character of this agreement which gives rise to the first and the more important of the two questions with which we have to deal.

The assessees have claimed that the agreement arrived at in settlement of their disputes with authors the authors was nothing more nor less than a payment to the authors of a compromise sum for the three years royalties already accrued together with a further sum also estimated by way of compromise to clear up their liability finally for royalties for the remaining two years of

the current agreement. The sum agreed upon was nine thousand and five hundred rupees; and the assessees therefore say that this sum of nine thousand and five hundred rupees laid out in this way during the accounting year ought to be treated as if it were simply a revenue payment of royalties and accordingly, ought to be allowed as a set-off against their gross income for the purpose of assessing taxable income.

The opposite view put forward by the Income-tax Department was that the payment of the nine thousand and five hundred rupees was not a commutation of past us, and it is fair to say that they have admitted very frankly, that they themselves in the early stages of these proceedings referred to the agreement reached, not as a commutation of royalties, but as a "purchase of the copyright" of the book in question. The line, therefore that the Department took was that the nine thousand and five hundred rupees was nothing more nor less than the consideration which was paid by the assessees for the out and out purchase of the copyright of the book, thereby, of course, putting an end to all question of royalties.

At that point, we turn to the findings of the Income-tax Tribunal. These are contained in para. 5 of its judgment dated September 27, 1943. They point out that this point as to the nine thousand and five hundred rupees being merely a commutation of royalties was never taken until the case reached the Income-tax Tribunal, it having been, if not conceded, at least never denied at any earlier stage that what the transaction really was, an out and out transfer of copyright. The Tribunal says, not without some reason, that it was then too late for the assessees so completely to shift their ground. Even if that were not technically so, it would at least be the case that it was too late for the assessees to advance a new story altogether with any expectation of being believed. The Tribunal finds, therefore, that it was a purchase of the copyright and was not merely a payment of past and future royalties. They have not actually said so in so many words in para. 5 of the judgment, but it is an inescapable inference from what they have said. Then founding themselves on the case of Inland Revenue Commissioners v. Longmans Green & Co., Ltd., they ultimately found that the price paid for an out and out purchase of the copyright was a capital expenditure.

The question here is one under Section 10 (2) (xii), whether the expenditure was "in the nature of capital expenditure." Once the facts have been found that the transaction was a purchase of the copyright, then in our judgment, it follows inevitably that it must have been a capital expenditure in the circumstances of this case.

We appreciate that there may be cases in which the purchase of a substantial asset is not in the nature of capital expenditure. That raises the question of the difference between capital assets and floating or circulating assets. And it will be found that the test lies in the character of the business which the purchaser is carrying on. We have been fortunate to notice that the in one of the most recent cases decided in the Privy Council, this very question has been discussed : British South Africa Company v. Commissioner of Income-tax. That was a case concerning the British South

Africa Company, which acquired valuable mining rights. The question was whether its acquisition of those mining rights was a capital transaction or whether its acquisition of those mining rights was a capital transaction or whether it was an item of its current business so as to give rise on re-sale to a profit or gain as the case might be. It is worth referring to what the then Lord Chancellor, Viscount Simon, said in this connection. He said :-

"The principles applicable to such a case as this are not in doubt. For the purpose of assessment to income-tax (and here there appears to be no distinction between British and Northern Rhodesian tax) the proceeds of sale of an asset are brought into account if the sale is in the course of the taxpayers trade or business. Thus, if it is his trade or business to make and to sell, or to acquire and to sell, shoe-making machinery, then the proceeds of sale of such machinery are brought into account : if it is his trade to make and sell shoes and for that purpose he owns and uses shoe-making machinery, the proceeds of such sale are not brought into account. In the former case, the machinery is some times called floating or circulating capital, in the latter fixed capital...."

In that case, of course, the British South Africa Company had power in its Memorandum of Association to deal in and to turn to account mining rights as such. The principles there set out appear to us apply exactly to the case before us. There is nothing to show in this case that it was any part of the business of the assessees, so to speak, to deal in copyrights. It was their business to publish and to sell books. The capital source as "machinery" from which the books were derived in those cases in which the assessees acquired them from outside was the copyright of the authors. And in acquiring that copyright, the assessees were acquiring a capital asset just as if they had been acquiring a patent or a piece of machinery to make shoes or any other of the paraphernalia required to produce that which it was their business to deal in.

In our judgment, there can be no doubt but that the Tribunal was perfectly right in this case.

There is one other short point which concerns an allowance for the destruction of stock-in-trade by the alleged ravages of white ants. The assessees claimed a sum of eighteen thousand rupees odd on this account. Nothing was originally allowed by the Income-tax Officer. But on appeal to the Assistant Commissioner, five thousand rupees was allowed and this was subsequently increased to Rs. 9,415 by the Appellate Tribunal. In the result, exactly half of what was originally claimed was allowed. The assessees have now come before us and, in effect, claim the balance. The only thing that the assessees have been able to do is to point to a single passage of the Tribunals judgment in which they say that "the fact..... remains that the assessees did not furnish cogent evidence as regards the extent of the loss....." The assessees say that that is unsatisfactory and does not amount to a finding of fact but merely to an opinion. In our view, it certainly does amount to a finding of fact. What it means is that the Tribunal does not believe the assessee when he says that he suffered a greater loss than Rs. 9,415. That must obviously be a finding of fact. For these reasons, we do not propose to review this question any further.

In the result, the application for reference will be rejected and the assessees must pay the Departments costs which we assess at a hundred rupees. We grant six weeks in which the learned Advocate for the Department may file his certificate.

Reference answered accordingly.